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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re F.F., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

F.F.,

Defendant and Appellant.

A135350

(Mendocino County
Super. Ct. No. SCUKJDSQ 12-
1643901)

INTRODUCTION

F.F., a 12-year-old boy, was interrogated by a police officer in the office of his middle school principal after the principal had searched him, found a knife and what appeared to be concentrated cannabis, and summoned police. The officer did not advise F.F. of his *Miranda*¹ rights before interrogating him. F.F. maintains the court erred in admitting evidence of his incriminating statements to the officer. We conclude F.F. was in custody at the time of the police questioning, thus requiring *Miranda* advisements. We also conclude the error in admitting his statements was not harmless beyond a reasonable doubt and therefore reverse the dispositional order as to the misdemeanor possession of

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

concentrated cannabis charge (Health & Saf. Code, § 11357, subd. (a)) and remand for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

On February 9, 2012, Ukiah Police Sergeant Erik Baarts was dispatched to the middle school F.F. attended. The principal gave Sergeant Baarts a knife and ziplock bag, which contained 0.05 grams of what Sergeant Baarts believed to be concentrated cannabis.²

Sergeant Baarts then questioned F.F., who was sitting in the principal's office. He estimated F.F. to be under 14 because he was a student at a middle school. Sergeant Baarts did not give F.F. *Miranda* advisements, and did not tell him he was free to go, because "he wasn't in custody per my standards."

F.F. told Sergeant Baarts the substance in the ziplock bag was "kief," which Sergeant Baarts described as "the trichomes or resins in a marijuana plant" Sergeant Baarts "confirmed" the substance was concentrated cannabis, based on his 15 years of law enforcement experience and more than 50 arrests for possession of kief, by smelling and examining the substance. F.F. was carrying the kief in his shoe to "make it more compact." Sergeant Baarts explained kief "comes out from the plant in a powder form. So it has to be compacted or it's going to go everywhere." F.F. told Sergeant Baarts he planned to sell it. Sergeant Baarts opined the 0.05 grams of kief was enough for more than one use.

The Mendocino County District Attorney charged F.F. with one count of misdemeanor possession of concentrated cannabis (Health & Saf. Code, § 11357, subd. (a)) and one count of possession of a knife on school grounds. (Pen. Code, § 626.10, subd. (a).) F.F. admitted the allegation of possessing a knife on school grounds. Following a voir dire examination of Sergeant Baarts on the *Miranda* issue, the court found F.F.'s statements to the officer "can come in without *Miranda*." The contested

² The principal did not testify.

hearing on the allegation of possession of cannabis concentrate proceeded, and the court found true the allegation of possession of concentrated cannabis.

F.F. was declared a ward of the court and placed on probation, subject to certain conditions. This timely appeal followed.

DISCUSSION

Absence of Miranda Admonishments

F.F. maintains it was error to admit statements he made to Sergeant Baarts without being advised of his *Miranda* rights. The Attorney General concedes F.F. was interrogated without *Miranda* advisements being given, but asserts F.F. was not in custody at the time of the questioning.

Following voir dire on the *Miranda* issue, the juvenile court found “I do find that the statement can come in without *Miranda*. It’s still in the investigative stage from the facts that I’ve been presented, and the officer is not sure from his testimony whether he’s going to take the minor into custody. I realize it’s hard to say what’s in a minor’s head, but I do not think that—I do think it’s still in the investigative stage and the officer is trying to figure out what the reality of the situation was.”

“Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court’s determination that a defendant did not undergo custodial interrogation, an appellate court must ‘apply a deferential substantial evidence standard’ [citation] to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, ‘a reasonable person in [the] defendant’s position would have felt free to end the questioning and leave’ [citation].” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

The requirements of *Miranda* are well-settled. “As a prophylactic safeguard to protect a suspect’s Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that ‘he has the right to remain silent, that anything he says can be used against him in a court of law, that he has

the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.’ [Citations.] If the suspect knowingly and intelligently waives these rights, law enforcement may interrogate, but if at any point in the interview he invokes the right to remain silent or the right to counsel, ‘the interrogation must cease.’ ” (*People v. Martinez* (2010) 47 Cal.4th 911, 947, quoting *Miranda, supra*, 384 U.S. at pp. 474, 479.)

