Gordon D. Schaber Competition

2023-24

Moot Court

Spencer Owens v.

The State of Placerado

FACT

Situation

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

--oOo--

SPENCER OWENS, a Minor, Petitioner & Appellant, vs. The State of Placerado, Respondent & Appellee.	Case No.: 2023-501 FACTS

The following facts were revealed during petitioner's trial:

At the start of the 2022-23 school year, the Placerado Legislature passed and the Governor signed sweeping education reform under State Bill 23 (SB 23) setting new standards for school curriculum throughout the state. The legislative reports contain the official summaries of arguments for and against the bill. In the reports, the proponents of SB 23 stated that the purpose of the bill was to increase civic unity and participation by eliminating lesson plans that portray any racial or religious group in a disparaging light. The proponents stated that SB 23 did not seek to silence the facts of history but sought to eliminate feelings of blame and shame upon students who are generations removed from

wrongdoing. Further, many historical texts and literary fiction include descriptions of people from oppressed groups based on dated stereotypes that have never been accurate and, more importantly, have no place in modern discourse. With passage of SB 23, the proponents of the bill hoped to celebrate the best of all cultures and educate students in neutral and fact-based ways so those students could comfortably work together to build a better future.

Opponents of SB 23 disputed that the bill would unite society and instead argued the bill served to rewrite history and silence views from historically oppressed groups. SB 23 passed with overwhelming support from the Placerado Legislature. The final bill included a penalty provision added to gain support of parental rights groups after an initial draft left loopholes for clubs and school-related groups to provide prohibited content to students. As a result, SB 23 included a penalty provision, which stated that "no person may provide content prohibited by SB 23 to a student in a public school without the consent of that student's parent or guardian. A person who provides such content is guilty of a misdemeanor."

The Placerado City School District (School District) implemented the Legislature's required changes to its curriculum. Most school districts and county libraries throughout the state complied with SB 23's penalty provision by implementing a process for parental consent. Others, like the School District, removed books from their libraries they believed negatively portrayed racial and religious groups.

To determine which books should be removed, the School District utilized its preexisting book review committee made of four

administrators, four teachers, four parents, and two students. The book review committee reviewed the titles of all the books in the library and selected from those titles books it wished to review. Committee members were provided with the publisher's summary of each book. All the members of the committee indicated they had read all the summaries but did not read many of the books contained on the list. The book review committee recommended to the School District's Board numerous books to remove from the School District's libraries, including some books committee members had not read. The Schools District's Board approved the book review committee's recommendations and removed all the recommended books from the School District's libraries. At the Board meeting adopting the book review committee's recommendations, the School Board members stated they adopted the recommendations to implement the State of Placerado's goal to unite the community so it could build a better future.

The parties agreed to a summary of books as constituting a fair representation of the books removed from the libraries. These books include:

1) Contemporary young adult novels such as, Angie Thomas' *The Hate You Give*, Samira Ahmed's *Internment*, and Romina Garber's *Lobizona*. The book review committee described these books as being divisive and portraying Caucasian Americans as the source of racial oppression.

2) Historical novels such as Mark Twain's *The Adventures of Tom Sawyer* and *The Adventures of Huckleberry Finn*, Margaret Mitchell's *Gone With the Wind*, and J.M. Barrie's *Peter Pan*. The book review

committee described these books as using outdated terms and stereotypes disparaging of oppressed racial groups.

3) International literature, such as Khaled Hosseini's *The Kite Runner* and *A Thousand Splendid Suns*, as well as Chinua Achebe's *Things Fall Apart*. The book review committee described these books as negatively portraying other nationalities and cultures, such that the books undermine unification goals advanced by SB 23.

4) High school classics that had been removed from the curriculum, such as Maya Angelou's *I Know Why the Caged Bird Sings*, Nathaniel Hawthorne's *The Scarlet Letter*, and Ralph Ellison's *Invisible Man*. The book review committee described these books as being outdated commentaries on society that had the effect of disparaging religious and racial groups for practices that were no longer common.

Following removal of the books and the start of the school year, Placerado High School administrators began receiving calls from parents about their children being found in possession, without parental consent, of books removed from the school's library. After several weeks of complaints, the Placerado High School administrators referred the case to the Placerado City Police Department, which initiated an investigation. After several months of investigating, and repeated complaints from parents, police officers were able to trace the underground book dealing to a social media account. Students could request books from the social media account and the books would be dropped off at several drop-off locations around town. While the officers could not trace the account to any individual, they were able to initiate several book deals on their own. Officers, however, were never able to

identify the book dealer and the underground book dealing continued throughout the school year, frustrating school administrators and local parents.

On prom night, Placerado City Police Officer Blake Acton was assigned to the gymnasium at Placerado High School to provide general public safety services, such as crowd control and crime deterrence. Because Officer Acton was on duty, he was dressed in his police uniform and armed with a department-issued handgun. Sophomore Spencer Owens was 15 years old at the time and a member of the student government committee organizing prom. Spencer was also a star athlete on both the football and baseball teams, as well as a B-average student. As a member of the prom committee, Spencer was assigned to the check-in table at the front door. Spencer knew Officer Acton because Officer Acton was the father of Spencer's childhood friend and had coached Spencer's baseball team every year since he was five years old. Spencer used to spend a lot of time at Officer Acton's house, but since his parents divorced a few months ago, Spencer moved, and his life had changed dramatically.

Prom night began with Spencer and Officer Acton facilitating the check-in process. The two talked with one another about everyday matters but the conversation quickly turned to Spencer. Officer Acton asked how Spencer was transitioning to life in a new house. Spencer gave short answers and avoided eye contact. Officer Acton prodded Spencer over the course of ten minutes, asking him about his life and making references to Spencer's parent's divorce. Spencer eventually became emotional and angry and talked to Officer Acton about how his life was

different since moving. Spencer said he was struggling to keep up in school and with sports, and that he felt like his parents did not care about him. Spencer said that his parents were never around, and he could do anything he wanted throughout the day.

With encouragement from Officer Acton to share his feelings, Spencer's complaining about his parents became complaining about adults in general. He said he was tired of waiting for adults to make the world a better place because they always failed at it. Spencer pointed to the School District's decision to remove books from the library as an example. He said that the administration and parents were delusional if they thought removing the books would stop minors from reading them. In fact, Spencer had bought all the books on the removal list on the internet. Spencer said that it was time for students to take matters into their own hands and make a dramatic statement even if there were personal consequences.

Officer Acton told Spencer that he needed to be careful about what he was doing, and that Spencer would have his own chance to change the world someday. But for now, Spencer needed to work towards college and a stable career. Officer Acton told Spencer that he did not want to see him ruin his future because he was going through a hard time. Spencer was silent. Officer Acton could tell Spencer wanted to get something off his chest, so Officer Acton invited Spencer to join him somewhere more private for the two of them to talk. Officer Acton ushered Spencer to the administration building, which was located next to the gymnasium. There was nobody in the administration building when the two entered and the lights were turned off. Officer Acton turned on the lights in the

reception area of the building and then walked with Spencer behind the reception desk and to the principal's office located directly behind it. Officer Acton turned on the lights in the principal's office and left the door open.

Officer Acton and Spencer sat on the two chairs placed next to each other in front of the principal's desk. Officer Acton told Spencer that it sounded like Spencer was having a really hard time and that it was better if he talked about it. For over 15 minutes, Spencer and Officer Acton again talked about Spencer's parents' divorce and Spencer's difficult transition. Spencer told Officer Acton that he wished his parents would focus more on him instead of themselves. Officer Acton asked Spencer if that was why he became interested in the book removal issue and wanted to do something dramatic. Spencer appeared nervous. Officer Acton told Spencer it was going to be okay, and that Spencer would feel better after he talked about it. Spencer remained silent for several minutes.

Officer Acton confronted Spencer with his admissions that he bought all the books on the removal list after they were removed by the School District and that he wanted to take matters in his own hands. Officer Acton told Spencer those admissions were very incriminating statements when considering an underground book dealer was giving minors prohibited books all around town. Officer Acton saw Spencer look toward the principal's office door and told Spencer to focus on their conversation. Officer Acton encouraged Spencer to be responsible and mature and own up to his actions. Officer Acton also told Spencer that the truth always came out and that Spencer needed to make everything

right before he ruined his future prospects and disappointed his family. Spencer then confessed to Officer Acton that he was the underground book dealer.

Officer Acton responded by telling Spencer that the conversation had obviously turned more serious. He told Spencer that Spencer needed to remember that Officer Acton was a police officer and anything Spencer said could lead to consequences. Officer Acton then asked Spencer whether he wanted to continue talking with him or call his parents to talk about everything. Spencer said he was scared he was going to get in trouble even though the School District's book removal decision was wrong. Officer Acton told Spencer that the worst was over because Spencer had already admitted to being the underground book dealer. Now Spencer needed to cooperate and show this was a mistake and not Spencer being a bad kid. Spencer began crying.

Officer Acton gave Spencer a hug and told him it was going to be okay and to take his time. After about five minutes, Spencer calmed down and told Officer Acton he was feeling better and wanted to get fresh air. Officer Acton walked with Spencer outside and continued to ask him questions about the underground book dealing. While standing outside, Spencer told Officer Acton how he communicated with and left books for students without being detected.

As a result of this confession, Spencer was charged with 15 misdemeanor counts under SB 23. The prosecution was not able to link the underground book dealer's social media account to Spencer through expert means. Instead, the prosecution relied solely on Spencer's confession to Officer Acton when arguing for Spencer's guilt. A jury found

Spencer guilty of all 15 misdemeanor counts, and the trial court sentenced him to three years of probation. Spencer's state appeals were unsuccessful.

Spencer filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Placerado, alleging he is unlawfully confined by his probationary terms in violation of the United States Constitution. Specifically, Spencer argues the government violated his privilege against self-incrimination by admitting his un*Mirandized* and involuntary confession into evidence at trial. He also contends his convictions under SB 23 violate his right of free speech as a matter of law. After argument from the parties, the district court denied Spencer's petition. Spencer has appealed to the United States Court of Appeals for the Fifth Circuit. Three issues are now pending before the Fifth Circuit:

1. Did the district court err by concluding Spencer was not in custody for the purposes of *Miranda* before confessing that he was the underground book dealer?
2. Did the district court err by concluding Spencer's confession was voluntarily made under the Fifth Amendment?
3. Did the district court err in concluding SB 23 did not violate Spencer's free speech rights under the First Amendment as a matter of law?

LIBRARY

Cases edited for length & content

86 S.Ct. 1602
Supreme Court of the United States

Ernesto A. MIRANDA, Petitioner,
v.
STATE OF ARIZONA.
Michael VIGNERA, Petitioner.
No. 759.
|
Argued Feb. 28, 1966.
|
Decided June 13, 1966.

Opinion

Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

I.

The constitutional issue we decide in each of the cases presented is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

The modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since Chambers v. State of Florida, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. State of Alabama, 361 U.S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

Police manuals generally prescribed the same interrogation techniques. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. This fact may be illustrated simply by referring to three confession cases decided by this Court. In Townsend v. Sain, 372 U.S. 293, (1963), the defendant was a 19-year-old heroin addict, described as a 'near mental defective,' id., at 307-310. The defendant in Lynumn v. State of Illinois, 372 U.S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to 'cooperate' in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in Haynes v. State of Washington, 373 U.S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney. In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In Miranda v. Arizona, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In Vignera v. New York, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an

inculpatory statement upon being questioned by an assistant district attorney later the same evening. In Westover v. United States, the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in California v. Stewart, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to ensure that the statements were truly the product of free choice.

II.

There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We conclude that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Our holding is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

131 S.Ct. 2394
Supreme Court of the United States

J.D.B., Petitioner,
v.
NORTH CAROLINA.

No. 09–11121.
|
Argued March 23, 2011.
|
Decided June 16, 2011.

Justice SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona,* 384 U.S. 436 (1966). It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

I

Petitioner J.D.B. was a 13–year–old, seventh-grade student attending class when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police questioned J.D.B. after he was seen near a house in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother—his legal guardian.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and seen in J.D.B.'s possession. Investigator DiCostanzo went to the school to question J.D.B. Upon arrival, DiCostanzo informed the school's resource officer and the assistant principal that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and parent contact information, neither the police officers nor the school administrators contacted J.D.B.'s grandmother.

The uniformed officer interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo and the assistant principal. The door to the conference room was closed. With the two police officers and the administrator present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor an opportunity to speak to his grandmother. He was not informed that he could leave.

Questioning began with small talk—discussion of sports and J.D.B.'s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to "do the right thing," warning J.D.B. that "the truth always comes out in the end."

Eventually, J.D.B. asked whether he would "still be in trouble" if he returned the "stuff." In response, DiCostanzo explained that return of the stolen items would be helpful, but "this thing is going to court" regardless. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court."

After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement. When the bell rang indicating the end of the schoolday, J.D.B. was allowed to leave.

J.D.B. was charged with one count of breaking and entering and one count of larceny. J.D.B.'s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J.D.B. had been "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]." The North Carolina Supreme Court held, over two dissents, that J.D.B. was not in custody when he confessed, "declin[ing]

to extend the test for custody to include consideration of the age ... of an individual subjected to questioning by police." *In re J.D.B.,* 363 N.C. 664, 672, 686 S.E.2d 135, 140 (2009).

We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age. 562 U.S. 1001 (2010).

II

A

Any police interview of an individual suspected of a crime has "coercive aspects to it." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) *(per curiam)*. Only those interrogations that occur while a suspect is in police custody, however, "heighte[n] the risk" that statements obtained are not the product of the suspect's free choice. *Dickerson v. United States,* 530 U.S. 428, 435 (2000).

