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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001190-DG

A.K.M. APPELLANT

ON DISCRETIONARY REVIEW FROM POWELL CIRCUIT COURT
v. HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 12-XX-00001

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: A.K.M., a juvenile, appeals the decision of the Powell Circuit Court affirming the Powell District Court's denial of A.K.M.'s motion to suppress. A.K.M. argues his right against self-incrimination was violated when he was placed in custody and interrogated by a principal on public school property without *Miranda* warnings and, again, when questioned by an officer in the principal's office. Because the principal was not acting in concert with law

enforcement or following an established procedure involving law enforcement, we affirm in part. However, because we conclude A.K.M.'s statements made in the principal's office were made after he invoked his right to remain silent, we reverse and remand.

The facts were testified to at a suppression hearing. A.K.M. was charged with unlawfully entering Powell County High School and taking money in an undetermined amount ($20-$40) from the shop classroom. Principal Kyle Lively and the shop teacher initially investigated the incident and learned from another student that A.K.M. had been involved in the burglary.

Principal Lively then discussed the matter with A.K.M., first in the hallway and then directed A.K.M. into the teacher's lounge. Principal Lively instructed A.K.M. to "tell the truth" and informed him that a law enforcement officer was present at the school. In the teacher's lounge, A.K.M. admitted he had been involved with the burglary.

Principal Lively testified he and A.K.M. then walked to the principal's office where Officer Townsend and Mr. Pickelsimer (a Department of Juvenile Justice case worker) were waiting. Officer Townsend and Mr. Pickelsimer arrived earlier at the school on a matter unrelated to the burglary. After Principal Lively informed Officer Townsend of A.K.M.'s admission, Officer Townsend read A.K.M. his *Miranda* warnings. A.K.M.'s mother was called and she gave the officer permission to talk with A.K.M. Principal Lively testified A.K.M. was questioned by Principal Lively, Officer Townsend, and Mr.

Pickelsimer. After being Mirandized, A.K.M. repeatedly stated "I don't want to tell on myself." Eventually, in the office in the presence of Principal Lively, Officer Townsend and Mr. Pickelsimer, A.K.M. confessed he was involved in taking the money from the shop classroom. A.K.M.'s statements were the only evidence of his involvement in the crime.

A.K.M. was charged with burglary in the second degree. He was detained and a detention hearing was held on October 20, 2011. At that time, the burglary charge was amended down to burglary in the third degree. On October 25, 2011, a review was held in which the county attorney agreed to defer prosecution of the charges on the conditions that A.K.M. follow household rules and enroll in and complete the Hillcrest residential treatment program. On January 4, 2012, the Department of Juvenile Justice filed a violation notice indicating that A.K.M. had left the Hillcrest program without permission or successfully completing all requirements.

A.K.M. was taken into custody and detained pending adjudication of the charge of burglary in the third degree. On January 13, 2012, an adjudication hearing was held. A.K.M. made a motion to suppress his statements based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court denied the motion finding that A.K.M. was not interrogated by the police or in custody and, therefore, *Miranda* warnings were not required. Thereafter, A.K.M. entered a conditional guilty plea. The circuit court affirmed the district

court's denial of A.K.M.'s motion to suppress his statements. We accepted discretionary review.

In reviewing a trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky.App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). With this in mind, we turn to the parties' arguments concerning the denial of A.K.M.'s motion to suppress his statements.

The first question presented is whether the statement made to Principal Lively must be suppressed because A.K.M. was not Mirandized prior to entering the teacher's lounge and being questioned by Principal Lively. Pursuant to *Miranda*, an individual must be expressly informed of his constitutional rights prior to a custodial interrogation. *Watkins v. Commonwealth*, 105 S.W.3d 449, 451 (Ky. 2003). However, "[a] *Miranda* warning is not required when a suspect is merely taken into custody, but rather when a suspect in custody is subject to custodial interrogation." *Id*. Thus, *Miranda* established a two-step threshold requiring "questioning by law enforcement and being held in custody." *N.C. v. Commonwealth*, 396 S.W.3d 852, 855 (Ky. 2013).

School principals are not law enforcement officers. The distinctions between principals and law enforcement officers were concisely stated by the New Hampshire Supreme Court:

> Although school principals are responsible for administration and discipline within the school, and must regularly conduct inquiries concerning both violations of school rules and violations of law, they are not law enforcement agents. They are neither trained nor equipped to conduct police investigations, and, unlike law enforcement agents, enforcing the law is not their primary mission. Law enforcement officers are responsible for the investigation of criminal matters and maintenance of general public order, while school officials, in comparison, are charged with fostering a safe and healthy educational environment that facilitates learning and promotes responsible citizenship.

