Filed 6/4/12 In re B.H. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re B.H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B235738 (Super. Ct. No. 2010040421) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. B.H., Defendant and Appellant.	

B.H. appeals a judgment of the juvenile court declaring him a ward of the court and committing him to the Division of Juvenile Facilities. (Welf. & Inst. Code, §§ 602, 731.) We reverse counts 4 and 9 and remand for further proceedings regarding those counts consistent with *J.D.B. v. North Carolina* (2011) - U.S. -, - [131 S.Ct. 2394, 2406-2408].

FACTS AND PROCEDURAL HISTORY

On June 2, 2011, the Ventura County prosecutor filed a sixth amended petition pursuant to Welfare and Institutions Code section 602, alleging that 14-year-old B.H. committed the following felony and misdemeanor offenses: petty theft (counts 1 and 2); lewd acts upon a child (counts 3, 4, and 9); battery (counts 5 and 10); possession

of a weapon on school grounds (count 6); possession of a controlled substance (count 7); assault by means likely to produce great bodily injury (count 8); and genital penetration by a foreign object (count 11.) (Pen. Code, §§ 484, subd. (a), 288, subd. (a), 242, 626.10, subd. (a), 245, subd. (a)(1), 289, subd. (h); Health & Saf. Code, § 11377, subd. (a).)

Counts 1 and 2 involved petty thefts from B.H.'s fellow students at Los Cerritos Middle School. On January 14, 2010, B.H. rifled K.W.'s locker and took a cellular telephone from the locker. During two interviews with a sheriff's deputy, B.H. admitted opening the locker and taking the telephone. Count 2 concerned the theft of B.P.'s bicycle on September 27, 2010, from a bicycle rack at the school. A school security camera videotaped B.H. taking the bicycle.

Count 3 involved lewd acts committed upon five-year-old S.N. in San Bernardino County. Count 4 involved lewd acts committed upon S.N. on January 1, 2011, at her babysitter's residence. S.N. testified that B.H. "touched [her] private" over her undergarments. Count 5 concerned allegations by A.F. that B.H. touched her breast five times.

Counts 6 and 7 involved B.H.'s possession of a large knife and prescription medication (prescribed psychotropic drugs) on the campus of Los Cerritos Middle School. The school principal described B.H. as "emotionally disturbed" and a special education student. The principal also stated that B.H. is of "at least average intelligence." Following this incident, the school suspended B.H. as a student and he enrolled in Phoenix school for special education.

Counts 8 and 10 concerned B.H.'s batteries on other wards while in custody. The incidents were videotaped by security cameras.

Count 9 concerned B.H. touching and orally copulating his sister's vagina. Count 11 concerned B.H.'s sexual molestation of his cousin in December 2010.

January 12, 2011 Interview at Phoenix School

On January 12, 2011, Ventura County Sheriff's Detective Gregory Tougas and Sergeant Barbara Payton drove to Phoenix school in an unmarked white vehicle to interview B.H. regarding the sexual crimes committed against S.N. and B.H.'s sister.

(Counts 4 and 9.) Tougas and Payton did not display handguns or handcuffs and they were dressed in casual clothing. For reasons of privacy, they interviewed B.H. in the school parking lot away from other students. Tougas questioned B.H. as Payton stood several feet away. Tougas did not inform B.H. of his *Miranda* rights, nor did he state that B.H. was under arrest or would be arrested. Tougas believed that he was detaining B.H. "to get his side of the story."

During the interview, B.H. stated that he touched S.N.'s vagina over her clothing and tried to persuade her to kiss his penis. He admitted masturbating while viewing child pornography on his computer. B.H. also admitted touching his sister's vagina and performing oral copulation on her. After the interview, Tougas and Payton arrested B.H.

Prior to the adjudication hearing, B.H. sought to exclude evidence of his interview statements, contending that the officers did not inform him of his *Miranda* rights. The juvenile court held an evidentiary hearing and heard argument from the parties. The prosecutor asserted that a suspect's age "does not have any play at all" in determining whether B.H. was in custody for *Miranda* purposes. B.H. argued to the contrary, i.e., that age "is a relevant consideration." Without discussing the age issue, the juvenile court decided that the *Miranda* advisements were not required because the interview was not a custodial interview, and it denied the motion. The judge stated that "the officers actually went out of their way a little bit to make sure that they didn't create a coercive atmosphere."