By its very nature, custodial police interrogation entails "inherently compelling pressures." *Miranda,* 384 U.S., at 467. Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely." *Ibid*. Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States,* 556 U.S. 303, 321, (2009) That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," *Dickerson,* 530 U.S., at 435, this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S., at 444. And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a "prerequisit[e]" to the statement's admissibility as evidence in the Government's case in chief, that the defendant "voluntarily, knowingly and intelligently" waived his rights. *Miranda,* 384 U.S., at 444, 475–476; *Dickerson,* 530 U.S., at 443–444.

Because these measures protect the individual against the coercive nature of custodial interrogation, they are required " 'only where there has been such a restriction on a person's freedom as to render him "in custody." ' " *Stansbury v. California,* 511 U.S. 318, 322 (1994) *(per curiam)* (quoting *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) *(per curiam)*). As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Thompson v. Keohane,* 516 U.S. 99, 112 (1995).

Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to "examine all of the circumstances surrounding the interrogation," *Stansbury,* 511 U.S., at 322, including any circumstance that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *id.,* at 325. On the other hand, the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant. *Id.,* at 323. The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning. *Alvarado,* 541 U.S., at 667; see also *California v. Beheler,* 463 U.S. 1121, 1125, n. 3 (1983) *(per curiam)*.

The benefit of the objective custody analysis is that it is "designed to give clear guidance to the police." *Alvarado,* 541 U.S., at 668. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind. See *id.,* at 430-431 (officers are not required to "make guesses" as to circumstances "unknowable" to them at the time); *Alvarado,* 541 U.S., at 668 (officers are under no duty "to consider ... contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights").

B

The State contends that a child's age has no place in the custody analysis, no matter how young the child subjected

to police questioning. We cannot agree. In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury,* 511 U.S., at 325. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child's age is far "more than a chronological fact." *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982). It is a fact that "generates commonsense conclusions about behavior and perception." *Alvarado,* 541 U.S., at 674 (BREYER, J., dissenting). Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," *Eddings,* 455 U.S., at 115-116; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird,* 443 U.S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to ... outside pressures" than adults, *Roper,* 543 U.S., at 569; and so on. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio,* 332 U.S. 596, 599 (1948) (plurality opinion) Describing no one child in particular, these observations restate what "any parent knows"—indeed, what any person knows—about children generally. *Roper,* 543 U.S., at 569.

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, *e.g.,* 1 W. Blackstone, Commentaries on the Laws of England *464–*465 (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like this Court's own generalizations, the legal disqualifications placed on children as a class—*e.g.,* limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered. Restatement (Third) of Torts § 10, Comment *b,* p. 117 (2005).

As this discussion establishes, "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *Eddings,* 455 U.S., at 115-116. We see no justification for taking a different course here.

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. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. Cf. *Alvarado,* 541 U.S., at 665 (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age was not unreasonable where the defendant "was almost 18 years old at the time of his interview"). It is, however, a reality that courts cannot simply ignore.

* * *

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

668 F.3d 190
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellant,
v.
Michael Angelo CAVAZOS, Defendant–Appellee.

No. 11–50094.
|
Jan. 19, 2012.

BENAVIDES, Circuit Judge:

This appeal is brought by the United States of America (the "Government") to reverse the district court's order suppressing certain incriminating statements made by Defendant Michael Angelo Cavazos ("Cavazos"). We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 2010, between 5:30 a.m. and 6:00 a.m., Cavazos woke to banging on his door and the shining of flashlights through his window. U.S. Immigration and Custom Enforcement ("ICE") Agents, assisted by U.S. Marshals, Texas Department of Public Safety personnel, and Crane Sheriff's Department personnel, were executing a search warrant on Cavazos's home. The warrant was issued on the belief that Cavazos had been texting with a minor female. After Cavazos's wife answered the door, approximately fourteen law enforcement personnel entered Cavazos's residence.

Immediately upon entering, government agents ran into Cavazos's bedroom, identified him, and handcuffed him as he was stepping out of bed. Agents then let Cavazos put on pants before taking him to his kitchen. Cavazos's wife and children were taken to the living room. Cavazos remained handcuffed in the kitchen, while the entry team cleared and secured the home for approximately five minutes.

Once the house was secured, agent Tarango asked Cavazos if there was a private room in which they could speak. Cavazos suggested his son's bedroom. In the bedroom, Cavazos sat on the bed while the two agents sat in two chairs facing him. The agents asked Cavazos if he wanted the door open, but Cavazos said to keep the door closed. Agents Mitchell and Tarango informed Cavazos that this was a "non-custodial interview," that he was free to get something to eat or drink during it, and that he was free to use the bathroom. The agents did not read Cavazos his *Miranda* rights.

About five minutes into the initial interrogation, Cavazos asked to use the restroom. The agents allowed Cavazos to use the restroom but accompanied him in doing so. Cavazos then returned to his son's bedroom, where agents were interrupted several times to obtain clothing to dress Cavazos's children.

The interrogation continued and at some point, Cavazos asked to speak with his brother, who was his supervisor at work. The agents brought Cavazos a phone and allowed him to make the call, instructing Cavazos to hold the phone so that the agents could hear the conversation. Cavazos told his brother that he would be late for work.

Finally, the agents asked Cavazos if he had been "sexting" the victim. Cavazos allegedly admitted that he had, and also described communications with other minor females. After the interrogation was over, Cavazos agreed to write a statement for the agents in his kitchen. While Cavazos began writing the statement, an agent stood in the doorway and watched him.

Cavazos wrote his statement for approximately five minutes before agents Mitchell and Tarango interrupted him. At that point the agents formally arrested Cavazos and read him his *Miranda* rights. From beginning to end, the interrogation of Cavazos lasted for more than one hour, and the agents' conduct was always amiable and non-threatening. Subsequently, Cavazos was indicted for coercion and enticement of a child, and for transferring obscene material to a minor.

Cavazos moved to suppress the statements he made before he was read his *Miranda* rights. The motion was granted. Thereafter, pursuant to 18 U.S.C. § 3731, the Government filed this appeal of the district court's order.

ANALYSIS

"*Miranda* warnings must be administered prior to 'custodial interrogation.' " *United States v. Bengivenga,* 845 F.2d 593, 595 (5th Cir.1988). "A suspect is ... 'in custody' for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Id.* at 596. "Two

discrete inquires are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *J.D.B. v. N. Carolina,* —— U.S. ——, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011). "The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *Bengivenga,* 845 F.2d at 596.

A determination of whether a defendant is "in custody" for *Miranda* purposes depends on the "totality of circumstances." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). "[T]he subjective views harbored by either the interrogating officers or the person being questioned are irrelevant." *J.D.B.,* 131 S.Ct. at 2402 (internal quotation marks omitted).

Here, the totality of circumstances, drawn from the record as seen in the light most favorable to Cavazos, indicates Cavazos was in custody at the time he made his incriminating statements. Just after 5:30 a.m., Cavazos was awakened from his bed, identified and handcuffed, while more than a dozen officers entered and searched his home; he was separated from his family and interrogated by two federal agents for at least an hour; he was informed he was free to use the bathroom or get a snack, but followed and monitored when he sought to do so; and he was allowed to make a phone call, but only when holding the phone so that the agents could overhear the conversation. An interrogation under such circumstances, and those others discussed above, would lead a reasonable person to believe that he was not "at liberty to terminate the interrogation and leave," *J.D.B.,* 131 S.Ct. at 2402, notwithstanding the fact that the interrogation occurred in his home and he was informed the interrogation was "non-custodial."

In arguing *Miranda* warnings were not necessary, the Government relies on the fact that Cavazos was interrogated in his own home, a fact which, taken alone, lessens the likelihood of coercion. *See United States v. Fike,* 82 F.3d 1315, 1325 (5th Cir.1996). *Miranda,* however, does not allow for a simple in-home vs. out-of-home dichotomic analysis. Here, significant facts weigh against the presumption that an in-home interrogation is non-coercive: a large number of officers entered Cavazos's home, without his consent, early in the morning, and Cavazos's subsequent movement about the home was continually monitored. *See United States v. Craighead,* 539 F.3d 1073, 1085 (9th Cir.2008) (suppressing statements made during in-home interrogation where home was "a police-dominated atmosphere"); *United States v. Mittel–Carey,* 493 F.3d 36, 40 (1st Cir.2007) (finding in-home interrogation custodial where search conducted early in the morning by eight officers, and officers exercised physical control over defendant); *cf. United States v. Hargrove,* 625 F.3d 170, 181 (4th Cir.2010) (finding in-home interrogation non-custodial; noting "[the defendant] was permitted to move about his house"). Similarly, although Cavazos was allowed to speak to his brother on the phone, the agents had him position the phone in such a way that they could listen, indicating that they had sufficient control of Cavazos to require him to do so, and implying Cavazos enjoyed no privacy at that time. Also, Cavazos was immediately located and handcuffed at the start of the search, demonstrating that the agents sought out Cavazos and had physical dominion over him. *See Bengivenga,* 845 F.2d at 597 n. 16 ("The *awareness* of the person being questioned by an officer that he has become the 'focal point' of the investigation, or that the police have ample cause to arrest him, may well lead him *to conclude, as a reasonable person,* that he is not free to leave, and that *he has* been significantly deprived of his freedom ...."). While the handcuffs were removed prior to interrogation, the experience of being singled out and handcuffed would color a reasonable person's perception of the situation and create a reasonable fear that the handcuffs could be reapplied at any time. *Cf. Hargrove,* 625 F.3d at 179 (noting the defendant was "never placed in handcuffs").

The Government places significant emphasis on the fact that the agents informed Cavazos that the interview was "non-custodial." Such statements, while clearly relevant to a *Miranda* analysis, are not a "talismanic factor." *See Hargrove,* 625 F.3d at 180 (quoting *Davis v. Allsbrooks,* 778 F.2d 168, 171–72 (4th Cir.1985)). They must be analyzed for their effect on a reasonable person's perception, and weighed against opposing facts. Here, several facts act to weaken the agents' statement such that it does not tip the scales of the analysis. First, to a reasonable lay person, the statement that an interview is "non-custodial" is not the equivalent of an assurance that he could "terminate the interrogation and leave." *See J.D.B.,* 131 S.Ct. at 2402; *cf. United States v. Perrin,* 659 F.3d 718, 721 (8th Cir.2011) (noting defendant informed he "did not have to answer questions"); *Hargrove,* 625 F.3d at 180 (noting defendant informed he was "free to leave"). Second, uttered in Cavazos's home, the statement would not have the same comforting effect as if the agents had offered to "leave at any time upon request." *See*

Harrell, 894 F.2d at 125 (finding defendant was not in custody during in-home interrogation when, *inter alia,* he was informed police would leave on his request); *see also, Craighead,* 539 F.3d at 1082–83, 1088 (finding assurance defendant was "free to leave" had lessened effect when interrogation occurred in defendant's home). This is not to say that a statement by police to a defendant that an interrogation is "non-custodial" does not inform our decision as to the necessity of a *Miranda* warning when an interrogation is conducted inside the home. Instead, we recognize the "totality of circumstances" *Miranda* commands, and we note that statements made in different circumstances will have different meanings and differently affect the coercive element against which *Miranda* seeks to protect.

In engaging in the inquiry required by *Miranda,* the Court is mindful that no single circumstance is determinative, and we make no categorical determinations. Reviewing, in totality, the unique circumstances presented in the record here, in the light most favorable to Cavazos, the party prevailing below, we find a reasonable person in Cavazos's position would not feel "he or she was at liberty to terminate the interrogation and leave." *See J.D.B.,* 131 S.Ct. at 2402.

CONCLUSION

For the reasons stated above, the order of the district court is AFFIRMED.

41 F.4th 451
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellant,
v.
Braylon Ray COULTER, Defendant—Appellee.

No. 20-10999
|
FILED July 18, 2022

Edith H. Jones, Circuit Judge:

A lone police officer performed a traffic stop on Braylon Ray Coulter in the middle of the night. Having been given reason to suspect that Coulter, who revealed an aggravated robbery conviction, had a gun, the officer handcuffed him and asked where it was. Coulter answered, and the officer's partner arrived later to find a .40 caliber pistol and .37 ounces of marijuana in Coulter's backpack between the front seats of the van he drove. Before Coulter divulged that information, the officer did not provide *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). The admissibility of Coulter's unwarned statements therefore depends on whether he was "in custody" as contemplated by *Miranda* at the time he offered them.

We hold that a reasonable person in Coulter's position would not have thought that he was in custody for *Miranda* purposes. Moreover, the officer questioned Coulter in an environment that was not tantamount to a station house interrogation as contemplated by *Miranda.* All of Coulter's unwarned statements are therefore admissible. The district court's judgment suppressing those statements is REVERSED.

I. BACKGROUND

Coulter was driving an old van with "squeaky brakes" through a neighborhood at 2:41 a.m. on July 15, 2018. Officer Nino de Guzman of the Lancaster, Texas Police Department began following Coulter and discovered that the van "was registered to an address in a different city, that its registration was expired, and that it had no insurance." Officer Guzman thought Coulter might have been a burglar and decided to pull him over.

After Coulter voluntarily stepped out of the van, Officer Guzman twice asked him whether he had any guns. Coulter said "[m]m-mm" before answering no. Officer Guzman then frisked Coulter before asking him who owned the van and where he came from. Coulter replied that it belonged to his boss and that he just left work. When Officer Guzman also asked Coulter for identification, he admitted to not having any. Officer Guzman then conducted a background check and learned that Coulter's driver's license was suspended. Coulter also disclosed that he was on parole for aggravated robbery. Following that admission, Officer Guzman asked Coulter for a third time whether he had a gun. Coulter once again insisted that he did not and then added that he did not own the van. Officer Guzman inquired more broadly as to whether "anything illegal" was in the van, even as he emphasized that he did not care if Coulter had a small amount of marijuana. Without admitting to possession, Coulter conceded that he smoked marijuana in the van the week before and that morning. This admission, combined with Coulter's "suspicious behavior," gave Officer Guzman probable cause to conduct a search.

