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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

NYLEETA ELAINE HUFFAKER,) 0-89
63623

Defendant-Appellant.)

Appeal from Black Hawk District Court - C. W. Antes and Forest E. Eastman, Judges.

Defendant appeals conviction of robbery in the first degree in violation of section 711.2, supplement to the Code 1977. - REVERSED AND REMANDED.

Alfredo G. Parrish, of Parrish & Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from her conviction of robbery in the first degree in violation of section 711.2, supplement to the Code 1977. Defendant contends the trial court should have suppressed her oral and written confession on the ground that those statements were obtained in violation of her constitutional rights. Defendant also contends the trial court erred in allowing a police officer to give hearsay testimony at trial. In addition, defendant asserts the trial court erred in submitting a particular instruction on proof of intent and in submitting an instruction stating that a sawed-off shotgun was a dangerous weapon as a matter of law. We conclude that defendant's written confession should have been suppressed and we reverse and remand for a new trial.

During the late evening hours of September 19, 1978, or the early morning hours of September 20, 1978, defendant, seventeen years of age at the time, was arrested for the robbery of a Kum N Go store in Cedar Falls. She was booked and taken to an interrogation room at the Cedar Falls Police Department. An investigating officer read defendant her Miranda rights and allowed her to read them. Defendant then signed a waiver of rights form, and the officer began interrogating defendant. After eliciting an oral confession from defendant, the officer asked defendant if she would sign a written statement. At that point, the uncontradicted testimony reveals that defendant declined to sign any written statement until given the opportunity to consult with an attorney. The interrogation ceased at that time, and defendant was placed in a cell to sleep. Approximately six hours later, defendant was again informed of her rights, she again signed a waiver form, and signed a written statement prepared by the investigating officer.

On September 29, 1978, defendant was charged by trial information with robbery in the first degree in violation of section 711.2, supplement to the Code 1977. On January 9, 1979, defendant filed a motion to suppress the oral and written statements obtained following her arrest. After a hearing, held on February 26, 1979, the motion was overruled. On May 2, 1979, after a jury trial, defendant was convicted as charged. On May 31, 1979, defendant's motion for new trial was overruled and defendant was sentenced to a term of not less than five and not more than twenty-five years.

Defendant's contention that her oral and written confessions were improperly

obtained raises the constitutional issues of the right to silence under the fifth amendment and the right to counsel under the sixth amendment. Therefore we make an independent evaluation of the totality of the circumstances surrounding the alleged constitutional violation. State v. Fisher, 279 N.W.2d 265, 266 (Iowa 1979); State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976). In a case such as this, in which the State contends that an individual has waived his or her constitutional rights prior to giving an in-custody oral or written confession, the burden is on the State to show by a preponderance of the evidence that the waiver was voluntary, knowing, and intelligent. Fisher, 279 N.W.2d at 266; State v. Hilpipre, 242 N.W.2d 306, 310 (Iowa 1976); State v. Hartman, 281 N.W.2d 639, 643 (Iowa App. 1979). When the individual was not represented by counsel during the custodial interrogation, the State's burden is particularly heavy. Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1626, 16 L. Ed. 2d 694, 724 (1966); State v. Jacoby, 260 N.W.2d 828, 832 (Iowa 1977). When the individual was a minor at the time the confession was obtained, and the minor did not have the opportunity to consult with a parent, guardian, custodian, adult friend, or lawyer during the interrogation, a deep shadow of distrust is cast over the resulting confession. In re Thompson, 241 N.W.2d 2, 6 (Iowa 1976).

Initially, we confront the factual questions of whether and when counsel was requested. See Fisher, 279 N.W.2d at 267. At the hearing on her motion to suppress, defendant contended she requested counsel before, during, and after the interrogation following her arrest. She also testified she requested counsel prior to signing the written statement. The investigating officer testified that the only time defendant requested counsel was after her oral confession when she was asked if she would sign a written statement. The testimony is uncontradicted that at that point defendant requested to consult with an attorney prior to signing a written statement. The trial court found that to be the only time defendant attempted to exercise her right to counsel. In this situation of conflicting testimony, we defer to the trial court's conclusion based on that court's determination of credibility and adopt that finding of fact.