Adjudication and Disposition

Following an adjudication hearing conducted over several days in June, 2011, the juvenile court sustained the sixth amended petition regarding counts 1, 2, 4, 6, 8, 9, and 10; dismissed count 3 without prejudice for jurisdiction reasons; and dismissed counts 5, 7, and 11 as not proven. The court declared B.H. to be a ward of the court and

committed him to the Division of Juvenile Facilities for a period not to exceed 10 years.[1] The court awarded B.H. 189 days of predisposition custody credit and ordered him to pay victim restitution.

B.H. appeals and contends that the juvenile court erred by not excluding evidence of his interview statements. Approximately one week following the court's denial of B.H.'s motion, the United States Supreme Court decided *J.D.B. v. North Carolina, supra,* - U.S. -, - [131 S.Ct. 2394, 2406], holding that a juvenile's age must be considered as part of a custodial interrogation analysis.

DISCUSSION

B.H. argues that the juvenile court did not consider his age pursuant to *J.D.B. v. North Carolina, supra,* - U.S. -, - [131 S.Ct. 2394, 2406] [including the juvenile's age in the custody analysis is consistent with the objective nature of that test]. He asserts that the error in admitting evidence of his admissions contributed to the adjudication and thus is not harmless beyond a reasonable doubt. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166 [standard of review].)

To invoke the protections of *Miranda*, a suspect must be subjected to custodial interrogation. (*Miranda v. Arizona* (1966)384 U.S. 436, 444.) "Custodial" refers to a situation where a person has been taken into custody or otherwise deprived of his freedom of action in a significant way. (*Thompson v. Keohane* (1995) 516 U.S. 99, 107; *id.* at p. 112 ["ultimate inquiry" is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest]; *People v. Aguilera, supra,* 51 Cal.App.4th 1151, 1161.) Custody determinations are resolved by an objective standard--would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest. (*J.D.B. v. North Carolina, supra,* - U.S. -, - [131 S.Ct. 2394, 2402].)

[1] Pursuant to *In re C.H.* (2012) 53 Cal.4th 94, the juvenile court recently vacated B.H.'s commitment, and it is not an issue in this appeal.

Among the relevant factors to consider in determining the issue of custody are: whether contact was initiated by the police or the suspect, and if by the police, whether the suspect voluntarily agreed to an interview; where the interview occurred; whether police informed the suspect that he was under arrest or in custody; the length of the interrogation; how many police officers participated; whether the police were aggressive or accusatory; and whether the police used interrogation techniques to pressure the suspect. (*People v. Aguilera*, *supra*, 51 Cal.App.4th 1151, 1162.) Juvenile status is relevant and to be considered, but no one factor is dispositive. (*J.D.B. v. North Carolina*, *supra*, - U.S. -, - [131 S.Ct. 2394, 2406]; *People v. Nelson* (2012) 53 Cal.4th 367, 383, fn. 7 [a juvenile suspect's known or objectively apparent age is one factor in the custody analysis].)

In *J.D.B. v. North Carolina*, *supra*, - U.S. -, - [131 S.Ct. 2394, 2398-2399], the United States Supreme Court held that the age of a child subjected to police questioning is relevant to the analysis whether the interrogation was custodial. In that case, a uniformed police officer removed the juvenile, who was 13 years old, from his seventh grade classroom, and questioned him in a closed door conference room with another police investigator and two school employees. The juvenile was not read his *Miranda* rights, was not permitted to speak with his legal guardian, and was not informed that he was free to leave. After 30 to 45 minutes of questioning, the juvenile confessed to committing burglaries. The state trial court denied a motion to suppress the juvenile's confession, ruling that the questioning did not amount to a custodial interrogation. (*Id.* at p. - [131 S.Ct. at pp. 2399-2400].)

The Supreme Court reversed the judgment and remanded for further proceedings. "Reviewing the question *de novo* today, we hold that so 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. [Fn. omitted.] This is not to say that a child's age will be a determinative, or even a significant, factor in every case. [Citations.]

It is, however, a reality that courts cannot simply ignore." (*J.D.B. v. North Carolina*, *supra*, - U.S. -, - [131 S.Ct. 2394, 2406].)