After Officer Guzman smelled marijuana emitting from the van, Coulter told Officer Guzman he "want[ed] to be real with [him]." Officer Guzman asked for a fourth time whether he had a gun, Coulter suggested that he would be "losing[ ]" by answering and that he did not "want to lose[.]" Coulter also insisted he "had people trying to kill [him] .... [and did not] want to be caught out [there] with nothing." These comments prompted Officer Guzman to inform Coulter that he was "just going to detain [him]" so that he did not "run up and grab the gun." Coulter offered to walk farther away instead, though he never moved.

Officer Guzman then instructed Coulter to turn and face his police car and handcuffed him "for officer safety." As he did so, Officer Guzman reiterated that Coulter was "[j]ust detained. That's it." He also asked Coulter whether he understood what detention meant, but Coulter did not directly respond. Officer Guzman explained that the handcuffs were necessary because he did not want to "wind up fighting with [Coulter]." Coulter said "[n]o, no, no, no[ ]" before saying that Officer Guzman was "cool." Officer Guzman then emphasized for a third time that Coulter was "just detained" and asked again whether he understood what that meant. Coulter responded "[y]eah." Officer Guzman instructed Coulter "not to pull away, because [he] did not 'want to tase [sic] [him] and do a bunch of paperwork.' " Coulter said that was "fine." Coulter then reiterated that he "want[ed] to be real with [Officer Guzman]."

After securing Coulter in handcuffs, Officer Guzman asked

him where the suspected gun was. Coulter then explicitly admitted for the first time that he had a gun in his backpack. Coulter later suggested that Officer Guzman could just take the gun and let him go. While Coulter remained handcuffed and standing in the street, a fellow officer arrived, searched the van, and located the gun along with .37 ounces (approximately 10 grams) of marijuana in his backpack. Officer Guzman then arrested Coulter.

A grand jury indicted Coulter in February 2019 for being a felon in possession of a firearm. He moved to "suppress all statements [he made] in response to the officer's questioning once he was in handcuffs." The district court granted the suppression motion."

The government filed this interlocutory appeal from the district court's judgment and the trial has been continued pending resolution of the appeal.

II. STANDARD OF REVIEW

"Custody determinations under *Miranda* present 'a mixed question of law and fact.' " *United States v. Arellano-Banuelos*, 912 F.3d 862, 868 (5th Cir. 2019)). "When considering the denial of a motion to suppress, this Court reviews factual findings for clear error and legal conclusions, including ... whether *Miranda*'s guarantees have been impermissibly denied, de novo." *United States v. Nelson*, 990 F.3d 947, 952 (5th Cir. 2021).

III. DISCUSSION

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...." "To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the *Miranda* Court held, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation." *Thompson*, 516 U.S. at 107 (citing *Miranda*, 384 U.S. at 444). "[I]f the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt." *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

Custodial interrogations that necessitate *Miranda* warnings consist of "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. "A suspect is ... 'in custody' for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Wright*, 777 F.3d 769, 774 (5th Cir. 2015)). Restraint on freedom of movement usually resembles formal arrest when, "in light of the objective circumstances of the interrogation, ... a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Howes*, 565 U.S. at 509.

The freedom-of-movement test, however, "identifies only a necessary and not a sufficient condition for *Miranda* custody." *Shatzer*, 559 U.S. at 112. That is because "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer*, 468 U.S. at 437. Courts must therefore also assess whether the environment surrounding the questioning implicated the concerns identified in *Miranda. See Howes*, 565 U.S. at 509-13 (2012); *Shatzer*, 559 U.S. at 112-14; *Berkemer*, 468 U.S. at 435-42.

Moreover, "when [the Supreme] Court creates a prophylactic rule to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs." *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009). In other words, *Miranda* represents a judicially created rule that "is justified only by reference to its prophylactic purpose, ... and applies only where its benefits outweigh its costs[.]" *Shatzer*, 559 U.S. at 106. The Court recently surveyed a wide swath of its post-*Miranda* decisions and demonstrated that "all [of them] ... engaged in cost-benefit analysis to define the scope of these prophylactic rules." *Vega*, 142 S.Ct. at 2105.

A.

A custodial determination in the *Miranda* context involves "an objective determination, depending on the totality of the circumstances, that looks to the circumstances surrounding the interrogation and whether, given the circumstances, a reasonable person would have felt he was at liberty to terminate the interrogation and leave." *Nelson*, 990 F.3d at 955. In other words, the court must consider whether "a reasonable person in the suspect's position would have understood the situation to constitute *a restraint on freedom of movement of the degree which the law associates with formal arrest.*" *Bengivenga*, 845 F.2d at 596 (emphasis added). "The reasonable person through whom [the court] view[s] the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly

apprehensive nor insensitive to the seriousness of the circumstances." *Id.* Neither the officer's nor the suspect's subjective intent "is relevant to the custody determination." *United States v. Chavira*, 614 F.3d 127, 133 (5th Cir. 2010). Because no single fact or circumstance results in *Miranda* custody, "this court has repeatedly considered certain key details" encapsulated by the following factors:

- *First*, the length of the questioning;
- *Second*, the location of the questioning;
- *Third*, the accusatory, or non-accusatory, nature of the questioning;
- *Fourth*, the amount of restraint on the individual's physical movement; and
- *Fifth*, statements made by officers regarding the individual's freedom to move or leave.

Wright, 777 F.3d at 775 (citations omitted).

The first factor, the *length of the questioning*, plainly does not suggest the equivalent of formal arrest. Approximately fifteen minutes elapsed between Officer Guzman's first contact with Coulter and Coulter's admission that he had a pistol in his backpack. This court has warned against "[o]verreliance upon the length of [questioning]" because doing so "injects a measure of hindsight into the analysis which [it] wish[es] to avoid." *United States v. Harrell*, 894 F.2d 120, 124 n.1 (5th Cir. 1990). While "a detention of approximately an hour raises considerable suspicion[,]" *id.*, a thirty-minute interview "suggests [that a suspect] was *not* in custody." *United States v. Ortiz*, 781 F.3d 221, 233 (5th Cir. 2015). Based on these authorities, the comparatively brief questioning here is incompatible with finding that Coulter was in custody pursuant to *Miranda.*

The *location of the questioning* did not suggest, even to the district court, that a reasonable person in Coulter's position would have equated it with formal arrest. "Interrogations in public settings are less police dominated than stationhouse interrogations; the public nature reduces the hazard that officers will resort to overbearing means to elicit incriminating responses and diminishes the individual's fear of abuse for failure to cooperate." *Chavira*, 614 F.3d at 135). Thus, "[t]he fact that an interview takes place in a public location weighs against the conclusion that a suspect is in custody ...." *Ortiz*, 781 F.3d at 231. Officer Guzman questioned Coulter while he stood on a neighborhood street. In fact, the questioning took place in front of the home where Coulter apparently lived with his parents. Later, his mother "came out[side] and [officers] released the van to her." We have also noted that a smaller number of officers mitigates a suspect's "sense of vulnerability." *Bengivenga*, 845 F.2d at 598. No other officers were present during Officer Guzman's questioning of Coulter. This factor weighs against finding Coulter was in custody as contemplated by *Miranda.*

Regarding the third factor, the district court found that the non-accusatory *nature of the questioning* did not suggest that a reasonable person in Coulter's position would have equated it with formal arrest. The district court determined that Officer Guzman "was merely appealing to Coulter's interests in being truthful and helpful during the search, rather than engaging in formal questioning." We agree.

The *amount of restraint* presents a more nuanced question This court has held, that "the brief handcuffing of a suspect does not render an interview custodial *per se*[ ]." *Michalik*, 5 F.4th at 589 n.3. And the Supreme Court generally recognizes that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda.*" *Howes*, 565 U.S. at 509. Indeed, "[s]ome *significant* restraint of freedom of movement must have occurred." *United States v. Howard*, 991 F.2d 195, 200 (5th Cir. 1993). For example, this court determined that a suspect was not in *Miranda* custody even though officers approached him with their guns drawn and handcuffed him for five to ten minutes before removing the handcuffs and initiating questioning. *Ortiz*, 781 F.3d at 224-25, 232-33.

Here, Officer Guzman had a substantial conversation with Coulter before placing him in handcuffs. And at that time, Officer Guzman explained that the handcuffs were necessary because he did not want Coulter "to run up and grab the gun[,]" or "wind up fighting with [Coulter]." Importantly, Coulter replied "[y]ou're cool." Such a response does not convey that Coulter equated the handcuffs with formal arrest. Coulter also never asked or attempted to end the encounter. He remained standing in the street without being forced on the ground or into Officer Guzman's vehicle. Under the circumstances, objective concerns for officer safety necessitated the amount of restraint generated by the handcuffs, Coulter implicitly acknowledged the limited purpose of the restraint, and a reasonable person in his position would not have equated such restraint with formal arrest. The district court erred by ruling otherwise.

Fifth, we must disagree with the district court's finding that Officer Guzman's *statements regarding Coulter's freedom to move or leave* "weigh[ed] in favor of finding that [Coulter] was in custody." To begin, assurances that a suspect "[is] not under arrest and that he [is] free to leave" weigh in favor of determining that a suspect is not in custody. *Wright*, 777 F.3d at 777. Informing a suspect he is

"not under arrest, [even without] explicitly tell[ing] him he [is] free to leave[,] .... would [also] suggest to a reasonable person that he [is] free to leave[.]" *Ortiz*, 781 F.3d at 231. Here, Officer Guzman placed Coulter in handcuffs and explained that it was "[j]ust detainment." He then twice reassured Coulter that he was "just detained." And, most important, Coulter confirmed that he understood what being "detained" meant. Coulter could have asked for clarification or simply said "no," but he just said "[y]eah[,]" which clearly suggests Coulter understood that he was not in custody as contemplated by *Miranda.*

The district court relied on Officer Guzman's statement, after he handcuffed Coulter, "not to pull away, because Officer Guzman did not 'want to tase him.' " Coulter asserts now that he understood the statement to warn that "an attempt to leave could result in being tased." This isolated statement could create an inference that Coulter may have been in *Miranda* custody. But "no one fact is determinative," *Wright*, 777 F.3d at 775, and Coulter immediately replied, "[t]hat's fine." This contemporaneous response, like Coulter's conveying that Officer Guzman was "cool" when he handcuffed Coulter, objectively indicates that Coulter did not equate the tasing statement with formal arrest as events unfolded. Unlike the district court, we conclude, based on the men's interactions, that Officer Guzman's conversation with and statements to Coulter were not indicative of the restraint associated with formal arrest.

B.

Assuming *arguendo* that a reasonable person in Coulter's position would have equated the situation with formal arrest, the court must next determine "whether the relevant environment [in which Coulter was questioned] present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda.*" *Id.* at 565 U.S. at 509, 132 S. Ct. at 1189-90.

The Supreme Court holds that officers generally need not issue *Miranda* warnings before questioning motorists and passengers during a routine traffic stop. Because "a traffic stop is presumptively temporary and brief[,] .... questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Berkemer*, 468 U.S. at 437-38. Moreover, because "the typical traffic stop is public, at least to some degree[,] .... the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than that surrounding the kinds of interrogation at issue in *Miranda* itself." *Id.* at 468 U.S. at 438-39. But, once "a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" *Berkemer*, 468 U.S. at 440.

The environment in which Officer Guzman questioned Coulter did not present the same inherently coercive pressures as the station house questioning at issue in *Miranda.* Unlike station house interrogations, the encounter between Officer Guzman and Coulter lasted only approximately fifteen minutes. And unlike the atmosphere surrounding a station house interrogation, Coulter remained standing in the street in front of his parents' home. Faced with strikingly similar circumstances, the Ninth Circuit determined that similar facts "f[e]ll short of the sorts of police dominated and compelling atmospheres presented in the four cases under review in *Miranda*." *Bautista*, 684 F.2d at 1292.

IV. CONCLUSION

For the reasons stated above, a reasonable person in Coulter's position would not have equated the restraint on his freedom of movement with formal arrest. But even if Coulter could have reasonably thought that he was in custody for *Miranda* purposes after being handcuffed, the environment in which Officer Guzman questioned him was not tantamount to a station house interrogation as contemplated by *Miranda.* The district court's judgment suppressing those statements is REVERSED.

747 F.3d 754
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
IMM, Juvenile Male, Defendant–Appellant.

No. 11–10317
|
Argued and Submitted Feb. 12, 2013.
|
Filed March 31, 2014.

REINHARDT, Circuit Judge:

IMM, a juvenile, appeals his conviction for sexual assault. We reverse because the district court erred when it admitted into evidence an inculpatory statement obtained from IMM in violation of his Fifth Amendment rights under *Miranda v. Arizona,* 384 U.S. 436 (1966).

BACKGROUND

I

Based on conflicting reports that the juvenile had sex with his younger cousin, police interviewed the juvenile seven months after the incident. A detective, who was in plain clothes but visibly armed, drove to the juvenile's home and transported him and his mother to the police station in an unmarked car. The drive lasted 30 to 40 minutes. At the police station, which was staffed by uniformed police officers, the detective escorted the juvenile and his mother into a small room about five or six feet by five or six feet—just big enough for a small desk, approximately four chairs, and a recording device. The detective closed the door and kept it closed the entire time he was with the juvenile (including the brief period he was with the juvenile and his mother).

