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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE INTERESTS OF D.J.K., A Child,
Appellant.

FILED JUNE 25, 1986

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Appeal from the Iowa District Court for Black Hawk County (No. 3414), Joseph Moothart, Associate District Judge.

Defendant, a juvenile, appeals an order of the juvenile court adjudging him to have committed a delinquent act, namely sexual abuse in the second degree in violation of Iowa Code section 709.3(2). **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

John S. Pieters, Waterloo, Iowa, for the appellant.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney General; and Jon Henson and Jan Pederson, Assistant Black Hawk County Attorneys, for the appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Defendant, a juvenile, appeals an order of the juvenile court adjudging him to have committed a delinquent act, namely sexual abuse in the second degree in violation of Iowa Code section 709.3(2). We affirm in part; reverse in part, and remand.

Defendant has learning disabilities and emotional problems with a lengthy history of psychological testing and counseling. Defendant was sixteen at the time of the alleged act, but was functioning emotionally and intellectually at the upper elementary level. For approximately the past four years, defendant has lived with his foster mother, Mrs. Schneider.

On May 22, 1984, defendant was riding on a bus for special persons when he allegedly sexually assaulted a nine-year-old boy. Another passenger witnessed the act and reported it to the bus driver.

The incident was investigated by Detective Lt. Sewick of the Black Hawk County Sheriff's Department. On May 31, 1984, Detective Sewick contacted defendant's natural mother about the events on the bus. Defendant's natural mother referred Lt. Sewick to a social worker, who in turn referred the detective to Melvin Wolf, an attorney who had previously represented defendant about matters in juvenile court. Lt. Sewick indicated to Mr. Wolf that he wanted to talk to defendant about the incident on May 22, and Mr. Wolf gave permission to do so.

On that same day, Lt. Sewick telephoned Mrs. Schneider and arranged to have defendant taken to the police station the following day so that he could ask defendant a few questions. The next day, June 1, 1984, defendant arrived at the police station with his foster mother. After approximately a half hour of questioning, defendant signed a Miranda waiver and a statement confessing

having committed certain acts. This statement was given without the advice or consultation of his attorney or foster mother, or any other adult.

Defendant was charged with sexual abuse in the second degree on June 19, 1984. A motion to suppress the confession was filed and, after a hearing, was overruled. The confession was admitted into evidence at trial. On June 18, 1985, defendant was found to have committed the act alleged and therefore determined to be delinquent.

On appeal, defendant alleges the trial court erred in admitting the confession into evidence. He also contends the trial court erred in determining an adult witness was competent to testify.

I. The Confession. Defendant urges the confession was inadmissible for three reasons. First, the confession was obtained in violation of Iowa Code section 232.45; second, he received ineffective assistance of counsel; and third, his confession was not made knowingly, intelligently, and voluntarily.

A. Statutory Compliance. Defendant asserts that Lt. Sewick did not follow the specific statutory methods by which a child may effectively waive his or her right to counsel. Iowa Code section 232.11(1)(a) provides in part:

> A child shall have the right to be represented by counsel...from the time the child is taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code, and during any questioning thereafter by a peace officer or probation officer.

In addition, Iowa Code section 232.45(9) allows statements given by a child to be admitted in evidence "provided that the statements were made with the advice of counsel or after waiver of the child's right to counsel." Thus, the statute adopts a per se exclusionary rule when a child has not effectively waived its right to counsel. State v. Walker, 352 N.W.2d 239,241 (Iowa 1984); In the

Interest of J.A.N., 346 N.W.2d 495,498 (Iowa 1984); State v. Aldape, 307 N.W.2d 32,35 (Iowa 1981) (dictum).

In State v. Walker, the supreme court interpreted the guidelines for police officers set out in Iowa code section 232.11(2). That section distinguishes between juveniles sixteen and older, and those less than sixteen. The Walker court stated,

> For the child who is at least sixteen years of age, the statute replaces written parental consent with the requirement that good faith efforts be made to notify the parent, guardian, or custodian and to provide the notified person with four explicit facts about the juvenile's circumstances: (1) "that the child has been taken into custody and" (2) "of the alleged delinquent act for which the child has been taken into custody," (3) "the location of the child, and" (4)"the right of the parent, guardian or custodian to visit and confer with the child." Iowa Code § 232.11(2) (1983).