“Because these measures protect the individual against the coercive nature of custodial interrogation, they are required ‘ “only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’ ” ’ [Citations.] As we have repeatedly emphasized, whether a suspect is ‘in custody’ is an objective inquiry. [¶] ‘Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.’ [Citations.] [¶] Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to ‘examine all of the circumstances surrounding the interrogation,’ [citation], including any circumstance that ‘would have affected how a reasonable person” in the suspect’s position ‘would perceive his or her freedom to leave,’ [citation]. On the other hand, the ‘subjective views harbored by either the interrogating officers or the person being questioned’ are irrelevant. [Citation.] The test, in other words, involves no consideration of the ‘actual mindset’ of the particular suspect subjected to police questioning.” (*J.D.B. v. North Carolina* (2011) ___ U.S. ___, 131 S.Ct. 2394, 2402 (*J.D.B.*).

Courts have identified a variety of relevant circumstances to be considered as part of the custody determination. Among them are “whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview

was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.] [¶] No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162 (*Aguilera*).

The United States Supreme Court recently held a minor's age is also one of the objective factors to be considered. "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be determinative, or even a significant, factor in every case. [Citation.] It is, however, a reality that courts cannot simply ignore." (*J.D.B.*, *supra*, 131 S.Ct. at p. 2406, fn. omitted.) Similarly, the fact that an interrogation of a minor has taken place at his or her school is part of the objective analysis of whether the minor was in custody. The "effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person 'questioned in school' is a

‘minor,’ [citation], the coercive effect of the schoolhouse setting is unknowable.” (*Id.* at p. 2405.)

We consider the undisputed objective circumstances, including F.F.’s age and the setting of the interrogation, to independently determine if he was in custody for *Miranda* purposes. Police initiated the contact with F.F., and there is no evidence he voluntarily agreed to be interviewed. (*Aguilera, supra*, 51 Cal.App.4th at p. 1162.) At the voir dire on the *Miranda* issue, Sergeant Baarts testified he was summoned to a middle school, where the principal handed him a knife and a ziplock bag containing 0.05 grams of what he believed was concentrated cannabis and told him he found it when searching F.F. Thus, the “express purpose of the interview was to question [F.F.] as a . . . suspect.” (*Aguilera*, at p. 1162.) Though the Attorney General asserts “[i]t . . . does not appear that Baarts questioned [F.F.] in an intense manner,” the record reflects nothing about the intensity of the questioning.

Sergeant Baarts did not tell F.F. he was free to leave or that he did not have to talk to him. Sergeant Baarts testified his purpose in questioning F.F. and examining the suspected cannabis was “to determine that there was actually a violation of the law and that the item was what [F.F.] said it was. And also, I was not at a conclusion on what I was ultimately going to do with [F.F.], whether I was going to take enforcement action, handle it via a counseling session and maybe meeting with his parent. So my decision for the enforcement action hadn’t come to conclusion yet.”

A consideration in the objective custody determination, as the Supreme Court has noted, was F.F.’s youth and detention in the principal’s office. A school principal’s office is a more coercive atmosphere for a child attending that school than for the average adult. (*J.D.B., supra*, 131 S.Ct. at p. 2405.) F.F., 12 years old and 4 feet 10 inches tall, was seated, unhandcuffed, in the principal’s office. Sergeant Baarts was aware of his youth, and testified he estimated F.F. to be under the age of 14. Indeed, Sergeant Baarts began by questioning F.F. to determine if he was legally capable of committing a crime.