The detective testified that he did not read the juvenile his rights under *Miranda.* Nor, he admitted, did he have the juvenile sign a consent form. Instead, he read the Parental Consent to Interview a Juvenile Form to the juvenile's mother and had her sign it. Although the juvenile was sitting in the room at the time, the detective read the Parental Consent to Interview a Juvenile Form to his mother, and no evidence was offered that the juvenile was listening to the reading of the Form or that he understood its contents. His mother signed the Form and agreed to wait in the lobby because she thought the detective "would treat [the juvenile] like a child." The detective ordered the juvenile to wait in the room while he escorted the juvenile's mother to the lobby, leaving the door shut. When he returned, the detective said to the juvenile, "I read your mom those rights, okay, so at any time throughout the, the interview you don't feel comfortable, you can stop and you don't have to answer any questions." The detective then asked if the juvenile understood and the juvenile replied, "Uh-huh."

The juvenile was twelve years old at the time of the interview, though the detective later testified that he "looked a little younger." As the juvenile's mother noted at the suppression hearing, the juvenile had been in special education classes and could read only at a second grade level, even though he was in sixth grade. The juvenile also had emotional problems stemming from his troubled home life. He had witnessed his father try to kill his mother and may have been sexually abused by his father.

The detective had no special training in conducting interviews with juveniles or juvenile suspects. He also testified, remarkably, that he had never heard of false confessions. He added that he saw no problem with an officer, in an interrogation, telling a young child with special education needs what the officer would like that child to say.

The detective spent 55 minutes questioning the juvenile, beginning his questioning by asking him basic identifying information. The juvenile did not know his own address. The detective then pressed the juvenile for details on what had happened with his cousins outside his grandfather's trailer. At first, and for nearly half of the interrogation, the juvenile denied that any sexual conduct had occurred. He explained repeatedly explained his recollection of the events. He also said "I don't know" and "I don't really remember" in response to several questions.

The detective responded by using what he later described as "deception." Even though the juvenile's grandfather did not, in fact, see the juvenile do anything improper, the detective repeatedly insisted to the juvenile that his grandfather had seen him sexually abuse his cousin. When the juvenile disagreed, the detective asked questions such as, "Would you consider your grandpa a liar?", and reminded the juvenile that "we've already made the decision that grandpa doesn't lie right?" Even as he told the juvenile that his grandfather had reported abuse and implied that any disagreement meant that the juvenile thought his grandfather was a liar, the detective warned the juvenile: "[T]his isn't really a big thing but it

can turn into a big thing if you're not going to be honest." When the juvenile said "I wasn't doing nothing," the detective responded: "Yeah, you were doing something. Because grandpa tells me you were doing something. So he's a liars?"

Halfway through the interrogation, the detective accused the juvenile of sexual assault. The detective then told the juvenile that his grandpa saw everything and that the investigator was not making things up. When the detective asked, "We know your cousin got on top of you, I want to know what you did," The juvenile repeated the language used by the detective when confessing his guilt to sexual assault. When the juvenile would thereafter answer questions unsteadily, the detective would prompt him with leading questions.

Before trial, IMM's lawyer filed motions to suppress the inculpatory statement on grounds of coercion and a *Miranda* violation. After a suppression hearing, the district court concluded that the statement was admissible and did not violate *Miranda* because the juvenile had not been in custody when the statement was made and the statement had been given voluntarily.

DISCUSSION

I

"Any police interview of an individual suspected of a crime has coercive aspects to it." *J.D.B. v. North Carolina,* —— U.S. ——, 131 S.Ct. 2394 (2011). When police conduct results in an individual being placed "in custody," the substantial coercion inherent in his situation "blurs the line between voluntary and involuntary statements, and thus heightens the risk that [the person being interrogated] will not be 'accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself.' " *Dickerson v. United States,* 530 U.S. 428, 435 (2000) (quoting *Miranda,* 384 U.S. at 439). "Custodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States,* 556 U.S. 303, 320–21 (2009). "[T]hat risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." *J.D.B.,* 131 S.Ct. at 2401. As the Supreme Court long ago recognized, circumstances that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio,* 332 U.S. 596, 599 (1948) (plurality opinion).

Here, the parties dispute whether the juvenile was "in custody" when he was questioned at the police station and whether he was properly Mirandized. We conclude that he was in custody and that he was not Mirandized.

A. The Juvenile was "In 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 (1994) (per curiam). "This inquiry requires a court to examine the totality of the circumstances from the perspective of a reasonable person in the suspect's position." *United States v. Crawford,* 372 F.3d 1048, 1059 (9th Cir.2004) (en banc) (citing *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984)). "[W]e must determine whether the officers established a setting from which a reasonable person would believe that he or she was not free to leave." *United States v. Kim,* 292 F.3d 969, 973–74 (9th Cir.2002); *see also Thompson v. Keohane,* 516 U.S. 99, 112 (1995) ("Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.").

In *United States v. Kim,* we identified a non-exhaustive list of five factors that have often proven relevant in deciding whether a suspect was in custody: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." 292 F.3d at 974 (citations omitted). As we recognized in *Kim,* "[o]ther factors may also be pertinent to, and even dispositive of, the ultimate determination whether a reasonable person would have believed he could freely walk away from the interrogators." *Id.*

Although this inquiry is objective, the Supreme Court held in *J.D.B.* 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 any reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." 131 S.Ct. 2394, 2406. The Court cautioned that "a child's age [may] affect[ ] how a reasonable person in the suspect's position would perceive his or her freedom to leave," and warned that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable

adult would feel free to go." *Id.* at 2402–03. Thus, *J.D.B.* recognized that for *Miranda,* as for so many other rights, common sense dictates that we must take into account the unique characteristics and vulnerabilities of children. *See id.* at 2404.

We review the "in custody" determination de novo. *United States v. Bassignani,* 575 F.3d 879, 883 (9th Cir.2009).

The first *Kim* factor, "the language used to summon the individual," slightly favors a finding that the juvenile was in custody. In general, when a suspect voluntarily agrees to accompany police with an "*understanding that questioning would ensue,*" this factor weighs against a finding of custody. *Kim,* 292 F.3d at 974. We have strongly cautioned, however, that "[v]oluntary initiation of contact with police cannot be, under any circumstances, the end of the inquiry into whether a defendant was 'in custody' during the encounter." *Id.* at 975. That warning applies with particular force here: although the juvenile's mother agreed to a voluntary meeting with the detective, there is no evidence that the juvenile himself ever agreed to an interview or understood it to be voluntary. The evidence shows only that, from the juvenile's vantage point, an armed detective arrived at his house one Saturday morning, drove him and his mother 30 to 40 minutes to a police station, and brought him to a small room where he remained for nearly an hour of questioning. Although the officer did not menace the juvenile or order him into the car, it is doubtful that any juvenile would have seen these circumstances as the result of a free and voluntary choice to be questioned.

The second *Kim* factor, "the extent to which the defendant is confronted with evidence of guilt," overwhelmingly favors a finding of custody. "We have found a defendant in custody when the interrogator adopts an aggressive, coercive, and deceptive tone." *Bassignani,* 575 F.3d at 884. Here, although the detective did not raise his voice, he repeatedly confronted the juvenile with fabricated evidence of guilt and engaged in elaborate deceptions. The detective fed the juvenile facts that fit the detective's predetermined account of what must have happened, accused the juvenile of dishonesty whenever the juvenile disagreed with the detective's false representations, and forced the juvenile to choose between adopting the detective's false account of events as his own and calling his own grandfather a liar. This last tactic directly played upon the juvenile's close relationship with his grandfather, whom he called "dad," and employed intense psychological coercion of a sort to which juveniles are uniquely vulnerable. *See J.D.B.,* 131 S.Ct. at 2403. Further, although the detective did not explicitly threaten the juvenile, he bluntly warned that the situation would "turn into a big thing if you're not going to be honest."

Thus, while the detective told the juvenile at the outset of the interview that the juvenile could stop it if he felt uncomfortable, the detective's aggressive, coercive, and deceptive interrogation tactics created an atmosphere in which no reasonable twelve year old would have felt free to tell the detective, an adult making full use of his position of authority, to stop questioning him. *See id.* at 2405. In fact, the juvenile's questioning ceased not when the juvenile asked that the detective stop but only when the detective had attained all the information he desired. Finally, given that the detective had driven him and his mother to the police station, more than a half hour from his home, the juvenile may well not have thought that he and his mother would be free to leave whenever they so desired.

The third *Kim* factor, "the physical surroundings of the interrogation," also weighs strongly in the juvenile's favor. While "[t]he fact that questioning takes place in a police station does not *necessarily* mean that such questioning constitutes custodial interrogation," *United States v. Coutchavlis,* 260 F.3d 1149, 1157 (9th Cir.2001), it often does.

In short, with respect to the third *Kim* factor, the juvenile was interrogated alone behind a closed door that appeared to be locked, in a small room in a police station located far from his home. He was told that, if he wanted to leave to use the restroom, he needed the detective's permission. Faced with this situation and level of police control, a reasonable person would not likely have felt free to terminate the interrogation and leave the police station.

The next *Kim* factor, "duration of detention," strengthens the conclusion that the juvenile was in custody. The juvenile spent 30 to 40 minutes in the unmarked police car and then nearly an hour being questioned. Although our precedents do not specify a precise amount of time at which a detention turns custodial, we have found an adult defendant to have been in custody when she was interrogated for 45 to 90 minutes. *See Kim,* 292 F.3d at 972. Under all the circumstances, including the fact that the juvenile was likely more overwhelmed and intimidated than an adult would be by such prolonged direct questioning by an adult police officer, this *Kim* factor supports a finding of custody.

The fifth and final *Kim* factor, "the degree of pressure applied to detain the individual," confirms that the juvenile was in custody. As in *Kim,* "this was a full-fledged interrogation, not a brief inquiry," in which

the juvenile was "detained for 'some time' " and then questioned for "at least [50 total] minutes." 292 F.3d at 977. This questioning was both hostile and accusatory, and, when conducted in isolation in a small room in a police station, quite capable of causing the juvenile considerable concern regarding his future. Although the juvenile was neither handcuffed nor arrested, "the scenario was not without pressure." *Barnes,* 713 F.3d at 1204-05.

Ultimately, considering the totality of the circumstances of the detention, and taking into account the fact that the juvenile was a minor, we conclude that a reasonable person in the juvenile's position would not have felt free to terminate the questioning and leave the police station. We therefore conclude that the juvenile was "in custody" during his interrogation by the detective.

B. The Juvenile Was Not Mirandized

The government contends that the juvenile's custodial status does not affect the outcome of this appeal because the juvenile waived his *Miranda* rights. The question of waiver arises, however, only where a suspect has been Mirandized. *See Berghuis v. Thompkins,* 560 U.S. 370, 385 (2010).

Here, as the district court recognized, the juvenile "was not advised of his *Miranda* rights." The detective repeatedly conceded this crucial fact while testifying at the suppression hearing. Indeed, the detective informed only the juvenile's mother of his rights and not the juvenile. Ultimately, *Miranda* requires that "*an individual* held for interrogation must be clearly informed [of *his* rights]." 384 U.S. at 471. Accordingly, the juvenile's inculpatory statements during his interrogation by the detective must be suppressed.

We reverse and remand.

80 S.Ct. 274
Supreme Court of the United States

Jesse BLACKBURN, Petitioner,
v.
STATE OF ALABAMA.

No. 50.
|
Argued Dec. 10, 1959.
|
Decided Jan. 11, 1960.

Mr. Chief Justice WARREN delivered the opinion of the Court.

Jesse Blackburn was tried in the Circuit Court of Colbert County, Alabama, on a charge of robbery, then later found guilty. By far the most damaging piece of evidence against him was his confession, which he persistently maintained had not been made voluntarily. The record seemed to provide substantial support for this contention, and we granted certiorari because of a grave doubt whether the judgment could stand if measured against the mandate of the Fourteenth Amendment to the Constitution of the United States. Consideration has hardened this doubt into firm conviction: Jesse Blackburn has been deprived of his liberty without due process of law.

The crime with which Blackburn was charged was the robbery of a mobile store on April 19, 1948. By that date Blackburn, a 24-year-old black man, had suffered a lengthy siege of mental illness. He had served in the armed forces during World War II, but had been discharged in 1944 as permanently disabled by a psychosis. He was thereupon placed in an institution and given medical treatment until he was released from a Veterans Administration hospital for a ten-day leave in the care of his sister. He failed to return to the hospital and consequently was discharged. The robbery of which he stands convicted occurred during this period of unauthorized absence from a mental ward. Blackburn's medical records further disclose that from 1946 he was classified by the Veterans Administration as 100 percent 'incompetent' and that at the time of his discharge from the hospital both his diagnosis of 'schizophrenic reaction, paranoid type' and his characterization as 'incompetent' remained unchanged.

This does not by any means end the record of Blackburn's history of mental illness. He was arrested shortly following the robbery, and sometime after his confession on May 8, 1948, the Sheriff reported to the circuit judge that Blackburn had exhibited symptoms of insanity. The judge thereupon had Blackburn examined by three physicians, and after receiving their report he concluded that there was 'reasonable ground to believe that the defendant was insane either at the time of the commission of the offense or at the present time.' Later, the commission on Alabama's State Hospitals unanimously declared Blackburn insane, the judge committed him to the Alabama State Hospital for the mentally ill until he should be 'restored to his right mind.' Blackburn was also examined by another set of doctors who diagnosed his mental condition as 'Schizophrenic reaction, paranoid type' and declared that he was 'Insane, incompetent, and should be placed in a hospital.' In October 1952, he was declared mentally competent to stand trial.

At his trial, Blackburn entered pleas of not guilty and not guilty by reason of insanity. He testified that he could remember nothing about the alleged crime, the circumstances surrounding it, his arrest, his confession, his commitment to the State Hospital, or the early period of his treatment there. He denied the truth of the confession, but admitted that the signature on it appeared to be his.

