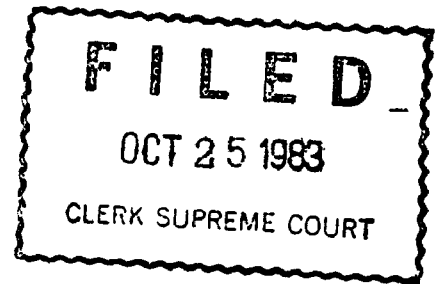


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

Filed October 25, 1983

vs.)

JOHN LYNDON THOMAS O'CONNOR,)

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68810

Defendant-Appellant.)

Appeal from Keokuk District Court, James D. Jenkins, Judge.

Defendant juvenile appeals his conviction of burglary in the second degree in violation of Iowa Code section 713.3 (1981) and theft in the fourth degree in violation of Iowa Code section 714.2(4), alleging that the trial court erred in overruling defendant's motion to suppress inculpatory statements allegedly taken in violation of his Miranda rights, which he claims were not voluntarily waived, allowing prosecution as an adult offender. AFFIRMED.

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ. Sackett, J., takes no part.

DONIELSON, J.

Defendant juvenile appeals his conviction of burglary in the second degree in violation of Iowa Code section 713.3 (1981) and theft in the fourth degree in violation of Iowa Code section 714.2(4), alleging that the trial court erred in overruling his motion to suppress inculpatory statements allegedly taken in violation of his Miranda rights. We affirm.

The charges filed against defendant stemmed from a burglary at a gas station in Hedrick, Iowa, and a theft of various items from the station. Police officers went to defendant's house after receiving information implicating him in the crime. Defendant was 17 at the time and had previously had trouble with juvenile authorities.

One of the officers testified that after they were allowed in defendant's home, defendant was read his Miranda rights with his mother present. Defendant and his mother denied that any rights were read. Although defendant and his mother initially refused to go to the police station, another officer persuaded them to go, stating that defendant would be allowed to go home if no problems developed.

Police officers testified that at the police station the defendant was presented with a juvenile Miranda form and that the defendant was advised of his rights. The officers testified that the defendant's mother was present and signed the documents waiving the defendant's rights. Defendant subsequently made incriminating oral and written statements.

Defendant stated that he could not recall being advised of his rights at the police station. He also stated that his mother did not enter the interrogation room until after he had given a written statement and that he signed a Miranda waiver after giving the statement. Defendant's mother testified that she never signed a waiver of defendant's Miranda rights until after defendant had given a

statement. Both defendant and his mother testified that they were told that the case would be handled as a juvenile matter.

Defendant filed a motion to suppress the written statement on the ground that "the admission into evidence of the statement made by this Defendant, would be a deprivation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and Articles One, Six, Eight, Nine, and Ten of the Iowa Constitution." While defendant's motion asserted that the statements he made were not made voluntarily, he did not assert that his waiver of his Miranda rights was involuntary.

After a hearing on defendant's motion, the trial court suppressed certain oral statements made by defendant at his home prior to being transported to the police station, on the basis that they were made prior to the time defendant's mother signed the waivers and thus were inadmissible under Iowa Code section 232.11. However the court concluded that the written statement was voluntary and was given after defendant's mother waived his rights. The written statement was admitted as evidence.

On appeal defendant asserts that his waiver of Miranda rights was not voluntarily, knowingly and intelligently made. Defendant argues that he was not advised of the fact that he could be prosecuted as an adult and that his statements could be used against him in district court, and that, under the circumstances, he could not have effectively waived his rights.

I. Scope of Review

To determine whether or not defendant voluntarily, knowingly and intelligently relinquished his right to remain silent, we are obliged to make an independent evaluation of the totality of the circumstances. Our review, in such cases, is essentially de novo. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976).

II. Preservation of the Issue for Review

It is generally recognized that the voluntariness of a defendant's incriminating statements and the voluntariness of his waiver of Miranda rights are two distinct issues. State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977). Moreover, issues not timely raised in trial court normally may not be raised for the first time on appeal, even if they are of constitutional magnitude. State v. Pardock, 215 N.W.2d 344, 347 (Iowa 1974). In the present case, although defendant asserted in his motion to suppress that his written confession was not made voluntarily, he failed to challenge the voluntariness of his Miranda waiver. The State argues that defendant's failure to raise that issue specifically in his motion precludes him from raising it on appeal. We do not agree.