Consequently, we conclude that defendant was advised of her rights prior to giving her oral confession and she exercised a waiver of those rights. Defendant contends,

however, that because of her age, lack of education, the absence of a responsible adult with whom she could consult during the interrogation, and her physical condition, due to lack of sleep, lack of food, and the ingestion of various amounts of alcohol and drugs, her waiver was not voluntary and intelligent. After consideration of the factors listed in Thompson, 241 N.W.2d at 6-7, that ordinarily play a role in determining the voluntariness of a defendant's confession, we conclude under this record that the trial court correctly concluded the State met its burden of showing by a preponderance of the evidence that prior to and during the giving of her oral confession, defendant voluntarily, knowingly, and intelligently waived her Miranda rights.[1] Consequently, the trial court properly overruled defendant's motion to suppress with regard to her oral confession.

With regard to the written statement, however, we reach the opposite conclusion. Defendant stated that prior to signing a written statement, she wished to consult with an attorney. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." Miranda, 384 U.S. at 474, 86 S. Ct. at 1628, 16 L. Ed. 2d at 723. Here, the interrogation ceased, but no attorney was summoned. Instead, defendant was placed in a cell to sleep for approximately six hours. She was then made aware of her rights again, and she again signed a waiver form, prior to signing the written confession prepared by the investigating officer. Thus, her request for an attorney made six hours previously was never honored. We think the principle stated in State v. Moon, 183 N.W.2d 644 (Iowa 1971) is applicable to the circumstances of this case.

> [W]henever an in-custody accused in any manner or at any time invokes his right to counsel, any questions thereafter asked of, or statements made to him which are likely to, expected to, or do in fact elicit a confession, including the affixing of his signature to any inculpatory or exculpatory written document, constitute a part of the Miranda proscribed interrogation process.

Id. at 649.

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[1] We parenthetically note the significance of defendant's demand for counsel after her oral confession as reflecting a cognizance of her constitutional right and yet a conscious choice of waiver prior to the oral confession. State v. Jump, 269 N.W.2d 417, 424 (Iowa 1978).

We do not reach the conclusion that once an individual invokes the right to counsel, that right cannot be subsequently waived. We do conclude, under the circumstances of this case, involving a minor who did not have the opportunity to consult with a responsible adult other than the police officers, and who had little if anything to eat and little sleep during the prior twenty-four hour period, and whose request to consult with counsel prior to signing a statement had not been honored, that the State has not sustained its heavy burden of showing by a preponderance of the evidence that defendant's waiver prior to signing the written confession, was effectively voluntary, knowing, and intelligent. Under the circumstances, defendant could have concluded that her prior request for counsel had been rendered futile by the officer's desire to proceed without honoring that request. The officer did not ask defendant whether she had changed her mind or whether she still desired counsel prior to signing the written statement. Under the circumstances, defendant should not have been required to repeat a previously futile attempt to invoke her right to counsel. See generally Hilpipre, 242 N.W.2d at 310.

The trial court erred in not granting defendant's motion to suppress with regard to her written confession for a violation of her Miranda rights, and that confession was erroneously admitted into evidence at trial. Consequently, we reverse that portion of the trial court's ruling and remand for a new trial. Since we reverse and remand for a new trial on this issue, we need not address any of the other issues defendant raises on appeal.

REVERSED AND REMANDED.

Carter and Donielson, JJ., dissent.

I dissent. The trial court's denial of defendant's motion to suppress is a principled application of the Miranda rule as it was applied to juveniles in Interest of Thompson, 241 N.W.2d 2 (Iowa 1976), and is fully warranted on the factual situation presented here. Conversely, I believe the majority decision in this case constitutes an entirely unwarranted application of Miranda and Thompson.

In Thompson, the Supreme Court of Iowa rejected the contention that there is a per se rule which holds that a minor, acting alone, may not waive the constitutional rights afforded under Miranda. It was there noted that "It is apparent most courts, required to deal pragmatically with an ever-mounting crime wave in which minors play a disproportionate role, have considered society's self-preservation interest in rejecting a blanket exclusion or juvenile confessions." 241 N.W.2d at 5. Such reasoning is particularly applicable to the present case where the seventeen-year-old defendant had been arrested for a robbery with a sawed-off shotgun. Thompson also recognizes that a voluntary confession by a minor who has waived their right against self-incrimination is admissible.