Evidence concerning the circumstances of the confession was supplied by the Chief Deputy Sheriff. He testified that he composed Blackburn's statement in narrative form on the basis of Blackburn's answers to the various questions asked by the officers, and Blackburn signed the confession two days later. The Chief Deputy described that the examination had begun at approximately one o'clock in the afternoon and had continued until ten or eleven o'clock that evening, with about an hour's break for dinner. Thus it was established that the questioning went on for eight or nine hours. Apparently most of the interrogation took place in closely confined quarters—a room about five by eight feet—in which as many as three officers had at times been present with Blackburn. The Chief Deputy conceded that Blackburn said he had been a patient in a mental institution, but claimed that Blackburn also stated he had been released, and avowed that Blackburn 'talked sensible and gave sensible answers,' was clear-eyed, and did not appear nervous.

Blackburn's counsel objected to admission of the statement, but the objection was overruled and the confession was submitted to the jury. After the Alabama Court of Appeals affirmed the judgment and held that the Fourteenth Amendment did not require exclusion of the confession, Blackburn petitioned this Court for certiorari. We granted review.

Since Chambers v. State of Florida, 309 U.S. 227, this

Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. Thus the range of inquiry in this type of case must be broad, and this Court has insisted that the judgment in each instance be based upon consideration of 'the totality of the circumstances.' Fikes v. State of Alabama, 352 U.S. 191, 197.

It is also established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.' Lisenba v. People of State of California, 314 U.S. 219, 236. Consequently, we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession. E.g., Spano v. People of State of New York, 360 U.S. 315, 324; Payne v. State of Arkansas, 356 U.S. 560, 567-568; Watts v. State of Indiana, 338 U.S. 49, 50, note 2; Haley v. State of Ohio, 332 U.S. 596, 599. As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar. See.

But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last term, 'The abhorrence of society to the use of involuntary confessions also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. People of State of New York, supra, 360 U.S. at pages 320-321. Thus a complex of values underlies the stricture against use by the state of involuntary confessions and the role played by each in any situation varies according to the particular circumstances of the case.

In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent circumstances are considered—the eight-to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.

This case is novel only in the sense that the evidence of insanity here is compelling. This Court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was 'of low mentality, if not mentally ill,' Fikes v. State of Alabama, supra, at page 196, or had a 'history of emotional instability,' Spano v. People of State of New York, supra, 360 U.S. at page 322. And although facts such as youth and lack of education are more easily ascertained than the imbalance of a human mind, we cannot say that this has any appreciable bearing upon the difficulty of the ultimate judgment as to the effect these various circumstances have upon independence of will, a judgment which must by its nature always be one of probabilities.

The evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition. Therefore, the use of this evidence to convict Blackburn transgressed the imperatives of fundamental justice which find their expression in the Due Process Clause of the Fourteenth Amendment, and the judgment must be reversed.

Reversed.

111 S.Ct. 1246
Supreme Court of the United States

ARIZONA, Petitioner
v.
Oreste C. FULMINANTE.

No. 89–839.
|
Argued Oct. 10, 1990.
|
Decided March 26, 1991.

Justice WHITE delivered the opinion of the Court.

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. We affirm the judgment of the Arizona court.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter was missing. He had been caring for her while his wife, the girl's mother, was in the hospital. Two days later, the girl's body was found in the desert east of Mesa. She had been shot twice in the head and a ligature was around her neck.

Fulminante's statements to police concerning his stepdaughter's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any involvement in his stepdaughter's death. During one conversation, he told Sarivola that his stepdaughter had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

Sarivola learned more as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. Sarivola offered to protect Fulminante from his fellow inmates, but told him, " 'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.' " Fulminante then admitted to Sarivola that he had driven his stepdaughter to the desert on his motorcycle, where he strangled her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head.

Sarivola was released from prison in November 1983. Fulminante was released the following May. On September 4, 1984, Fulminante was indicted in Arizona for first-degree murder.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison. He asserted that the confession was coerced. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confession was voluntary. The State introduced the confession as evidence at trial, and Fulminante was convicted of murder and sentenced to death.

Fulminante appealed to the Arizona Supreme Court, arguing that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced. The court reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola.

II

The State argues that it is the totality of the circumstances that determines whether Fulminante's confession was coerced, *cf. Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973), but contends that rather than apply this standard, the Arizona court applied a "but for" test, under which the

court found that but for the promise given by Sarivola, Fulminante would not have confessed. In support of this argument, the State points to the Arizona court's reference to *Bram v. United States,* 168 U.S. 532 (1897). Although the Court noted in *Bram* that a confession cannot be obtained by " 'any direct or implied promises, however slight, nor by the exertion of any improper influence,' " *id.,* at 542-543, it is clear that this passage from *Bram,* which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion. Rather, the court cited this language as part of a longer quotation from an Arizona case which accurately described the State's burden of proof for establishing voluntariness. *See* 161 Ariz., at 244. Indeed, the Arizona Supreme Court stated that a "determination regarding the voluntariness of a confession ... must be viewed in a totality of the circumstances," 161 Ariz., at 243, and under that standard plainly found that Fulminante's statement to Sarivola had been coerced.

In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." *Ibid.* In addition, Sarivola was aware that Fulminante had been receiving " 'rough treatment from the guys.' " *Id.,* at 244, n. 1. Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to his stepdaughter's murder, *id.,* at 243, and "[i]n response to Sarivola's offer of protection, [Fulminante] confessed." *Id.,* at 244. Agreeing with Fulminante that "Sarivola's promise was 'extremely coercive,' " *id.,* at 243, the Arizona court declared: "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." *Id.,* at 262.

"[T]he ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Miller v. Fenton,* 474 U.S. 104, 110. Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960).

As in *Payne,* where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, *Payne v. Arkansas,* 356 U.S. 560, 564-565 (1958), so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

Affirmed.

405 F.3d 278
United States Court of Appeals, Fifth Circuit.

LaCresha MURRAY, et al., Plaintiffs,
LaCresha Murray, Plaintiff–Appellee,
v.
Ronnie EARLE, etc.; et al., Defendants.
No. 03–51379
|
March 31, 2005.

WIENER, Circuit Judge:

Defendants appeal the district court's denial of their motion for summary judgment on the grounds of immunity under federal law. They contend on appeal that they should not be held liable for coercing a confession from the minor, LaCresha Murray, which ultimately led to her later-reversed conviction (and lengthy incarceration) for injury to a child. We reverse.

I. FACTS AND PROCEEDINGS

This case arises out of the investigation of LaCresha Murray's ("LaCresha") involvement in the death of Jayla Belton, age two, in 1996. At the time of these events, LaCresha was eleven years old. She and her siblings lived with her grandparents, R.L. and Shirley Murray, who were her adoptive parents, as well. The Murrays also provided daycare in their home for several other children.

Late in May of 1996, LaCresha was the last person to be seen with Jayla before she acted violently ill and died. An autopsy conducted the following day revealed that Jayla had suffered a severe liver injury caused by a blunt blow to the abdomen. The medical examiner concluded that Jayla had died within five to fifteen minutes after receiving the injury and also noted some thirty other bruises to Jayla's body. The examiner ruled Jayla's death a homicide.

That same day, law-enforcement authorities removed all the children from the Murray home. They placed LaCresha and one of her sisters in Texas Baptist Children's Home, a private shelter for children which contracts with the State to provide foster care. Three days after LaCresha had been removed from her adoptive parents' home, Detective Reveles directed Detectives Pedraza and Eels, along with Angela McGown, the supervisor of the Travis County Child Protective Services, to interview LaCresha. It is undisputed that, by this time, the police considered LaCresha a suspect in Jayla's death.

Before the interview of LaCresha, Detectives Reveles and Pedraza consulted with assistant district attorney Emmons on the proper method of interrogating LaCresha. Emmons testified that, even though LaCresha had been at the Texas Baptist Children's Home for three days, none of the officials believed that she was in the custody of the State. Pedraza and Eels gave LaCresha a *Miranda* warning before beginning to interrogate her, but they did not notify her parents or attorney.

The detectives questioned LaCresha at the Baptist Children's Home for approximately two hours, eventually eliciting a confession that she had dropped Jayla and kicked her. At trial, the State charged LaCresha with injury to a child; her confession was admitted; and the jury convicted her. The juvenile court adjudicated LaCresha delinquent and sentenced her to twenty-five years in the custody of the Texas Youth Commission.

Three years later, the Texas Court of Appeals reversed LaCresha's conviction. The appellate court ruled that LaCresha had been in the custody of the State and that her confession was inadmissible under Texas law.

LaCresha then brought suit in district court for damages against numerous the defendants for violations of her Fifth Amendment right against self-incrimination. The defendants appeal the denial of their summary judgment motions for qualified immunity on LaCresha's Fifth Amendment claims.

II. ANALYSIS

A. Fifth Amendment Violation

In undertaking a qualified immunity analysis, we must first determine whether the plaintiff has suffered a violation of his constitutional rights and, if so, whether a reasonable official should have known that he was violating the plaintiff's constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002).

1. *Constitutional Violation*

It is axiomatic that a criminal defendant's constitutional rights have been violated "if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity." *Miranda v. Arizona*, 384 U.S. 436, 465 n. 33 (1966). The Fifth Amendment privilege against

self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right. *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) The constitutional privilege against self-incrimination adheres in juvenile court proceedings just as it does in ordinary criminal court. In fact, states must take greater care to protect juveniles against coerced confessions during police interrogations, because children are more likely to be induced to confess, and their confessions are less likely to be reliable. *In re Gault*, 387 U.S. 1, 30-31, 55 (1967)

a. *Custodial Interrogation*

An individual's Fifth Amendment right against self-incrimination is implicated only during a "custodial" interrogation. The Supreme Court defines "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." A suspect is "in custody" for these purposes either (1) when he is formally arrested or (2) "when a reasonable person in the position of the suspect would understand the situation to constitute a restraint on freedom of movement to the degree that the law associates with formal arrest." We review *de novo* the question whether an interrogation was custodial. *United States v. Gonzales*, 121 F.3d 928, 939-940 (5th Cir.1997)

The Texas appellate court held that LaCresha's interrogation was custodial, adopting and applying a "reasonable child" standard. The court asked whether, under these circumstances, a reasonable child of eleven would have believed that her freedom of movement was constrained to the degree associated with formal arrest. The appellate court emphasized that LaCresha was involuntarily removed from her home by the State and placed in a children's shelter. The state appellate court held that, for purposes of evaluating whether LaCresha was "in custody," the Texas Baptist Children's home was not a jail or detention facility. The appellate court ruled that (1) because the shelter assumed all duties of care and control over children residing there, it was a place of confinement; and (2) practically speaking, LaCresha was not free to leave, as she would have had to "run away" from the shelter, and she had no means of returning to her home.

The defendants protest that we ought not consider a suspect's age in evaluating whether he was "in custody" for purposes of a Fifth Amendment violation. Rather, they assert, we must use an objective test, asking only whether a reasonable *person,* not a reasonable *child,* would have concluded that his liberty was constrained. The Supreme Court has endorsed this approach when confronted with an interrogation of a seventeen-year-old suspect, but the Court's conclusion rested on the assertion that the "custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." *Yarborough v. Alvarado*, 541 U.S. 652 (2004). Justice O'Connor wrote separately to emphasize that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry" but that in *Yarborough,* the defendant was almost eighteen years old and it would be difficult "to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority." *Yarborough*, 124 S.Ct. at 2152 (O'Connor, J., concurring).

The case of an eleven-year-old is different. The police should have no difficulty recognizing that their suspect is a juvenile and adjusting their determination whether the suspect would understand his freedom of movement to be constrained accordingly. In any event, even if we were to ignore LaCresha's age at the time of her interrogation, we would still conclude that a reasonable individual of any age who is removed involuntarily from his home, housed by the State for three days, not informed that he is free to leave, and questioned by two police detectives in a closed interrogation room, would believe that his liberty was constrained to the degree associated with formal arrest. We hold that LaCresha was "in custody" for purposes of evaluating her interrogation.

b. *Involuntary Confession*

Next, we must determine whether the statement that LaCresha gave while in custody was involuntary, making its introduction at her criminal trial violative of her Fifth Amendment right. Although LaCresha's statement was taken in violation of Texas law, this alone did not automatically produce a violation of her Fifth Amendment right. Once we have concluded that a juvenile's interrogation was custodial, we determine whether such a suspect's confession is coerced or involuntary by examining the totality of the circumstances surrounding the child's interrogation. In addition to the fact that the interrogation was conducted in violation of state law, our examination includes consideration of the juvenile's "age, experience, education, background, and intelligence." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) The Supreme Court has admonished that the police are required to take special care to ensure the voluntariness of a minor suspect's confession:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in

> the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. *In re Gault*, 387 U.S. 1, 55 (1967).

Every factor weighed in our analysis militates against the conclusion that LaCresha's statement was voluntary. At eleven years of age, she was far younger than the fifteen-year-old juvenile suspect whom we held to have voluntarily confessed in *Gachot v. Stadler*, 298 F.3d 414, 416-421 (5th Cir.2002) (noting that the defendant was accompanied by his brother during the interrogation, voluntarily went to the police station for questioning, and was there for approximately four hours). *Compare Fare*, 442 U.S. at 726-27 (holding 16 1/2 year-old juvenile voluntarily and knowingly waived his Fifth Amendment rights during an interrogation as he had considerable experience with the police, having a record of several arrests, sufficient intelligence to understand the rights he was waiving, and was not worn down by improper interrogation tactics or lengthy questioning by trickery or deceit) with *Haley v. Ohio*, 332 U.S. 596 (1948) (holding that a 15-year-old who had been arrested at midnight, taken to a police station and subjected to continuous interrogation by a rotation of several police officers, without counsel or friend, until he confessed to participating in a robbery and shooting, had not voluntarily confessed).

Here, in contrast, La Cresha had no experience with the criminal justice system, had been held in the custody of the State for three days, was unaccompanied by any parent, guardian, attorney, or other friendly adult, and was found to have below-normal intelligence by the court-appointed psychiatrist prior to her criminal trial.

LaCresha cannot be held to have knowingly and voluntarily waived her rights to be represented by counsel and to remain silent. Other than having LaCresha sign a *Miranda* card, and briefly explaining her rights to her at the outset of the interrogation, the police took no precautions to ensure the voluntariness of her statement, let alone "special care." The police made no effort to contact LaCresha's adoptive parents, and the shelter, which had assumed responsibility for her care, sent no representative with her to the interrogation. LaCresha was never told that she was free to leave or that she could call her adoptive parents or any other friendly adult. In addition, the police officers represented to LaCresha that they had already talked to everyone in her family, that everyone "knew" what happened, and that she could help her family only by telling the truth. We hold that LaCresha's statement was involuntary, and that its admission at trial violated her Fifth Amendment right against self-incrimination.

2. *Clearly Established Law*

While admitting LaCresha's confession at trial was a violation of her Fifth Amendment right, LaCrsha's claim that the *officers* violated her Fifth Amendment right lacks merit. As in the analogous context of Fourth Amendment violations, an official who provides accurate information to a trial judge, cannot "cause" a subsequent Fifth Amendment violation arising out of the judge's decision to admit the evidence at trial, even if a defendant can later demonstrate that his or her statement was made involuntarily while in custody. *Chavez v. Martinez*, 538 U.S. 760, 773-74 (2003)

LaCresha has not identified, and we have not found, any evidence in the record to indicate that the state judge who presided over her juvenile trial failed to hear (or was prevented from hearing) all of the relevant facts surrounding her interrogation before deciding to admit her confession into evidence. Like the state appellate court, we disagree with the trial court's ruling, yet we are constrained to hold that it constituted a superseding cause of LaCresha's injury, relieving the defendants of liability. Accordingly, we reverse the district court's denial of qualified immunity for the defendants.

REVERSE AND REMAND.

675 F.3d 911
United States Court of Appeals, Fifth Circuit.

Tyler EDMONDS; Sharon Clay, Plaintiffs–Appellants,
v.
OKTIBBEHA COUNTY, MISSISSIPPI, Defendant–Appellee.

No. 10–60957
|
March 26, 2012.

JERRY E. SMITH, Circuit Judge:

Tyler Edmonds sued Oktibbeha County, Mississippi, under 42 U.S.C. § 1983. Edmonds claimed county actors coerced a confession. The district court entered summary judgment for the county, and we affirm.

I.

Kristi Fulgham shot her husband shortly before taking Edmonds and two of her children on a trip to the Gulf Coast. The next day, she told Edmonds that she had killed her husband and urged Edmonds to take the blame to protect her from the death penalty. A day later, when county sheriff's deputies arrested Fulgham for the murder, she professed her innocence and fingered Edmonds, whereupon a deputy asked his mother to bring him in.

Accompanied at his interrogation by his mother, Edmonds first denied any knowledge until deputies removed his mother from the room and brought in Fulgham to urge Edmonds to "tell the truth." Shortly thereafter, he confessed but retracted the confession a few days later. The jury heard both the confession and the retraction. Edmonds was convicted of murder and sentenced to life, but the judgment was overturned, *Edmonds v. State,* 955 So.2d 787 (Miss.2007), and he was acquitted on retrial.

At the interrogation, mother and son executed *Miranda* waivers. Over the next two hours, deputies interrogated Edmonds in Clay's presence. He insisted that he did not know anything about the killing and that he was the last one out of the house before the group left for the beach. His interrogators said they did not believe him and continued to ask about the murder, assuring Edmonds that Fulgham had already accused him.

As long as his mother stayed in the room, Edmonds refused to admit any knowledge. The sheriff eventually had the deputies escort his mother from the room against her will, based on his belief that Mississippi law did not forbid the separation. With his mother removed, the deputies reiterated to Edmonds his sister's accusation and showed him her written statement without letting him read it; Edmonds refused to believe the written statement, whereupon a deputy offered to have Fulgham repeat it in person.

Edmonds accepted and was allowed to visit with his mother while a deputy went to get Fulgham. During the visit, he told his mother that he was at the station to "protect [his] sister." He was then taken to sit in a deputy's office, away from his mother, at which point Fulgham was brought in. She sat down next to him, had him hold her hand, and told him, "You need to tell them what happened. I've already told them and they know what happened and you need to tell them the truth," which Edmonds took as a cue to confess. Their visit lasted less than a minute, after which Edmonds was taken to another room, where he waited twenty to thirty minutes for deputies to set up video equipment. His *Miranda* rights were explained twice more, both before and after taping began, and he signed another waiver.

On video, Edmonds gave a detailed but false account of the fatal weekend, culminating in his statement that he and his sister together shot Fulgham's husband in his sleep, Fulgham standing behind Edmonds, with each having a hand on the trigger. After that admission, Edmonds continued through a detailed account of the weekend's travels until his mother entered the interrogation room, demanding to be present. She asked Edmonds whether he had a problem talking to the deputies without her, and he indicated no. She then learned what he had confessed. Mother and son both became distraught; the deputies stopped taping and let them speak in private. Edmonds, an honors student with no criminal record, was arrested and held in county jail.

Reflecting on the confession after his eventual acquittal, Edmonds summarized the interrogation process in an interview on the *Dr. Phil* show:

> Q. Tyler, you went in with the idea of confessing when you went in there, right?
>
> A. Um ...
>
> Q. You'd already made the deal with your sister?
>
> A. Yes.

> Q. So, you just walked in and said you did it.
>
> A. No, at first I went in and ... I denied having anything to do with it. My mother was in the room with me, initially, and then they took her out of the room with me and wouldn't let her back into the room with me, and then, that's when I falsely confessed.
>
> Q. All right, but did you do it on purpose or were you coerced into it?
>
> A. Um, to confess?
>
> Q. Yes.
>
> A. I was coerced by my sister.
>
> Q. By your sister, but not by the police.
>
> A. Uh, no, not by the police.

Dr. Phil: Headline Horror Stories (CBS television broadcast Dec. 15, 2008).

II.

Edmonds alleged that deputies coerced his confession in violation of his Fifth Amendment self-incrimination right and his Fourteenth Amendment due process rights. Viewed under the totality of the circumstances, Edmonds's confession was voluntarily given, meaning that its introduction at trial did not offend the Fifth Amendment. Although a thirteen-year-old's separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weigh against voluntariness, his express desire to help his sister decides the issue. There is no evidence that, absent Edmonds's resolve to reduce Fulgham's punishment, the deputies' interrogation tactics would have produced a confession. Fulgham may have used her brother's love to make him lie on her behalf, but there is no evidence that the deputies knew of her plan.

Under the Fifth Amendment's privilege against self-incrimination, when a person confesses in custodial interrogation, courts "determine whether such a suspect's confession is coerced or involuntary by examining the totality of the circumstances surrounding the ... interrogation." *Murray v. Earle,* 405 F.3d 278, 288 (5th Cir.2005). When the suspect is a child, the evaluation must consider his "age, experience, education, background, and intelligence, and [inquire] into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Michael C.,* 442 U.S. at 725.

Although some circumstances in this case may indicate susceptibility to police coercion, their relevance pales beside Edmonds's stated desire to help his sister. Improper police tactics did not implant that desire: In all likelihood, Fulgham's manipulation did. Edmonds revealed that motive not only after the fact, in his videotaped retraction (and also later on national television), but also before the fact, to his mother in advance of his brief meeting with Fulgham and the subsequent false confession. The deputies likely presumed that Edmonds loved his sister, but he does not argue that the deputies knew that bringing Fulgham to meet with him would further her exploitative scheme.

Despite that separation from a parent weighs heavily in a voluntariness analysis, Edmonds appears to have desired the separation so that he could falsely confess without triggering the eventual emotional downpour. In a moment alone with his mother before meeting with Fulgham at the station, he told her he was trying to protect his sister, and he apparently carried out that plan by confessing shortly thereafter. When his mother pushed into the interrogation room later, she asked him, "Do you have a problem talking to them without me?" and he indicated no. Though it is possible that Edmonds might never have confessed if not separated from his mother, the separation did not give him a new motive to confess but only removed an emotional obstacle in the way of his pre-existing intention.

The other factors commonly considered in a voluntariness analysis do not decisively point in one direction. Edmonds was young (thirteen) and had no prior contact with the criminal justice system. At the same time, he and his mother came to the station voluntarily; his mother was in the room with him for much of the evening; he was intelligent; and he had his *Miranda* rights explained three times and signed two waivers, the first with his mother. The interrogation totaled three hours, but with multiple breaks, including a twenty- to thirty-minute wait caused not by pressure tactics but by the need to set up video equipment. Further, Edmonds told a national television audience that the deputies did not coerce him into confessing.

The totality of the circumstances indicates that Edmonds's confession was voluntary.

18 F.Supp.3d 838
United States District Court,
S.D. Texas,
Houston Division.

UNITED STATES of America
v.
Harold Joseph CARMOUCHE, et al.

Criminal Action No. H–13–298.
|
Signed April 28, 2014.

GRAY H. MILLER, District Judge.

Pending before the court is Kenton Deon Harrell's motion to suppress. After considering the evidence, parties' arguments, and applicable law, the court is of the opinion that Harrell's motion to suppress should be DENIED.

I. BACKGROUND

Five defendants, including Harrell, were charged in a two count indictment alleging conspiracy to interfere with commerce by robbery, 18 U.S.C. § 1951(a), and conspiracy to use or carry a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(*o*). Defendants allegedly conspired to rob a U.S. Postal vehicle on February 21, 2013. Specifically, a U.S. Postal vehicle was departing the downtown Houston Post Office. According to the driver of the postal vehicle, a red Chevrolet Impala pulled in front of his vehicle and blocked his path. After the vehicles stopped, a black male, wearing a face mask and carrying a pistol exited the Impala, ordered the driver from the vehicle, entered the vehicle, and both the Impala and the postal vehicle drove away. The postal vehicle was recovered a few hours later several miles away from the location of the robbery. The merchandise in the vehicle was stolen, including $240,000 worth of Rolex watches.

Harrell filed a motion to suppress all written and oral statements made by him to Postal Inspectors in this case, arguing that his statements were made involuntarily. Three of the defendants have either pled guilty or expressed their intent to plead guilty. The court held a hearing on April 4, 2014 and heard testimony and arguments from the parties regarding the motion to suppress. Postal Inspector Devin Mowrey, the lead investigator, testified on behalf of the government. He testified regarding the various statements taken from the defendants in this case.

Relevant to the motion to suppress, Inspector Mowrey testified that he had received information that Harrell was at a meeting on the day of or on the day before the robbery where the robbery was discussed among the conspirators. On April 3, 2013, he asked Harrell to meet him at a local Denny's restaurant in order to discuss the investigation of the robbery. Harrell agreed to meet with the Inspector. Harrell traveled to the Denny's restaurant on his own accord. Inspector Mowrey and his partner, Inspector Boyd, questioned Harrell about the facts they had gathered during their investigation. Inspector Mowrey stated that during the interview the facts known to the Inspectors were presented to Harrell, and he was given an opportunity to explain the information or provide his version of the events. They told him that he was involved in their investigation of the robbery, but did not tell him that anyone had implicated him as being a participant in the robbery. Inspector Mowrey testified that he told Harrell he knew he was at the meeting where other defendant's planned the robbery.

Inspector Mowrey did not say to Harrell whether he believed Harrell was merely present at the planning meeting or a participant in the meeting and robbery. Inspector Mowrey told Harrell that "it is better to be a witness than a defendant, and to tell us the truth." He implied there was value in being a witness, but explained that all charging decisions were made by the U.S. Attorney's Office. Harrell confirmed he was at the planning meeting. Inspector Mowrey testified that Harrell was not a target of the investigation at this time. This first interview lasted approximately 30 minutes, and Harrell left the restaurant. Harrell was not read his *Miranda* rights and was not placed into custody.

Inspectors Mowrey and Boyd had another meeting with Harrell at a Denny's restaurant in April. Inspector Mowrey requested the interview with Harrell and told him that he needed to continue to cooperate and that it was better to cooperate. Harrell agreed to go to the Denny's to be interviewed. The second meeting was held to gain further details about the information provided by Harrell during their first meeting. Inspector Mowrey did not recall if he told Harrell that it was better to be a witness, than a defendant during this interview. The Inspector relayed to Harrell that he only believed Harrell was involved in this investigation, and he was not a target. Harrell was not read his *Miranda* rights, and he was not taken into custody.

Inspector Mowrey still viewed Harrell as a potential witness, and he expressed this belief to the Assistant U.S. Attorney in charge of the case. Inspector Mowrey had no other in-person meetings with Harrell in the interval between April and November, but only a few telephone

conversations. Inspector Mowrey discussed with Harrell the prospect of testifying at trial as a witness. By November 2013, three of the defendants had been indicted and arrested.

On November 13, 2013, Inspector Mowrey asked Harrell to come down to the Postal Inspector's Office to take a polygraph examination in order to test his veracity as a witness. Inspector Mowrey believed that Harrell was not telling him the complete truth or that certain information was being withheld by Harrell. Harrell agreed to undergo a polygraph examination and came to the Postal Inspector's Office by his own transportation. Harrell was read his *Miranda* rights by the polygrapher, and the polygrapher explained that providing the *Miranda* rights was standard protocol for all persons being given a polygraph. Harrell signed the waiver of his *Miranda* rights, took the polygraph examination, and provided another statement to Inspector Mowrey. This encounter lasted approximately 3 to 4 hours.