The state must prove by a preponderance of the evidence that defendant's confession was made voluntarily, and that the police officer complied with the statute and obtained a valid waiver of counsel. See State v. Walker, 352 N.W.2d, at 243; State v. Aldape, 307 N.W.2d at 36.

Approximately nine days after the alleged incident, Lt. Sewick contacted defendant's natural mother by telephone and told her that he wished to talk with defendant. He informed her of the nature of the incident being investigated and the reason for the investigation. He doesn't recall whether or not he told defendant's natural mother that she had a right to be there during the questioning. But Lt. Sewick apparently never received permission from defendant's natural mother because she simply referred the officer to defendant's social worker.

The detective contacted the social worker who then referred all inquiries to Mr. Wolf, defendant's attorney. After hearing the explanation for Lt. Sewick's call, Mr. Wolf gave permission to talk to defendant and said that he didn't think it was necessary to be present during the questioning.

Finally, Lt. Sewick contacted defendant's foster mother on May 31st and explained that there had been an incident on the school agency transportation bus and he wanted to talk to defendant about it. In fact, he made it clear that the incident involved an allegation of sexual abuse that occurred on May 22, 1984. He did not indicate to the foster mother that he had talked to anyone else at that time. The conversation concluded when Mrs. Schneider agreed to bring defendant down to the police station for questioning the following morning at 9:00 A.M.

The very first of the four specific facts that must be conveyed to a parent, guardian or custodian in an attempt to obtain permission for waiver of counsel is, "that the child has been taken into custody,...." In this case, when permission was obtained to question defendant, he was not in custody. Permission was granted by the attorney a day before the defendant was brought to the station.

Under section 232.11, defendant's statements taken in the absence of counsel and without his parents' consent, are inadmissible if he was "in custody". See In Interest of J.A.N., 346 N.W.2d at 499. The term "in custody" means the same thing under Chapter 232 as it does in constitutional cases. Id. The supreme court in J.A.N., quoted State v. Cook, 330 N.W.2d 306, 311 (Iowa 1983), and its discussion of the Miranda definition of custody:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Even though permission was obtained from defendant's attorney the day before he arrived at the police station, that permission was not given when defendant was "in custody". Permission should have been obtained again once defendant was given his Miranda rights at the police station. See In Interest of J.A.N., 346 N.W.2d 346-349.

Under the totality of the circumstances, we also cannot conclude that Mrs. Schneider gave the police permission to question defendant. When she took defendant to the station she asked Lt. Sewick whether at least defendant's natural mother, his social worker, or his attorney should be present. The detective only responded that it wasn't "necessary" for them to be present. The record shows that Mrs. Schneider was both upset and confused about her role at that moment.

> Q. And what was the response to that? A. It wasn't necessary at that time. That is, you know, he told me that Melvin Wolf had told him it wasn't necessary, and that his social worker had said it wasn't necessary for her to be there.
>
> Q. Did you ask if you could go in with him? A. Yes, I did.
>
> Q. What did he tell you? A. That he felt that [defendant] would be more open — that sometimes the kids communicated better with them if there was no one else present.
>
> Q. To your knowledge did Lt. Sewick try to contact anybody then ahead of the questioning? A. No. I was extremely concerned because as a foster parent I have no rights. I can only make requests. I cannot make — I cannot insist that I be present. I could only ask.

We conclude therefore that because permission was not obtained after defendant was in custody the first requirement of section 232.11(2) was not met.

The same facts support the conclusion that state has not proven compliance with the fourth requirement of section 232.11(2), "the right of the parent, guardian or custodian to visit and confer with the child." The State adopts the trial court's reasoning that since the foster mother was with the defendant the night between the detective's call on May 31st and the questioning on June 1, "it was not necessary to advise her that she had the right to visit with and confer with

the juvenile." However, our conclusion that defendant was not "in custody" at that point refutes the state's and the trial court's conclusion. In fact, it is apparent from the transcript quotation, that the detective not only did not inform Mrs. Schneider, or anyone else, of the right to confer with defendant, he effectively prevented her attempts to accompany defendant when he said it "wasn't necessary" for her to go in the room.

Even before the four requirements of section 232.11(2) were enacted, the supreme court in In re Thompson, 241 N.W.2d 2,5-6 (Iowa 1976), emphasized, "the importance of securing for the minor under interrogation the advice and consultation of a parent, guardian, custodian, adult friend, or lawyer," and that "failure to provide such support will throw a deep shadow of judicial distrust over the resulting confession." See also, State v. Walker, 352 N.W.2d at 243.

