IN THE SUPREME COURT OF FLORIDA

H. D., a Child,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO: 64,796

FILED
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RESPONDENT'S BRIEF ON THE MERITS

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LIST OF CITATIONS

PRELIMINARY STATEMENT

In this Brief, "H.D.", the defendant in the juvenile delinquency proceedings held before the Circuit Court in and for the Fifteenth Judicial Circuit, Palm Beach County, Florida, Family and Juvenile Division, and the Appellant before the Fourth District Court of Appeal, will be referred to as Petitioner. The State of Florida, the prosecution in the trial court, and Appellee before the Fourth District, will be referred to as Respondent.

"R" will be used to mean the Record-on-Appeal before the Fourth District, and forwarded to this Court; "e.a." means emphasis added; and "A" refers to the Appendix attached to Respondent's brief hereto. The first six pages of Respondent's Appendix is the same as that of Petitioner.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts. The Fourth District's opinion in the case sub judice has now been officially reported as: In re: H.D., 443 So.2d 410 (Fla. 4th DCA 1984).

POINT ON APPEAL

WHETHER TRIAL COURT APPROPRIATELY DENIED PETITIONER'S MOTION TO SUPPRESS, IN THAT FAILURE TO COMPLY WITH RULE 8.290(d)(4), FLORIDA RULES OF JUVENILE PROCEDURE, DOES NOT RENDER INCULPATORY STATEMENTS INADMISSIBLE PER SE?

ARGUMENT

TRIAL COURT APPROPRIATELY DENIED PETITIONER'S MOTION TO SUPPRESS, IN THAT FAILURE TO COMPLY WITH RULE 8.290(d)(4), FLORIDA RULES OF JUVENILE PROCEDURE, DOES NOT RENDER INCULPATORY STATEMENTS INADMISSIBLE PER SE.

Petitioner has initially maintained that the failure to comply with the mandatory requirements of Rule 8.290(d)(4) of the Florida Rules of Juvenile Procedure, operates in a per se manner, to automatically render any pre-delinquency proceedings statements given by a juvenile to a police officer inadmissible at said proceeding. This viewpoint and approach cannot be substantiated, after examination of the statutory language of the Rule itself, the criminal counterpart of the Rule, and the intent and interpretation of said provisions.

Upon examination of Rule 8.290(d)(4), supra, and subsequent interpretations of the intent of the Florida Supreme Court and the Florida Bar Juvenile Rules Committee, it is apparent that said Rule does not apply at all to a juvenile's pre-trial statements, in the Fifth Amendment context, but to a juvenile's right to counsel, in the Sixth Amendment sense. The title of the Rule itself is "Providing Counsel to Parties," while the title of subsection (d) is "waiver of counsel" (e.a.). Sections (d)(1) through (d)(5) all refer to the preservation and protection of a juvenile defendant's right to counsel, at all "critical stages" of the proceedings, emphasizing that

any waiver of counsel must be affirmatively demonstrated on the record. Brewer v. Williams, 430 U.S. 387, 47 S.Ct 1232, 51 L.Ed.2d 424 (1977); Carter v. State, 408 So.2d 766 (Fla. 5th DCA 1982). Furthermore, the specific provisions of Rule 8.290, encompass said right to counsel, from the "intake" stage, to each "subsequent stage of the proceedings." Rule 8.290(a), (d)(5), Florida Rules of Juvenile Procedure (1980). Significantly, there are no express parts of the Rule which refer or allude to the consequence of a failure to comply with its provisions. Rule 8.290, supra.

The Rule's non-applicability, in the context of Petitioner's rights against self-incrimination, was further demonstrated by the 1980 Committee Note to Rule 8.290.[1] Said Note explicitly provides that Rule 8.290 "was not intended by the committee [Juvenile Rules Committee of the Florida Bar] to affect the admissibility of the Miranda[2] warnings." The Rules Committee, and the Florida Supreme Court, in adoption of same, provides a strong indication of intent that the Rule was meant for preservation of Sixth, not Fifth Amendment rights.

