Filed 2/21/12 In re C.D. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re C.D., a Person Coming Under the Juvenile Court Law.	B230544 (Los Angeles County Super. Ct. No. MJ19336)
THE PEOPLE, Plaintiff and Respondent, v. C.D., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Benny C. Osorio, Judge. Affirmed.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Dane R. Gillette, Senior Assistant Attorney General, James William Bilderback II, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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C.D. was declared a ward of the juvenile court and committed to the care, custody and control of the Los Angeles County Probation Department for placement in a short-term youth camp after the court sustained a petition alleging he had committed several burglaries and related theft offenses on December 7, 2010. On appeal C.D. contends his statements to law enforcements officers were obtained in violation of his constitutional rights and his counsel was constitutionally ineffective in failing to move to suppress them at trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *C.D.'s Prior Adjudications and Disposition Orders*

On April 28, 2010 a Welfare and Institutions Code section 602 (section 602) petition was filed alleging C.D., then 16 years old, had committed grand theft of personal property (Pen. Code, § 487, subd. (a)). On June 11, 2010 C.D. admitted the allegations and was placed home on probation.

On October 5, 2010 a second section 602 petition was filed alleging C.D. had committed the offense of possessing a weapon on school grounds (Pen. Code, § 626.10, subd. (a)(1)). On October 21, 2010 C.D. admitted the allegations and remained at home on probation.

2. *The Instant Section 602 Petition*

On December 14, 2010 a third section 602 petition was filed alleging on December 7, 2010 C.D. had committed three counts of first degree burglary (Pen. Code, § 459) (counts 1, 4 & 5); two counts of grand theft of personal property (Pen. Code, § 487, subd. (a)) (counts 2 & 6); and grand theft of a firearm (Pen. Code, § 487, subd. (d)(2)) (count 4). C.D. denied all the allegations.

3. *The Jurisdiction and Disposition Hearings*

According to the evidence presented at the jurisdiction hearing, on December 7, 2010 Vickie Bass came home to find her home had been burglarized. Several items had been taken, including jewelry, cameras, a shotgun and a rifle.

Ronald Rosselli lived in the same apartment building as Bass. He testified he was asleep on December 7, 2010 when he heard someone enter his bedroom. The intruder

shined a flashlight in his face and then ran away. Rosselli found his cabinets and drawers in disarray and the sliding door open.

Robin Jones also lived in the same building. She came home on December 7, 2010 to find her closets "trashed" and several items missing, including a laptop computer, a videogame system, videogames and a cell phone.

Bridget Smith, a deputy with the Los Angeles County Sheriff's Department, investigated the burglaries. As part of that investigation, she interviewed C.D. after learning he had been involved in prior thefts. Before the interview C.D. was advised of his right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*)). C.D. replied he understood his rights and wished to speak about the burglaries. C.D. admitted to Deputy Smith he had committed each of the burglaries.

C.D. testified in his own defense. He insisted that, contrary to what he had told detectives during his interview, he had not been involved in the burglaries. His friends had committed the offenses; he had been home with his mother all night. He told a different story to detectives during his interrogation because they warned him he would go to jail for a long time if he did not tell them "what they wanted to hear." He believed if he "went along with what they said," he would be released to his mother. For that reason, C.D. "basically" repeated everything the detectives had said to him about what had happened.

C.D.'s mother, R.D., also testified for the defense. She asserted C.D. had been at home with her at 10:00 p.m. the night of the burglaries and was home when she awoke at 5:30 a.m. the next day. R.D. brought her son to the sheriff's station after receiving a call from the sheriff's department that detectives wanted to interview him. During the interview she heard her son twice say, "I want my mother."

The juvenile court sustained each count of the petition. Following a disposition hearing, the court declared C.D. a ward of the court and, subject to certain terms and conditions of probation, ordered him to a camp community placement program for six months.

CONTENTIONS

C.D. contends his request to speak with his mother during his custodial interview was tantamount to an invocation of his right to remain silent and the deputies violated his constitutional rights by continuing to interrogate him. He also asserts his counsel was constitutionally ineffective in failing to move to suppress his statements at trial.

DISCUSSION

1. *Governing Law*

"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.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 947, quoting *Miranda, supra,* 384 U.S. 436, 479.) Once a suspect invokes his right to remain silent, law enforcement must "'scrupulously honor[]'" the invocation and cease questioning him or her. (*Michigan v. Mosley* (1975) 423 U.S. 96, 103 [96 S.Ct. 321, 46 L.Ed.2d 313]; accord, *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2259, 176 L.Ed.2d 1098].) "'Critically, however, a suspect can waive these rights.'" (*People v. Nelson* (2012) 53 Cal.4th 367, 374 (*Nelson*), quoting *Maryland v. Shatzer* (2010) 559 U.S. ___, ___ [130 S.Ct. 1213, 1219, 175, L.Ed.2d 1045].) These constitutional protections apply to minors. (*In re Gault* (1967) 387 U.S. 1, 45 [87 S.Ct. 1428, 18 L.Ed.2d 527]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1167 (*Lessie*).)

