No. 25343 - In Re: James L. P. and State of West Virginia v. James L. P.

Starcher, Chief Justice, dissenting:

For purposes of deciding the instant case, I am willing to agree with the majority's basic proposition -- that the circuit court could permissibly conclude (from the evidence at the transfer hearing) that the appellant was probably embellishing and fabricating, to bolster his case that he was in effect "under arrest" when he left his school with the police.

The majority then, upon finding that the circuit court could credit the police version of events, holds that -- under those facts -- the circuit court could conclude that the appellant was not "under arrest" or "in custody."

This is where I part company from the majority. Assuming that the police version of events was accurate, I would still say that the appellant was both "in custody" and in effect "under arrest," when he left school with the police.

Here is a likely scenario that is entirely consistent with the police testimony. In the principal's office, the police said to the appellant, "We want to ask you some questions about an incident we are investigating. We'd like you to come down to the police station and talk to us about it. OK?"

The appellant replied, "OK." He then accompanied the police to the station, freely, with no gripping by the arms, no requests for his mother, etc.

The question we must ask is: would a reasonable 17-year-old, under these circumstances, have felt free to say "no" to the police request?

According to the police version of events, the appellant was affirmatively told that he was "free to go" -- but he was told this *only when he got to the police station*. Where was he supposed to go then -- out the station house door for a several-mile hike back to school?

In order to support their conclusion that the appellant was in effect not under arrest or in custody when he left the school with the police, the majority has to believe that a reasonable high-school senior in the appellant's shoes would have felt feel free to say "no" at the principal's office to the police request that he accompany them. *See* Syllabus Point 3, in part, *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989).

But I don't see any evidence to support such an improbable belief. Common sense tells me that like any other reasonable high-school senior in the same situation, the appellant went with the police because, based on the objective circumstances, he felt that he *had* to do as they asked. *Certainly no one had told him differently.* Juveniles aren't just "free" to leave school in the middle of the day whenever they want, with anyone who shows up. They have to be in someone's custody, or the school isn't supposed to let them go.

Thus, because the evidence at the transfer hearing, viewed in the light most favorable to the prosecution, tended to show that the appellant's confession was the product of either an illegal *de facto* arrest without probable cause, or alternatively was obtained after the appellant was in police custody without being promptly presented to a magistrate or having a chance to consult with his parents or guardian, under our

established law, the circuit court should have ruled that the confession was, on the evidence presented, inadmissible.

I would vacate the transfer order, because it was based on the appellant's confession, and remand the case for further proceedings. But I would also allow the prosecution and the defense on remand to put on further evidence -- say from the principal, and from Kiva H. -- to try to more accurately establish what actually happened before the appellant left school with the police. The circuit court should know, for example, how and why the principal appears to have violated a specific policy requiring that the police present a warrant before removing a student from school.

Of course, these and other factual issues regarding the circumstances leading up to the appellant's confession may still be addressed at the appellant's criminal trial in the circuit court's adult jurisdiction, if there is one.[1]

I am authorized to state that Justice McGraw joins me in this dissent.

[1]The instant case, like many "confession suppression" cases, reflects a tension that often exists in criminal investigations. The police, for good reasons, strongly want to do their job of solving crimes and bringing the perpetrators to justice.

But our Bill of Rights and our statutory law, for equally good reasons, draw a number of lines around police conduct -- lines that sometimes make it harder to get evidence about a crime. These lines include the protections that we afford to juveniles, particularly those who are in police custody.