IN THE SUPREME COURT OF FLORIDA

H.D., a Child,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.64,796

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

References to respondent's answer brief will be by the designation "RB" followed by the appropriate page number(s).

POINT 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

Several points in the answer brief merit reply:

Respondent then argues that the 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.(RB4) First, even if examined in the context of the Sixth Amendment, petitioner had a sixth amendment right to counsel at the time of arrest. This is even though the petition alleging delinquency had not been filed. Escobedo v. Illinois, 378 V.S. 478 (1964). Secondly, the Miranda warnings implicate the Sixth as well as the Fifth Amendment since they include a warning that an arrestee is entitled to counsel during custodial interrogation. Further, a juvenile may properly waive his Miranda rights, but the state bears a heavier burden in establishing that the waiver was voluntarily, knowingly, and intelligently made. T.B. v. State, 306 So.2d 183 (Fla.2d DCA 1975); Arnold v. State, 265 So.2d 64 (Fla. 3rd DCA 1972), cert denied, 272 So.2d 817 (Fla. 1973). Here, if petitioner waived his right of counsel, it was done at the police station, not in the courtroom, and the waiver was done in the context of the giving of Miranda warnings and custodial interrogation. Rule 8.290(d) provides for waiver of counsel by juveniles out of court, which would include the waiver of counsel during Miranda warnings.

Respondent contends that Rule 8.290(d)(4), addresses only the duty of the intake officer, the public defender and the court in providing counsel to a juvenile offender (RB-14). A plain reading of Rule 8.290(d) indicates otherwise. Of course, 8.290(a), (b), and (c) pertain to the duties of the intake officer, the public defender, and the court, respectively, in providing counsel. However, Rule 8.290(d) 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 state 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 subsequent stage of the proceedings at which the party appears without counsel. [emphasis supplied].

Rule 8.290(d), Fla.R.Juv.P.

Respondent cites a 1980 Committee note to Rule 8.290 published in a publication of the Florida Bar as authority for its proposition that Rule 8.290 does not apply to situations involving police officers.(RB5) This Committee note provides:

> "1980 Committee Note: This rule was not intended by the Committee to effect the admissibility of the Miranda Warnings."

Petitioner is uncertain as to exactly what this committee note means and as to how much authority is afforded committee notes. Apparently this committee note has been unpersuasive with the appellate courts. Petitioner notes that the opinions of the Fourth District in State v. Cartwright, 448 So.2d 1049 (Fla. 4th DCA 1984) and In the Interest of H.D., 443 So.2d 410 (Fla. 4th DCA 1984) do not discuss this committee note but were decided on other grounds. Similarly, the First District failed to address this committee note, in its opinion and on rehearing. S.L.W. v. State, 445 So.2d 586 (Fla. 1st DCA 1983). Moreover, petitioner did not challenge the admissibility of Miranda warnings below. Instead, petitioner challenged the waiver of counsel and admissibility of his inculpatory statements which were made in the context of the giving of Miranda warnings and custodial interrogation. This 1980 committee note does not address the admissibility of statements obtained pursuant to the giving of Miranda warnings. The note is therefore inapplicable to the instant facts and petitioner's reliance on it is misplaced.

Respondent makes mention as did petitioner of the recent recommendations for changes in the Florida Rules of Juvenile Procedure. In Re Amendment to Juvenile Court Rules. Petitioner would point out that the fact that the change is felt to be necessary implies that the current wording of the rule lends support to petitioner's argument. Petitioner would point out that the proposed changes were not made or established at the time of appellant's delinquency proceedings. Petitioner is unsure as to the impact of the changes as they are solely recommendations.

Respondent relies heavily on Florida Rule of Criminal Procedure 3.111(d)(4), and Jordan v. State, 334 So.2d 589 (Fla. 1976), which interpreted the adult rule, thus reasoning that a juvenile's rights are ordinarily similar to an adult's rights (RB-8-9). "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 statute. 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, 399 So.2d 13 (Fla. 1st DCA 1981).

Respondent's reliance on Jordan v. State, supra, is misplaced.

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. Moreover, considering the policy of this state, to treat juvenile suspects differently than adult suspects, State v. Rhoden, 448 So.2d 1013 (Fla. 1984), the interpretation employed in Jordan v. State, supra, should be limited to the adult rules of criminal procedure.

Petitioner submits that Doerr v. State, 383 So.2d 905 (Fla. 1980) likewise, is of little guidance in deciding the issue at bar. There, this Court construed Section 39.03(3)(a), Florida Statutes (1975), and determined that it is not required that every confession by a juvenile after he is taken into custody be automatically rendered inadmissible if it were given prior to notification of the juvenile's parents or legal guardians. The purpose of Section 39.03(3)(a) is simply to assure that a juvenile's parents are advised of the juvenile's whereabouts when a juvenile is kept beyond the period of the statutory definition

of custody. Villar v. State, 441 So.2d 1181 (Fla. 4th DCA 1983). "...[T]he statutory requirement of notification has nothing to do with interrogation." Doerr, 383 So.2d at 907.

This rule obviously pertains to interrogation, wherein the constitutional right to counsel is implicated in the giving of Miranda Warnings. There is a grave distinction between a waiver of a fundamental constitutional right to counsel and a statutorily imposed requirement of notification, which has nothing to do with interrogation.

The Fourth District incorrectly determined that the issue is controlled by Jordan v. State, supra and that Rule 8.290(d)(4) does not pertain to situations involving police officers. The position taken by the First District on this issue is correct. 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. The Fourth District improperly affirmed the trial court's ruling admitting petitioner's inculpatory statements into evidence.

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.

CONCLUSION

WHEREFORE, based on the foregoing argument, reasoning, 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 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 the Honorable Richard Bartmon, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 23th day of August, 1984.

Cathleen Brady
Of Counsel