COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0103

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF JAMES F.R., JR.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES F.R., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

CURLEY, J. James F. R., Jr. (James) appeals from a dispositional order adjudicating him delinquent for committing first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He argues that his motion requesting the

suppression of his two inculpatory statements should have been granted. He contends that at the time he gave the first statement he was in a custodial setting, thus requiring the officers to read him his ***Miranda***[1] rights. With respect to his second statement, although he was advised of his ***Miranda*** rights, he claims that the second statement was tainted by the first statement and, further, that he was not adequately informed of his rights because he did not understand them and, thus, he could not possibly have waived them knowingly and voluntarily. Further, he argues that he was denied his constitutional due process right to a jury trial.[2] We affirm. Although we determine James's motion to suppress his first statement should have been granted, we conclude that the second statement was admissible after applying the test found in ***Oregon v. Elstad***, 470 U.S. 298 (1985). Finally, James's argument that he was entitled to a jury trial is controlled by the recent case of ***State v. Hezzie R.***, 219 Wis.2d 849, 580 N.W.2d 660 (1998), which concluded that juveniles involved in delinquency proceedings are not entitled to a jury trial unless they fall within one of three categories, none of which are present here.

I. BACKGROUND.

On April 6, 1997, James, who would turn twelve years old in two days, was visiting his father, James R., at his father's home. Living in the home,

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1986).

[2] James has raised two other issues in this appeal. He argues that he requested legal counsel, but the police continued to question him, contrary to established law. He also posits that his constitutional rights were violated at his stipulated-facts court trial because he never personally waived his rights to testify, to confront the witnesses against him or to call witnesses on his own behalf. We decline to address these issues because they are raised for the first time on appeal. *See* ***State v. Rogers***, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995) (failure to raise a specific challenge in the trial court waives the right to raise it on appeal).

besides his father, were Maude, his father's girlfriend, Maude's children, and several other people, including Marlene C. and her nine-month-old daughter, K.E. Maude had agreed to babysit for K.E. that afternoon and James had offered to help her.[3] Maude later related to the police that during the time she was babysitting for K.E., James told her that he noticed a bloody discharge in K.E.'s diaper when he was changing her diaper. The baby was eventually taken to the hospital where she was diagnosed as having serious lacerations to the labia and the vagina as a result of sexual abuse.

At approximately three o'clock the next morning, two investigating officers went to James's home after obtaining his address from his father. Once at the home, the officer spoke briefly to James's mother, and then, after instructing James to get dressed, escorted James to an unmarked police car parked outside his home, where he was interviewed. At this time, James was not advised of his ***Miranda*** rights. Although originally denying that he did anything wrong, James finally admitted that he had placed his finger in the baby's vagina. He was then placed under arrest and taken to the central police station where he was booked.

James was again interviewed at approximately 5:20 a.m. This time he was given his ***Miranda*** rights before he repeated the inculpatory statement to the police. James was charged in juvenile court with first-degree sexual assault of a child. His ***Miranda-Goodchild***[4] motion requesting the suppression of both

[3] The stipulated criminal complaint, the trial court, and the appellant's brief all inaccurately make reference to Maude as James's mother.

[4] *See* ***Miranda***, 384 U.S. 436 (discussing voluntariness of confessions and procedures in custodial interrogations); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 264-65, 133 N.W.2d 753, 763-64 (1965) (requiring the judge to hold a hearing to determine the voluntariness of the defendant's confession).

statements was denied. Following the denial of the motion, James's attorney and the assistant district attorney advised the trial court that they would be having a court trial based on stipulated facts. After reading the stipulated documents and hearing from James's counsel, the trial court found James guilty of first-degree sexual assault of a child. The trial court sentenced him to one year probation with the requirement that he abide by a variety of conditions, including that he cooperate with any recommended counseling and treatment, that he submit to DNA testing, and that he report as a sexual offender to the Attorney General's office for fifteen years. This appeal follows.

