IN THE SUPREME COURT OF FLORIDA

H. D.; a Child,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.64,796

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

MISCELLANEOUS

PRELIMINARY STATEMENT

The parties in this brief will be referred to as follows: H.D., the defendant in the juvenile proceeding below, and the appellant in the District Court of Appeal, Fourth District, is now referred to as the Petitioner. The State of Florida, the prosecution in the trial court, and the Appellee in the District Court of Appeal, Fourth District, is now referred to as Respondent. In the Statement of Case and Facts H.D. is referred to as Appellant.

The record on appeal forwarded by the District Court will consist of a record volume, referred to by the symbol "R" followed by the appropriate page number(s) and a single volume of transcript which contains the trial court proceedings before the Honorable Emory J. Newell, Circuit Court Judge, Palm Beach County Florida. This volume will be referred to by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Pursuant to a Petition filed on February 9, 1983, the Appellant, a 16 year old juvenile, was charged with burglary (Count I), and theft (Count II). (R32).

A motion to suppress was filed on March 14, 1983 (S1) (Inadvertently, trial counsel put the wrong case number on the motion). The basis for the motion was that two witnesses did not attest to the Appellant's written waiver of counsel as required by F.R.Juv. Pro. 8.290(d)(4) .

At the hearing, the state stipulated that the appellant's waiver of counsel was not written and not attested to by two witnesses (R12,5). The motion was denied after lengthy argument. (R9).

The Appellant proceeded to trial. Detective Thomas Stufano testified that on January 1281, 1983, while investigating a burglary at Phil's Auto Store, he talked to the Appellant's mother. (T11,12,13). She gave him permission to speak to the Appellant, who was at school. Detective Stufano picked the Appellant up from Atlantic High School, and transported him to the Delray Police Station. (T14).

The Appellant was placed in an interview room, and he was advised that he had a right to remain silent. (T15). The Appellant was advised of all his Miranda rights as soon as they reached the police station, and once again on the tape. (T15). The Appellant acknowledged that he understood all his rights. (T16). Detective Stufano testified that he did not promise the Appellant anything, and that he did not threaten the Appellant.

(T16). The appellant did not appear as if he were under the influence of alcohol or drugs according to Detective Stufano. (T16). Detective Stufano testified that he has dealt with the appellant on a number of occasions in the past, and the appellant always appeared to be coherent, and to understand what was said to him. (T17). Detective Stufano knows that the Appellant is in high school, although he does not know how well he is doing. (T18). The motion to suppress Appellant's statement was renewed. (T21). The motion was denied. (T22).

Over objection, Detective Stufano testified that the Appellant told him that he, Charles Williams, and Ms. Woods, went to Phil's Auto Shop. Charles Williams took out the bottom panel, and went inside Phil's Auto Shop. Charles Williams took some change while he was inside. (T24). Detective Stufano alleged that the Appellant stated that he was a lookout, and that Williams later split the money with him. The Appellant later exchanged his change for bills. (T24). According to Officer Stufano, he found $3.50 on the Appellant, which the Appellant allegedly stated was the money obtained from Phil's Auto Store. (T25). The statement was allegedly taped but for some reason the tape was not played for the court. (T25). In fact, the State objected to the defense listening to the tape. (T26). The Appellant renewed his motion to suppress (T29), and it was denied (R29).

Notice of Appeal to the Fourth District Court of Appeal was timely filed on March 25, 1983 (R37).

The Court of Appeal, Fourth District issued its opinion on January 4, 1984 affirming the conviction as follows: Finding that Rule 8.290(d)(4) of the Florida Rule of Juvenile Procedure tracks 3.111(d)(4) of the Florida Rules of Criminal Procedure, we affirm on the authority of Jordan v. State, 34 So.2d 589 (Fla. 1976).

Petitioner moved for rehearing. In addition, petitioner sought certification of the legal issue to this court. The Motion for Rehearing and/or Request for Certification of Conflict was denied on January 18, 1984. Subsequently, express conflict was noted by the Fourth District. In State v. Cartwright ___ So.2d ___ (Fla. 4th DCA February 22, 1984) (9 FLW 442)

Petitioner filed Notice to invoke the jurisdiction of this court pursuant to Rule 9.030(a)(2)(V),(IV) and 9.120, F.R. App. P., on January 24, 1984.

This court accepted jurisdiction, and this brief on the merits follows.

POINT INVOLVED ON APPEAL

Whether the failure to comply with Florida Rule of Juvenile Procedure 8.290(d)(4) renders inadmissible inculpatory statements obtained from a child absent a valid waiver of counsel obtained pursuant to that rule.

