YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Section 51.095 of the Family Code does not apply where child's freedom of movement is not restrained to the degree associated with formal arrest.[In the Matter of F.C.W.](06-4-07A)

On September 26, 2006, the Houston Court of Appeals held that although respondent was the focus of the investigation and his freedom of movement was restricted, he was not in custody when he spoke to arson investigators, rendering his statement admissible.

¶ 06-4-7A. **In the Matter of F.C.W.**, MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex.App.— Houston, 9/26/06).

Facts: On the evening of August 20, 2004, fifteen-year-old F.C.W. and his friend J.N. visited the home of a mutual friend, K. Allard. At around 8:00 or 9:00 p.m., F.C.W. and J.N. left Allard's house and walked to the home of another friend, Priscilla, who lived nearby. After Priscilla's mother told the pair that Priscilla could not see them that night, F.C.W. and J.N. walked back to Allard's house, n1 passing the house where Stacey Hawileh lived with her father and younger siblings. A short time later, a passerby knocked on Mr. Hawileh's door and told him the truck in his driveway was on fire. n2 Mr. Hawileh extinguished the fire and called the police. A member of the Harris County Sheriff's Department arrived, assessed the situation, and called the fire marshal.

> n1 According to F.C.W.'s testimony at trial, he and J.N. were casually lighting pine needles with lighters and letting them burn. J.N. denied this.
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> n2 F.C.W. testified that he had picked up a newspaper in plastic wrapping, and that J.N. took the newspaper, shoved pine needles into it, lit the pine needles, and threw the package into the bed of Mr. Hawileh's truck. Although J.N.'s testimony agreed with F.C.W.'s testimony regarding the means used to start the fire, J.N. testified that F.C.W. ignited the pine needles and threw the newspaper into the truck.

About thirty minutes later, arson investigator Nathan Green arrived. He photographed the damage to the truck, examined the scene, and concluded that arson was the likely cause of the fire. Meanwhile, F.C.W. and J.N. returned to Allard's house and spent the night. According to Allard, the boys told him they had set a girl's red truck on fire. n3 The next day, Stacey Hawileh commented to Allard that her truck had been set on fire, and Allard told her about F.C.W.'s and J.N.'s involvement. Stacey gave this information to her father, who repeated it to Investigator Green.

> n3 Allard also testified that F.C.W. insulted J.N. for not helping him do it or fully participating.

On September 14, 2004, Green and a partner went to the disciplinary school F.C.W. attended to speak with him about the incident. F.C.W. was summoned to the principal's office where the two investigators were waiting with the school principal. The two investigators were wearing polo-style golf shirts with the word "Arson" on them, and their firearms were visible on their waistbands. Green sat behind the principal's desk and conducted most of the interview. F.C.W. sat in a chair opposite Green, and the principal stood behind Green, in front of a door to the office. There was conflicting testimony as to where Green's partner, Investigator Bolton, was located. F.C.W. testified that Bolton stood behind him, blocking the remaining door to the office, but Green testified that Bolton sat beside F.C.W. Finally, F.C.W. testified that the office doors locked automatically from the outside, but that he knew he could open the doors from the inside.

The interview lasted twenty or twenty-five minutes. It is undisputed that the arson investigators did not inform F.C.W. of his right to remain silent, consult an attorney, or have a parent or other adult present. According to Green, he told F.C.W. he was not under arrest and was free to leave; however, F.C.W. testified that Green never told him he was free to leave. At trial, F.C.W. stated he felt scared during the interview, and Green testified that F.C.W. cried briefly. F.C.W. made no attempt to leave the office or end the interview, and did not ask to speak to anyone or to have anyone else present. He admitted he was involved in the arson, but only in a joint capacity with J.N., saying he was not quite sure who exactly started the fire. n4 Green incorporated some of F.C.W.'s statements into his report. After the interview ended, F.C.W. returned to class.

> n4 This is based on the following exchange between appellant's attorney and Green:
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> Q: And your report just mentioned that you interviewed [F.C.W.] and that he said that he and [J.N.], from your statements today, he and [J.N.] placed pine needles and newspapers into the back of the truck; is that correct?
>
> A: Correct, yes, sir.
>
> Q: Did he mention who started the fire?
>
> A: No, he did not.
>
> Q: No?
>
> A: They just made reference to both of them being there.
>
> Q: Okay. Did he tell you that [J.N.] might have started the fire?
>
> A: Actually, I believe the comment was made that he wasn't quite sure or remembered who set that particular fire.

On January 26, 2005, F.C.W. was charged with arson. Following a bench trial on April 18, 2005, F.C.W. was adjudicated delinquent for arson, sentenced to probation until his eighteenth birthday, and ordered to pay restitution of $ 935.00 to Mr. Hawileh.