Inspector Mowrey testified that the polygraph results revealed that Harrell had not been completely truthful about the robbery or he was withholding information. During the interview, Harrell asked Inspector Mowrey if he was in trouble, and the Inspector responded it was up to the U.S. Attorney's Office. Harrell was indicted on December 12, 2013 and arrested days later. Harrell now moves to suppress all of his statements to Postal Inspectors on the basis that Inspector Mowrey's direct and indirect statements that he would be a witness rendered the statements involuntary.

II. LEGAL STANDARD

The Government bears the burden of proving, by a preponderance of the evidence, that the statements made during an interrogation were voluntary. *Colorado v. Connelly* 479 U.S. 157, 168 (1986). The voluntariness of a defendant's statement is reviewed based on the totality of the circumstances surrounding the interrogation. *Dickerson v. United States,* 530 U.S. 428, 437 (2000). When reviewing the totality of the circumstances, both the characteristics of the accused and details of the interrogation should be considered. *Dickerson,* 530 U.S. at 434, 120 S.Ct. 2326. "A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice." *United States v. Broussard,* 80 F.3d 1025, 1033 (5th Cir.1996).

To render a confession involuntary, a defendant must demonstrate that law enforcement officers engaged in coercive conduct and that there was a causal link between the officer's coercive conduct and the confession. *United States v. Bell,* 367 F.3d 452, 461 (5th Cir.2004). Coercive conduct refers not only to physical violence but also to other deliberate means calculated to break the defendant's will, including direct or subtle forms of psychological persuasion. *Broussard,* 80 F.3d at 1034. The Fifth Circuit has been careful to note that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *United States v. Reynolds,* 367 F.3d 294, 298 (5th Cir.2004). The court must examine " 'whether a defendant's will was overborne by the circumstances surrounding the giving of [an incriminating statement]." *Dickerson,* 530 U.S. at 434.

III. ANALYSIS

Harrell argues that he was induced into giving statements to Postal Inspectors by Inspector Mowrey's representations that he was not a target of the robbery investigation and that he was only being interviewed as a witness. He claims that his statements were rendered involuntary based on the circumstances surrounding the interviews and the impressions left by Inspector Mowrey with Harrell regarding his status in the investigation. Certain indirect or implied promises of leniency or immunity may be "so attractive they render a resulting confession involuntary" if the promise is not kept. *Streetman v. Lynaugh,* 812 F.2d 950, 957 (5th Cir.1987). However, "a confession is not involuntary merely because the suspect was promised leniency if he cooperated with law enforcement officials." *United States v. Santiago,* 410 F.3d 193, 202 (5th Cir.2005). The existence of a promise constitutes but one factor in the voluntariness determination and "does *not* render a confession involuntary *per se*." *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir.1988).

Here, the court credits the testimony of Inspector Mowrey and finds that Harrell was not promised any sort of leniency or immunity, which under the totality of the circumstances, would render his statements involuntary. Based on the testimony of Inspector Mowrey, Harrell willingly attended, traveling to and from by his own means, three personal interviews with Inspector Mowrey. The encounters were not particularly lengthy, two interviews were conducted at a public restaurant, and Harrell was informed that he was free to leave at any time. He was not in custody during any of the interviews.

With regard to Inspector Mowrey's direct or indirect implications that Harrell would only be a witness in this case, Inspector Mowrey's testimony confirms that Harrell was thought of and expected to be a witness on behalf of the government until the point the polygraph examination revealed he had been untruthful. Inspector Mowrey testified that he did tell Harrell that it was better to be a witness than a defendant and there was some value in being

a witness. However, Inspector Mowrey also advised Harrell more than once that the U.S. Attorney's Office retained the ultimate decision on whether or not he would be charged in connection with the robbery and that the statements being made by Harrell were being provided to the U.S. Attorney's Office. And, despite the lack of any custodial interrogation, he was read and waived his *Miranda* rights during the final interview. These warnings accurately informed him that his statements could be used against him, and based upon Harrell's experience with law enforcement, the court does not find that he was unable to understand these warnings. *See Bell,* 367 F.3d at 461 (trickery or deceit is only prohibited to the extent that it deprives the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them).

Inspector Mowrey's statements that Harrell was not a target and that it would be better to be a witness were not promises of leniency or immunity. *See Cardenas,* 410 F.3d at 295 (encouragement to cooperate with the government as a witness not held to constitute coercion). At all times prior to the polygraph examination, Harrell was viewed and treated by the Inspector as a witness. Thus, there was no misrepresentation or deception on the part of the Inspectors by taking this position. Ultimately, it was the false or withheld information that changed Harrell's status in the investigation from witness to target.

The Fifth Circuit considered a similar case in *United States v. Fernandes,* 285 Fed.Appx. 119 (5th Cir.2008). In *Fernandes,* the police officers initiated a "knock-and-talk" at the suspect's residence related to information that the defendant was selling drugs from his apartment. *Id.* at 121. The officer told defendant "I don't want you to get in any trouble. That's not why I'm here ... if I can respond to this complaint and say I've spoke to [defendant], and he gave me the bong, and I went away, then we're over with it, okay." *Id.* The officers eventually gained access to the defendant's apartment and observed other paraphernalia used to distribute drugs. *Id.* at 122. At that point, defendant was placed under arrest. *Id.*

Fernandes argued that his statements should be suppressed because the officers extracted his incriminatory statements by making promises that the incident would be "over with" if he produced his bong. *Id.* at 124. The Fifth Circuit affirmed the district court's rejection of this argument. The court found the officer's statement did not, when viewed in the context of the entire encounter, render defendant's statements involuntary. *Id.* at 125. The statement was "at most an implication of leniency," and was merely a "prediction of future events, rather than an explicit promise." *Id.* at 124-25. "[I]ndirect promises do not have the potency of direct promises." *Id.* at 124. Additionally, as found by the district court, the statement by the officer was likely true when he told the suspect to give him the bong and then the incident would be "over with." *Id.* at 124. Had only a bong resulted from the consensual encounter, then the officers likely would have terminated the encounter. *Id.* Thus, no explicit promises of leniency were found based on the officer's statement. *Id.*

Like the statement in *Fernandes,* Inspector Mowrey did not make any explicit promises of immunity to Harrell. The Inspector did not tell Harrell that he would not be indicted and did not use trickery or deception to secure Harrell's statements. In fact, Inspector Mowrey's statements that implied Harrell was being questioned as a witness were true when made. The implication was not that the defendant would be immune from prosecution, but rather that the defendant would not face prosecution so long as his account of the event proved true. Therefore, based on the totality of the circumstances, the court does not find that Harrell's will was overborne by the Inspector's interrogation tactics such that his statements were rendered involuntary.

IV. CONCLUSION

Because the court finds that Harrell's statements were given voluntarily, the court DENIES Harrell's motion to suppress.

It is so ORDERED.

102 S.Ct. 2799
Supreme Court of the United States

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26 et al., Petitioners,
v.
Steven A. PICO, by his next friend Frances Pico et al.

No. 80–2043
|
Argued March 2, 1982.
|
Decided June 25, 1982.

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice MARSHALL and Justice STEVENS joined, and in which Justice BLACKMUN joined except for Part II–A–(1).

The principal question presented is whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.

I

Petitioners are the Board of Education of the Island Trees School District, in New York, and its board members (the Board). The Board is a state agency charged with responsibility for the operation and administration of the public schools within the School District, including the Island Trees High School and Island Trees Junior High School. Respondents are students (the students).

In September 1975, the Board attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference petitioners obtained lists of books described as "objectionable," and "improper for school students." It was later determined that the High School library contained nine of the listed books, and that another listed book was in the Junior High School library. In February 1976, the Board gave directed that the listed books be removed from the library shelves and delivered to the Board's offices, so that Board members could read them. When this directive was carried out, it became publicized, and the Board issued a press release justifying its action. It characterized the removed books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," and concluded that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical dangers." 474 F.Supp. 387, 390 (EDNY 1979).

A short time later, the Board appointed a "Book Review Committee," consisting of four Island Trees parents and four members of the Island Trees staff, to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." In July, the Committee made its final report to the Board, recommending that five of the listed books be retained and that two others be removed from the school libraries. As for the remaining four books, the Committee could not agree on two, took no position on one, and recommended that the last book be made available to students only with parental approval. The Board substantially rejected the Committee's report later that month, deciding that only one book should be returned to the High School library without restriction, that another should be made available subject to parental approval, but that the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum." The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed.

The students reacted to the Board's decision by bringing the present action under 42 U.S.C. § 1983. They alleged that petitioners had

> "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value."

The students claimed that the Board's actions denied them their rights under the First Amendment and requested the court to order the Board to return the nine books to the school libraries.

The District Court granted summary judgment in favor of the Board. 474 F.Supp. 387 (1979). A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, and remanded the action for a trial on the students' allegations. 638 F.2d 404 (1980). We granted certiorari, 454 U.S. 891 (1981).

II

We emphasize the limited nature of the substantive

question before us. Our precedents have long recognized certain constitutional limits upon the power of the State to control the curriculum and classroom. The students do not seek to impose limitations upon the Board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of this case thus does not intrude into the classroom, or into the courses taught there. Further, even as to library books, the action before us does not involve the *acquisition* of books. The students have not sought to compel the Board to add to the library shelves any books students desire to read. Rather, the only action challenged is the *removal* from school libraries of books originally placed there by the school authorities.

The substantive question before us is further constrained by the procedural posture of this case. The Board was granted summary judgment by the District Court. The Court of Appeals reversed that judgment, and remanded the action for a trial on the merits of the students' claims. We can reverse the judgment of the Court of Appeals, and grant the Board's request for reinstatement of the summary judgment in its favor, only if we determine that "there is no genuine issue as to any material fact," and that the Board is "entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). In making our determination, any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party and in favor of the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970).

In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose *any* limitations upon the discretion of the Board to remove library books from school libraries? Second, if so, does the evidence before the District Court, construed most favorably to the students, raise a genuine issue of fact whether the Board might have exceeded those limitations? We examine these questions in turn.

A

(1)

The Court has long recognized that local school boards have broad discretion in the management of school affairs. See, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). *Epperson v. Arkansas,* 393 U.S., at 104, reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities," and that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969), noted that we have "repeatedly emphasized ... the comprehensive authority of the States and of school officials ... to prescribe and control conduct in the schools." We have also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). We are therefore in full agreement with the Board that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), we held that under the First Amendment a student in a public school could not be compelled to salute the flag. We reasoned that boards of education must exercise their discretionary functions within the confines of the Bill of Rights. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*, at 637. Thus, we held that students' liberty of conscience could not be infringed in the name of "national unity" or "patriotism." 319 U.S., at 640-641.

Later cases have consistently followed this rationale. Thus *Epperson v. Arkansas*, invalidated a State's anti-evolution statute as violative of the Establishment Clause, and reaffirmed the duty of federal courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." 393 U.S., at 104.

And *Tinker v. Des Moines School Dist., supra*, held that a local school board had infringed the free speech rights of high school and junior high school students by suspending them from school for wearing black armbands in class as a protest against the Government's policy in Vietnam; we stated there that the "comprehensive authority ... of school officials" must be exercised "consistent with fundamental constitutional safeguards." 393 U.S., at 507. We held that students' rights to freedom of expression of their political views could not be abridged by reliance upon an "undifferentiated fear or apprehension of disturbance" arising from such expression:

> "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this ... often disputatious society." 393 U.S., at 508-509.

In sum, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.*, at 506, and therefore local school boards must discharge their "important, delicate, and highly discretionary functions" within the limits and constraints of the First Amendment.

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. *Epperson v. Arkansas*, 393 U.S., at 104. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

In keeping with this principle, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows from the *sender's* First Amendment right to send them: "The right of freedom of speech and press ... embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

As we recognized in *Tinker*, students too are beneficiaries of this principle:

> "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.... [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.' " 393 U.S., at 511.

Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker v. Des Moines School Dist.*, 393 U.S., at 506. But the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), observed that " 'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' " The school library is the principal locus of such freedom.

The Board emphasizes the inculcative, i.e., teaching, function of secondary education, and argues that it must be allowed *unfettered* discretion to "transmit community values" through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. The Board might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

(2)

In rejecting the Board's claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of

the Board to remove books from its libraries. In this inquiry we enjoy the guidance of several precedents. *West Virginia Board of Education v. Barnette*, stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion .... If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S., at 642.

This doctrine has been reaffirmed in later cases involving education. For example, *Keyishian v. Board of Regents, supra*, 385 U.S., at 603, noted that "the First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom."

With respect to the present case, we hold that the Board rightly possess significant discretion to determine the content of its school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by black people or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas.* Thus whether the Board's removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind the Board's actions. If the Board *intended* by its removal decision to deny the students access to ideas with which the Board disagreed, and if this intent was the decisive factor in the Board's decision, then the Board has exercised their discretion in violation of the Constitution.

On the other hand, the students concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. And again, the students concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." In other words, in the students' view such motivations, if decisive of the Board's actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

In brief, we hold that local school boards may not *remove* books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S., at 642. Such purposes stand inescapably condemned by our precedents.

B

We now turn to the remaining question presented by this case: Do the evidentiary materials that were before the District Court, when construed most favorably to the students, raise a genuine issue of material fact whether the Board exceeded constitutional limitations in exercising its discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which forecloses summary judgment in favor of the Board.

Before the District Court, the students claimed that the Board's decision to remove the books "was based on its personal values, morals and tastes." The students also claimed that the Board objected to the books in part because excerpts from them were "anti-American." The accuracy of these claims was partially conceded by the Board, and the Board's own evidence lent further support to the students' claims. In addition, the record developed in the District Court shows that when the Board offered its first public explanation for the removal of the books, they relied in part on the assertion that the removed books were "anti-American," and "offensive to ... Americans in general." 474 F.Supp., at 390. Further, while the Book Review Committee appointed by the Board was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level,"—the Committee's recommendations that five of the books be retained and that only two be removed were rejected by the Board, without reason. Finally, while the Board originally defended its removal decision with the explanation that "these books contain obscenities, blasphemies, brutality, and perversion beyond description," 474 F.Supp., at 390, one of the books, A Reader for Writers, was removed even though it contained no such language.