Because we find the state failed to prove that the first and the fourth requirements of section 232.11(2) were met, we hold defendant's inculpatory statement should have been suppressed and excluded from evidence at trial.

B. Ineffective Assistance of Counsel. Defendant argues that he received ineffective assistance of counsel when Mr. Wolf gave Lt. Sewick permission to question him without Mr. Wolf's attendance or assistance. The sixth amendment grants every defendant the constitutional right to effective representation by counsel. Strickland v. Washington, 466 U.S. 668,104 S.Ct. 2052, 80 L.Ed.2d 674 (1985); Kyle v. State, 364 N.W.2d 558 (Iowa 1985).

Defendant asks that his confession and statements be stricken from the evidence because of the alleged ineffective assistance from Mr. Wolf. We note however that our holding on the waiver of counsel issue has provided the same relief requested on this issue. We also recognize a duty to avoid constitutional questions when the merits of a case may be fairly decided without facing them.

In Interest of J.A.N., 346 N.W.2d at 498; See also, State v. Davis, 269 N.W. 2d 434, 439 (Iowa 1978). We pause only to note that counsel's handling of this matter was cavalier at best, and, at worst, perhaps improper.

C. Voluntariness. Defendant alleges that his confession and statements were not given voluntarily, knowingly, and intelligently. We need not address this issue however because our holding on the waiver of counsel issue has removed his statement and confession from the evidence.

II. Competency of Witness. After an in camera hearing, the trial court determined that a witness who had observed the alleged incident was competent to testify. Defendant argues on appeal that this witness was incompetent and should not have been allowed on the witness stand.

The witness in question, at the time of trial, was twenty-seven years old but mentally deficient. She was questioned about her ability to distinguish between the truth and a lie as well as her ability to relate to others what she has seen. She was confused as to what day of the week it was and she thought that the special holiday in December was Mother's Day. And, she could not explain what "accurately" meant when asked on cross-examination. Despite these shortcomings however, the trial court determined that she was sufficiently competent to testify.

Both parties cite State v. Harvey, 242 N.W.2d 330,336 (Iowa 1976), as the controlling authority on this issue. In that case the supreme court cited Iowa Code section 622.1 which provided that, "every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared." The supreme court in Calvert v. State, 310 N.W.2d 185, 186 (Iowa 1981), stated the standard of appellate review when it said, "We will not disturb the trial court's determination that the witness is incompetent, absent a showing of abuse of discretion".

Iowa Code section 622.1 was repealed however by 1983 Iowa Acts Chapter 37, §7. The competency of a witness is now governed by Iowa Rule of Evidence 601 which states, "Every person of sufficient capacity to understand the obligation of an oath or affirmation is competent to be a witness except as otherwise provided in these rules." It is clear there has been no substantial change in the wording of the rule and the case law has been consistent in construing the applicable standard, whether it fell under Iowa Code §622.1 (1983), or Iowa Rule of Evidence 601. See State v. Miller, 359 N.W. 2d 508, 511 (Iowa App. 1984).

Most importantly however, despite the change in authority, our standard of review on this issue is still an abuse of the trial court's discretion. Id. And, as a helpful guide in determining whether the trial has abused its discretion, we note the advisory committee's notes to Rule 601.

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo.Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509.

In this case the witness's father testified that she did not have problems relating things accurately and reliably that she had seen. Based upon the record before us, we cannot say the trial court abused its discretion in admitting the testimony of this witness.

Because the State has not proven by a preponderance of the evidence that it complied with the four requirements of Iowa Code section 232.11(2), we reverse the trial court's decision not to suppress defendant's confession and

inculpatory statements. We affirm the trial court's decision to permit the witness in question to testify. Therefore we remand the case to the trial court for retrial in accordance with our holdings.

AFFIRMED IN PART: REVERSED IN PART AND REMANDED.

Sackett, J., concurs specially; Donielson, J. dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. To maintain, as the majority does, that the waiver of counsel requirements enumerated in Iowa Code section 232.11(2) (1985) were not satisfied under these circumstances is contrary to the purpose of the statute. Iowa Code § 232.11(2) was designed to prevent the custodial interrogation of children prior to the time the child's parent, guardian, or custodian was notified to allow them an opportunity to intervene and comfort and counsel the child. See generally, In the Interest of J.A.N., 346 N.W.2d 495 (Iowa 1984).

