Review of Recent Juvenile Cases (2007)

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

South Dakota adopts totality of the circumstances test for voluntariness of a juvenile's confession.[In the Interest of J.M.J.](07-2-6)

On January 3, 2007, the South Dakota Supreme Court held that notice to a parent, guardian, or custodian and a child's opportunity to confer with such persons are significant factors in evaluating the voluntariness of a statement or confession under the totality of the circumstances.

¶ 07-2-6. **In the Interest of J.M.J.**, 2007 SD 1, 726 N.W.2d 621, 2007 S.D. Lexis 1(Sup.Ct. SD, 1/3/07).

Facts: The circumstances leading up to J.J.'s interrogation began when Deputy Steve McMillin (McMillin) of the Fall River County Sheriff's Office was called to Rapid City Regional Hospital to investigate allegations that sixteen-year-old J.J. had raped his three-year-old niece. McMillin took a statement from the niece's mother and then retrieved the niece's clothing for purposes of investigation. McMillin drove to J.J.'s residence, arriving between 2 a.m. and 3 a.m. In J.J.'s Mother's presence, he questioned J.J. after advising him of his constitutional rights under *Miranda.* McMillin read the rights from a pre-printed card, which included an instruction for additional advisement when questioning a juvenile. The card instructed officers to "inform the juvenile that there is the possibility that he/she may be tried as an adult and that any statements made during questioning can be used against him/her in an adult proceeding." For reasons unknown, McMillin did not follow the card's direction to provide the additional advisement. Subsequently, J.J. waived his rights and answered questions for approximately twenty-five minutes, during which he denied the allegations. McMillin then took J.J. into custody and escorted J.J. to the patrol car. Alone with McMillin on the way to the patrol car, J.J. asked McMillin, "if I did tell what I did, do I have to still go in?" McMillin told J.J. that if he had done something, McMillin needed to know. J.J. then told McMillin that he did it and, thereafter, repeated his confession in the presence of his Mother.

Subsequently, the State filed a petition alleging that J.J. was a juvenile delinquent because he had committed the crime of first degree rape, or in the alternative, sexual contact with a child under sixteen years of age. Initially, the State gave notice of its intention to transfer the matter to adult court but decided not to because J.J.'s psychological evaluation indicated that he could potentially be rehabilitated in the juvenile justice system.

Prior to adjudication, J.J. filed a motion to suppress any statements made to law enforcement at the time of his arrest because McMillin had failed to advise him that he could be tried as an adult. The court denied the motion. The juvenile court ultimately adjudicated J.J. a delinquent child and remanded him to the custody of the Department of Corrections. J.J. appeals, claiming the trial court erred by failing to suppress his statements to law enforcement. He also claims that the evidence was insufficient to adjudicate him as a delinquent.

Held: Affirmed

Opinion: [Earlier text omitted] In this case, the trial judge declined to follow the per se rule of *Lohnes* and considered whether J.J.'s confession was voluntary based on a totality of the circumstances analysis. However, in applying the totality of the circumstances analysis, it is unclear whether the judge considered failure to warn of the possibility of adult prosecution as a factor. Another problem in this case is that information concerning J.J.'s learning disabilities and the effect of not being told he could be tried as an adult did not surface until the adjudication and disposition hearings. For example, during the adjudication hearing, Mother first testified about J.J.'s delayed development and that she would not have agreed to the interview had she known that J.J. could have been tried as an adult. Similarly, information that J.J. had an IQ of 79, was diagnosed with Attention Deficit Hyperactivity Disorder and was on an Individual Education Plan came through testimony in the adjudication and disposition hearings. The only witness at the suppression hearing was Deputy McMillin. He testified that he went to J.J.'s residence at about 2:30 or 3:00 a.m. He knocked on the door and J.J.'s mother answered. He then explained "what was going on and that [he] needed to speak to J.J. about the incident." He asked her permission to speak with J.J. She agreed and awoke J.J. During the questioning, McMillin stood in the entry while J.J. and Mother sat at a table in front of him. McMillin explained to them "that no matter what come [sic] about, that [his] mind had already been made up and there was nothing that was going to change the outcome of the interview." McMillin then read J.J. his *Miranda* rights from a pre-printed card. He read from the card as follows:

> You have the continuing right to remain silent and to stop questioning at any time. Anything you say can be used as evidence against you. You have the continuing right to consult with and have the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed for you. Do you understand your rights? Do you wish to waive your rights and talk to me at this time?

J.J. answered the two questions, "yes." Although the pre-printed card indicated that when questioning a juvenile, the officer should also explain that the child could be tried as an adult, the deputy admitted he did not read that portion of the card. Thus, J.J. was not informed that there was the possibility of being tried as an adult.

During the short interview in the residence, J.J. made no admissions. The deputy then put J.J. under arrest and collected the clothing J.J. had been wearing that day. The deputy then explained to J.J. and Mother that he was taking J.J. to the sheriff's office and would be contacting a judge to decide if J.J. would be placed in the juvenile detention facility. The deputy then walked J.J. towards the patrol car, which was parked on the street. On the way to the car, J.J. asked McMillin, "if I did tell what I did, do I have to still go in?" McMillin responded, "if you did something, I need to know. I understand it is tough to say certain things in front of your parents." J.J. then confessed. McMillin testified as follows:

> From there he said, "I did do it. She told me to do it." I said, "a three-year-old girl told you to do it?" He said, "yes," and I inquired where it was at. He said, "in the Explorer." I asked, "if I bring your mom out here, will you explain everything to her?" He said he would. So I placed him in the patrol car and went in and got his mom."

Mother then came to the patrol car and J.J. told her what had happened. This taped conversation was introduced into evidence. J.J. asked again if he could stay with his mother.

Based on this evidence and briefs submitted by counsel, the judge decided that the statements were voluntary. In a letter decision, she indicated that the factors she considered were as follows: "1) the defendant's youth; 2) the defendant's lack of education or low intelligence; 3) the absence of any advice to the defendant of his constitutional rights; 4) the length of detention; 5) the repeated and prolonged nature of questioning; 6) the use of physical punishment such as the deprivation of food or sleep; 7) the defendant's

prior experience with law enforcement and court system; and 8) whether the interrogating officers used deception or misrepresentation." The judge's written decision does not indicate that she took into consideration the factors involving the absence of the warning that he could be tried as an adult and the presence or absence of J.J.'s mother when he made the statements. *See Horse, 2002 SD 47, P26, 644 N.W.2d at 224*. She did, however, mention them in her decision as follows:

> Having considered the totality of the circumstances, the Court determines that J.J.'s consent to interrogation was freely and voluntarily given. J.J. was fifteen years old at the time of his arrest. He was advised of his *Miranda* rights prior to the interrogation, but not of the fact that there was a possibility he could be tried as an adult. He indicated he understood his rights, wished to waive them and speak to Deputy McMillan. No evidence that J.J. is of low intelligence has been presented to the Court. J.J. was questioned for a very short period of time in his own home with his mother present. J.J. was not punished in any way during the interrogation. Also, the Court has been presented with no evidence that Deputy McMillan used deception or misrepresentation to obtain the confession. After J.J. initially refused to speak he then reinitiated the conversation outside his mother's presence and then made incriminating statements. J.J. will be tried in juvenile rather than adult court.

The State had the burden of proving by a preponderance of the evidence that J.J.'s statements were voluntary. *Holman, 2006 SD 82, P13, 72 N.W.2d at 456*. Based on the testimony and evidence presented at the suppression hearing, we cannot say that the trial court erred in finding voluntariness. Evidence of J.J.'s learning disabilities and low IQ and Mother's claim that she would have stopped the interrogation had she been told that J.J. could be tried as an adult may have tipped the scales against voluntariness. However, that evidence was not presented as part of the motion to suppress. It was not until the adjudicatory hearing that Mother attempted to testify that she did not know or understand during the questioning at the residence that J.J. could have been tried as an adult and that had she known she would not have allowed McMillin to continue questioning her son. The State objected to her testimony and the judge sustained the State's objection because it should have been presented at the suppression hearing. The judge then asked as follows:

> Well, we're in the unique situation where a trial is occurring before the Court. We had a full blown suppression on this. You briefed it as did [the State's Attorney] and there was a significant amount of information that you didn't apparently bring to the Court. Now, you want to revisit this during the middle of an adjudicatory hearing, is that what you're asking the Court to do?
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> The Court's point is that should have been done at the suppression hearing. Are you asking the Court to reconsider the ruling made at the suppression hearing by evidence now you're garnering at the adjudicatory proceeding?

J.J.'s counsel answered that he did not want the judge to reconsider the suppression ruling and that he only offered the information for the purpose of determining the weight and credibility to give to J.J.'s confession. Counsel's answer was as follows:

> I'm asking you, as trier of fact, to make a determination, when you render your decision, not to give any credibility to those admissions that were made under the circumstances in which they were procured and that's what the jury instruction says, when you look at admissions or confessions, you're supposed to look at them as suspect, as a jury. That's the jury, what they are suppose to do. The reason you look at all circumstances under which they were obtained.

> So all I'm doing is fleshing out how those are to be determined and what weight you are going to give to those admissions.

A review of the judge's findings reveals that almost all of her findings in determining guilt were based on evidence and testimony other than J.J.'s confession. Of the judge's nineteen findings of fact, only two mention J.J.'s admissions. Her findings in regard to the admissions were as follows:

> 16. That J.J. admitted, in a conversation with Fall River County Deputy Sheriff Steve McMillin and his mother, that [the niece] wanted to know what it felt like if he put "his winker in her dink," and that she wanted him to and that he did do it.
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> 17. That the Court reduces the weight given to the admission of J.J. because of the testimony that J.J. is enrolled in an Individual Education Program at the Edgemont School and that he is two years behind as he was not allowed to matriculate immediately from Kindergarten and the fifth grade; however, these grade retentions were a result of J.J.'s maturity levels and not a result of his inability to read, write or communicate.

None of the other findings of fact upon which the judge based her adjudication depended on or were a result of J.J.'s statements. The findings were based on the testimony of the doctor that examined the niece, statements made by the niece to her mother and others, and photographs of the child's injuries.

Conclusion: Even if we were to assume that J.J.'s statements were involuntary, the error was harmless beyond a reasonable doubt because the judge gave reduced weight to the admission and because the evidence supported the adjudication without the admission. *See Holman, 2006 SD 82, P25, 72 N.W.2d at 459*.