II. ANALYSIS.

1. *James's first statement was inadmissible*.

James argues that the statement he gave in the back of the squad car early in the morning of April 7, 1997, was inadmissible because, although not under arrest, he was in a custodial setting, and thus, subject to the holding of ***Miranda***, that a person in custody must be advised of certain rights prior to being questioned by law enforcement officers. We are assuming that James is entitled to the benefit of the ***Miranda*** ruling, as the case of ***Fare v. Michael C.***, 442 U.S. 707, 717 n.4 (1979), assumed without deciding that the holding in ***Miranda*** extends to juveniles; however, the Supreme Court has never explicitly extended the ***Miranda*** ruling to juveniles.

Whether an individual was in custody, when the facts are not in dispute, is a question of law we review *de novo*. *See* ***State v. Koput***, 142 Wis.2d 370, 378, 418 N.W.2d 804, 808 (1988) ("[W]here the facts are undisputed, [whether one is in] 'custody' is a matter of law."). The test for determining whether one is in custody is whether, under the totality of the circumstances, a

reasonable person would believe that he or she is not free to leave. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984); ***Koput***, 142 Wis.2d at 379-80, 418 N.W.2d at 808. "The question is whether a reasonable person in [the defendant's] situation would have considered himself to be in custody." ***Koput***, 142 Wis.2d at 380, 418 N.W.2d at 808. Stated somewhat differently, whether a defendant is in custody for ***Miranda*** purposes depends on whether the suspect reasonably supposed his freedom of action was curtailed to a degree associated with formal arrest. *See* ***Berkemer***, 468 U.S. at 440. Further, the test is identical whether the individual being questioned is a juvenile or an adult. *Cf.* ***Shawn B.N. v. State***, 173 Wis.2d 343, 363-65, 497 N.W.2d 141, 148 (Ct. App. 1992) (finding confession of thirteen-year-old boy voluntary, absent evidence of coercion). "The test is 'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***State v. Gruen***, 218 Wis.2d 581, 593, 582 N.W.2d 728, 732 (Ct. App. 1998).

Here, although the material facts are not in dispute, the record reflects that the trial court failed to apply the proper test to the facts as found by the trial court. Following the testimony of witnesses at the motion to suppress, the trial court stated, "[a]ll right, the argument can be made that he was in custody but the question is reasonableness …. It is a reasonable[ness] standard, reasonable people in reasonable circumstances [sic]. The discussion with Mr. R[.] in the squad car, the officer [ ] was investigatory; not accusative." The trial court then went on to find that James was the prime suspect, that he was young, scared, unsophisticated and not highly intelligent. However, the trial court then concluded, in denying the motion, that "the police department acted in a reasonable manner and under reasonable circumstances." The trial court never

found whether a reasonable person in James's situation would have considered himself or herself in custody. When the trial court fails to apply the proper legal test to a set of circumstances, it is our task to review the record and apply the correct test to the factual findings made by the trial court. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983) (when a circuit court fails to set forth its reasoning, the appellate court independently reviews the record to determine whether it provides a basis for the circuit court's exercise of discretion). After reviewing the record, we determine that a reasonable boy of James's age and experience would have believed he was not free to leave.

Although not formally placed under arrest, the circumstances related at the motion to suppress suggest that James's freedom was curtailed. At the time of the first interview, it was three o'clock in the morning. James was eleven years old, had been sleeping, and had no previous encounters with the police. Later reports submitted to the trial court indicated that James's test scores revealed an intelligence quotient of 80—characterized as putting James's verbal skills at far below average. These facts, standing alone, strongly suggest that James believed he was not free to leave. Further, James's testimony supports this conclusion. James related that the two unknown men came to his door, woke him up, and "checked his underwear," an act an eleven-year-old boy is not likely to permit unless he believes the unknown men have the ability to exercise some control over his person. These men then instructed James to get dressed and accompany them. James also testified, in response to the question as to why he went with the two men, "I was thinking that I had to go." Although his mother was initially told he was not under arrest, James never spoke to his mother before leaving the house and did not know that he was not being arrested. Nor was James ever told that he did not have to go with the police or that he was free to leave. He was then placed

in an unmarked police car at approximately 3:30 a.m., which was parked on a residential street, where he was questioned. The police car in which he was held had doors that could not be opened from the inside. It was James's recollection that he spoke to the officers in the parked car "for a long time," although the police testified it was only ten minutes. The testimony revealed that at first the officers told him that they did not think he had done anything wrong. When he agreed that he had done nothing wrong, the police did not stop their questioning, nor did they tell James he could leave. Instead, they continued their questioning until James admitted to placing his finger in the baby's vagina. Under the circumstances present here, a reasonable boy of James's age, experience, education and intelligence would have believed that he was not free to leave, nor could he have left had he tried. Further, a reasonable boy of James's age, experience, education, and intelligence would have felt that he was not at liberty to terminate the interrogation and leave. *See* ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995) (explaining proper inquiry in determining "custody"). Thus, we find the totality of the circumstances required the police to advise James of his ***Miranda*** rights, and we must conclude that the first inculpatory statement should have been suppressed. However, we find no improper conduct or coercion on the part of the officers.

2. *James's second statement was admissible.*

We next address James's argument that his second statement should also be suppressed. James makes a four-part argument. First, he claims that if this court determines that his first statement was inadmissible because the police failed to give him the ***Miranda*** warnings, then "[t]he 'Mirandized' statement was irrevocably tainted by the coercion employed in obtaining the confession in the back of the squad car" and is inadmissible. James further submits that even if this

court has found the first statement admissible, the second statement should not be admitted because James was not adequately informed of his ***Miranda*** rights, he did not understand them, and thus, he could not and did not waive them knowingly and voluntarily.

The State counters this argument, asserting that the case of ***Oregon v. Elstad***, 470 U.S. 298 (1985), is dispositive. The holding in ***Elstad*** explains that where the initial statement made while defendant was in police custody in his home was voluntary, failure to give ***Miranda*** warnings does not bar admissibility of a station house confession made shortly thereafter, that was preceded by a careful reading and waiver of ***Miranda*** rights. *See* ***Elstad***, 470 U.S. at 309. Thus, according to the State, the failure to provide the ***Miranda*** warnings to James does not automatically require the suppression of his second statement, if James was given "a careful and thorough administration of ***Miranda*** warnings," ***id.*** at 310-11, and the first statement was not derived from coercive or improper tactics, *see* ***id.*** at 311-14. Under this test, we conclude the second statement was admissible.

We again note James's first statement should have been suppressed because it was given at a time when a reasonable boy of James's age, experience and intelligence would have considered himself or herself to be in custody. Although James now argues that the trial court erred in finding that there was no coercion, because the events which preceded the obtaining of this second statement constituted "clear evidence of not so subtle psychological coercion," the record does not support that contention. Like the circumstances present in ***Elstad***, there was no evidence of police coercion or improper tactics in obtaining James's first statement. Thus, the first hurdle to admission of the second statement has been met. We next address James's argument that the second statement was inadmissible because the police did not properly administer the ***Miranda***

warnings; that James did not understand his constitutional rights; and, therefore, that James could not have waived those rights knowingly and voluntarily.

In determining the validity of a juvenile's waiver of his or her ***Miranda*** rights, courts employ the "totality of circumstances" test. *See* ***Fare***, 442 U.S. at 724. The state bears the burden of proving that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them. *See* ***State v. Santiago***, 206 Wis.2d 3, 18-19, 556 N.W.2d 687, 692-93 (1996). Further, the state must prove that any statement given after the ***Miranda*** rights is voluntary. ***Id.*** at 19, 556 N.W.2d at 693.

With regard to the circumstances surrounding the procuring of the second statement, the trial court found that the police, in explaining the ***Miranda*** rights to James, exceeded that which would have been legally necessary and they "took the statement in a constitutionally valid manner." We are satisfied that the record supports the trial court's finding that James was given a careful and thorough administration of his ***Miranda*** warnings which he knowingly and voluntarily waived.

James was questioned the second time at approximately 5:20 a.m. The interview occurred in a small room. Testimony at the ***Miranda-Goodchild*** hearing revealed that, at this time, James was not restrained and he had been given the opportunity to drink water and to use the bathroom. Although James admitted to being a "little tired," he had apparently slept for a period of time between being transported to the downtown police station and the interview. In his testimony, the officer explained that he advised James of his ***Miranda*** rights in the following manner: he used a standard card which listed all the ***Miranda*** rights, and "[e]ach right that is written in the sentence was read, and then he was asked if he

understood what that meant, and them I made little notes as to his response in regards to what those meant." The officer also explained that he had previously determined that James could read, but he had difficulty reading cursive, so the officer decided to print James's statement. The officer told the trial court that in asking James to explain the rights just read to him in his own words, James was able to explain the rights and he agreed to talk to the officer after all the rights were read. During the interview James was never denied any creature comforts, and there is no evidence that any threats or promises were made. The officer wrote down James's statement and had James sign it. This document was admitted into evidence. Thus, the record supports a finding that James was properly advised of his ***Miranda*** rights, that he understood them, and that he waived them voluntarily and knowingly.

3. *James was not denied his constitutional right to a jury trial.*

James argues that he should have had a jury trial after requesting one because he has a constitutional right to a jury trial. The trial court, relying on § 938.31(2), STATS., determined that he was not entitled to a jury trial. Recent case law is dispositive of this issue. In ***Hezzie R.***, 219 Wis.2d 849, 580 N.W.2d 660, the supreme court tackled the task of interpreting the recent major legislative overhaul to the Juvenile Justice Code. Specifically, the supreme court was asked to decide whether § 938.31(2), STATS., 1995-96, eliminating a jury trial for delinquency adjudications, violated juveniles' state and federal constitutional rights. Section 938.31(2), STATS., 1995-96, reads:

> **(2)** The hearing shall be to the court. If the hearing involves a child victim or witness, as defined in s. 950.02, the court may order the taking and allow the use of a videotaped deposition under s. 967.04 (7) to (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the court shall make a

> determination of the facts. If the court finds that the juvenile is not within the jurisdiction of the court or the court finds that the facts alleged in the petition or citation have not been proved, the court shall dismiss the petition or citation with prejudice.

The supreme court found that the statute was constitutional and upheld the denial of a jury trial to juveniles by severing several unconstitutional provisions from the rest of Chapter 938.[5] *See* ***Hezzie R.***, 219 Wis.2d at 888-91,

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[5] The provisions severed by the supreme court were §§ 938.538(3)(a)1, STATS., 1995-96, 938.538(3)(a)1m, STATS., 1995-96, and 938.357(4)(d), STATS., 1997-98. The supreme court concluded that §§ 938.538(3)(a)1, STATS., 1995-96, 938.538(3)(a)lm, STATS., 1995-96, and 938.357(4)(d), STATS., were criminal in nature because they subjected a juvenile who had been adjudicated delinquent to placement in an adult prison. *See* ***State v. Hezzie R.***, 219 Wis.2d 849, 887-88, 580 N.W.2d 660, 674 (1998). Those provisions violated a juvenile's rights to a trial by jury and were found unconstitutional. *See* ***id.***

Section 938.538(3)(a)1, STATS., 1995-96, provided:

> **(3)** COMPONENT PHASES. (a) The department shall provide each participant with one or more of the following sanctions:
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> 1. Subject to subd. 1m., placement in a Type 1 secured correctional facility, a secured child caring institution or, if the participant is 17 years of age or over, a Type 1 prison, as defined in s. 301.01 (5), for a period of not more than 3 years.

Section 938.538(3)(a)1m, STATS., 1995-96, provided:

> 1m. If the participant has been adjudicated delinquent for committing an act that would be a Class A felony if committed by an adult, placement in a Type 1 secured correctional facility, a secured child caring institution or, if the participant is 17 years of age or over, a Type 1 prison, as defined in s. 301.01 (5), until the participant reaches 25 years of age, unless the participant is released sooner, subject to a mandatory minimum period of confinement of not less than one year.

Section 938.357(4)(d), STATS., provided:

> (d) The department may transfer a juvenile who is placed in a Type 1 secured correctional facility to the Racine youthful offender correctional facility named in s. 302.01 if the juvenile is 15 years of age or over and the office of juvenile offender review in the department has determined that the conduct of the juvenile in the Type 1 secured correctional facility presents a serious problem to the juvenile or others. The factors that the office of

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580 N.W.2d at 674-75. The supreme court concluded that the statute, after severing the objectionable portions, did not violate the right to jury trial under the State and Federal Constitutions, nor did it violate the juveniles' rights of due process and equal protection under State and Federal Constitutions. *See* ***id.*** at 891-97, 580 N.W.2d at 675-78.

James's delinquency proceedings did not involve any of the three situations which would require a finding that a denial of a jury trial was unconstitutional. Thus, James was not unconstitutionally denied his right to a jury trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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juvenile offender review may consider in making that determination shall include, but are not limited to, whether and to what extent the juvenile's conduct in the Type 1 secured correctional facility is violent and disruptive, and the security needs of the Type 1 secured correctional facility and whether and to what extent the juvenile is refusing to cooperate or participate in the treatment programs provided for the juvenile in the Type 1 secured correctional facility. Notwithstanding sub. (1), a juvenile is not entitled to a hearing regarding the department's exercise of authority under this paragraph unless the department provides for a hearing by rule. A juvenile may seek review of a decision of the department under this paragraph only by the common law writ of certiorari. If the department transfers a juvenile under this paragraph, the department shall send written notice of the transfer to the parent, guardian, legal custodian and committing court.

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FINE, J. *(concurring)*. Although I agree with the result of the majority opinion, I write because I do not believe that under settled law we can say that a reasonable innocent juvenile under the circumstances here would believe that he or she was in custody for ***Miranda*** purposes.

The law with respect to what constitutes custody for ***Miranda*** purposes was recently set out by the United States Court of Appeals for the Eleventh Circuit:

> [T]he issue is whether "under the totality of the circumstances, a reasonable man in the suspect's position would feel a restraint on his freedom of movement ... to such extent that he would not feel free to leave." The test is objective: the actual, subjective beliefs of the defendant and the interviewing officer on whether the defendant was free to leave are irrelevant. But, to be more specific, the Supreme Court has said that whether a suspect is in custody turns on whether restrictions on the suspect's freedom of movement are "of the degree associated with formal arrest." And, under the objective standard, the reasonable person from whose perspective "custody" is defined is a reasonable *innocent* person. Whether a defendant knows he is guilty and believes incriminating evidence will soon be discovered is irrelevant.

United States v. Moya, 74 F.3d 1117, 1119 (11th Cir. 1996) (internal citations omitted; ellipsis in original; emphasis added). In my view, an innocent lad in James's situation would not have believed that his discussion with the officers in their unmarked car was a custodial interrogation as that concept has been defined by ***Miranda*** and its progeny, and that he was not free to leave—any more than *any* juvenile of James's age being asked to accompany two adults to their automobile for a talk. Thus, unless we are willing (and I am not) to fashion a *per se* rule that a juvenile of James's age is *always* in custody for ***Miranda*** purposes when that juvenile is alone with police officers on their turf, the record here does not support

the majority's conclusion that James was in custody for ***Miranda*** purposes during his interview in the unmarked police car.