ARGUMENT

ISSUE PRESENTED

Whether the failure to comply with Florida Rule of Juvenile Procedure 8.290(d)(4) renders inadmissible inculpatory statements obtained from a child absent a valid waiver of counsel obtained pursuant to that rule.

This case is before this court upon this court having accepted jurisdiction based on "express" conflict between the decision of the Fourth District in this case and the decision of the First District S.L.W. v. State, ___So.2d ___(Fla. 1st DCA Case No.AS-175, Opinion filed December 2, 1983)[8 FLW 2814] on rehearing (February 27, 1984)[9 FLW 463]. The First District acknowledged a conflict between S.L.W. supra and In the Interest of H.D., ___ So.2d ___ (Fla. 4th DCA Case No.83-678, Opinion filed January 4, 1984) [9 FLW 40] as did the Fourth District in State v. Cartwright, ___ So.2d___ (Fla. 4th DCA 1984)(9 FLW 442).

Petitioner for the reasons that follow submits that the Fourth District erred in affirming Petitioner's conviction based on Jordan v. State, 334 So.2d 589 (Fla. 1976), Petitioner agrees with the First District that compliance with the relevant Rule of Juvenile Procedure is mandatory. Thus,in this case, the failure to comply, rendered inadmissible the inculpatory statement made by Petitioner to the police officer.

The juvenile justice statutory scheme, Chapter 39, Florida Statutes, grants to a juvenile a right to be treated differently from adults. State v. Rhoden, ___ So.2d ___ (Fla. S.Ct. Case No.62,918, Opinion filed April 5, 1984) [9 FLW 123]. However,

Chapter 39 does not address juvenile procedure, specifically, waivers of counsel. This subject matter was properly left to this Court which adopted the Florida Rules of Juvenile Procedure as rules of the court. See In Re Transition Rule 11, 270 So.2d 715 (Fla. 1972); In Re Florida Rules of Juvenile Procedure, 345 So.2d 655 (Fla. 1977), and In Re Florida Rules of Juvenile Procedure, 393 So.2d 1077 (Fla. 1980).

Adopted as part of the Rules of juvenile procedure was Rule 8.290(d) which provides for juvenile waivers of counsel in general, in court and out of court. There is no qualifier limiting the procedure of Rule 8.290(d)(4) to waivers before intake officers, public defenders, and the court.

> (d) Waiver of Counsel.
>
> (1) The failure of a child to request appointment of counsel or his announced intention to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.
>
> (2) A child shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the child's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.
>
> (3) No waiver shall be accepted where it appears that the party is unable to make an intelligent and understanding choice because of his mental condition, age,education,experience, the nature or complexity of the case, or other factors.
>
> (4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than two attesting witnesses. Said witnesses shall attest the voluntary execution thereof.
>
> (5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each sub-

> sequent stage of the proceedings at which the party appears without counsel. [emphasis supplied].
>
> Rule 8.290(d), Fla.R.Juv.P.

If a statute or rule uses a word without defining it, then its common or ordinary meaning applies. State v. J.H.B., 415 So.2d 814 (Fla. 1st DCA 1982); accord, State v. Cormier, 375 So.2d 852 (Fla. 1979); cf., Carson v. Miller, 370 So.2d 10 (Fla. 1979) (unambiguous statutory language must be accorded its plain meaning). This rule clearly, obviously, and unambiguously sets forth the requirements for an out of court waiver of counsel in a juvenile case. The waiver must be in writing and attested by two witnesses. "The rule applies to situations involving police officers and therefore to the present case" S.L.W.; 8 FLW at 2184.

Respondent argued below that Florida Rules of Juvenile Procedure, does not apply to pre-arrest investigatory proceedings, because the rules are court rules which govern procedures only in the circuit court (PB-16,24). See Rule 8.010, Florida Rule of Juvenile Procedure. Interestingly, a similar argument was rejected by the Fourth District in State v. Cartwright, ___ So.2d ___ (Fla. 4th DCA Case Nos. 83-614 and 83-6151, opinion on rehearing filed February 22, 1984) [9 FLW 442]. There, as in the instant case, the state argued that the rules of juvenile procedure govern only procedures in the circuit court, and that imposition of a rule governing the conduct of law enforcement personnel constitutes a constitutionally impermissible encroachment upon the legislative and/or executive branches by the judiciary. The Fourth District noted:

> It seems reasonably clear that the judicial branch does have the constitutional authority to impose a rule of evidence rendering a waiver of counsel invalid or a confession inadmissible for violation of court imposed rules.
>
> 9 FLW at 442

However, the appellate court, being of the view that such a rule of inadmissibility per se should emanate from this Court rather than from a district court of appeal, declined to impose such a rule.

