J-S50010-13

2013 PA Super 316

IN THE INTEREST OF B.T.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
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APPEAL OF: B.T.	:	No. 1335 EDA 2012

Appeal from the Dispositional Orders of January 6, 2012
in the Court of Common Pleas of Philadelphia County,
Juvenile Division, at No(s): CP-51-JV-0003613-2011,
CP-51-JV-0003615-2011, CP-51-JV-0003616-2011,
CP-51-JV-0003617-2011, CP-51-JV-0003618-2011

BEFORE: ALLEN, J., COLVILLE,* J., and STRASSBURGER,* J.

OPINION BY STRASSBURGER, J.: **FILED DECEMBER 09, 2013**

B.T. (Appellant) appeals from the dispositional orders[1] of January 6, 2012, following his adjudication of delinquency based upon his commission of multiple burglaries[2] and related crimes. On appeal, Appellant challenges (1) the October 6, 2011 order denying his motion to dismiss for lack of jurisdiction, and (2) the October 21, 2011 order denying his motion to suppress. We affirm the dispositional order entered at case 3618; vacate the dispositional orders and adjudications of delinquency entered at cases 3613, 3615, 3616, and 3617; reverse the October 21, 2011 order denying

[1] Appellant purports to appeal from the adjudication of delinquency and the disposition. However, "[i]n juvenile proceedings, the final Order from which a direct appeal may be taken is the Order of Disposition, entered after the juvenile is adjudicated delinquent." ***Commonwealth v. S.F.***, 912 A.2d 887, 889 (Pa. Super. 2006). We have amended the caption accordingly.

[2] 18 Pa.S.C. § 3502.

* Retired Senior Judge assigned to the Superior Court.

Appellant's suppression motion; and remand the case for further proceedings consistent with this opinion.

On July 1, 2011, Detective Orlando Ortiz went to Appellant's home as part of an investigation into a series of burglaries. Appellant's father informed Detective Ortiz that Appellant was nine years old, and produced documentation reflecting a date of birth in November 2002 for Appellant.[3] Based upon this information, Detective Ortiz informed Appellant's father that Appellant was too young to be charged with a crime, but that he would like to talk to Appellant about additional burglaries and the other individuals involved. Detective Ortiz explained to Appellant's father that Appellant would not be charged with any criminal acts, and Appellant's father gave permission for Appellant to go with Detective Ortiz to the police station. Appellant, his father declining to go along, was transported in an unmarked police car, without restraints. At the station, Appellant ate pizza while Detective Ortiz interviewed him for approximately one hour. While Detective Ortiz subsequently drove Appellant home, Appellant pointed out houses that he and other participants had burglarized.

The next time the police interacted with Appellant was over a month later, when Appellant was caught in the act of a burglary and restrained by one of the victims until the police arrived. Having received information that

[3] The documentation does not include a birth certificate, but rather consists of immigration paperwork from when Appellant entered the United States from Liberia in 2007.

Appellant was actually 15 years old,[4] the police arrested Appellant for that burglary as well as the others to which Appellant admitted having committed.

Appellant was charged in five separate juvenile petitions on August 13, 2011, with burglary and related crimes. On September 7, 2011, Appellant moved to dismiss the petitions, claiming that the juvenile court lacked jurisdiction because Appellant was under the age of ten. In response, the juvenile court ordered that Appellant undergo a bone age scan. At a subsequent hearing, radiologist Dr. Michael Nalbantian testified that the test results suggested, to a reasonable degree of medical certainty, that Appellant was 15.6 years old as of September 16, 2011, the date of the scan. Considering two standard deviations, which would account for nutritional defects and disease, Appellant would be at least 13 years and two months old. Finding this evidence credible, and the documentary evidence purporting Appellant to be only nine years old incredible, the juvenile court denied Appellant's motion to dismiss.

