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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-481 / 89-295

389

Buchanan County No. J-541

IN THE INTEREST OF S.C.S., A Child,

Appellant.

Appeal from the Iowa District Court for Buchanan County, Stephen C. Clarke, Judge.

The child appeals from an adjudication of delinquency and a subsequent dispositional order. **REVERSED AND REMANDED.**

Daniel H. Swift of Swift & Swift, Manchester, for the appellant.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Kathrine S. Miller-Todd, Assistant Attorney General; for the appellee.

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

SCHLEGEL, P.J.

The juvenile appeals an adjudication of delinquency and a subsequent dispositional order. He challenges the admission into evidence of certain field sobriety test results, arguing that the test results were obtained in violation of his right to counsel. We reverse and remand based on this issue.

The appellant also challenges the sufficiency of the evidence to establish that he had committed the delinquent act of operating a vehicle while intoxicated. In addition, he contends that the statutory provisions for appointment of juvenile court referees are unconstitutional, that there should be a right to jury trial in juvenile delinquency hearings, that he should have been allowed to appeal the adjudication of delinquency prior to the entry of a corresponding dispositional order, and that the juvenile court should have stayed the dispositional order in its entirety pending this appeal. The State responds that these issues were not preserved for appellate review.

The juvenile in question, a fifteen-year-old boy, was arrested for OWI. The arrest took place after the appellant pulled out in front of the officer on a highway crossing the center line several times. The officer pulled the vehicle over and proceeded to give several field sobriety tests to the juvenile. The appellant failed two of the five tests and the officer arrested him. The

juvenile was later adjudicated to be delinquent due to the commission of that offense. He has appealed from the delinquency adjudication and the resulting dispositional order.

This action was tried in equity and ordinarily our scope of review would be de novo. Iowa R. App. P. 4. When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Appellant challenges the admission of certain field sobriety test results. He claims they were admitted in violation of his statutory right to counsel. There is no question a juvenile is entitled to the assistance of counsel pursuant to the sixth amendment to the United States Constitution. The Iowa Code also specifically entitles a juvenile to counsel under sections 232.11(1)(a) and (2). An adult may waive his right to counsel, however Iowa Code section 232.11(2) will not allow a juvenile to waive counsel without the written consent of his parents. Two additional requirements of this section are that the juvenile must be under the age of 16 and be taken into custody. In this particular case every requirement is undisputed except custody.

The Iowa Code defines custody in section 232.(50), which states:

> Taking into custody means an act which would be governed by the laws of arrest under the criminal code if the subject of the act were an adult. The taking into custody of a child is subject to all constitutional and statutory protections which are afforded an adult upon arrest.

If the minor in this case would be considered "in custody" if he were an adult, section 232.11(2) of the Iowa Code requires the exclusion of evidence obtained without a written waiver by appellant's parents. In Interest of J.A.N., 346 N.W.2d 495, 498 (Iowa 1984). An adult is "in custody" when he has been deprived of his freedom of action in any significant way. Id. at 499. Under the totality of the circumstances the appellant was "in custody." The officer stopped the car with his lights flashing. He had appellant perform several tests, all done in a manner that would suggest the appellant had no choice. The officer never indicated that appellant was free to leave, and when all the circumstances are weighed it is clear he was not. The failure to obtain the parent's written consent requires the exclusion of the test results, and therefore we must remand this case for a new trial.

The remaining issues raised in appellant's brief have not been properly raised on appeal. Therefore, we need not address these issues. This case is remanded for a new trial with instructions that evidence of the field sobriety tests be excluded as fruits of the violation of the juvenile's right to counsel under Iowa Code section 232.11.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. *(dissenting)*

I respectfully dissent. In Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 334 (1984), the United States Supreme Court held that persons temporarily detained pursuant to ordinary traffic stops are not "in custody" for the purposes of Miranda. Nothing in the record before us indicates that the traffic stop involved herein was other than ordinary.

Therefore, I would hold that the juvenile was not "in custody" at the time the officer requested he perform certain "sobriety" tests.