A waiver of a person's *Miranda* rights must be knowing, intelligent and voluntary. (*People v. Dykes* (2009) 46 Cal.4th 731, 751 ["'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel'"]; *People v. Cunningham* (2001) 25 Cal.4th 926, 992.) In the case of a juvenile, the determination whether a waiver is knowing, intelligent and voluntary requires "special

caution." (*In re Gault, supra,* 387 U.S. at p. 45; see *Haley v. Ohio* (1948) 332 U.S. 596, 599 [courts must use "special care in scrutinizing the record" to determine whether a minor's custodial confession is voluntary].) Because children "'generally are less mature and responsible than adults'" and often "'lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them'" (*J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394, 180 L.Ed.2d 310]), courts look to the totality of the circumstances, which includes an evaluation of the juvenile's age, experience, education, background and intelligence, to determine whether he or she "has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725; accord, *Lessie, supra,* 47 Cal.4th at p. 1167; *Nelson, supra,* 53 Cal.4th at p. 375.)

A juvenile's request to speak with a parent is neither a per se nor a presumptive invocation of Fifth Amendment rights. (*Lessie, supra,* 47 Cal.4th at p. 1168; accord, *Nelson, supra,* 53 Cal.4th at p. 381.)[1] Rather, when the question involves whether a minor has voluntarily waived his or her rights under *Miranda,* a request to see a parent is one factor to consider among the "totality of the circumstances." (*Lessie,* at pp. 1167-1168.)

The inquiry is different following a proper waiver of *Miranda* rights. (See *People v. Martinez, supra,* 47 Cal.4th at p. 951 ["'invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together'"].) Once a suspect has waived his or her rights under *Miranda,* he or she may still invoke those rights during

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1 The *Lessie* Court overruled its prior decision in *People v. Burton* (1971) 6 Cal.3d 375, 384, which had held a minor's request to speak to a parent during a custodial interrogation, absent evidence demanding a contrary conclusion, must be construed as an invocation of the minor's Fifth Amendment privilege. *Burton's* holding, the *Lessie* Court concluded, was inconsistent with the United States Supreme Court's subsequent pronouncements in *Fare v. Michael C., supra,* 442 U.S. 707, which held, absent an unambiguous request to speak to an attorney, a determination whether the defendant has invoked his or her Fifth Amendment rights is to be decided under the totality of the circumstances. (*Lessie, supra,* 47 Cal.4th at p. 1167.)

the interrogation. However, the invocation of Fifth Amendment rights, whether it be the right to remain silent or the right to counsel, must be both unambiguous and unequivocal. (*Berghuis v. Thompkins*, *supra*, __ U.S. ___ [130 S.Ct. at p. 2259]; *People v. Stitely* (2005) 35 Cal.4th 514, 535 ["It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his right. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether."].) Applying that standard, the Supreme Court recently held a juvenile's post-waiver request to speak to a parent is generally not a clear and unambiguous invocation of a suspect's Fifth Amendment rights. (*Nelson, supra*, 53 Cal.4th at p. 381 ["[w]here as here a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a post-waiver request for a parent is insufficient to halt questioning unless the circumstances are such that reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking—the right to counsel or silence"].)

2. *C.D. Has Forfeited His Argument That the Custodial Interrogation Violated His Constitutional Rights Under Miranda and Has Not Demonstrated His Counsel Was Constitutionally Ineffective for Failing To Raise the Issue*

C.D. contends his request to see his mother during his interrogation was tantamount to an invocation of his Fifth Amendment right to remain silent and required the police to cease the interrogation. Significantly, C.D. did not seek to suppress his statements in the juvenile court, where a factual record could have been developed that would allow this court to review the claim on the merits. (See *People v. Dykes*, *supra*, 46 Cal.4th 731 [we review the trial court's legal conclusions concerning whether the defendant invoked his or her Fifth Amendment rights independently but "'evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers and "'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence'"'"]; see generally *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754 [one of the basic justifications for the forfeiture doctrine is to allow the reviewing court to consider a claim

based on a fully developed factual record].)[2] Accordingly, C.D. has forfeited this claim on appeal. (See *People v. Rundle* (2008) 43 Cal.4th 76, 116 [forfeiture doctrine applies to objections based on *Miranda* violations], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [*Miranda*-based claim forfeited for failing to object at trial]; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194; see generally *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [forfeiture applies in juvenile delinquency cases].)

C.D.'s contention his counsel was constitutionally deficient in failing to raise the issue at trial also fails. A defendant claiming ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment right to counsel must show that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 ["[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no

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2 As it exists now, the record is devoid of factual findings critical to the analysis of the claim on the merits, including whether C.D. actually made the request at all (his mother testified he did, but C.D. did not) and if so, whether it was made at the inception of the interrogation or following a valid waiver of his Fifth Amendment rights.

rational tactical purpose for counsel's omissions"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation" [citation], the contention [that counsel provided ineffective assistance] must be rejected'"].)

The record here is silent as to the reasons counsel did not raise the issue below, and several justifications potentially exist, including, perhaps most significantly, the claim had no merit. The limited record we do have shows C.D. had waived his rights and agreed to speak to detectives, and such a waiver was both knowing and voluntary. C.D. was not a naïve juvenile. At the time of the interrogation, he was just a few days shy of his 17th birthday. He had been arrested and questioned several times prior to this incident and was familiar with the *Miranda* advisement. There was no evidence of cognitive deficiencies or any inability to understand the rights given to him. His request to speak to a parent, whether it occurred at the inception of the interview (see *Lessie, supra,* 47 Cal.4th at p. 1167) or following a valid waiver (see *Nelson*, *supra*, 53 Cal.4th at p. 381), without more, is insufficient to find a Fifth Amendment violation. On this extremely thin factual record, C.D. simply cannot establish his counsel was constitutionally deficient in failing to move to suppress his statements at trial.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.