Further support for Petitioner's position that Rule 8.290(d)(4) pertains to pre-arrest custodial interrogation is evidenced by the proposed changes to the rules of juvenile procedure submitted to this Court on April 2, 1984, by the Juvenile Court Rules Committee of The Florida Bar (A-1). The committee deleted all sections of Rule 8.290 which pertained to matters occurring outside the court room. In this regard, Rule 8.290(d)(4) was deleted in its entirety (A-6). Thus, the proposed rule changes would eliminate any future conflict between the courts of this state as to the application of the present Rule 8.290(d)(4) to pre-arrest custodial interrogation.

In M.L.H. v. State, 393 So.2d 13 (Fla. 1st DCA 1981), the First District interpreted Rule 8.290(d)(4) as a mandate from this Court that two witnesses attest to the voluntary execution of a juvenile's waiver of his right to counsel. There, during questioning, the juvenile made certain incriminating oral statements and gave what was purported to be a written statement. The arresting officer was the only person to witness the juvenile's signature on the waiver of rights form. Additionally, the juvenile could neither read nor write except to sign his

name. The First District held that the failure to comply with the rules of juvenile procedure, along with the juvenile's inability to read or write invalidated his confession. Respondent notes that Judge Ervin, who dissented in M.L.H., based on this Court's decisions in Doerr v. State, 383 So.2d 905 (Fla. 1980) and Jordan v. State 334 So.2d 589 (Fla. 1976), was on the First District's panel in S.L.W. v. State, supra, and concurred in the instant decision.

Sub judice, a written waiver of counsel was never procured and executed by petitioner with two attesting witnesses; no constitutional rights form was signed by Petitioner. The only evidence relied on by the state to prove that Petitioner validly waived his right to counsel prior to making the purported confession was the testimony of one officer. It is obvious that the intent of Rule 8.290(d)(4) is to safeguard the rights of juveniles and to insure that waivers of counsel made out of court in juvenile cases are, in fact, voluntary, in light of the fact that juveniles are more susceptible than adults to the pressures of custodial interrogation made without counsel.

The Appellee below and the Fourth District in affirming Petitioner's conviction relied on Florida Rule of Criminal Procedure 3.111(d)(4), and Jordan v. State, supra, which interpreted the adult rule, thus reasoning that a juvenile's rights are ordinarily similar to an adult's rights (PB-22-23). "Neither the Rules of Juvenile Procedure nor the Rules of Criminal Procedure provide that the criminal procedure rules are applicable in juvenile proceedings" D.K.D. v. State, 440 So.2d 468,469 (Fla. 1st DCA 1983). For example, the appellate courts have

interpreted the juvenile speedy trial rule and statute as being unambiguous and mandatory, thereby limiting the method required to extend time for speedy trial solely to the provisions of the juvenile rule and statue. J.J.S. v. State, 440 So.2d 465 (Fla. 1st DCA 1983); In the Interest of K.L.H., 407 So.2d 297 (Fla. 4th DCA 1981). See also L.G. v. State, 405 So.2d 252 (Fla. 3rd DCA 1981) (because of the mandatory requirements of the juvenile rules and the obvious statutory distinctions which the rules reflect regarding adults and juveniles, the appellate court rejected the holding of an adult case pertaining to the adult attorney-client relationship). Likewise, compliance with Rule 8.290(d)(4), Florida Rule of Juvenile Procedure, is mandatory, the adult rules notwithstanding. M.L.H. v. State, supra.

Reliance on Jordan v. State, supra, is misplaced. In Jordan, the defendant relied on Rule 3.111(d)(4), Florida Rules of Criminal Procedure, as providing a ground for making his confession inadmissible. This Court determined that Rule 3.111(d)(4) was inapplicable to the Jordan facts. First, this Court, after examining Rule 3.111 in its entirety, determined that the waiver of counsel provision related to the subject indicated in the title of the rule: "Providing counsel to indigents". Second, this Court reasoned that there was nothing in Rule 3.111 which provided for suppression of evidence.

Although Rule 8.290(d), Florida Rules of Juvenile Procedure, is identical to Rule 3.111(d), Florida Rules of Criminal Procedure, the remaining provisions of the rules are dissimilar. Applying the analysis used in Jordan, an examination of Rule 8.290 in its entirety does not clearly establish that the waiver