On October 21, 2011, a hearing was held on Appellant's motion to suppress the statements given to the police on July 1, 2011. Appellant claimed that the statements wherein he described his role in the burglaries should be excluded because they were given during the course of a custodial

[4] The record does not explain what new information the police received between the time of the interrogation and the time of the arrest, nor why the information was unavailable to them before they interrogated Appellant.

detention, and Appellant had not been advised of his ***Miranda***[5] rights prior to questioning. ***See*** Motion to Suppress, 9/2/2011; N.T., 10/21/2011, at 23-35. Appellant also claimed that his confession was not knowing, intelligent, and voluntary. ***See*** Motion to Suppress, 9/2/2011; N.T., 10/21/2011, at 35-36. The juvenile court denied the motion, finding that ***Miranda*** warnings were not warranted because the police, relying upon information given by Appellant's father, believed that Appellant could not have been prosecuted due to his age.

Hearings were held on November 9 and November 22, 2011, concerning the various burglary charges. On January 6, 2012, the juvenile court adjudicated Appellant delinquent, and committed him to Abraxas Leadership Development program by separate dispositional orders of the same date filed at each docket number. On February 29, 2012, the juvenile court discharged Appellant from Abraxas and ordered him committed to George Junior Republic.

Appellant filed a timely notice of appeal following denial of reconsideration. Appellant presents two questions for this Court's review.

> 1. Did not the [juvenile] court err as a matter of law and deny Appellant due process under both the Pennsylvania and United States Constitutions when it denied his Motion to Dismiss Due to Lack of Jurisdiction, where Appellant alleged that at the time of the acts in question he was only 9 years of age

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1986).

> and did not qualify as a delinquent child under 42 Pa.C.S.A. § 6302?
>
> 2. Did not the [juvenile] court err as a matter of law and violate Appellant's state and federal constitutional rights when it denied his Motion to Suppress Statements after Appellant was subjected to a custodial interrogation and the officer failed to administer ***Miranda*** warnings; additionally, did not the [juvenile] court err and violate Appellant's federal and state Constitutional rights when it held that there was good faith exception to the ***Miranda*** requirements because the officer honestly believed Appellant was only 9 years old?

Appellant's Brief at 3.

"Because the question of subject matter jurisdiction is purely one of law, our standard of review is *de novo*, and our scope of review is plenary." ***Commonwealth v. Brinson***, 30 A.3d 490, 492 (Pa. Super. 2011) (citing ***Commonwealth v. D.S.***, 903 A.2d 582, 584 (Pa. Super. 2006)). However, factual findings and credibility determinations in juvenile proceedings are within the exclusive province of the hearing judge. ***In re L.A.***, 853 A.2d 388, 391 (Pa. Super. 2004).

"A petition alleging that a child is delinquent must be disposed of in accordance with the Juvenile Act." ***In re J.J.***, 848 A.2d 1014, 1017 (Pa. Super. 2004). A delinquent child is a "child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation." 42 Pa.C.S. § 6302.

At the hearing on Appellant's motion to dismiss, he offered the following documents as evidence that he was born in November 2002:

Immigration and Naturalization Service form I-94, which was required for Appellant to enter the United States; a permanent resident's card issued by the U.S. Department of Homeland Security; and reports from his school confirming that Appellant was in third grade. The Commonwealth offered the testimony of Dr. Nalbantian who performed a bone age test, which involved comparing x-rays of Appellant's hand and wrist to an atlas of skeletal maturity, then consulting a table with standard deviations to arrive at an age within two standard deviations. N.T., 10/6/2011, at 9-12. To a reasonable degree of medical certainty, Dr. Nalbantian opined that Appellant was 15.6 years old in the autumn of 2011.[6] ***Id.*** at 20.

Based upon Dr. Nalbantian's testimony, as well as his own experience with juveniles, the hearing judge concluded that Appellant was 15 years old, and thus the birthdate proffered by Appellant was not correct. ***Id.*** at 37-38. Correspondingly, the hearing judge did not believe that the person identified in Appellant's documents was actually Appellant. ***Id.*** Therefore, having made the factual finding that Appellant was well beyond the age of ten at the time the alleged delinquent acts occurred, the hearing judge denied Appellant's motion.

