IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO.: 65,021
S. L. W., a child,)
Respondent.)

PETITIONER'S REPLY BRIEF

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Attorney for Petitioner

TOPICAL INDEX

	PAGE
PRELIMINARY STATEMENT	1
POINT ON APPEAL	2
WHETHER THE FAILURE TO COMPLY WITH RULE 8.290(d)(4), F.R.JUV.P., RENDERS INADMISSIBLE INCULPATORY STATEMENTS OBTAINED FROM A CHILD ABSENT A VALID WAIVER OF COUNSEL OBTAINED PURSUANT TO THAT RULE?	
ARGUMENT	2-8
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	PAGE
Brewer v. Williams, 430 U.S. 387 (1977)	5
Cartwright v. State, No. 65,040 (Notice filed March 22, 1984)	4,7
D.K.D v. State, 440 So.2d 468 (Fla. 1st DCA 1983)	7
D.K.D v. State, No. 64,603 (Oral Argument held June 8, 1984)	7
In the Interest of H.D., a child, No. 64,796 (Notice filed January 30, 1984)	4,7
In re Gault, 387 U.S. 1 (1967)	2
Jordan v. State, 334 So.2d 589 (Fla. 1976)	6,8
Kirby v. Illinois, 406 U.S. 682 (1972)	5
M.L.H v. State, 399 So.2d 13 (Fla. 1st DCA 1981)	6,8
Miranda v. Arizona, 384 U.S. 436 (1966)	3,5,6
S.L.W v. State, 445 So.2d 586 (Fla. 1st DCA 1984)	1,3
Scott v. Illinois, 440 U.S. 367 (1979)	5

State v. Cain, 381 So.2d 1361 (Fla. 1980) 2

State v. Cartwright, No. 83-614, 83-615 (Fla. 4th DCA February 22, 1984) [9 FLW 422] (on rehearing) 3,4,6

Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) cert. denied 434 U.S. 1088 2

OTHER AUTHORITY

Florida Statutes, Chapter 39 2

Fla.R.Juv.P. 8.290(2)(4) 2,4,5,6,7

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
vs.	)	CASE NO.: 65,021
S. L. W. a child,	)	
Respondent.	)	

PRELIMINARY STATEMENT

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

The opinion of the Court of Appeal, First District, is now reported as:

S.L.W. v. State, 445 So.2d 586 (Fla. 1st DCA 1984).

POINT ON APPEAL

WHETHER THE FAILURE TO COMPLY WITH RULE 8.290(d)(4), F.R.JUV.P., 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:

The State agrees with many of the assertions submitted in brief concerning the "right" to preferred treatment as a juvenile offender. AB at 2-3. In fact the legal premises and authority offered by respondent were initially cited in the State's merit brief. The State does disagree with the implication and statement that "the juvenile justice statutory scheme, Chapter 39, Florida Statutes, grants to juveniles a right to be treated differently from adults." RB at 3. This "right" extends only so far as deemed permissible by the state legislature; for as both parties agree, there is no inherent or constitutional right to preferred treatment as a juvenile delinquent. In re Gault, 387 U.S. 1 (1967); Woodward v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) cert. denied 434 U.S. 1088; State v. Cain, 381 S.2d 1361, 1363 (Fla. 1980).

Inasmuch as the legislative provisions of Chapter 39 do not specifically address the standard to be applied when taking statements from juvenile suspects, nor does the stated purpose of the committee formulating Rule 8.290(d)(4), F.R.Juv.P., indicate that the rule is to affect the admissibility of Miranda warnings, there appears to be no

express right to preferred treatment. Accordingly, the standard to be applied in obtaining statements from juveniles (at least prior to being charged and the attachment of right to counsel) is no less than that the Fifth Amendment protections applicable to adults. Miranda v. Arizona, 384 U.S. 436 (1966). In admitting the statement, the trial court was of the opinion that the rule applied after initiation of formal proceedings and under circumstances where a fiduciary relationship was owed the juvenile. See Appendix A, p. 39.

In State v. Cartwright, No. 83-614, 83-615 (Fla. 4th DCA February 22, 1984) [9 FLW 442] (on rehearing), the Fourth District rejected the position advanced by the State in that case (and secondarily relied upon here) that the rules of juvenile procedure govern only procedures in the circuit court and imposition of such rules upon law enforcement personnel constitutes a constitutionally impermissible encroachment upon the legislative and/or executive branches by the judiciary.[1] Id. at 442. This legal position has been asserted in this case with the provision that the rules of juvenile procedure, when read in pari materia, do not expressly extend to preceeding police interrogations conducted outside the parameters of a judicial proceedings. See, argument presented in the initial brief at pp. 24-25.

---

[1] The district court's opinion specifically indicates that such a per se rule of inadmissibility should emanate from this Court rather than from a district court of appeal. cf. S.L.W. v. State, 445 So.2d 586 (Fla. 1st DCA 1984).

It is the State's primary position that Rule 8.290(d)(4), F.R.Juv.P., does not create a per se rule of admissibility for out-of-court waivers of counsel. This position was also argued in State v. Cartwright and affirmed by the Fourth District. Respondent does address this aspect of the Cartwright opinion.

Respondent's comments concerning the 1980 Committee Note are interesting. First, he expresses uncertainty as to the meaning and how much authority is to be afforded the Committee Note. Second, he notes that the opinions of the Fourth District in State v. Cartwright and In the Interest of H.D., have ignored the Committee Note entirely or have found it unpersuasive. This approach totally overlooks the explanation set forth in the initial brief at p. 22, n. 5. As stated there, the Committee Note is reproduced only in the Florida Bar publication of the juvenile rules and was not available to the State until rehearing in this cause and was not cited by the State as persuasive authority in either State v. Cartwright or In the Interest of H.D.[2] The position supported by the Committee Note was argued before the district court in this case, however Committee Note was not cited as authority for the legal position.