In the absence of a per se rule excluding confessions of minors, I can find no reason to exclude the written confession in the present case. It is undisputed that defendant was given the warnings and advice of rights required by Miranda prior to both the oral and written confessions. On each occasion she executed a written waiver of her constitutional right against self-determination. I fail to see that the record reflects any evidence that her capacity for self-determination was impaired. This is the test of voluntariness. State v. Connor, 241 N.W.2d 447, 454 (Iowa 1976). I therefore submit that the totality of circumstances, as shown by the record in the present case, fully supports the finding that the State has met its burden of establishing that defendant acted knowingly and voluntarily with respect to the execution of the waiver-of-rights forms and that both the oral and written confessions were voluntarily given.

The majority decision appears to turn on a finding of violation of Miranda rights incident to the written confession rather than a finding that the written confession was involuntary. These are separate and distinct issues. State v. Washington, 257 N.W.2d 890, 894-95 (Iowa 1977). If it is based on the former, it is the result of an apparent misconception of the rights embodied in Miranda. It places much reliance on what is deemed to be a failure of the officers to honor defendant's request for counsel. The requirement which Miranda places upon law enforcement officers when the subject of custodial interrogation indicates a desire to consult counsel is merely to cease the

interrogation. In the present case this was done. There is not, as the majority implies, a duty on the part of the police to provide counsel for the accused at this stage of the criminal justice process. This right does not attach until the initiation of judicial proceedings. Brewer v. Williams, 430 U.S. 387, 398-99, 97 S.Ct. 1232, 1238, 51 L.Ed. 2d 424, 436 (1977); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964). There is no showing in the record that the defendant was prevented from contacting a lawyer upon request.[1]

It is also well established that when the suspect in custody indicates a desire to consult counsel before further questioning, such election is not written in stone. A fresh waiver of rights may be obtained and, if voluntary, questioning may then be resumed. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975). See State v. Iowa District Court, 236 N.W.2d 54, 56 (Iowa 1975); State v. McClelland, 164 N.W.2d 189, 193 (Iowa 1969). The test is whether the right to cut off questioning was honored when invoked. Mosley, 423 U.S. at 103, 96 S.Ct. at 329, 46 L.Ed. 2d at 321. I find no evidence of any violation of this principle in the present record. Defendant did not merely fail to repeat a prior request to consult an attorney as the majority suggests. She affirmatively acted so as to waive such request in writing.

With respect to voluntariness, the decision of the majority presents a remarkable inconsistency between the findings on the oral confession and those on the second waiver of rights and written confession when the only significant intervening factor was the opportunity of the accused to sleep for six hours.[2] At the suppression hearing defendant herself testified that she signed the written confession because she thought it was "the best thing to do." At this stage the police already had her oral confession. The situation was as stated in United States v. Bayer, 331 U.S. 532, 540-41, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654, 1660 (1947):

> Of course, after an accused has once let the cat out of the bag by confessing . . . he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.

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[1] The record is ambiguous as to the nature of defendant's requests to the officer's visa vis a lawyer. The majority disbelieves some of her testimony with respect thereto. I must conclude that there is no evidence she was denied her rights under section 804.20, The Code (right to a telephone call) as interpreted in State v. McAteer, 290 N.W.2d 924 (Iowa 1980) or section 232.16, The Code. She indicates in her own testimony that she asked the officers to make certain telephone calls on her behalf and inferentially that this was done.

[2] Any contention of the defendant that the written statement was induced by promissory leniency is repetitive of the same claims rejected by the majority with respect to her oral confession.

I submit that these pressures are not sufficient to make an otherwise voluntary act involuntary.

There is another reason why I cannot subscribe to reversing defendant's conviction on the basis of the trial court's ruling admitting the written confession in evidence. As the majority agrees, the prior oral statement was properly admitted in evidence. Because I find that the written confession is merely repetitive of that evidence and adds no new information, I deem the error, if any, should be classified as harmless under the doctrine applied in State v. Kellog, 263 N.W.2d 539, 541 (Iowa 1978). See also State v. Slack, 3 Wash. App. 116, 119, 472 P.2d 541, 543 (1970).

I have considered the other assignments of error urged by defendant (not discussed in the majority decision) and conclude that they are without merit. I would affirm the judgment of the trial court.

Donielson, J., joins in this dissent.