In this case, the officer who obtained D.J.K.'s statement did so only after attempting to satisfy the statutory requirements of § 232.11(2). He made a good faith effort to notify those with interests on behalf of the child of the four facts listed in the statute. In fact, the officer arguably could have exceeded the required good faith effort. First, the officer notified D.J.K.'s natural mother about the incident and "what the situation was." The officer then contacted D.J.K.'s social worker and notified her of the situation. The fact that the mother and the social worker merely referred the officer to somebody else instead of acting on the information themselves does not detract from showing that his efforts were made in good faith. The officer then contacted the attorney who had been assigned to D.J.K. in a previous CHINA proceeding and explained the situation to him. Lastly, the officer contacted D.J.K.'s foster mother, notified her of the incident, and asked that D.J.K. be brought in for questioning.

Thus, the child's natural mother, social worker, lawyer, and foster mother were all notified that D.J.K. was to be taken in for questioning at least one day prior to the actual questioning of the child. Hence, the officer did nearly everything possible to notify all persons closely connected with D.J.K. about the incident and that he was going to be brought in for questioning, therefore making a good faith effort to comply with the statutory requirements.

According to State v. Walker, 352 N.W.2d 239, 243-44 (Iowa 1984), Iowa Code § 232.11(2) has been interpreted by the Iowa Supreme Court to require that the child's parent, guardian, or custodian be notified of four explicit facts to enable the child to waive his right to counsel. The first requirement was a good faith effort to notify the parent, guardian, or custodian that the child had been taken into custody. This requirement was designed to insure that the parent was informed the child was in custody so they could provide him/her with counsel or assistance. Here, the parent, social worker, lawyer, and foster mother were notified before the child was to be taken into custody. Therefore, those individuals were provided with an even better opportunity to insure that the child would receive adequate assistance and counsel when he was actually taken into custody. Therefore, not notifying the parent, guardian, or custodian after the child was taken into custody should not negate the fact that the essential purpose of this first requirement was fulfilled by their prior notification.

Facts two and three were both satisfied and were not at issue in this case.

The fourth Walker fact requires a good faith effort to notify the parent, guardian, or custodian of their right to visit and confer with the child. The trial court held that since the foster mother was with the child the night before the child had to be brought in for questioning, "it was not necessary to advise her that she had a right to visit and confer with the juvenile." This correct ruling is supplemented by the fact that an officer also contacted the child's social worker and attorney and informed them about the incident. Since all that is required is for the parent, guardian, or custodian to be notified of their rights to visit and confer, this requirement was met by notifying the social worker and lawyer of the incident. It would be absurd to assume that the child's attorney was not aware of his right to counsel his juvenile client, and the social worker also should have been aware of her right to confer with the child. There-

fore, even if they were not directly informed of their rights to visit and confer with the child, both knew or should have known their rights and declined their opportunity to advise and counsel D.J.K. Hence, the fourth Walker factor was met, thereby satisfying the statutory requirements of Iowa Code § 232.11(2). Thus, the child's statement should not have been suppressed and excluded from the evidence at trial.

The child's ability to voluntarily, knowingly, and intelligently supply a statement confessing to these acts was also questioned in this case. D.J.K. was sixteen years old at the time of the incident, but according to the expert testimony of Lanny Strausser, D.J.K.'s counselor, D.J.K. could only function at an upper elementary level at best and had trouble comprehending things, even though he claimed to understand them.

The Iowa Supreme Court has stated that "In a number of cases we have found a defendant's waiver or admission voluntary even though the defendant was mentally subnormal or disordered." State v. Davidson, 340 N.W.2d 770, 772 (Iowa 1983). Confession or waiver of counsel have been held to be voluntary in several cases similar to the case at bar. State v. Brown, 341 N.W.2d 10 (Iowa 1983); State v. Hahn, 259 N.W.2d 753 (Iowa 1977). In fact, in State v. Gilmore, 259 N.W.2d 846 (Iowa 1977), and Davidson, 340 N.W.2d 770 (Iowa 1983), the supreme court held that the testimony of the officers questioning a defendant who attested to the defendant's ability to understand Miranda and the questions asked, prevailed over expert testimony stating that the person probably did not understand the questions and the significance of waiving his Miranda rights.

