Review of Recent Juvenile Cases (2012)

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

Fifteen-year-old was not in custody when he made incriminating statements in police station. [McCreary v. State](12-3-3)

On May 17, 2012, the Houston Court of Appeals (1 Dist.) held that the trial court was within its discretion in concluding that juvenile was not in custody at the time he made his recorded statement; consequently, the provisions of the Family Code governing the taking of a juvenile into custody and the admissibility of custodial statements by a juvenile did not apply.

¶ 12-3-3. **McCreary v. State**, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005 (Tex.App.-Hous. (1 Dist.), 5/17/12).

Facts: Officers from the Webster Police Department (WPD) responded to a report of a shooting at the Nasa Liquor Store. They discovered the body of the store owner, Thanh Pham, in a pool of blood behind the store's counter and a nearly empty cash register. Pham died from gunshot wounds to his head, torso, and upper extremity. Police recovered .45 caliber shell casings, a bullet fragment, and latent fingerprints from inside the store. Three of the fingerprints lifted from the store's counter belonged to McCreary. A firearms identification expert determined that the shell casings and bullet fragments could only have come from a limited number of firearms, including a Taurus brand .45 semiautomatic pistol.

When Joseph Rock, a Webster-area resident, learned of Pham's death, he informed WPD that he had shopped at the liquor store shortly before the shooting. As he pulled into the store's parking lot, Rock observed a young man wearing a light gray or white hoodie and blue shorts outside of the store listening to an I–Pod. The young man was in the same location when Rock left the store after making his purchases. Rock identified McCreary in a photo array.

Having no other suspects and also having received two anonymous tips about McCreary's involvement in Pham's death, WPD Detectives Quintana, Palermo, and Latham made contact with McCreary, then 15 years-old, at his mother's home. There, police recovered a pair of blue shorts and an I–Pod. According to McCreary's mother, McCreary wore the blue shorts on the day of Pham's death. Although it was his opinion that probable cause did not yet exist to arrest McCreary, Detective Latham asked McCreary to make a voluntary statement at the police station. Detective Latham informed McCreary that he was "not being placed under arrest ... not being charged with the crime. And that he's going to be able to leave whenever he wants and that [the detectives would] be glad to give him a ride back."Both McCreary and his mother consented.

Due to the cold weather, the detectives suggested that McCreary bring some warm clothing to the police station. McCreary responded: "Let me get my white hoodie—I mean, my black

hoodie[.]" McCreary sat in the front passenger seat of the detectives' vehicle on the way to the police station. He was not handcuffed or restrained. He inquired en route whether the detectives' service weapons were "four fives."

At the police station, Detective Latham reaffirmed that McCreary was still free to leave at any time, and, without answering any questions, McCreary asked to leave. McCreary walked out of the police station's back door, jumped a fence, and "shot" the detectives his "middle finger."

The next day, McCreary telephoned police and requested a second opportunity to give a voluntary statement. Detectives Quintana and Palermo picked McCreary up from his home. This time, however, McCreary's mother was not there. En route to the police station, McCreary again sat in the front passenger seat of the detective's vehicle without handcuffs or other restraints.

Detective Latham took McCreary to an interview room and shut the door. Just as he did the day before, Detective Latham began the interview by asking McCreary whether he was at the police station of his own free will and whether he understood that he was not under arrest. McCreary responded affirmatively, and no admonishments were given. Detective Latham characterized the one-hour interview that followed as "an intense interview, a tactical interview" during which McCreary laughed, cried, got angry, and made incriminating statements about the amount of money stolen from the store and the manner in which Pham was shot. The interview was video-recorded. Although Detective Latham exaggerated the evidence and repeatedly accused McCreary of murdering Pham, Detective Latham never expressed an intent to arrest McCreary. And, when McCreary indicated he was ready to leave, Detective Latham did not arrest McCreary. Instead, he and Detective Quintana gave McCreary a ride home.

The State accepted a capital murder charge against McCreary at a time when he was being held in a juvenile detention facility on an unrelated aggravated assault charge. Detectives Palermo and Quintana retrieved McCreary from the juvenile detention center and transported him to another facility for the purpose of entering his fingerprints in the Automatic Fingerprint Identification System (AFIS). McCreary did not receive any admonishments. While the detectives were processing McCreary's information, McCreary observed a deputy walking by and stated, "You got a chrome .45, man, that's nice."The detectives returned McCreary to the juvenile detention center.