(Pen. Code, § 26, subd. (1); see *In re Gladys R.* (1970) 1 Cal.3d 855, 862.)³ Sergeant Baarts was asked “[w]ould a 12-year-old sitting in a principal’s office feel he was free to go?” He responded “I’m not able to determine what a 12-year-old would feel or not. I know that he wasn’t in custody per my standards.”

“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” (*J.D.B.*, *supra*, 131 S.Ct. at pp. 2398–2399.) Considering all the circumstances of F.F.’s interrogation, we conclude no reasonable 12 year old in F.F.’s position would believe he was free to leave the principal’s office or terminate the police officer’s interrogation.

The Attorney General maintains the circumstances surrounding F.F.’s interrogation were comparable to those in *In re Joseph R.*,⁴ in which the court held a minor was not in custody. In that case, a police officer investigating a reported rock-throwing incident went to a home a witness told him the rock-throwers had entered. (*Joseph R.*, *supra*, 65 Cal.App.4th at p. 956.) The two minors came out on the porch, where they consented to a pat down for weapons. (*Id.* at p. 957.) The officer told them “they did not have to talk to him, but he wanted to ask them a few questions.” (*Ibid.*) After one minor refused to cooperate, the officer told Joseph R. a witness had seen him throw a rock at a bus. (*Ibid.*) Joseph R. responded “he had no idea what he was talking about.” (*Ibid.*) The officer placed Joseph R. in handcuffs in the back of the patrol car for “about five minutes.” (*Ibid.*) When the officer returned, he took Joseph R. out of the car, removed the handcuffs, and began asking questions. (*Ibid.*) The officer said it was “ ‘a pretty stupid thing’ to throw rocks at a bus,” and Joseph R. responded “ ‘Yeah, it was a pretty dumb thing for us to do.’ ” (*Ibid.*) The court held that response was admissible, despite the absence of *Miranda* warnings, because Joseph R. was not in custody. (*Joseph R.*, at p. 961.) The court noted the response was made after “Joseph had been released

³ “[I]n order to become a ward of the court . . . clear proof must show that a child under the age of 14 years at the time of committing the act appreciated its wrongfulness.” (*In re Gladys R.*, *supra*, 1 Cal.3d at p. 862.)

⁴ *In re Joseph R.* (1998) 65 Cal.App.4th 954 (*Joseph R.*).

from the temporary restraints he experienced while the officer tended to another aspect of his investigation . . . [and] he was never told he was going to be arrested, but he was told he need not answer the officer’s questions. . . . Joseph was, in fact, not arrested for another six weeks.” (*Ibid.*) The court found it critical that at the time he was questioned, Joseph R. was unrestrained—he had been released from the police car and the handcuffs had been removed. (*Joseph R., supra*, 65 Cal.App.4th at pp. 957–958.) And, the officer had specifically told him “he was under no obligation to answer any of the officer’s questions,” (*id.* at p. 957) one of the factors in the custody analysis. (*Aguilera, supra*, 51 Cal.App.4th at p. 1162.)

The circumstances surrounding F.F.’s interrogation are quite different. In contrast to the minor in *Joseph R.*, F.F. was a 12 year old in the “coercive atmosphere” of his middle school principal’s office, not outside an acquaintance’s house.⁵ Though he had at one point been placed in a police car in handcuffs for a few minutes, when the police questioning occurred, Joseph R. was neither handcuffed nor inside the police car. (*Joseph R., supra*, 65 Cal.App.4th at pp. 957–958.) F.F. had *not* been advised, as Joseph R. had, that he need not answer any questions. (*Ibid.*) And, this was not an open-ended investigation of a crime—Sergeant Baarts had been summoned to the school because the principal found F.F. in possession of contraband, and he proceeded to interrogate him.

Given the undisputed factual circumstances surrounding F.F.’s interrogation, we independently conclude he was in custody for the purposes of *Miranda*. In the absence of *Miranda* advisements, it was error to admit F.F.’s responses to Sergeant Baarts’s questioning.⁶

⁵ Joseph R., in contrast, was 14 years old. (*Joseph R., supra*, 65 Cal.App.4th at p. 958, fn. 4.)