An issue has been preserved for appeal if defendant's objection was specific enough to advise the trial court as to what issues are being raised. It is our opinion that the trial court had ample warning that the voluntariness of defendant's Miranda waiver was at issue. A determination of the voluntariness of defendant's Miranda waiver is necessary to determine the voluntariness of the ensuing confession. See State v. Hartman, 281 N.W.2d 639, 644 (Iowa Ct. App. 1979). The trial court recognized this in its ruling on defendant's motion to suppress, stating as a controlling legal principle that "[w]here the Defendant understood the import of a written Miranda Warning and voluntarily signed it, was aware of the crime under investigation, was of at least average intelligence, and had prior experience with the legal system, state satisfied its burden of showing that Defendant's statements were voluntary."

The issue was properly considered below, and has therefore been adequately preserved for review.

III. Waiver of Miranda Rights

We are satisfied that the State has demonstrated by a preponderance of the

evidence that the written waivers were signed prior to the time defendant's incriminating statements were elicited. The State has the burden of showing by a preponderance of the evidence that defendant voluntarily, knowingly and intelligently waived his right to remain silent. In re Interest of Thompson, 241 N.W.2d 2, 6 (Iowa 1976); State v. Feters, 202 N.W.2d 84, 88-89 (Iowa 1972).

Defendant's primary contention is that his waiver and the ensuing written confession were elicited from him as a result of assurances by police officers that his case would be handled as a juvenile matter. Clearly a waiver premised on a promise of leniency is not voluntary. State v. Hodges, 326 N.W.2d 345, 349 (Iowa 1982).

Iowa Code section 232.45(9) provides that:

statements made by the child after being taken into custody. . . are admissible as evidence in chief against the child in subsequent criminal proceedings provided that the statements were made with the advice of the child's counsel, or after waiver of the child's right to counsel and provided that the court finds the child had voluntarily waived the right to remain silent.

This statute goes on to list the factors to be considered in determining whether a minor's waiver of Miranda rights was knowing and voluntary:

- a. Opportunity for the child to consult with a parent, guardian, custodian, lawyer or other adult.
- b. The age of the child.
- c. The child's level of education.
- d. The child's level of intelligence.
- e. Whether the child was advised of his or her constitutional rights.
- f. Length of time the child was held in shelter care or detention before making the statement in question.
- g. The nature of the questioning which elicited the statement.
- h. Whether physical punishment such as deprivation of food or sleep was used upon the child during the shelter care, detention, or questioning.

Id.

We believe the record in this case clearly demonstrates that defendant knowingly, voluntarily, and intelligently waived his Miranda rights as the trial

court properly found. Defendant does not really argue that his waiver was invalid under those factors; indeed, we believe that consideration of these factors inevitably leads to the conclusion that defendant's constitutional rights were fully protected. Instead, defendant challenges the waiver on the wholly different ground that he mistakenly believed he would be tried as a juvenile instead of as an adult. There is no statutory or case law authority for holding that the legal efficacy of a juvenile's waiver of Miranda rights depends upon his own subjective impression as to whether he will be tried as a juvenile or as an adult.

In addition, we believe defendant's contention, if upheld, would place a nearly impossible burden on the juvenile justice system and the investigatory phase of criminal prosecution when juveniles are involved. According to the defendant, a juvenile's waiver of his or her Miranda rights could not be knowing or intelligent until after it is determined whether he or she will be tried as a juvenile or as an adult.

This determination, however, is made only after the involved procedure set forth in Iowa Code § 232.45 has been completed. That procedure involves, among other things, the filing of a motion by the county attorney requesting the juvenile court to waive jurisdiction so that the defendant can be tried as an adult, a hearing on such motion, an investigation relating to the propriety of such waiver of jurisdiction, and the court's determination. Such a long time delay would certainly impede the investigative units' (police, sheriff or DCI) ability to make an effective use of a juvenile's waiver of Miranda rights—not only is there the inevitable fading of memory, but there is always the possibility that, with the passage of time, vital evidence may be lost or destroyed. The main point, however, is the necessity of moving quickly into the investigation as close to the time of the crime as possible. Only after the police investigate, the county attorney charges by information or indictment, and the basic facts surrounding the

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crime have been acquired will the procedure be employed for determining whether a juvenile is to be tried as a juvenile or as an adult. See Iowa Code § 232.45. Defendant would place any interrogation of a juvenile defendant at the end of this entire process. This would be neither practical nor desirable. Thus, defendant could not have been given any assurances by the police that he would be tried as a juvenile since these other procedures must be completed first. The record does not support defendant's claim that he was in fact assured by the officials that he would be tried as a juvenile. If he had been so assured, his claim of an unknowing waiver of Miranda rights would be stronger; however, that is not the case here.

The record amply demonstrates that defendant's Miranda rights were knowingly and voluntarily waived and his constitutional rights were fully protected. Defendant's conviction and sentence are affirmed.

AFFIRMED.

All judges concur, except Snell and Schlegel, JJ., who dissent.

SNELL, J. (dissenting)

I respectfully dissent. The majority has misconstrued defendant's argument and is thereby led to believe that to accept defendant's argument would hamstring the investigatory duties of the police and would stop the prosecution from functioning properly. None of this will happen, of course, except through the majority's reasoning.

The majority believes the court is asked to adopt a purely subjective standard to determine whether a defendant-juvenile has waived his constitutional rights. That is not what this case is about. Although the subjective impressions of the juvenile are entitled to consideration, the test for determining waiver is an objective test whereby all the surrounding circumstances are analyzed to see if the waiver of constitutional rights was obtained under conditions that require a suppression of the confession. See In re Thompson, 241 N.W.2d 2, 5-6 (Iowa 1976). An examination of the totality of circumstances in each case is the condition precedent for concluding that a juvenile has or has not knowingly and voluntarily waived his privilege against self-incrimination. See, e.g., id.; Edwards v. State, 227 Kan. 723, 727, 608 P.2d 1006, 1009-10 (1980); People v. Prude, 66 Ill. 2d 470, 475-77, 6 Ill. Dec. 689, 691-92, 363 N.E.2d 371, 373-74, cert. denied, 434 U.S. 930, 98 S. Ct. 418, 54 L. Ed. 2d 291 (1977); State v. Hall, 350 So. 2d 141, 144 (La. 1977). Applying this standard, I find that the juvenile defendant's confession followed a waiver of constitutional rights that was not knowingly and voluntarily given.

The issue here is whether a juvenile must be aware that he could be tried as an adult before he can knowingly waive his Miranda rights. The factors which the court is obliged to consider to determine the voluntariness of the child's waiver include the child's age, his level of education, his level of intelligence, his opportunity to consult with a parent, guardian or counsel, the length of his

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detention prior to waiver, and the nature of the questioning which elicited the statement. Iowa Code § 232.45(9); State v. Adalpe, 307 N.W.2d 32, 36 (Iowa 1981).

At the time of the interrogation, defendant was seventeen years old and had received seven years of education. He was asleep at his home when the police officers arrived at about 10:00 a.m. to question him. He had been asleep for two to four hours at most, having been awake for twenty-four hours just before that. During that time he had consumed more than one-half of a half gallon of Jack Daniels 90-proof whiskey.

Defendant's mother was at home with defendant when the police officers arrived. She testified that Ottumwa Patrolman Jack Anderson said to her, "You know me, Maggie, I'm Anderson." She said, "Yeah, I know you. I've know—been acquainted for about three years." He said, "I'm honest." Defendant's mother replied, "Yes, I know that." Officer Anderson then asked her, "Would John come over and talk to us?" She testified, "I didn't really make a decision. And I said to John 'What do you want to do?' I said, 'I've known Anderson a long time. He's trustworthy.' So John said, 'Could I come home if I come over and talk to you?' Anderson hesitated and said yes. So I looked at John. I said, 'Well, come on. Let's get going.' So we left the house, and John got in the back of the squad car and I sat in front with Anderson." Anderson testified he told defendant's mother that they could come back home if no problems developed.

Defendant and his mother arrived at the police station about 10:45 a.m. Defendant was taken to a room with three policemen. He stated he was "still catching a buzz" from his drinking. After a few minutes, Anderson came in with defendant's mother. During the course of the proceedings, defendant and his mother signed a document entitled "Juvenile Miranda Rights," which referred to defendant throughout as the "child in custody." At the bottom of the form was a statement designated "Waiver of parent, guardian, or custodian." As completed, it

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I, Margaret O'Connor, 114 N. Davis having been first advised that said child has the right to be represented by counsel from the time (he) ~~(she)~~ is taken into custody for an alleged delinquent act and during any questioning thereafter by a Peace or Probation Officer, hereby consent to this child giving up this right. I believe (he) ~~(she)~~ is intelligently and voluntarily making this decision based up (sic) my personal conversation with (him) ~~(her)~~. Yes x
 No _____

Defendant and his mother signed the "Waiver of Rights" contained in the "Juvenile Miranda Rights"; Officer Anderson signed the waiver form as a witness. Defendant then wrote and signed a confession. Upon completing this, defendant got up and asked Detective Brown if he could go home with his mother. Brown said that he could not. Detective Brown then produced another "Juvenile Miranda Rights" form and proceeded to go through the entire process again. The purpose of going through the process twice is unclear. In any event, it is clear that none of the proceedings in any way indicated that by waiving his rights, defendant might be exposing himself to prosecution as an adult. Conversely, all of the events were framed in the context of defendant's being prosecuted as a juvenile offender. Defendant had been previously placed at the Boys' Training School at Eldora, had violated parole and therefore thought he would be returned to the Eldora school. He had been treated as a juvenile on five previous occasions when he had committed criminal acts. He stated that prior to the time that he signed the confession he had no knowledge that the statements could be used against him in a court in which he would be tried as an adult. His mother testified:

I figured it was a juvenile matter. I mean, why tell a person that the boy is going to come home. What would you assume after being three years as a juvenile. So I figured, well, another juvenile matter. That's all I've (sic) been, juvenile, juvenile.