of counsel provision pertains only to providing counsel to parties in post-arrest situations. Rule 8.290(d) does not provide for the suppression of evidence. Nevertheless, the legal remedy for a violation of the Sixth Amendment right to counsel, which is implicated in the Miranda warnings (right to counsel during custodial interrogation), is the exclusion of the evidence. See Escobedo v. Illinois, 378 U.S. 49 (1962)(the accused in a state prosecution is denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment, and no pre-trial statement elicited bay the police during interrogation may be used against him at a criminal trial, where the police investigation, conducted prior to indictment, is no longer a general inquiry into an unsolved crime about has begun to focus on a particular suspect). Petitioner, therefore, submits that the interpretation of Rule 3.111(d)(4), as announced in Jordan v. State, supra, is inapplicable to Rule 8.290(d)(4) since the respective rules, read in total, differ substantially. Moreover, considering the policy of this state, to treat juvenile suspects differently than adult suspects, State v. Rhoden, supra, the interpretation employed in Jordan v. State, supra, should be limited to the adult rules of criminal procedure. The coerciveness of the custodial setting where a juvenile is under investigation has been recognized consistently and it is of heightened concern. Haley v. Ohio, 332 U.S. 596 (1948).

Therefore, the Fourth District erred in affirming the trial court's ruling admitting Petitioner's inculpatory statements into evidence based on Jordan. The First District correctly determin-

ed that Rule 8.290(d)(4) pertains to situations involving police officers. Moreover, compliance with the rule is mandatory and renders inadmissible inculpatory statements obtained from a child absent a valid waiver of counsel obtained pursuant to Rule 8.290(d)(4), Florida Rules of Juvenile Procedure.

Petitioner submits that even if this Court determines that failure to conform to Rule 8.290(d)(4) does not render the statement per se inadmissible, based on the totality of the circumstances, see Gallegos v. Colorado, 370 U.S. 49 (1962), Petitioner's statements were otherwise involuntary and inadmissible.

In T.B. v. State, 306 So.2d 183, 185 (Fla. 2nd DCA 1975), the Second District, quoting from People v. Lara, 4332 P.2d 202, 215 (Cal. 1967), set out the general rule regarding juvenile confessions.

> ... [A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence of consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education,experience, and ability to comprehend the meaning and effect of his statement...." 62 Cal. Rptr. at 599, 432 P.2d at 215.
>
> To these considerations must be added the requirement that, if the statement stems from custodial interrogation, the accused must be given his rights under Miranda and must voluntarily, knowingly and intelligently waive those rights. Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.
>
> A juvenile may waive his rights under Miranda, but the state bears a heavy burden in establishing that the waiver was intelligently made. Arnold v. State, Fla. App. 3rd, 1972, 265 So.2d 64, cert.den., Fla. 1973, 272 So.2d 817.

Petitioner argued in the District Court of Appeal (see Initial Brief of Appellant at pages 5-6) and maintains before this court, that Petitioner's statements were otherwise inadmissible because his waiver of counsel was involuntarily and unintelligently made. In addition to failing to comply with Juvenile Rule 8.290(d)(4), the record indicates that Detective Stufano did not make any further inquiry as to whether petitioner, a sixteen year old juvenile, fully understood and comprehended the consequences of his waiver. Stufano did not inquire as to the extent of petitioner's educational background or intelligence, nor his ability to read or write. Stufano merely read petitioner his rights on a Miranda card. After reading from the card, Stufano asked petitioner if he understood the rights, to which, according to Stufano, petitioner answered yes. In addition, petitioner's delivery to the Juvenile Detention Center was delayed while he was taken to the police station to be interviewed. Furthermore, petitioner had no adult who was friendly towards him present during either of these questionings. Due to the coerciveness of the interrogational setting, after a few minutes petitioner confessed to the burglary.

In Gallegos v. Colorado, supra, at 54 the United States Supreme Court observed that a 14 year old suspect could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions". The juvenile defendant, in that Court's view, required:

> The aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the

protection which his own immaturity could not.

Id. Similarly, in In re Gault, supra, at 55, the Court admonished that "the greatest care must be taken to assure that [a minor's] admission was voluntary".

Petitioner contends that a perfunctory reading of Miranda rights is not sufficient to enable a 16 year old juvenile to make an intelligent and voluntary waiver. This involuntariness coupled with the officer's failure to comply with the rules of juvenile procedure, as in M.L.H. and S.L.W., supra, undoubtedly, rendered respondent's purported inculpatory statements invalid. The Fourth District Court of Appeal was incorrect in affirming the trial court's ruling admitting petitioner's inculpatory statements into evidence. Petitioner urges this Court to reverse the opinion of the Fourth District in H.D., supra.

CONCLUSION

WHEREFORE, based upon the foregoing argument, reason and citation of authority, petitioner respectfully requests that this Honorable Court reverse the decision of the Fourth District Court of Appeal, which affirmed the trial court's ruling admitting the petitioner's inculpatory statements into evidence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Honorable RICHARD G. BARTMON, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 23rd day of July, 1984.

Cathleen Brady
Of Counsel