⁶ There is no contention the juvenile court failed to consider the relevant circumstances. Indeed, the Attorney General maintains the trial court was aware of and considered F.F.’s age in making its custody determination. Thus, we do not, as the court in *J.D.B.* did, remand for a new *Miranda* hearing for consideration of the appropriate factors. (*J.D.B., supra*, 131 S.Ct. at p. 2408.)

Chapman Prejudicial Error Analysis

The Attorney General asserts even if the court erred in admitting evidence of the statements made by F.F. to Sergeant Baarts, any error was harmless under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). “We must reverse a conviction that rests on evidence from an interrogation conducted in violation of *Miranda* unless admission of the evidence was harmless beyond a reasonable doubt.” (*People v. Bradford* (2008) 169 Cal.App.4th 843, 854, citing *Chapman, supra*, at pp. 21–22.) It is the state’s burden to “demonstrate[], beyond a reasonable doubt, that the [constitutional error] . . . did not contribute to petitioners’ convictions.” (*Chapman, supra*, 386 U.S. at p. 26.)

The Attorney General maintains any error was harmless because there was “ample” and substantial evidence F.F. possessed concentrated cannabis in the absence of F.F.’s statements, asserting “the trial court *received* [the principal’s] statement to Baarts about the contraband found on appellant.” (Italics added.) Sergeant Baarts testified the principal handed him a knife and suspected concentrated cannabis and told Baarts he found them when he searched F.F. That testimony, however, was elicited during the “voir dire on the *Miranda* issue,” not during introduction of evidence at the jurisdictional hearing.

While certain aspects of juvenile proceedings are conducted in an “informal nonadversary atmosphere,” that informality does not apply “where there is a contested issue of fact or law,” or to the rules of evidence. (Welf. & Inst. Code, §§ 680, 701.) In a juvenile court hearing, “[t]he admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision. Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602. . . .” (Welf. & Inst. Code, § 701.)

“In California, if a criminal defendant objects to the admissibility of evidence of a confession or admission on grounds such as involuntariness of the confession or admission, or violation of his *Miranda* rights, he necessarily disputes the existence of a

preliminary fact to admissibility of the proffered evidence, that is, that the confession or admission was made voluntarily and not in violation of any constitutional right such as the privilege against self-incrimination.” (*People v. Torrez* (1987) 188 Cal.App.3d 723, 730–731.) In a criminal jury trial, “the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.” (Evid. Code, § 402, subd. (b).) “[I]t is permissible for a trial judge trying a case without a jury to conduct the voir dire hearing and determine the admissibility of a confession.” (*People v. Acosta* (1971) 18 Cal.App.3d 895, 903, italics omitted.)

Because this was a juvenile proceeding, the trial court was the trier of fact. The rules of evidence still applied, however. Simply because the Evidence Code section 402 hearing was conducted midway through the jurisdictional hearing does not mean testimony at that hearing was part of the prosecutor’s case-in-chief. Thus, without evidence of F.F.’s statements to Sergeant Baarts, there was no evidence admitted at the jurisdictional hearing itself the concentrated cannabis was found in F.F.’s possession. The Attorney General has not met its burden of demonstrating the error in admitting evidence of F.F.’s statements made to Sergeant Baarts without receiving *Miranda* advisements was harmless beyond a reasonable doubt.⁷

DISPOSITION

The jurisdictional finding as to the allegation of possession of concentrated cannabis and the dispositional order is reversed, and the case is remanded to the juvenile court to modify, to the extent warranted, the dispositional order based on the

⁷ Given our conclusion, we do not reach F.F.’s claim of lack of evidence of his capacity to commit this crime under Penal Code section 26. It does not appear F.F. has asserted this claim in regard to his admission of possessing a weapon on school grounds, but if he has, we reject it given his admission at the time of his plea he knew the conduct was wrong.

remaining jurisdictional finding. In all other aspects, the orders of the juvenile court are affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.