While questioning D.J.K., Officer Sewick deemed him to be friendly and cooperative during the making of the statement. He commented that D.J.K. was responsive to the questions asked and appeared to understand what was being said. Therefore, according to Gilmore, 259 N.W.2d 846 (Iowa 1977), and

Davidson, 340 N.W.2d 770 (Iowa 1983), D.J.K.'s statement should be regarded as having been voluntarily given and admissible as evidence at trial.

SACKETT, J. (specially concurring)

I agree with the majority that the trial court's decision to permit the witness to testify was not an abuse of discretion and therefore should be affirmed on this issue.

I also agree with the majority's determination this cause should be reversed in part and remanded for a new trial on the issue of admissibility of defendant's confession. I disagree, however, with the majority's determination the confession was inadmissible because it was obtained in violation of Iowa Code §232.11(1)(a) (1985). Rather, I find this cause should be reversed and remanded for new trial because defendant received ineffective assistance of counsel and therefore was prejudiced by admission at trial of his uncounseled statement.[1]

I.

We are confronted with an alleged constitutional violation in the instant case. Our scope of review is de novo and we should make an independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985); State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

II.

The right to assistance of counsel, under the sixth amendment to the Federal Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981) (citing Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed.2d 158, 171-72 (1932)). Effective assistance of counsel means conscientious, meaningful representation. Scalf v. Bennett, 260 Iowa 393, 397, 14 N.W.2d 860, 864 (1967). There is a presumption that counsel is competent and counsel's conduct falls within a range of reasonable professional assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980).

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[1] The attorney representing defendant at the time of confession did not represent defendant at trial or on appeal.

The test for determining whether a defendant has been denied effective assistance of counsel is whether, considering all of the circumstances, the attorney's performance was within the "normal range" of competence. Aldape, 307 N.W.2d at 42. To establish a claim of ineffective assistance of counsel, defendant must show:

> (1) That counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
> (2) That the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)).

In Strickland, the court summarized the test for when ineffective assistance of trial requires reversal:

> The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 466 U.S. at 686, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93. Defendant has the burden to prove by a preponderance of the evidence that counsel rendered ineffective assistance. Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982); Aldape, 307 N.W.2d at 42. We ordinarily do not find an adequate basis for relief when the claim of ineffectiveness concerns an attorney's decision regarding strategy or tactics. State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984). When counsel makes a reasonable decision concerning strategy, we should not interfere simply because the chosen strategy is unsuccessful. Id.

The claim of ineffective assistance of counsel in the instant case is not one involving a disagreement over strategy or tactics. Rather, it is one involving

a lack of strategy by defendant's counsel. Iowa Code §232.11(1)(a) (1985) provides that a juvenile's sixth amendment right to counsel from the moment he is taken into custody. Pursuant to §232.11(1)(a) sixth amendment right of effective counsel attaches earlier for juveniles than it does for adults.

The fact defendant's attorney said his presence during custodial questioning was not necessary, suggests two possibilities that his performance was not effective. First, the attorney's inaction suggests he was unaware that §232.11(1)(a) recognizes any action taken by officers during a juvenile's custody to be a critical stage in the adversarial process to which the sixth amendment right attaches. Second, the attorney's inaction suggests that he had not properly weighed the circumstances involved in that case (i.e., the defendant's age, education, level of intelligence, nature of questioning, seriousness of the offense, opportunity to consult with a parent, guardian or counsel prior to questioning) prior to telling Detective Sedwick that it was not necessary for defendant to have counsel present during questioning.

Either way, defense counsel's inaction resulted in a retarded youth being subjected to custodial interrogation on a serious offense and signing both a Miranda waiver and confession without any person present to advise him and protect his rights. As such, counsel's performance in letting defendant enter such a situation so unprotected and uninformed was so deficient both at the time he talked with Detective Sedwick and at the time defendant was questioned that counsel "was not functioning" as the advocate guaranteed by the sixth amendment.

The prejudice which resulted to defendant from counsel's inaction is obvious. Without advice of counsel this youth signed a waiver of his rights and confessed to the sexual assault for which he was being questioned. This confession, which

may never have been made if defendant had received counsel's advice at the time of questioning, was used at trial to convict defendant. Because defendant received ineffective assistance of counsel, the confession should have been suppressed prior to trial. The admission of the improperly obtained confession at trial is not harmless error and requires reversal. Therefore, I would reverse and remand for new trial based on defendant being unfairly prejudiced by his ineffective assistance of counsel which resulted in admission at trial of defendant's uncounseled statements.