Quite the contrary to Appellant's claim that the juvenile court "arbitrarily substituted" a number for the information in the documents,

[6] Applying two standard deviations, Appellant was at least 13 years old, and may have been nearly 18 years old.

Appellant's Brief at 11, the juvenile court's factual finding is based upon its credibility determinations and is supported by the record. Accordingly, that finding will not be disturbed on appeal. ***See In re A.D.***, 771 A.2d 45, 53 (Pa. Super. 2001) (affirming the juvenile court's jurisdiction to handle case as a delinquency matter rather than a dependency matter based upon the hearing judge's factual determination that A.D. was ten years old at the time the delinquent acts occurred). Therefore, because Appellant was a child of at least ten years of age at the time of the alleged delinquent acts, the juvenile court did not err in denying Appellant's motion to dismiss based upon lack of jurisdiction.[7]

Appellant's second argument challenges the denial of his suppression motion. Our standard of review is as follows.

> An appellate court may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the suppression court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. It is also well settled that the appellate court is not bound by the suppression court's conclusions of law. However, [w]hether a confession is constitutionally admissible is a question of law and subject to plenary review.

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[7] Appellant raises concerns about possible collateral consequences of the juvenile court's age determination. ***See*** Appellant's Brief at 11-12, N.T., 10/6/2011, at 33-34 ("[W]hen he goes to apply for a job, when he goes to apply for the armed forces, when he goes to apply for a driver's license; all of these organizations are going to run his Social Security number, and his Social Security number is going to say that he was born in 2002, which is what his documents say."). However, those issues are neither presently before us nor ripe for review.

In re V.C., 66 A.3d 341, 350-51 (Pa. Super. 2013) (quoting ***Commonwealth v. Knox***, 50 A.3d 749, 746-747 (Pa. Super. 2012)).

The parties here do not dispute the following facts relevant to the suppression issue. The police went to Appellant's home because they suspected that he had committed several burglaries in the area, and wished to take him to police headquarters for an interview. N.T., 10/21/2011, at 8. When Appellant's father informed Detective Ortiz that Appellant was only nine years old, Detective Ortiz informed Appellant's father that Appellant "wasn't going to be charged" with a crime. ***Id.*** Nonetheless, the police "wanted information on other co-defendants, or locations that [Appellant] might possibly [have] committed burglaries at in the area." ***Id.*** With this explanation, Appellant's father gave the police permission to take Appellant with them. ***Id.*** at 9. Having transported Appellant to the district headquarters, the police interrogated Appellant, without a parent or interested adult present, about the burglaries for more than an hour, eliciting admissions from him. ***Id.*** at 9-10. Thereafter, "while [the police] were driving [Appellant] home, he pointed out several houses that he had broken into, along with other co-defendants." ***Id.*** at 10. After it was determined that Appellant was over 10 years old, Appellant's admissions were used against him, and in fact were the only pieces of evidence tying Appellant to four of the five burglaries at issue in this appeal.

From these facts, we are left with the strictly legal question of whether Appellant's incriminating statements should have been excluded. We begin with an examination of the applicable principles of law.

> To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects subject to custodial interrogation by law enforcement officers must be warned that they have the right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney. Juveniles, as well as adults, are entitled to be apprised of their constitutional rights pursuant to ***Miranda***. If a person is not advised of his ***Miranda*** rights prior to custodial interrogation by law enforcement officers, evidence resulting from such interrogation cannot be used against him. A person is deemed to be in custody for ***Miranda*** purposes when [he] is physically denied of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation.

In re R.H., 791 A.2d 331, 333 (Pa. 2002) (plurality) (citations and quotation omitted).

"[I]f a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a prerequisite to the statement's admissibility in the Government's case in chief, that the defendant voluntarily, knowingly and intelligently waived his rights." ***J.D.B. v. North Carolina***, -- U.S. --, 131 S.Ct. 2394, 2401 (2011) (internal quotations omitted).

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the

> right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that ***Miranda*** rights have been waived.
>
> A determination of whether a juvenile knowingly waived his ***Miranda*** rights and made a voluntary confession is to be based on a consideration of the totality of the circumstances, including a consideration of the juvenile's age, experience, comprehension and the presence or absence of an interested adult.

In re T.B., 11 A.3d 500, 505-506 (Pa. Super. 2010) (quotations, citations, and emphasis omitted).

The juvenile court determined that Appellant was in custody and subject to interrogation, ***see*** N.T., 10/21/2011, at 26-27, 32; however, it opined that it was not "police custody in such a manner that would trigger" ***Miranda*** warnings. Juvenile Court Opinion, 12/19/2012, at 5. Citing no authority, indeed acknowledging that there is no authority on point,[8,9] the juvenile court explained its decision as follows.

> [T]he police drove the Appellant from his home to the police district and questioned [him] only after receiving permission from his father in an effort to assist them in their criminal investigation of certain crimes. There was no intention by the police to elicit incriminating information from the Appellant for

[8] The juvenile court stated on the record: "I'm comfortable that this case is going to be one of the cases that makes laws, because I think this is a case of first impression for everyone…." N.T., 10/21/2011, at 37.

[9] The author of this Opinion vigorously disagrees with the Dissent's assertion that he "took to task" the juvenile court in this case. Disagreeing with another judge is not taking him to task. Furthermore, the author served with the Honorable A. Frank Reynolds on the Juvenile Court Judges Commission and has the utmost respect for him and his extensive knowledge of juvenile law.

> the purpose of charging him with any crime. The Appellant, who was fed pizza at the police district, knew that there was never any prospect that he would be taken into custody. Rather, he knew at all times, as did his father, that he would be driven home once he provided all necessary information to aid the police in their investigation of crimes that he would not be charged with.
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> The [juvenile c]ourt denied the motion because police were told, wrongly as it happens, that Appellant was nine years old and not chargeable with a crime. [***Miranda*** warnings] would have served no purpose by their consideration. After his interview they took him home and gave him to his father.

Id. at 5-6. The juvenile court's on-the-record explanation offers additional insight into this analysis.

> The detective did not read him his rights because the detective knew the function of reading him his rights, and going through the process. And there's no way that the detective was going to tell him, if you don't want to talk with me or … legal counsel will be provided, because none of that stuff was going to happen for an eight-year old, and [***Miranda***] is a process that you go through to protect people from criminal sanctions, as a result of the constitution.
>
> So, Detective Ortiz, did not owe him [***Miranda*** warnings] …. [T]here's no reason, if you fully believe, if one fully believes, that a person cannot be prosecuted, there's no reason to … give that person [***Miranda***] warnings.
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> * * *
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> [U]nder the circumstances… I believe the detective was acting in good faith, and I believe that because I don't believe that Detective Ortiz would have taken the boy home, and given him back to his father, unless he believe[d] that he was talking to a child.
>
> I further believe that the material obtained by Detective Ortiz, as a result of his, for want of a better word, "interrogation" of the boy, was obtained in good faith for purposes of getting

> information as to the crimes themselves, and the others who participated in the crimes.
>
> I further believe that the father and others may very well have participated in the immigration fraud, and that's how we've come to the state that we are now.
>
> I don't believe that the father was telling Detective Ortiz the truth. I believe that he was in the process of deceiving him.
>
> I'm in the same situation as the first time I saw the boy, and I ordered that the doctor evaluate him, to determine his age.

N.T., 10/21/2011, at 34-35, 37-38.