Over the course of the eight-day trial on guilt-innocence, the State presented physical evidence and the testimony of twenty-one witnesses, including the investigating officers, medical and forensic experts, and Rock. McCreary's classmate, Edwin Alfaro, testified that, within one or two weeks of Pham's death, McCreary bragged about shooting Pham and taking money from the store. The State also presented evidence that Craig Lindhorst, McCreary's acquaintance, had stolen a Taurus brand .45 semiautomatic pistol and sold it to McCreary.

McCreary filed pre-trial motions to suppress his oral statements made during the vid-eo-recorded interview (the "recorded statements") and his oral statement, during fingerprinting, complimenting the deputy's .45 caliber service weapon (the "unrecorded statement"), contending that the statements were obtained in violation of provisions of the Family Code governing

statements by a juvenile. After hearing testimony and argument at trial, the trial court denied the suppression motions and admitted McCreary's statements into evidence.

Admissibility of Statements by a Juvenile

"A motion to suppress is nothing more than a specialized objection to the admissibility of evidence." Simmons v. State, 288 S.W.3d 72, 76–77 (Tex.App.-Houston [1st Dist.] 2009, pet. ref d). McCreary argues that the trial court erred by admitting his recorded and unrecorded statements because they were custodial statements taken in violation of sections 51.095, 52.02 and 52.025 of the Family Code. SeeTEX. FAMILY CODE ANN. §§ 51.095 (West 2008) (governing admissibility of statements by juvenile), 52.02 (West 2008) (governing taking of juvenile into custody), 52.025 (West 2008) (governing designation of juvenile processing office). Specifically, with respect to the oral statements recorded during his interview with Detective Latham, McCreary asserts that Detective Latham violated the Family Code by (1) conducting the interrogation at the Webster police station instead of a juvenile processing office as required by sections 52.02 and 52.025 and (2) failing to have a magistrate give McCreary the statutory warnings required by sections 51.095(a)(1)(A) and 51.095(a)(5). With respect to his unrecorded statement—"you got a chrome .45, man, that's nice"—McCreary asserts that sections 51.095(a)(1)(A) and 51.095(a)(5) likewise preclude its admission in evidence because he made the statement while in custody, he made the statement in response to "conversational interaction" with Detective Palermo, and he was not given any statutory admonishments by a magistrate.

Held: Affirmed

Memorandum Opinion: The admissibility of custodial statements made by a juvenile is governed by section 51.095 of the Family Code. SeeTEX. FAMILY CODE ANN. § 51.095. Subsection 51.095(a)(5) provides that a juvenile's oral statement is admissible if these conditions are satisfied: (1) the statement is made while the child is in the custody of an officer, in a detention facility or other place of confinement, or in possession of the Department of Family and Protective Services; (2) the statement is recorded by an electronic recording device; and (3) at some time before making the statement, "the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning."FN2Id. § 51.095(a)(5). A juvenile's oral statement made as a result of custodial interrogation without the benefit of a magistrate warning is inadmissible at trial. See id. § 51.095(a)(5), (b)(1); see alsoTex.Code Crim. Proc. Ann. art. 38.22 §§ 2, 3 (West 1979 & Supp.2000). But "[a] statement of a juvenile that is not the product of custodial interrogation is not required to be suppressed by section 51.095 [.]" In re D.J.C., 312 S.W.3d at 712 n.1;see Meadoux v. State, 307 S.W.3d 401, 408 (Tex.App.-San Antonio 2009), aff'd on other grounds, 325 S.W.3d 189 (Tex.Crim.App.2010) ("A voluntary oral statement by a juvenile that does not stem from custodial interrogation is admissible, even if the juvenile did not receive the statutory admonishments.").

FN2. The warnings required to be given by section 51.095(a)(1)(A) are as follows:

> (i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time[.]
TEX. FAMILY CODE ANN. § 51.095(a)(1)(A).

Custodial interrogation is questioning that is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. See Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528 (1994); In re D.J.C., 312 S.W.3d at 712 (addressing whether juvenile was in custody for purpose of determining admissibility of confession in juvenile delinquency proceeding).“A custodial interrogation occurs when a defendant is in custody and is exposed ‘to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response.’ “ Roquemore, 60 S.W.3d at 868 (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90 (1980)). A juvenile is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. Jeffley, 38 S.W.3d at 855.

Our analysis involves two steps. In re D.J.C., 312 S.W.3d at 712. First, we determine whether there was a formal arrest or restraint of movement to the degree associated with an arrest by examining all of the circumstances surrounding the interrogation. Stansbury, 511 U.S. at 322, 114 S.Ct. at 1528–29; In re D.J.C., 312 S.W.3d at 712. This determination focuses on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. Stansbury, 511 U.S. at 322, 114 S.Ct. at 1528–29; In re D.J.C., 312 S.W.3d at 712.“[T]he restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention.” Dowthitt v. State, 931 S.W.2d 244, 255 (Tex.Crim.App.1996).