II. ISSUES PRESENTED

In two issues, F.C.W. contends the trial court erred by admitting statements he made to the arson investigators on September 14, 2004. F.C.W. argues in his first issue that his statements were the product of a custodial interrogation without the protections of *TEX. FAM. CODE ANN. § 51.095(b)* (Vernon Supp. 2005), and are therefore inadmissible. In his second issue, F.C.W. argues that even if the

interrogation is deemed non-custodial, the statements were involuntary, and thus, their admission violated his right to due process.

Held: Affirmed

Memorandum Opionion: *Section 51.095* dictates that certain requirements must be met for a juvenile's statements to be admissible. *See TEX. FAM. CODE ANN. § 51.095*. However, when a juvenile makes voluntary oral statements that do not arise from custodial interrogation, the statute does not require the statements to be excluded. *See TEX. FAM. CODE ANN. § 51.095(b)(1)*, *(d)*. Here, it is undisputed that the requirements of *section 51.095* were not met at the time F.C.W. made his statements to the arson investigators. Thus, the outcome of F.C.W.'s first issue depends on whether the questioning in the principal's office was custodial.

In general, a person is in custody if a reasonable person under the same circumstances would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)* (citing *Stansbury v. California, 511 U.S. 318, 320, 114 S. Ct. 1526, 1528-30, 128 L. Ed. 2d 293, 298-99 (1994)*). When the person involved is a minor, courts consider the age of the defendant and all the circumstances surrounding the interrogation to decide whether there was a formal arrest or a restraint of movement to the degree associated with formal arrest. *In re V.P., 55 S.W.3d 25, 31 (Tex. App.--Austin 2001, pet. denied)*. Stated another way, the court's inquiry is whether, based on the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted. *Id*. The factors relevant to the determination of whether a whether a child is in custody include whether there was probable cause to arrest; the focus of the investigation; and to the extent communicated or manifested, the officer's subjective intent and the child's subjective beliefs. *Dowthitt, 931 S.W.2d at 254*.

We first examine whether arson investigators had probable cause to arrest F.C.W. at the time of the interview. A law enforcement officer has probable cause to arrest when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent person in believing that the arrested person had committed an offense. *Beverly v. State, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990)*. Here, Green had been told by two other students at the disciplinary school that F.C.W. was involved in the crime, but Green had no corroborating evidence, and the teenagers could have been motivated by other factors. On this record, we cannot say that the information was sufficient to provide Green with probable cause to arrest F.C.W.

We next examine the manifested intent of the investigators. According to Green, he told F.C.W. he was not under arrest and was free to leave. F.C.W. was not placed in handcuffs at any point during the interview, and although F.C.W. testified that he believed the doors of the office locked automatically, he also testified he knew he could open the doors from the inside. It is also undisputed that F.C.W. never attempted or asked to leave the office or to speak to his parents, a lawyer, or a trusted adult. Although F.C.W. testified that the investigators told him they had a videotape of the incident, the trial court was free to disbelieve this statement, and hence, to find that the officers did not manifest an intent to arrest F.C.W. *See Marsh v. State, 140 S.W.3d 901, 905 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd)* ("The trial court is the exclusive fact finder in a motion to suppress hearing, and, therefore, it may choose to believe or disbelieve any or all of a witness's testimony.").

We conclude that, although a reasonable fifteen-year-old in this situation could have felt his freedom of movement was restricted, he would not have felt that his freedom of movement was restrained to the degree associated with a formal arrest. n5 F.C.W. was never handcuffed, and the trial court could have found that F.C.W. was told he was free to leave. Although F.C.W. was the focus of the investigation, he was not in custody when he spoke to the arson investigators. Because only a custodial interrogation

invokes the protections of *section 51.095 of the Family Code*, the absence of those safeguards does not render F.C.W.'s statements inadmissible. We overrule F.C.W.'s first issue.

> n5 ALTHOUGH NOT ESSENTIAL TO OUR DISPOSITION, WE NOTE THAT F.C.W. HAD BEEN ARRESTED BEFORE, AND THUS WOULD NOT EQUATE AN INTERVIEW IN THE SCHOOL PRINCIPAL'S OFFICE WITH THE SIGNIFICANT RESTRAINT ON FREEDOM OF MOVEMENT ASSOCIATED WITH A FORMAL ARREST.

Conclusion: For the foregoing reasons, we hold the trial court did not abuse its discretion in denying the appellant's motion to suppress the statements he made to arson investigators. Accordingly, we affirm the judgment of the trial court.