State v. Tinkham, 143 N.H. 73, 77, 719 A.2d 580, 583 (1998) (internal citations and quotations omitted).

However, if a person who does not carry the title of law enforcement acts in concert with or on behalf of law enforcement to obtain a confession, *Miranda* warnings are required. This was the situation when police acted in concert with a social worker who knew the suspect to question that suspect. *Buster v. Commonwealth*, 364 S.W.3d 157 (Ky. 2012). Whether a student questioned by school officials acting in concert or on behalf of law enforcement is entitled to the protections of *Miranda* warnings was addressed by our Supreme Court in *N.C.*

Because we conclude the Court in *N.C.* espoused law relevant to this case but the facts presented are distinguishable, the facts in *N.C.* are worthy of

repetition. A Nelson County High School student was suspected of possessing and giving away hydrocodone pills. A Nelson County deputy sheriff assigned to the school as a School Resource Officer (SRO) and an assistant principal went to the student's classroom, took him from class and to the school office. After questioning by the assistant principal in the deputy sheriff's presence, the student admitted to giving pills to students. Testimony at the suppression hearing revealed the assistant principal and the SRO "had a loose routine they followed for questioning students when there was suspected criminal activity." *N.C.*, 396 S.W.3d at 854.

The Court began its analysis by framing the issue in the context of the facts presented and, in doing so, emphasized the significance of the presence of the SRO from the inception of the assistant principal's investigation.

> The issue before the Court is whether a student is entitled to the benefit of the *Miranda* warnings before being *questioned by a school official in conjunction with a law enforcement officer*, the SRO, when he is subject to criminal charges in district court or, as in this case, adult felony charges in circuit court. The SRO, a deputy sheriff assigned to the school in a full-time capacity by the local sheriff's office, participated in the process by going with the assistant principal, taking the student out of class, escorting him to the principal's office, and was present in a closed room while the assistant principal questioned the student. He summed up the result of the questioning, charged the student with a Class D felony, and issued a citation on the spot.

Id. at 855 (emphasis added).

N.C. presented a case of first impression in this Commonwealth because of the unique needs of a school to maintain order in the schools and protection of

other children in their care on the school premises and during school activities. *Id*.

After discussing the significant public need of safeguarding our schools and those of a child's individual rights, the Court concluded that a principal acting in that role and not in concert with law enforcement may question a student without first Mirandizing that student. The Court recognized such a requirement would be unreasonable and unnecessary for the purpose of school discipline and safety. However, to strike a proper balance between the child's rights and the public need for safe schools the Court held:

> [A] proper balance is struck if school officials may question freely for school discipline and safety purposes, but any statement obtained may not be used against a student as a basis for a criminal charge when law enforcement is involved or if the principal is working in concert with law enforcement in obtaining incriminating statements, unless the student is given the *Miranda* warnings and makes a knowing, voluntary statement after the warnings have been given.

Id. at 865.

Even under the facts in *N.C.* where a law enforcement officer was present from the inception of the questioning to the end, our Supreme Court was divided. In a well-reasoned and impassioned dissent, Justice Cunningham expressed his fears school personnel would be hampered in their fight against the trend of school violence, drugs, and other crimes and further endanger the children by a student's assertion of the right to remain silent. Justice Cunningham candidly stated the reality: "When *Miranda* rights are required to be given, we must assume that those rights will be invoked." *Id*. at 870. The Court's opinion was also criticized by

Justice Venters in an equally well-written dissent in which Justices Cunningham and Scott joined. Notably, although Justice Abramson and Chief Justice Minton concurred, they did so by separate opinion.

Because the Court was far from unanimous, the majority went to great lengths in *N.C.* to limit its opinion to the facts of that case. The pivotal facts were the presence and involvement of law enforcement and the principal acting in concert with law enforcement. The facts in *N.C.* are markedly different than those now presented.

Specifically, in *N.C.*, from the moment the questioning of the juvenile began, the SRO was present and participated in the questioning. The "assistant principal was acting in concert with the SRO, and they had established a process for cases involving interrogations of this kind[.]" *Id*. at 863. Neither factor is present in this case.

Principal Lively was not acting in concert with the police when he questioned A.K.M. and there was no established process invoked involving law enforcement. In fact, Principal Lively testified school procedure was not to involve law enforcement until after school personnel investigated. Indeed, because he first questioned A.K.M. alone and not in his office, he was following the precise opposite procedure followed in *N.C.* by not involving law enforcement until after he conducted his school disciplinary investigation. Additionally, unlike in *N.C.* where the officer was involved from the inception of the investigation, Officer Townsend was only coincidentally present to talk to a student on an unrelated

matter. Principal Lively was not acting in concert with law enforcement but acting only as a principal investigating a school disciplinary matter.