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[1]Although apparently not published in 1984 Florida Rules of Court, said Note was apparently printed in the juvenile rules by the Florida Bar, and was presented to the Fourth District Court of Appeal, as supplemental authority, prior to its decision herein.

[2]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed. 2d 694 (1966) relating to Fifth Amendment rights against self-incrimination.

This intent has been even more dramatically reinforced by recent recommendations for changes in the Florida Rules of Juvenile Procedure. As submitted by the Florida Bar in In Re: Amendments to Juvenile Court Rules[3] said proposed charges are for the purpose, inter alia, of eliminating ambiguity, and conforming to certain provision of the rules on criminal procedure. (A, 2). The new changes purport to eliminate Rule 8.290(a), and (b), dealing with the duties of the intake officer and the public defender with regard to a juvenile's right to counsel, expressly because "it [subsections (a) and (b)] deals with matters occurring outside of the courtroom." (A, 3, 4). Although there was no "reason for change" immediately indicated for the proposed deletion of Rule 8.290(d)(4), the Chairman of the Florida Bar Juvenile Rules Committee subsequently provided such a "reason for change," in a letter to the Chief Justice Alderman. (A, 7-8). The language of the Committee's "reason" dramatically demonstrates that the intent and scope of the Rule 8.290(d)(4) was to address a juvenile defendant's Sixth Amendment rights, not affect statements given by juveniles, from a Fifth Amendment standpoint:

> "Proposed Rule 8.290(b)(4) [formerly 8.290(d)(4)].
>
> "This rule was never in-

[3]Submitted April 2, 1984, and presently pending before this Court, said Petition of proposed charges in the juvenile procedure rules has been included by Petitioner as an Appendix to the Initital Brief.

> tended to require law enforcement officers to obtain a waiver of counsel in writing, nor to obtain two witnesses to attest to the voluntary execution thereof. Because the rule, in its present form, has created confusion among the courts (trial and appellate), the Committe recommends the change in the rule as is now being proposed (deletion]."
>
> If necessary, the "reason for change" stated above may be connected into a Committee Note for this particular Rule.
> The proposed change coincides with what the Committee tried to do when it added the following 'committee note' in 1980 at the end of Rule 8.290(d)(4) [reference omitted]."

Letter by Chairman Arthur C. Johnson, Jr., Juvenile Rules Committee of the Florida Bar, June 13, 1984, to then Chief Justice James Alderman, Florida Supreme Court. [A, 7-8].

Thus, even though the aforementioned proposed changes were not made or established at the time of Appellant's delinquency proceeding, said charges, and the "reasons" given for same, are extremely instructive in clarifying the original intent of the 1980 Rule and Committee Note. Parker v. State, 406 So.2d 1089 (Fla. 1981); State ex.rel. Szabo Food Service, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). As a guide to such intent, the scope of the original Rule should be read, in conjunction with the 1980 Committee Note and the subsequent proposed changes, to have never had effect or application to pre-arrest custodial

interrogations by police officers, (A, 1-8); 1980 Committee Note, Rule 8.290(d)(4), supra; Rule 8.290(a)-(e)(1980), supra.

Petitioner has further continued to attempt to distinguish the criminal counterpart Rule to that of Rule 8.290, supra, as having no application to juvenile defendants. Such a position completely lacks merit, particularly when the provision of the criminal rule and its interpretations are examined. As the Fourth District expressly noted in its decision, Rule 3.111, in its subsection on "waiver of counsel", (d)(4), tracks verbatim the language of the juvenile rule. In re: H.D., 443 So.2d 410 (Fla. 4th DCA 1984); compare Rule 3.111 (d)(4)(1980), with Rule 8.290(d)(4), supra. Additionally, all other provisions of the subsection of the criminal rule dealing with "waiver of counsel" are also exactly the same as those in the juvenile rule. Compare Rule 3.111(d)(1)-(3),(5)(1980), with Rule 8.290(d)(1)-(3),(5), supra. In view of this exact similarity, it is thus impossible to distinguish the underlying reasoning and scope of Rule 3.111(d)(4), as expressly recognized by this Court in Jordan v. State, 334 So.2d 589 (Fla. 1976), from application to the case sub judice:

> Appellant urges that Florida has imposed by rule a stricter requirement, but his reliance on Subsection 3.111(d)(4), Fla.R.Cr.P., as providing an independent ground for making the confession inadmissible is misplaced. Read out of context,

> the provisions of the Rule relied upon by appellant might lead to the result urged. But we find two flaws in appellant's attempted application of Rule 3.111 to the facts here. First, the title of the Rule is "Providing Counsel to Indigents." Reading the Rule in its entirety makes it clear that its provisions relate to the subject indicated in its title. The remedy for its violation would be to require a new trial with counsel available to represent the indigent. We do not understand that appellant complains about the lack or quality of his representation in the instant proceedings. Second, there is nothing in Rule 3.111 which calls for suppression of evidence, the result appellant seeks to achieve. Our rules must be sensibly construed. They are not to be given a strained interpretation or stretched to the limit of every conceivable construction conjured up by the fertile imagination of counsel. For the reasons stated, it was not error to admit the confession in evidence.

Jordan, supra, at 592 (e.a.). Similarly, the Fourth District found the language of the Jordan decision to compel the same conclusion, when applied to the juvenile rule. H.D., supra, at 410.

Petitioner, however, chooses to distinguish Jordan, due to the "policy" in Florida to "treat juvenile suspects differently then adult suspects." Petitioner's Brief, at 12. The Florida Supreme Court has previously rebutted this argument, and the inferences therefrom, having ruled that there

is "no interest or Constitutional rights" of a juvenile defendant to be treated differently from/or preferentially to an adult. State v. Cain, 381 So.2d 1361 (Fla. 1981); also, see Woodward v. Washington, 556 F.2d 781 (5th Cir. 1977). It is clear that a juvenile is to be treated as such, only to the limited and specific extent that the legislature may provide. Cain, supra, at 1363. It is especially clear that, since the counterpart rules are exactly the same, regarding waiver of counsel, and that the juvenile rule provides for no additional protection or differing interpretation than the criminal rule, the reasoning and rationale of Jordan mandates affirmance of the Fourth District's opinion. Jordan. Petitioner's interpretation would create a schism between the relevant "waiver of counsel" procedural rules that was not intended or provided for, e.g., see In the Interest of J.B. v. Korda, 436 S.2d 1109 (Fla. 4th DCA 1983); State v. M.S.S., 436 So.2d 1067 (Fla. 2nd DCA 1983).[4]

Petitioner's reliance on Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct 1758, 12 L.Ed.2d 977 (1964) is equally misplaced. As evident from the Jordan decision, the remedy for

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[4]Petitioner additionally relies on State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), to support the proffered distribution in treatment of juveniles and adults. However, this Court's decision was expressly based therein on the specific dictates of Chapter 39, Florida Statutes, that juveniles be treated differently, with respect to written reasons for the use of adult sanctions in sentencing of a juvenile, and the fact that adult defendants had no criminal procedural counterpart to the benefits of such sentence review, as provided by Section 39.111(6), Florida Statutes. Rhoden, supra, at 1016-1017. The same rights are not solely indigenous to juveniles, with regard to waiver of counsel, in Florida. Rule 3.111(d)(4), supra; Jordan, supra.

non-compliance with the rules regarding waiver of counsel, is a new trial, with adequate counsel, so as to fulfill the protection of a defendant's Sixth Amendment rights. Jordan, at 592. The decision in Escobedo refers to the rights of a defendant in a Fifth Amendment context, and was reiterated as such in Miranda, 16 L.Ed.2d, at 705, 715, 710-725, which the juvenile rule explicitly proscribed. 1980 Committee Note, Rule 8.290(d)(4); In re: Amendments to Juvenile Rules of Procedure, supra.

Petitioner further claims that the "two witness attestation" requirement of Rule 8.290(d)(4) is mandatory, and that the failure to meet this requirement requires the exclusion of any statements made by a juvenile defendant to a police officer, under the First District's interpretation of the subject Rule in S.L.W. v. State, 445 So.2d 586 (Fla. 1st DCA 1983). However, the First District, in adopting this position, relied on an earlier panel decision in M.L.H. v. State, 399 So.2d 13 (Fla. 1st DCA 1981), in which the suppression of statements made by a juvenile was not based solely on the two witness attestation requirement per se. The Court in M.L.H. heavily relied upon the circumstances of the confession, which included, inter alia, that the defendant was illiterate, could not read or write, and gave a written statement which was unintelligible. M.L.H., supra, at 14. Therefore, the First District's reliance in S.L.W., on the

decision in M.L.H., supra, brings into serious question Petitioner's reliance on same, for the creation of a per se inadmissible rule. S.L.W., supra, at 586.

Furthermore, as to other similar statutory provisions, the failure to comply with technical requirements, which are arguably much more substantive than the "two witness attestation" requirement of Rule 8.290(d)(4) have not been construed to automatically exclude confessions or custodial statements of juvenile defendants. A panel of this Court, in Doerr, II v. State, 383 So.2d 905 (Fla. 1980), ruled that a confession of a juvenile defendant is not rendered per se inadmissible, by the failure of an intake officer to notify the juvenile's parents, prior to taking the juvenile's statements. In construing the express language of the subject statute, (Section 39.03(3)(a), Florida Statutes (1975)), this Court found that said requirement had nothing to do with interrogation of a juvenile, or the statements of a juvenile during interrogation. Doerr, supra, at 906-907. Further, and most relevant, the Court viewed such failure to comply with the notification requirement, as but one factor, in determining the voluntariness of a juvenile's confession, in the totality of circumstances examined for such a purpose. Doerr, at 907; Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981); G.K.D. v. State, 391 So.2d 327 (Fla. 1st DCA 1980); State v. Cobb, 387 So.2d 526 (Fla. 4th DCA

1980). Thus, Petitioner's suggested adoption of a "per se inadmissible" standard, in view of Doerr and its progeny, is a reading of the Rule in a vacuum, and ignores the precise rights and underlying purpose of the Rule in pari materia. Like Doerr, the Florida Supreme Court has sought to insure a defendant's right to counsel through the adoption of Rule 8.290, which has nothing to do with the suppression of statements, produced from pre-trial custodial interrogations. At most, the failure to have two witnesses attest to Petitioner's waiver of counsel herein, is one factor to be considered, among others, in evaluating the voluntariness of Petitioner's statements. Doerr, supra; Batch, supra; Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct 1209, 8 L.Ed.2d 325 (1962); State v. Cartwright, 448 So. 2d 1049 (Fla. 4th DCA 1984), at 1051; Villar v. State, 441 So.2d 1181 (Fla. 4th DCA 1983); Jordan, supra.

When reading Rule 8.290 in pari materia with Rule 8.010 of the Florida Rules of Juvenile Procedure, it is further clear that the Rule was not meant to apply to police officers, and pre-trial custodial interrogations. Said Rule provides, in outlining the scope of the juvenile procedure rules, that said rules "shall govern the procedures in the circuit court", not out-of-court procedures. Furthermore, as aforementioned, the new proposed changes in various aspects of Rule 8.290(d), have been made ex-

plicitly to eliminate their erroneous application to out-of-court situations in general. (A, 3-4, 7-8). This is particularly made clear by the proposed deletion of Rule 8.290(a) and (b), which heretofore defined the duties of the intake officer and public defender, over "matters occurring outside the courtroom" (A, 3, 4), as well as the "reason for change" given by the committee as to (d)(4) (A, 7-8), while leaving the remainder of the Rule, as to in-court protection of the right to counsel, intact. (A, 3-6).

Although Respondent is not unmindful of the Fourth District's expression of dicta on this point, in Cartwright, supra, at 1051, it is crucial to note these statements in light of Jordan, the 1980 Committee Note, supra, and the proposed Rule changes. The Fourth District panel was troubled by the State's reliance therein on the expressed scope of the juvenile rules in Rule 8.010, supra, and concluded that the judiciary possessed the authority to create an evidentiary rule, rendering confessions inadmissible as a consequence of violating procedural rules. Id. However, the cases, rules, and interpretations of those subject rules, demonstrate that there was no intention to create such an evidentiary rule, with such broad per se application, through Rule 8.290(d)(4). Jordan; 1980 Committee Note, Rule 8.290(d)(4). Respondent does not question the rule-making authority of the Florida Supreme Court, but does maintain that this Court

should not give the force of its ruling herein to such dicta, because the aforementioned rule-making authority was never intended to render custodial interrogation statements and confessions inadmissible. (A, 7-8).

Petitioner finally contends, as he did before the Fourth District, that his statements were involuntary under the "totality of the circumstances" rule of Gallegos, supra. Specifically, Petitioner maintains herein that Officer Stufano should have gone further, in determining Petitioner's intellectual capacity, and ability to read and write, than what the officer did herein. Petitioner's Brief, at 14-15. This places a much greater responsibility on a police officer during interrogation, than is required for an effective waiver of rights. The legal standards, governing the voluntariness of statements, require only that such statements be shown to have been freely, knowingly and voluntarily made, and can be express or implicit, depending on the circumstances. Miranda, supra; North Carolina v. Butler, 441 U.S. 369, 99 S.Ct 1755, 60 L.Ed.2d 286 (1979); Jones v. State, 440 So.2d 570 (Fla. 1983); Fields v. State, 402 So. 2d 46 (Fla. 1st DCA 1981). Under the totality of circumstances, the Record sub judice demonstrates, inter alia, that Petitioner was known by the officer to be going to high school (R, 18); that he was advised twice of his Miranda rights (R, 15); that Petitioner acknowledged hav-

ing been advised of such Constitutional right, and understanding each (R, 16); that Petitioner signed the waiver of rights card (R, 15-16); that no coercion, threats or promises were made to Petitioner (R, 16); that Petitioner did not appear to be under the influence of drugs or alcohol (R, 16); that Petitioner never indicated a desire to be silent, or request counsel, after being advised of his rights (R, 16-17); and that Petitioner agreed to make a statement (R, 17), and further appeared to comprehend his surroundings. (R, 17, 20-21, 23). The Record further established that Officer Stufano had previously had several encounters with Petitioner, and that on all such prior occasions, Petitioner had appeared to be literate and coherent. (R, 17-18). The fact that the officer did not consult an expert, or seek to observe Petitioner tested for a determination of his intellectual capacity, is a wholly unreasonable position, which extends far beyond what Miranda, Butler, supra, and the aforementioned cases mandate, as to a sufficient showing of voluntariness. Given these overwhelming circumstances, the failure of two witnesses to attest to Petitioner's waiver of counsel was relatively meaningless, and does not alter the finding of voluntariness made by the trial court, and affirmed by the Fourth District. Gallegos, supra; Butler, supra; also, see Fare v. Michael C; 442 U.S. 707, 726-27, 99 S.Ct 2560, 61 L.Ed.2d 197, 213-214

(1979).

In view of these arguments, the Fourth District's approach and opinion should be adopted by this Court, by affirming the Fourth District's decision herein, and by rejecting the broad and unauthorized application of Rule 8.290(d)(4) adopted by the First District in S.L.W.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court AFFIRM the opinion of the Fourth District Court of Appeal in In re: H.D., supra, and quash the opinion of the First District in S.L.W., supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished, by courier, to CATHLEEN BRADY, Assistant Public Defender, 15th Judicial Circuit of Florida, 224 Datura Street, 11th Floor, West Palm Beach, Florida 33401, this 13th day of August, 1984.

Richard G. Bartmon

Of Counsel