The juvenile court's only response to Appellant's argument that, under the circumstances, he was incapable of giving "a knowing, voluntary and intentional statement" was to opine that children are "the ones who are most likely to give that kind of statement. It has been my experience that when I'm speaking to children, they can be naïve, but I think that children are more likely to tell the truth…." ***Id.*** at 36.

As we noted above, the burden was on the Commonwealth to show, "as a prerequisite to the statement's admissibility in [its] case in chief, that [Appellant] voluntarily, knowingly and intelligently waived his rights." ***J.D.B.***, 131 S.Ct. at 2401. Under the unique circumstances of this case, we are constrained to conclude that the juvenile court erred in focusing on the "fraud" perpetrated by Appellant's father and the good faith of the police officers, rather than whether Appellant was deprived of his constitutional rights.

Regardless of what the police thought or why they thought it, the fact of the matter is that Appellant had the right to remain silent rather than to incriminate himself. That Appellant's father provided the police with inaccurate information about Appellant's age did not waive or negate Appellant's constitutional rights. That the police had a good-faith belief that Appellant was incapable of incriminating himself does not alter the reality that Appellant was so capable.[10]

The circumstances under which Appellant gave the statements used against him are these. Appellant, suspected of committing burglaries, was taken by police to their headquarters, where, as the juvenile court found, "[u]nder no circumstances was he free to leave." N.T., 10/21/2011, at 26. Once there, Appellant was interrogated about the burglaries he was suspected of having committed. Having been affirmatively told that he would face no legal consequences no matter what he said, Appellant

[10] The Dissent opines that because the police believed that the incriminating statements they were eliciting from Appellant could not be used to charge him with a crime, he was not subject to an "interrogation" for ***Miranda*** purposes. This is merely a backdoor way of injecting the Fourth Amendment good faith exception into the analysis of ***Miranda*** violations. Such is unjustified given the distinctions between the rights at issue and the conduct sought to be deterred by the exclusionary rule. ***See, e.g., People v. Smith***, 31 Cal.App.4th 1185, 1192-1193 (Cal.App.2 Dist. 1995) (holding that because the Fourth Amendment exclusionary rule serves to deter police misconduct, while evidence obtained in violation of the Fifth Amendment is excluded on principles of due process and to preserve the integrity of the justice system, the good faith exception does not apply to confessions obtained in violation of ***Miranda***).

provided the police with all of the information needed to secure adjudications of delinquency.

Under these circumstances, and given that Appellant was a child, in third grade, with a stipulated IQ of 50, we hold that it was error for the juvenile court to conclude that the Commonwealth met its burden of proving that Appellant's statements were made voluntarily, knowingly, and intelligently. ***See, e.g., In re T.B.***, 11 A.3d at 506-507 (Pa. Super. 2010) ("In examining the totality of circumstances to determine the legal question of whether Appellant's ***Miranda*** waiver was knowing and voluntary, we conclude that Appellant's age, fifteen, combined with his intelligence level [(IQ of 67)], his lack of consultation with an interested adult immediately prior to the interrogation, and the fact that no adult was present or informed of Appellant's rights before the police interviewed him all support the finding that his waiver was unintelligently and unknowingly entered.").

Accordingly, we reverse the October 21, 2011 order denying Appellant's motion to suppress and vacate the January 6, 2012 adjudications of delinquency and dispositional orders entered in cases 3613, 3615, 3616, and 3617. Because the burglary for which Appellant was adjudicated delinquent at case 3618 occurred after Appellant gave the statement at issue, and was thus not discussed in the statement, we do not disturb the dispositional order entered in that case.

Dispositional order entered at case 3618 affirmed. Dispositional orders and adjudications of delinquency entered at cases 3613, 3615, 3616, and 3617 vacated. October 21, 2011 order reversed. Case remanded for further proceedings consistent with this opinion. Jurisdiction relinquished.

Judge Allen files a Concurring/Dissenting Opinion.

Judgment Entered.

Joseph D. Seletyn, Esq.

Prothonotary

Date: 12/9/2013