When Detective Brown handed the second "Juvenile Miranda Rights" form to her to read, she said she had read it a hundred times and signed it. Police Officer Darrall Downey agreed that defendant had not been told that any statements he made could be used against him as an adult.

The burden of proof is on the State to show that a waiver of Miranda rights was effective, knowing and voluntary. Quick v. State, 599 P.2d 712, 720 (Alaska 1979); Commonwealth v. Walker, 477 Pa. 370, 375, 383 A.2d 1253, 1255 (1978). "Where a Juvenile is concerned, the burden on the state is even heavier than it would be with an adult." Quick. The juvenile must comprehend the full significance of the rights. Furthermore:

[T]he impediment of immaturity can only be overcome where the record establishes that the youth had access to the advice of an attorney, parent, or other interested adult and that the consulted adult was informed as to the constitutional rights available to the minor and aware of the consequences that might follow the election to be made.

Commonwealth v. Jamison, 474 Pa. 541, 545, 379 A.2d 87, 88-89 (1977) (quoting Commonwealth v. Smith, 472 Pa. 492, 496-99, 372 A.2d 797, 799-800 (1977)).

Under all of the circumstances surrounding this juvenile's confession it cannot be said that the waiver of his constitutional right against self-incrimination was done voluntarily, knowingly and intelligently. Both defendant juvenile and his mother believed that his delinquent acts would result in punishment as a juvenile. These beliefs were the logical conclusion from the circumstances. Not only were these reasonable understandings but nothing was presented to alert them that they could not expect defendant to be treated as a juvenile. It is one thing to confess voluntarily to a criminal act, knowing that the result will be a confinement at Eldora Training School for Boys, and quite another to confess, knowing that a penitentiary confinement may be the result. I find that

the State has failed to satisfy the burden of showing defendant voluntarily and knowingly waived his constitutional rights.

The result of the majority's decision and the reasoning behind it is to accord less constitutional protection to a juvenile than to an adult. An adult who waives his rights has no basis to complain that he was misled as to the consequences regarding punishment. But a juvenile, by virtue of the silence of the system, can be misled to confess, believing he will be punished for a delinquent act rather than for an adult crime. I believe that a juvenile is entitled to equal protection, not less, than that afforded an adult under the Constitution. That protection would include informing a juvenile that one of the consequences of waiving his constitutional rights is that any confession could be used to prosecute him as an adult.

The majority complains that defendant's contention would place a nearly impossible burden on the juvenile justice system. To the contrary, the burden would be slight since it would only be necessary to incorporate a statement into the "waiver of Miranda rights," warning the juvenile of the consequences of his act of waiver.

The majority also appears to harbor some notion that the police investigation depends upon whether a defendant is prosecuted as an adult or a juvenile. Further, the majority suggests that the investigation must move quickly on the basis of the information obtained by the confession. But the efficacy of a police investigation does not depend upon or await the outcome of an inquiry into the circumstances of a confession. Nor were the constitutional rights here at stake created to assist the police in their investigations.

Although it is not necessary in this case to go so far, because the confession should have been suppressed under the test for voluntariness presently applied, I

believe the better rule would be as adopted by the Supreme Court of South Dakota in State v. Lohnes:

With few exceptions, courts require additional protection of a juvenile's constitutional right to counsel and against self-incrimination. State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); State v. Cano, 103 Ariz. 37, 436 P.2d 586 (1968). Before a juvenile, who will be tried as an adult, effectively waives his constitutional right to counsel and against self-incrimination, the juvenile must be given notice that he may be tried as an adult. State v. Loyd, supra; State v. Cano, supra; Theriac v. State, 66 Wis. 2d 33, 223 N.W.2d 850 (1974). . . . We now hold that a juvenile is afforded additional, not less, protection of his constitutional rights and before a trial court can conclude that a juvenile has made a clear and intelligent waiver of his rights to counsel and against self-incrimination, the state shall have to establish that he was advised that there was a possibility that he may be tried as an adult.

324 N.W.2d 409, 414-15 (S.D. 1982).

I would reverse this case and remand it for a new trial with the juvenile defendant's confession suppressed.

Schlegel, J., joins this dissent.