We decline to extend the controversial holding in *N.C.* to the questioning of students by school officials not acting in concert with law enforcement. We interpret that decision narrowly to maintain the balance between the student's individual rights and the public interest in safety in our schools. For *Miranda* to apply when a student is questioned by a school official regarding conduct that may later lead to criminal charges, the involvement of law enforcement must be direct, preplanned, and active from the inception of the school official's questioning. Otherwise, the school official is not acting as law enforcement but only performing his or her duty to investigate school disciplinary matters, and no *Miranda* warnings are required.

However, our inquiry is not over. A.K.M. was further questioned by Officer Townsend and, therefore, the "law enforcement" threshold requirement of *Miranda* is met. The second threshold is whether he was in custody when questioned by Officer Townsend. We reject the Commonwealth's contention this issue was unpreserved.

"Custody" as used in *Miranda* does not mean merely physical custody but means police custody. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v.*

California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528–29, 128 L.Ed.2d 293 (1994) (quoting *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per curiam*)). The determination is based on objective circumstances, not the subjective belief of the defendants or the officers. *Id.* at 323, 114 S.Ct. at 1529. The relevant inquiry is would a reasonable person in the suspect's position have believed he was in police custody and not free to leave. *Id.* at 324, 114 S.Ct. 1529.

Although decided prior to *N.C.* but not discussed in that case, we believe the law espoused in *C.W.C.S. v. Commonwealth*, 282 S.W.3d 818 (Ky.App. 2009), remains good law. This Court rejected the notion that merely because a child was questioned by law enforcement at school, a place he was not free to leave during school hours, he was in custody for *Miranda* purposes. We stated:

> If we were to adopt his reasoning, we would essentially be holding that every child that is attending school experiences a restriction of movement akin to an arrest. That is simply not the case. We do not see how C.W.C.S.'s freedoms were any more restricted than any other student at the school. Detective Gibbs directly stated that C.W.C.S. did not have to speak with them, that he was free to return to class, and that the officers would leave the school premises if he so chose. Thus, he was told that he was voluntarily speaking with them, and it was clear he was not in police custody at this time. Since his movements were not restricted in a degree associated with arrest, C.W.C.S. was simply not in custody for *Miranda* purposes.

Id. at 822. In that case, it was determinative that the student "was told he was free to leave" and not required to discuss the criminal allegations against him.

Consequently, "he was not in custody and no *Miranda* warnings were required." *Id*.

A.K.M. was in a different situation than C.W.C.S. and, in this respect, we are unable to factually distinguish *N.C.* A.K.M. was questioned in the confines of a school administrator's office by law enforcement under circumstances that would indicate to a reasonable juvenile he could not simply terminate the questioning and leave. *N.C.*, 396 S.W.3d at 862. When questioned by Officer Townsend, A.K.M. had already confessed to Principal Lively that he had committed a crime and was escorted to the office where Officer Townsend and Mr. Pickelsimer were present. In the confines of the office, he was then read *Miranda* warnings, an act even a juvenile of A.K.M.'s age would reasonably believe indicated he was not free to simply leave and return to class. The question as we view it is whether the continued questioning after A.K.M. repeatedly stated "I don't want to tell on myself" violated his Fifth Amendment right to remain silent.

After Miranda warnings have been given and the individual indicates he "wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 474, 86 S.Ct. 1627. To invoke the right to remain silent, a suspect must clearly articulate his desire in a manner that a reasonable police officer in the situation would understand that the suspect wished for questioning to cease. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 30 (Ky. 2011).

After being Mirandized, A.K.M. repeatedly stated "I don't want to tell on myself," but eventually confessed to the three adults present, including Officer

Townsend, he was involved in taking the money from the shop classroom. We believe his statements, "I don't want to tell on myself," were sufficient for A.K.M. to invoke his Fifth Amendment rights. While his repeated assertion was unsophisticated, the statement clearly conveyed his desire to invoke his right to remain silent. As such, the interrogation should have ceased. Therefore, any statement made by A.K.M. after Officer Townsend read A.K.M. his *Miranda* warnings must be suppressed.

Based on the forgoing, we affirm that portion of the Powell Circuit Court's opinion and order holding statements made to Principal Lively are admissible. We reverse that portion holding statements made by A.K.M. after he invoked his right to remain silent are admissible. The case is remanded for proceedings consistent with this Opinion.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Renee VandenWallBake
La Mer Kyle-Griffiths
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Renee VandenWallBake
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky