**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

January 11, 2000

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-1991**

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

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**IN THE INTEREST OF PAO C. V.,**
**A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**PAO V.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge.[1] *Reversed and cause remanded with directions.*

[1] Judge Thomas Cooper entered the dispositional order; Judge Mac Davis decided the motion to suppress.

¶1 CURLEY, J.[2] Pao V. appeals from a dispositional order adjudicating him delinquent for two counts of possession of a dangerous weapon, contrary to WIS. STAT. § 948.60(2)(a). Pao V. argues that his motion to suppress should have been granted because his initial statement to the police was not knowingly and voluntarily made and that the weapons found as a result of his statement were "fruit of the poisonous tree," under ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963), thus requiring suppression. Further, Pao V. argues that his subsequent incriminating statement, made after being advised of his ***Miranda***[3] rights, was not sufficiently attenuated from his first involuntary statement to be admitted. This court agrees and reverses the dispositional order.

## I. BACKGROUND.

¶2 On June 21, 1998, in the early evening, the Waukesha County Sheriff's Department responded to a report of a fight in Nagawaukee Park, located in Waukesha County. When the sheriff's deputies arrived, both park rangers and members of the Delafield Police Department were present. During the course of the investigation into the fight, Deputy Jennifer Bauer and other police officers searched the automobile of a woman who had been arrested for an outstanding warrant. The police found bullets in the car and a clip for a gun wedged under a tire. This discovery led them to believe that there was a weapon in the park. Deputy Bauer was then told by the woman who had been arrested that Pao V. had been seen with a weapon earlier that day. Deputy Bauer placed Pao V. under

[2] This is a one judge appeal pursuant to WIS. STAT. § 752.31(3). Pao V. has requested that this matter be published. Pursuant to WIS. STAT. § 809.23(4)(b), no request for publication can be made in a decision by one court of appeals judge under § 752.31(2).

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

arrest for underage drinking and searched him. She also handcuffed him with his hands behind his back. Deputy Bauer estimated that she placed Pao V. under arrest approximately one hour after her arrival at the park. She then began interviewing Pao V. about the existence and the location of a gun. She estimated that she began talking to him about the weapon about fifteen to thirty minutes after he was placed under arrest and handcuffed. Before engaging Pao V. in a conversation about the missing gun, Deputy Bauer failed to read Pao V. his ***Miranda*** rights. In fact, Pao V. was not read his ***Miranda*** rights until he was taken to the sheriff's department later that night.

¶3 Pao V. first denied that he had a gun. Under continual questioning by Deputy Bauer, Pao V. admitted that he had had a weapon in his waistband earlier in the day, but he claimed that he had dropped it. Deputy Bauer then directed another officer to the location where Pao V. claimed he dropped the weapon. Deputy Bauer stated that she remained with Pao V. while the other officer looked for the gun. Not only did Deputy Bauer stay with Pao V., but she also testified that she physically held onto Pao V. almost the entire time they were in the park. When no weapons were found during this search, Deputy Bauer again began questioning Pao V. about the location of the missing weapon. She testified that two hours had passed since the initial arrest and that the park was dark. At this time, the only people left in the park were approximately eight police officers and Pao V. The deputy claimed that she urged Pao V. to tell her where the gun was located because she was concerned that children coming to the park to play might find it and hurt themselves. She also stated that, although she promised Pao V. nothing, she did tell him that if he cooperated with the police in finding the weapon, she would tell the district attorney who would be issuing him a citation for the underage drinking about his cooperation. She never told Pao V., however,

that he would be placed under arrest for possession of a weapon if one was found. Pao V. finally confessed to having hidden two weapons and he took the police to the place in the park where the weapons were hidden.

¶4 Pao V. was then transported to the sheriff's department, where his ***Miranda*** rights were read to him for the first time. The police reports reflect that this occurred at 11:17 p.m., about four hours after the arresting officer arrived at the park. Pao V. then gave a statement to the police admitting to what he had told the police in the park earlier. The police concluded their interrogation at 1:00 a.m. Pao V.'s parents were not contacted prior to this time.

¶5 Pao V. was charged with two counts of possession of a dangerous weapon and two counts of carrying a concealed weapon. He brought a motion to suppress his statements and the weapons. The Waukesha trial court held an evidentiary hearing. The trial court stated, "I'll find that all of the answers and information provided by the juvenile to the authorities was done voluntarily considering the circumstances." The trial court then adjourned the matter and asked for briefs on the question of whether the public safety exception as set forth in ***New York v. Quarles***, 467 U.S. 649 (1984), applied. Later, the trial court ruled that the ***Quarles*** holding applied to the facts presented here. The trial court then denied the motion to suppress.

¶6 Following the trial court's decision, Pao V. moved to change venue to Milwaukee County. The trial court granted this motion. On January 21, 1999, the Milwaukee County Circuit Court entered an order finding Pao V. delinquent for possessing armed and dangerous weapons. The trial court ordered Pao V.

placed under the supervision of the Milwaukee County Department of Human Resources for one year.[4]

Standards of Review

¶7 When reviewing the trial court's findings of evidentiary or historical facts, this court will not upset those findings made by the trial court unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Mazur***, 90 Wis. 2d 293, 309, 280 N.W.2d 194, 201 (1979). However, when this court reviews the trial court's determination of constitutional questions, it conducts an independent review. *See* ***id.*** at 309-10, 380 N.W.2d at 201. After a review of the record, this court accepts the trial court's determinations of historical fact, as the findings are not against the great weight or clear preponderance of the evidence. However, this court has reviewed those facts independently in determining that Pao V.'s constitutional rights were violated.

## II. ANALYSIS.

*A. Public safety exception.*

¶8 The trial court found that the failure to advise Pao V. of his constitutional rights did not render his statements inadmissible under the narrow public safety exception first enunciated in ***Quarles***. Pao V. does not argue that the

[4] This judgment was later amended on March 25, 1999, placing Pao V. in the correctional facility at Ethan Allen School for one year. This placement was then stayed, and Pao V. was placed under the supervision of the Milwaukee County Department of Human Services for one year, expiring January 21, 2000.

failure to advise him of his ***Miranda*** rights renders his statements inadmissible.[5] Instead, Pao V. asserts that his incriminating statements were not knowingly, voluntarily or intelligently given. The State contends in its brief that "Pao concedes that officers did not commit a violation of the prophylactic rules enunciated in Miranda." The State is wrong. The officers did violate the ***Miranda*** directive by asking Pao V. questions after his arrest without first advising Pao V. of his ***Miranda*** rights. Thus, the question remains as to whether the officers were excused from giving Pao V. the ***Miranda*** warnings under the public safety exception. As a result, a brief discussion of the public safety exception is warranted.

¶9 As noted, the United States Supreme Court directed in ***Miranda*** that all persons in custody must be advised of certain rights that spring from the Fifth Amendment right not to incriminate oneself. The United States Supreme Court first recognized the public safety exception to the admission of a statement given without ***Miranda*** rights in ***New York v. Quarles***. The facts in ***Quarles*** are quite different from those presented here. In ***Quarles,*** a woman reported to the police that she had been raped by a man with a gun who just entered a nearby supermarket. The police went into the store where an officer "quickly spotted" the perpetrator, Benjamin Quarles, who matched the description given by the victim. When Quarles saw the officer, he turned and ran towards the back of the store. After losing sight of him momentarily, the pursuing officer regained sight of him and ordered him to stop. After he was stopped and handcuffed, a frisk of

[5] Although no case has specifically extended the ***Miranda*** holding to juveniles, this court will assume that the holding in ***Miranda*** applies to Pao V. *See* ***Fare v. Michael C.***, 442 U.S. 707, 717 n.4 (1979) (the Supreme Court assumed without deciding that the ***Miranda*** rights extended to juveniles).

Quarles's person revealed that his shoulder holster was empty. The officer immediately asked him where the gun was, resulting in Quarles nodding his head in the direction of some empty cartons where the gun was found. Thereafter, Quarles was advised of his ***Miranda*** rights.

¶10 After being charged with criminal possession of a weapon, Quarles sought to exclude both the statement and the gun, claiming that he was clearly in custody and, as a result, before being questioned he should have been advised of his ***Miranda*** rights. The United States Supreme Court declared that the statement and the weapon were both admissible because, under these narrow facts, the public's safety outweighed the giving of the ***Miranda*** warnings before asking Quarles about the gun's location. *See* ***Quarles***, 467 U.S. at 651. In so finding, the Supreme Court reasoned that "[t]he prophylactic Miranda warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" ***Id.*** at 654 (quoted source omitted). The Supreme Court was quick to note, however, that no claim was ever made in ***Quarles*** that Quarles's statements were "actually compelled by police conduct which overcame his will to resist." ***Id.*** Thus, ***Quarles*** stands for the proposition that in certain limited circumstances, the failure to give ***Miranda*** warnings will not render a statement inadmissible if the immediate safety of the public requires the retrieval of a dangerous weapon. Although the holding excuses the police from the recitation of the ***Miranda*** warnings, it does not abrogate the Fifth Amendment protection against self incrimination.

¶11 Unlike ***Quarles***, Pao V. contends that his statement was "actually compelled by police conduct which overcame his will to resist." Thus, before deciding whether Pao V.'s statement falls within the public safety exception, this

court must address whether Pao V.'s statement was voluntary and made knowingly and intelligently.

*B. The totality of the circumstances test.*

¶12 In determining whether Pao V. knowingly, intelligently and voluntarily waived his right against self-incrimination, this court is required to apply a totality of the circumstances test. *See* ***Fare v. Michael C.***, 442 U.S. 707, 724-25 (1979). Relevant factors to be considered include the juvenile's age, experience, education, background, intelligence and the capacity to understand the warnings given, the nature of his fifth amendment rights, and the consequences of waiving those rights. *See* ***id.*** at 725. Additional factors to consider when deciding whether a statement is knowingly, intelligently and voluntarily given include an examination of "evidence of inherently coercive tactics, either in the nature of police questioning or in the environment in which the questioning took place." ***State v. Kiekhefer***, 212 Wis. 2d 460, 471, 569 N.W.2d 316, 323 (Ct. App. 1997). The state bears the burden of proving beyond a reasonable doubt that an accused has knowingly, intelligently and voluntarily waived his right to remain silent. *See* ***State v. Woods***, 117 Wis. 2d 701, 722, 345 N.W.2d 457, 468 (1984). After applying the test, this court concludes that the State has failed to meet its burden of proof.

¶13 It is undisputed that Pao V. was under arrest and he was not read his ***Miranda*** rights when he gave his first incriminating statement to the police. At the evidentiary hearing, Pao V. claimed to lack the ability to understand and read English and he testified through an interpreter. In its decision, the trial court found that Pao V., who had been in the United States for only three years at the time of his arrest, and who had spoken English for only three years, understood the

officer's questions. Despite his speaking English for a short period of time, it is apparent from reading both Deputy Bauer's and Pao V.'s testimony that Pao V. understood the officers' questions in the park. This is so because Pao V.'s responses were appropriate to the questions asked of him. The trial court further concluded that the officers made no threats or promises to him and that he was not coerced. This court will accept the trial court's findings of fact that no threats or promises were made because the findings are not against the great weight or clear preponderance of the evidence; however, whether Pao V. was coerced is a legal question which this court determines independently. *See* ***Kiekhefer***, 212 Wis. 2d at 470, 569 N.W.2d at 323.

¶14 Other facts testified to at the hearing that impact the totality of the circumstances test include that Pao V. was fourteen years of age at the time of his arrest and had not had any previous experience with the police and, at the time of this incident, he had completed the eighth grade and was enrolled to begin high school.

¶15 Using these factors and applying the totality of the circumstances test, this court concludes that Pao V.'s statements were not the product of a free and unconstrained choice. The factors supporting this conclusion are that: (1) Pao V. was an unsophisticated fourteen-year-old who had only been in this country for three years; (2) Pao V. was arrested in a park in the late evening and immediately handcuffed. A police officer physically held onto Pao V. or stood near him the entire time he was in the park. While his companions were either permitted to leave or were arrested and taken away, Pao V. remained in the dark park; (3) The record supports Pao V.'s contention that this was his first encounter with the police and, therefore, an assumption can be made that he had never before been advised of his constitutional rights; (4) The State failed to establish that

Pao V. knew that he was under no obligation to answer the questions asked of him in the park by the police; (5) The only people in the park were law enforcement personnel, including one who had a dog; and (6) The length of time he was questioned leads to the conclusion that Pao V. was intimidated into giving a statement. The arresting officer admitted questioning him continually for several hours. Further, the facts strongly suggest that Pao V. felt he was compelled to answer or risk remaining in the park until the guns were actually located.

¶16 Moreover, Pao V.'s early denial of having a gun also supports his contention that he did not want to voluntarily incriminate himself. When he first refused to answer questions about the gun's whereabouts, the questioning persisted. When he finally told them he had had a gun earlier and had dropped it, the officer testified she did not believe him and continued to question him. Insinuating that interrogation will continue until the police obtain the information they want is inherently coercive. *See* ***Minnesota v. Murphy***, 465 U.S. 420, 433 (1984). Here, Pao V. waited over two hours after his arrest before he confessed to possessing the guns and took the police to their location in the park.

¶17 Under the totality of the circumstances, this court concludes that Pao V. did not knowingly, intelligently, and voluntarily decide to incriminate himself. As a consequence of this ruling, a discussion of the public safety exception is unnecessary.

C. *The weapons and the second statement made after Miranda warnings must be suppressed.*

¶18 Pao V. argues that if this court agrees that his statement given in Nagawaukee park was not knowing and voluntary, then the guns and the second statement given after the ***Miranda*** warnings must also be suppressed. In its initial

decision, the trial court determined that if the statement given at the park had to be suppressed, then the statement given at the sheriff's department had to be suppressed because there were no intervening circumstances. This court agrees and further determines that the weapons must also be suppressed.

¶19 Under the doctrine enunciated in ***Wong Sun***, there must be sufficient attenuation between the improper police conduct and the resulting search.

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

***Wong Sun***, 371 U.S. 485 (quoted source omitted).

¶20 Furthermore:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Maguire, EVIDENCE OF GUILT, 221 (1959) (excerpt from ***Wong Sun***, 371 U.S. at 485). Here, the improper police coercion led directly to the seizing of the weapons. No reasonable argument can be made that the guns were not "the fruit of the poisonous tree."

¶21 Determining whether Pao V.'s statement, given at the sheriff's department after the administering of ***Miranda*** warnings, is admissible requires that this court "examine 'the time that passes between the confessions, the change in place of interrogations, and the change in identity of the interrogators' to decide whether that coercion carried over into the second warned confession.'" ***Kiekhefer***, 212 Wis. 2d at 474, 569 N.W.2d at 325 (quoted source omitted). Here, the only time that transpired between the questioning at the park and the later questioning at the sheriff's department was the time it took to transport Pao V. there. Although the location changed, as did the interrogator, the time element is key to the determination. Almost no time elapsed from the earlier coerced statement.

¶22 The State cites ***Oregon v. Elstad***, 470 U.S. 298, 314 (1985), as support for its position that the second statement given after the ***Miranda*** rights were recited to Pao V. is admissible. Unlike the facts in ***Elstad,*** however, here this court has found that the police tactics were coercive. Thus, the ruling in ***Elstad*** does not apply and the second statement must be suppressed. Accordingly, this matter is remanded to the circuit court with directions that orders be entered consistent with this opinion.

*By the Court*.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.