Second, we consider whether, in light of the circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave. In re D.J.C., 312 S.W.3d at 712. Courts have traditionally considered four factors in making this determination: (1) whether probable cause to arrest existed at the time of questioning; (2) the subjective intent of the police; (3) the focus of the investigation; and (4) the subjective belief of the defendant. Id. Because the custody determination must be based upon the objective circumstances, however, the subjective intent of both the interrogating officers and the person being questioned is irrelevant except to the extent that intent is manifested in words or actions. Id.

A juvenile may be in custody when he is interrogated alone by an armed police officer in an enclosed space. See In re D.J.C., 312 S.W.3d at 713;see also In re D.A.R., 73 S.W.3d 505, 511–12 (Tex.App.-El Paso 2002, no pet.). Being the focus of an investigation alone does not amount to being in custody. Meek v. State, 790 S.W.2d 618, 621 (Tex.Crim.App.1990). Neither does stationhouse questioning, in and of itself, constitute custody. Dowthitt, 931 S.W.2d at 255. When

the circumstances show that an individual acts upon the invitation or request of the police and there are no express or implied threats that he will be forcibly taken, that person is not in custody. Dancy v. State, 728 S.W.2d 772, 778–79 (Tex.Crim.App.1987); In re D.J.C., 312 S.W.3d at 713. “The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation.” Dowthitt, 931 S.W.2d at 255.

Four general situations may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. See id .;In re D.J.C., 312S.W.3d at 713.

McCreary relies on the fourth situation. The existence of probable cause, in and of itself, does not establish that a suspect is in custody. Dowthitt, 931 S.W.2d at 255. Custody requires that the law enforcement officer's knowledge of probable cause be manifested to the suspect. See id.“Such manifestation could occur if information substantiating probable cause is related by the officers to the suspect or by the suspect to the officers.”Id. Additionally, other circumstances must lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.Id.

When a juvenile is taken into custody, Section 52.02 of the Family Code applies. In re D.J.C., 312 S.W.3d at 715. Section 52.02(a) provides, in relevant part, that a person taking a juvenile into custody must immediately bring that juvenile to a designated juvenile processing office or perform one of several other enumerated acts. TEX. FAMILY CODE ANN. § 52.02(a). A failure on the part of law enforcement to comply with the requirements of section 52.02 may render a statement obtained from a juvenile inadmissible. See In re U.G., 128 S.W.3d 797, 799 (Tex.App.-Corpus Christi 2004, pet. denied) (holding juvenile's statement inadmissible when, after being placed in custody, police took juvenile to police station and held juvenile in area where adult suspects were being held instead of taking juvenile“to a juvenile processing office or any of the places listed as an alternative” in section 52.02).

A. The recorded statements

The trial court determined that the recorded statements made by McCreary during his interview with Detective Latham were admissible because the statements did not arise from custodial interrogation. The trial court further concluded that probable cause to arrest McCreary did not exist at the time he gave the recorded interview and that, under the circumstances of the interview, no reasonable fifteen-year-old would have felt that he was not free to terminate the interview. In reaching these conclusions the trial court made the following fact findings on the record: (i) on the first day detectives made contact with McCreary, McCreary voluntarily went to the police station with the consent of his mother; (ii) McCreary only stayed at the police station for a short while, having been informed that he was not under arrest; (iii) McCreary left the police station on his own accord; (iv) the next day, McCreary initiated further contact with detectives by telephone and asked for a second opportunity to give a statement, (v) having been on probation in juvenile court before, McCreary was a “worldly 15–year–old” familiar with

arrest procedures; (vi) McCreary voluntarily gave the recorded interview; (vii) McCreary concluded the interview "with words that he was done"; and (viii) McCreary asked for and received a ride home following the interview. Because the evidence adduced at the suppression hearing (i.e., the videotaped interview and Detective Latham's testimony regarding its circumstances), viewed in the light most favorable to the trial court's ruling, supports the trial court's findings, we afford the findings almost total deference. See Iduarte, 268 S.W.3d at 548; In re D.J.C., 312 S.W.3d at 711.

Applying the first part of our analysis, we examine all the circumstances surrounding McCreary's interview with Detective Latham to determine whether there was a formal arrest or restraint to the degree associated with an arrest. See In re D.J.C., 312 S.W.3d at 712. It is undisputed that McCreary was never handcuffed and was not formally arrested until well after the interview; in fact, immediately after the interview, the detectives gave McCreary a ride home. McCreary twice agreed to accompany the detectives to the police station and make a statement. En route to and from the police station, McCreary rode in the front passenger seat of the detective's vehicle, not in the back seat of a marked patrol vehicle. Before making any statement, McCreary was told more than once that he was not under arrest and was free to leave at any time. On both days McCreary was at the police station, the detectives placed him in an interview room and shut the door. Nonetheless, on the detective's first attempt to question McCreary, McCreary asked to leave. The detectives permitted him to exit both the interview room and the police station unhindered. On the second day, McCreary endured one hour of questioning before he stopped the interview on his own accord. The detectives again permitted McCreary to leave the police station unhindered. Based on all the objective circumstances surrounding the interview, the trial court reasonably could have concluded that McCreary was not under formal arrest nor restrained of freedom to the degree associated with an arrest at the time he made the recorded statements.

Turning to the second part of our analysis, we consider whether a reasonable fifteen-year-old in the same circumstances as McCreary would have felt free to terminate the interview and leave. See id .In making this determination, we look first to the objective factors of the existence of probable cause to arrest McCreary and the focus of the detectives' investigation and then to the detectives' and McCreary's subjective intents as manifested by their words and actions. Id. Detective Latham testified that there was limited evidence of McCreary's involvement in Pham's death at the time of the interview—specifically, two anonymous tips about McCreary, a witness who placed McCreary at the store shortly before the shooting, and clothing and an I–Pod recovered from McCreary's home. Detective Latham acknowledged, however, that McCreary was the only suspect in Pham's death.

As to his subjective intent, Detective Latham testified that he did not believe that probable cause existed to arrest McCreary either before the interview commenced or after McCreary made incriminating statements. Although Detective Latham accused McCreary of capital murder more than once during the interview, his words and actions during the interview were consistent with a subjective intent not to arrest McCreary. Detective Latham told McCreary during the interview that an arrest would not be made until there was a stronger case. Detective Latham never handcuffed or restrained McCreary, and Detective Latham permitted McCreary to freely leave the police station upon his request. As to the subjective beliefs manifested by McCreary's words

and actions, the record demonstrates that McCreary acknowledged he was making his statement voluntarily, he was not under arrest, and he was free to leave. Each time McCreary asked to leave the police station, the detectives permitted him to do so. Nothing in the record demonstrates that McCreary felt he was not free to withdraw his agreement to answer Detective Latham's questions.

Considering all the circumstances and the weight of the four traditional factors, we conclude that a reasonable fifteen-year-old in the same situation as McCreary would have felt free to terminate the interview and leave. We therefore hold that the trial court was within its discretion in concluding that McCreary was not in custody at the time he made his recorded statement; consequently, the provisions of the Family Code governing the taking of a juvenile into custody and the admissibility of custodial statements by a juvenile do not apply. See Meadoux, 307 S.W.3d at 408. Because the provisions of the Family Code do not apply, McCreary's recorded statement was admissible in evidence. The trial court did not abuse its discretion by denying McCreary's motion to suppress the recorded statement.

B. The unrecorded statement

Regarding McCreary's unrecorded statement—"you got a chrome .45, man, that's nice"—the trial court made a critical fact finding: "the statement made was spontaneous and not the result of any questioning."McCreary disagrees on appeal that the statement was spontaneous because "the State's proffer during the hearing outside the presence of the jury [established] that there was a conversational interaction between [Detective] Palermo and [McCreary] prior to [McCreary's] statements about the deputy's firearm."The standard by which we must review the trial court's denial of McCreary's motion to suppress, however, requires us to give almost total deference to the trial court's finding of historical fact when that finding is supported by the record. See Roquemore, 60 S.W.3d at 868. And, here, the record supports a finding that the statement was made spontaneously. According to Detective Palermo's testimony at the suppression hearing, McCreary was detained in a juvenile detention facility on unrelated charges for two days before the State accepted the capital murder charge arising from Pham's death. Detectives Palermo and Quintana received instructions to process McCreary on the new charge and add his fingerprints to AFIS. While the detectives were processing McCreary, a Harris County Deputy Sheriff walked by with a service pistol, and McCreary, without prompting from either detective, stated "you got a chrome .45, man, that's nice."Because "[a] statement of a juvenile that is not the product of custodial interrogation is not required to be suppressed by section 51.095[,]" we hold that the trial court did not abuse its discretion by denying McCreary's motion to suppress the unrecorded statement. See In re D.J.C., 312 S.W.3d at 712 n.1.

Conclusion: Having determined that the trial court did not err by refusing to suppress McCreary's recorded and unrecorded statements to police, we overrule his sole issue on appeal. The trial court's judgment is affirmed.