Respondent next attempts to claim a sixth amendment right to counsel while specifically disavowing a challenge to the pre-arrest

---

[2] Both cases are currently pending in this Court. See, Cartwright v. State, No. 65,040 (Notice filed March 22, 1984) and In the Interest of H.D., a child, No. 64,796 (Notice filed January 30, 1984).

statement on fifth amendment Miranda grounds. RB at 5-6. This failure to challenge the statement pretrial was emphasized before the district court. In essence, respondent contends that his statement is inadmissible -- not because it is involuntary -- but due to the per se prohibition of Rule 8.290(d)(4) concerning waiver of counsel without two attesting witnesses. Under this logic, a pretrial challenge to Miranda violations would be unnecessary for juvenile offenders. The instant rule would eliminate any possible showing by the State that statements given in the field to a single investigating officer were voluntary, knowing and intelligent. RB at 11.

Respondent's position concerning sixth and fifth amendment protections is contradictory. He disavows a fifth amendment interest except as asserted in a sixth amendment context. It is such application that the Juvenile Rules Committee intended to preclude.

The sixth amendment expressly guarantees a defendant the fundamental right to counsel in all federal and state criminal prosecutions that result in his imprisonment. Scott v. Illinois, 440 U.S. 367, 373 (1979). The right to counsel attaches at the initiation of formal "adversary" proceedings. Brewer v. Williams, 430 U.S. 387, 398 (1977). This has been interpretated to mean the initiation of judicial proceedings -- whether by formal charge, preliminary hearing, indictment or arraignment. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). It is for this reason that Rule 8.290 F.R.Juv.P. discusses the duties of the intake officer, the public defender, and the court.

The waiver of counsel provision of subsection (d)(4) is intended to be construed within this context. Respondent's "plain meaning" argument is unpersuasive (RB at 7-8) as the clear and unambiguous language of the rule and the committee note indicate otherwise.

The fifth amendment guarantee is against compulsory self-incrimination. The primary concern in this regard, as evidenced by the Supreme Court's opinion in Miranda v. Arizona, was that the coercive atmosphere created by police custody and interrogation would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. Id. at 457, 457-8. Violations of this "right" are reviewed in context of the totality of the circumstances. Respondent's interpretation of Rule 8.290(d)(4) precludes such review. It is also illogical for it creates a higher juvenile standard for waiver of counsel than for waiver of the privilege against self incrimination. In the latter a juvenile's age and experience are but factors to be considered in evaluating the totality of the circumstances surrounding the waiver, but do not serve as an absolute bar.

The State submits that at the time of the instant statement, a complaint of burglary has been filed by the victim and respondent was named as a suspect. The sixth amendment right to counsel had not attached. Respondent's statement should be reviewed in terms of voluntariness from a fifth amendment prospective -- under a totality of the circumstances standard. See, State v. Cartwright; M.L.H. v. State, 399 So.2d 13 (Fla. 1st DCA 1981); Jordan v. State, 334 So.2d 589 (Fla. 1976).

Respondent's position concerning the reasons for the proposed changes to the juvenile rules of procedure, specifically to Rule 8.290(d)(4) is incorrect. Respondent contends that the decision to eliminate subsection (d)(4) is a clear indication that the present rule applies to pre-arrest custodial interrogation. RB at 8. Nothing within the proposals submitted or oral arguments conducted before this court support's such an interpretation. Admittedly the proposed rule change is intended to eliminate conflict concerning the application of the rule to the pre-arrest interrogation. However the proposed deletion is an attempt by the rules committee to preclude application of the provision by the courts in a manner which was never intended or contemplated by the committee. The proposed amendments to the juvenile rules were argued before this Court on May 31, 1984. The current list of proposed changes does not set forth a reason for the proposed change of subsection (d)(4). However attempts are being made by the Rules Committee to supply its reasons. See, Appendix B.

The confusion surrounding the juvenile rules is evidenced by the number of cases currently pending in this Court on certified questions or alleging conflict among the district courts of appeal. D.K.D. v. State, 440 So.2d 468 (Fla. 1st DCA 1983), relied upon by respondent, is currently pending review. D.K.D. v. State, No. 64,603 (Oral argument was held June 8, 1984). See also, Cartwright v. State, No. 65,040 and In the Interest of H.D., No. 64,796.

The State respectfully submits that the district court erred in determining that failure to obtain two witnesses to respondent's out of court, pre-arrest statement renders the statement inadmissible as a violation of Rule 8.290 (d)(4). The State submits that under the circumstances, compliance with the waiver of counsel rule is not mandatory. The appropriate test is to evaluate the "totality of the circumstances" surrounding the statement See, Jordan v. State; M.L.H. v. State. Under this test, respondent's circumstances and those of the juvenile in M.L.H. are readily distinguishable. The holding in M.L.H. should not control here. The voluntariness of respondent's statement was not reviewed under the totality of the circumstances by the district court. If this standard is utilitzed, it is obvious that respondent's confession was knowingly, intelligently and voluntarily given to the investigating officer. This is particularly evident given respondent's failure to move to suppress the statement pre-trial. Accordingly, the statement was properly admitted at respondent's trial.

CONCLUSION

The record contains substantial competent evidence to support the trial court's findings and Petitioner, the State of Florida, respectfully requests that this Honorable Court affirm Respondent's conviction thereby quashing the opinion of the First District and reinstating the ruling of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Charlene V. Edwards, Assistant Public Defender, 2nd Judicial Circuit, P. O. Box 671, Tallahassee, Florida 32302, this 11 day of June, 1984.

Barbara Ann Butler
Assistant Attorney General

BAB/rh
#7 I