Here the record does not reflect that the juvenile court considered B.H.'s age as part of its determination that the Phoenix school interview was not a custodial interrogation. Our prescience may not be as acute as the dissent. The court's rationale that the interview was not custodial is not necessarily based in whole or part on the implied finding that the court considered the minor's age. B.H.'s admissions undoubtedly contributed to the adjudication and we cannot say with sufficient certainty that evidence of the admissions was harmless beyond a reasonable doubt. (*People v. Aguilera*, *supra*, 51 Cal.App.4th 1151, 1166.) We therefore reverse and remand regarding counts 4 and 9 for consideration of the relevant circumstances, including B.H.'s age, and a redetermination whether he was in custody for *Miranda* purposes. (*J.D.B. v. North Carolina*, *supra*, - U.S. -, - [131 S. Ct. 2394, 2408].) We express no opinion on the court's redetermination.

We reverse and remand regarding counts 4 and 9 with directions to the juvenile court to hold another hearing concerning the minor's *Miranda* motion. If the court again denies the motion, it shall reinstate the adjudication of counts 4 and 9. The judgment is otherwise affirmed.

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GILBERT, P.J.

I concur:

PERREN, J.

Yegan, J., Dissenting

The majority hold that the trial court failed to consider appellant's age in determining whether the police interview was a custodial interrogation. I dissent. Consistent with *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394] (*J.D.B.*), the trial court considered the totality of the circumstances including appellant's age, sophistication, and prior contacts with the police. (See *People v. Williams* (1997) 16 Cal.4th 635, 660; *People v. Massie* (1998) 19 Cal.4th 550, 576; In *re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) The court found that "the officers actually went out of their way . . . to make sure that they didn't create a coercive atmosphere, which is what the *Miranda* protections are designed for . . . . [¶] I do not feel that [B.] was in custody for the purposes of *Miranda*. And I do not believe the *Miranda* advisement was required by the officers."

Appellant's age was a paramount concern, as reflected in the Sixth Amended Petition which sets forth appellant's date of birth and escalating criminal activities over a span of 12 months. Appellant's contacts with the police, all of which were at school, showed a sophistication and maturity far beyond that of a typical teenager.

In the year preceding the January 2011 parking lot statement, the police interviewed appellant at school (January 14, 2010) about the theft of a cell phone. Three weeks later (February 5, 2010), appellant waived his *Miranda* rights and spoke to the officer. On October 15, 2010, appellant was interviewed again, this time about a bicycle theft and the sexual battery of a fellow student. On November 11, 2010, the police attempted to interview appellant about possession of a knife and pills at school. Appellant was upset but had the wherewithal not to waive his *Miranda* rights.

On January 12, 2011, Detective Gregory Tugas and Sergeant Barbara Peyton interviewed appellant in the school parking lot about the sexual

assault of five-year-old S. Appellant agreed to talk to the officers and described in detail how he sexually abused S. and eight-year old B.

J.DB. holds that a child's age is "a reality that courts cannot simply ignore" in determining whether a police interview is a custodial interrogation. (*J.D.B., supra,* __ U.S. at p. __ [131 S.Ct. at p. 2406].) But that did not happen here. The *Miranda* motion stated that appellant's age was an important factor in determining the voluntariness of his confession and whether he was in custody for purposes of *Miranda.* The trial court read and considered the motion, listened to the testimony, and reasonably concluded that appellant's age was not a determinative factor.

Even assuming that appellant's confession violates *J.D.B.,* reversal is inappropriate (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [113 L.Ed.2d 302, 332]; *People v. Cahill* (1993) 5 Cal.4th 478, 482.) "When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine with the admission of the confession was harmless beyond a reasonable doubt." (*Arizona v. Fulminante, supra,* 499 U.S. at p. 310 [113 L.Ed.2d at p. 332].)

It is uncontroverted that appellant touched five-year old S.'s vagina (count 4) and orally copulated/digitally penetrated eight-year old B. (count 9). The victims' statements were corroborated by family members and the police, and later corroborated by appellant at school. Remanding for specific J.R.B. findings about appellant's age is an idle act that elevates form over substance. I would affirm the judgment.

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YEGAN, J.

Manuel J. Covarrubias, Judge

Superior Court County of Ventura

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