Standing alone, evidence of the motivations behind the Board's removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed established and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. The evidence tends to show the Board ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the Superintendent of

Schools, and the guidance of publications that rate books for junior and senior high school students. Further, the Board's decision appears to be based, at least in part, on the books' inclusion on the PONYU list. Indeed, the Board did not undertake an independent review of other books in the libraries.

Construing these claims, affidavit statements, and other evidentiary materials in a manner favorable to the students, we cannot conclude that the Board was "entitled to a judgment as a matter of law." The evidence plainly does not foreclose the possibility that the Board's decision to remove the books rested decisively upon a desire to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which the Board and their constituents adhered. Of course, some of the evidence before the District Court might lead a finder of fact to accept Board's claim that its removal decision was based upon constitutionally valid concerns. But that evidence at most creates a genuine issue of material fact on the critical question of the credibility of the Board's justifications for its decision.

Affirmed.

Justice BLACKMUN, concurring in part and concurring in the judgment.

While I agree with much in today's plurality opinion, and while I accept the standard laid down by the plurality, I write separately because I have a different perspective on the nature of the First Amendment right involved.

I

To my mind, this case presents a particularly complex problem because it involves two competing principles of constitutional stature. On the one hand, and as we all can agree, the Court has acknowledged the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] ... teach fundamental values necessary to our democratic political system." *Ambach v. Norwick*, 441 U.S., at 77.

On the other hand, as the plurality demonstrates, it is beyond dispute that schools must operate within the confines of the First Amendment. In a variety of academic settings the Court therefore has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). While none of these cases define the limits of a school board's authority to choose a curriculum, they are based on the general proposition that "state-operated schools may not be enclaves of totalitarianism.... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969). The Court in *Tinker* thus rejected the view that "a State might so conduct its schools as to 'foster a homogeneous people.' " *Id.*, at 511.

In my view, the principle involved here is both narrower and more basic than the "right to receive information" identified by the plurality. Instead, I suggest that certain forms of state discrimination *between* ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.

The school is designed to, and inevitably will, teach ways of thought and outlooks; if educators intentionally may eliminate all diversity of thought, the school will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S., at 637. As I see it, then, the question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved. In this context, the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker v. Des Moines School Dist.*, 393 U.S., at 509, and that the board had something in mind in addition to the suppression of partisan or political views it did not share. School officials must be able to choose one book over another, without

outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present, such as the use of offensive language, inappropriate content for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

Because I believe that the plurality has derived a standard similar to the one compelled by my analysis, I join all but Part II–A(1) of the plurality opinion.

Justice WHITE, concurring in the judgment.

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar." 474 F.Supp. 387, 397 (EDNY 1979). The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. When findings of fact and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment, and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented.

We should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here. I therefore concur in the judgment of affirmance.

64 F.3d 184
United States Court of Appeals, Fifth Circuit.

Susan CAMPBELL, Etc., Plaintiff–Appellee,
v.
ST. TAMMANY PARISH SCHOOL BOARD, Etc.,
Defendant–Appellant.
No. 94–30594
|
Sept. 15, 1995.

WIENER, Circuit Judge:

In this case involving a First Amendment challenge to the removal of a book from all of the public school libraries in St. Tammany Parish, Louisiana, we review a ruling of the district court in which it found the St. Tammany Parish School Board's decision to remove the book unconstitutional and granted summary judgment to the parents who had objected to the book's removal. Our *de novo* review of the summary judgment evidence leads us to conclude that a genuine issue of material fact exists regarding whether the School Board removed the book for constitutionally impermissible reasons. We therefore reverse the district court's grant of summary judgment.

I
FACTS AND PROCEEDINGS

The instant case centers on the decision of the St. Tammany Parish School Board (School Board) to remove the book *Voodoo & Hoodoo* (Book), by Jim Haskins, from the public school libraries of the parish. Facially serious and scholarly, the Book traces the development of African tribal religion, its transfer to and evolution in the New World after slaves were brought from West Africa, and its survival in the United States through the current practice of two variations of the original African religion, voodoo and hoodoo.[1] Most of the first half of the Book discusses the evolution and practice of voodoo and hoodoo in African–American communities in this country, including in New Orleans, Louisiana. The second half of the Book is devoted to a presentation of "spells," "tricks," "hexes," "recipes," (spells) that outline, in how-to form, the way to bring about particular events. The spells are presented under four categories: "To Do Ill," "To Do Good," "In Matters of Law," and "In Matters of Love."

Early in 1992, Kathy Bonds, the parent of a seventh-grade girl enrolled in a St. Tammany Parish junior high school, discovered a copy of the Book in her daughter's possession. This copy of the Book came from the library of her daughter's school. After looking through the Book, Bonds telephoned the assistant principal at the daughter's school and objected to the Book's contents. Bonds also contacted a friend who was a member of the Louisiana Christian Coalition and gave that copy of the Book to her.

Pursuant to the School Board's written policies and procedures regarding challenged library materials, Bonds filed a formal complaint with the school principal. The crux of her complaint was that the Book heightened children's infatuation with the supernatural and incited students to try the explicit "spells," which she believed to be potentially dangerous. In response to Bond's complaint and pursuant to the school district's policies, the principal organized a school-level committee to review the matter.

After considering Bond's complaint, the school-level committee unanimously recommended retaining *Voodoo & Hoodoo* in the school's library, albeit on a specially-designated "reserve" shelf available only to eighth-grade students who had obtained written permission from their parents to check out the Book. This school-level committee found that the Book was educationally suitable and stated that it "fulfill[s] the purpose for which it was selected, that is, to offer supplemental information/explanation to a topic included in the approved 8th grade Social Studies curriculum."

Clearly not satisfied with the school-level committee's recommendation, Bonds filed an appeal. The superintendent of the St. Tammany Parish public school system, pursuant to the School Board's procedures, appointed seven persons to a parish-wide committee (Appeals Committee) to review the school-level committee's decision. The Appeals Committee, with only one member dissenting, agreed with the school-level committee's recommendation that the Book should be retained, but with restricted access. The lone dissenter was School Board member Robert Womack, whose Minority Report submitted after the Appeals Committee vote stated that the Book "promotes extremely unhealthy practices that are not conducive to sound moral values" and that "at a time when there is a resurgent interest in the occult and the supernatural, we do not need books like *Voodoo and Hoodoo* in our libraries."

Still undaunted, Bonds appealed that decision to the St. Tammany Parish School Board. At the meeting in which the School Board reviewed the objections to the Book's presence in the school library, a member of the Louisiana Christian Coalition gave a speech in which she told the School Board that the Book contained a " 'how to' section

on voodoo spells that encourage[d] harmful, antisocial behavior among young readers." She also presented to the School Board (1) a written statement objecting to the Book's presence in the school libraries "based on our belief that the manner in which the subject matter is presented constitutes an advocacy of practices of the voodoo religion" and (2) a petition containing 1,600 signatures urging removal of the Book from the parish school libraries. In addition, the School Board heard a presentation by the Appeals Committee outlining the process for challenging library materials and reporting the Appeal Committee's recommendation that the Book be placed in the reserve reference collection for eighth-grade students who had parental permission.

School Board member Womack, who had been the lone dissenter on the Appeals Committee, made a motion to remove *Voodoo & Hoodoo* from all of the libraries in the St. Tammany Parish public school system. In response, another School Board member, Robert Lehman, made a substitute motion to remove the Book from the schools and donate them to the public libraries. Lehman's substitute motion failed in a 7–7 tie vote. The School Board subsequently voted 12–2 in favor of Womack's motion to remove *Voodoo & Hoodoo* from all parish school libraries. In voting to remove the Book from the shelves altogether, the School Board did not express any opinion on the merits of the recommendations from the two committees that had reviewed the Bonds complaint previously. Neither did the School Board state the reason for its removal action.

The plaintiffs, parents of children enrolled in St. Tammany Parish schools (Parents), filed a lawsuit against the School Board, alleging the School Board's removal of *Voodoo & Hoodoo* from the public school libraries in St. Tammany Parish violated their children's First Amendment rights. The Parents filed a motion for summary judgment, which the court granted, ruling that there was no genuine issue of material fact in dispute. In so doing, the court stated that, by removing *Voodoo & Hoodoo* from all public school libraries in St. Tammany Parish, the School Board "intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs." The School Board timely appealed the district court's ruling.

II
ANALYSIS

We review the district court's grant of summary judgment by "reviewing the record under the same standards which guided the district court." *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). Summary judgment is proper when the moving party establishes, through competent evidence, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. If the evidence, viewed in the light most favorable to the nonmoving party, could not lead a rational trier of fact to find for the nonmoving party, then no genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986)

Our *de novo* review starts with an acknowledgment that public school officials have broad discretion in the management of school affairs and that the courts should not lightly interfere with the "daily operation of school systems." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). School officials' legitimate exercise of control over pedagogical matters must be balanced, however, with the recognition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). Mindful of the significant competing considerations at the core of this First Amendment book removal case, we turn to an examination of the relevant caselaw to ascertain what factual issues are material.

A. *Supreme Court Guidance*

The Supreme Court has repeatedly recognized that the broad authority of school officials over educational matters must be exercised in a manner that comports with fundamental constitutional safeguards. Applying this concept in a case similar to this one, the Court in *Board of Education v. Pico* 457 U.S. 853 (1982) considered the issue whether school officials acted properly in removing nine books from libraries in the public school district. A plurality of the Supreme Court in *Pico* first outlined the nature of the students' First Amendment rights and subsequently concluded that, based on the evidentiary materials in the record, a genuine issue of fact existed as to whether the school officials had exceeded First Amendment limitations on their discretion to remove library books from the schools. The *Pico* plurality stressed the "unique role of the school library" as a place where students could engage in voluntary inquiry. *Id.* at 868-69. It also observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding" and that the school library served as "the principal locus of such freedom." *Id*.

The *Pico* plurality recognized that the high degree of deference accorded to educators' decisions regarding curricular matters diminishes when the challenged decision involves a noncurricular matter. *See id*. at 868–70. Emphasizing the voluntary nature of public school library use, the plurality in *Pico* observed that school officials' decisions regarding public school library

materials are properly viewed as decisions that do not involve the school curriculum and that are therefore subject to certain constitutional limitations. *Id.*

In rejecting the school officials' claim of absolute discretion to remove books from their school libraries, the *Pico* plurality recognized that students have a First Amendment right to receive information and that school officials are prohibited from exercising their discretion to remove books from school library shelves "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' " *Id*. at 872. The *Pico* plurality observed that if school officials intended by their removal decision to deny students access to ideas with which the school officials disagreed, and this intent was the *decisive* factor in the removal decision, then the school officials had "exercised their discretion in violation of the Constitution." *Id.* The Court in its plurality opinion implicitly recognized, however, that an unconstitutional motivation would not be demonstrated if the school officials removed the books from the public school libraries based on a belief that the books were "pervasively vulgar" or on grounds of "educational suitability." *See id*. at 870–72.

Even though the constitutional analysis in the *Pico* plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the School Board's removal decision was based on unconstitutional motives. The Supreme Court has previously stated that, in cases in which there is no clear Supreme Court majority, courts should look to "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) Justice White's concurrence in *Pico* represents the narrowest grounds for the result in that case, and it does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library. The concurrence merely states that the procedural posture of the case did not require addressing the constitutional questions presented because a material issue of fact existed, precluding summary judgment. *Pico*, 457 U.S. at 882-86

Although the result in *Pico* was a remand to the district court for further development of the record, we do not read *Pico* as establishing a *per se* rule, requiring a merits trial in *every* instance in which a court must decide the constitutionality of removal of a school library book. In *Pico,* a majority of the court concluded that, based on that case's summary judgment record, material issues of factual dispute existed regarding the school officials' motivation in removing the books that precluded a summary judgment determination. Having examined the relevant caselaw, limited as it is, we now turn to an examination of the summary judgment evidence in the instant case to determine whether any issues of material fact exist here.

B. *Summary Judgment Evidence*

As reflected by the record in the instant case, the students attending the St. Tammany Parish public schools are not required to read the books contained in the libraries; neither are the students' selections of library materials supervised by faculty members—thus, the School Board's decision to remove *Voodoo & Hoodoo* concerns a non-curricular matter. See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (finding that curricular matters are those that "the public might reasonably perceive to bear the imprimatur of the school"). As such, the School Board's decision to remove the Book must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter. See *Pico*, 457 U.S. at 866-68

The Supreme Court has held, however, that the key inquiry in a book removal case is the school officials' substantial motivation in arriving at the removal decision. *See id*. at 870-72. We find that the record evidence before us is not sufficiently developed to permit a summary judgment determination. Our careful consideration of the School Board members' statements as contained in the record leaves us unable to declare, as a matter of law, that the School Board's vote to remove *Voodoo & Hoodoo* from all of the parish public school libraries was substantially based on an unconstitutional motivation. At this stage, we simply do not have a full picture of the reasons why the School Board members constituting the majority voted to remove the Book.

Although our examination of the summary judgment evidence ultimately leads us to remand the instant case for further development of the record, we are moved to observe that, in light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics, the School Board's non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to "strangle the free mind at its source." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) That possibility is reinforced by the summary judgment evidence indicating that many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did; many had done nothing more than browse through the book, while others had read only the several excerpts selected and furnished by a representative of the Louisiana Christian Coalition.

Moreover, we note that the School Board's failure to consider, much less adopt, the recommendation of the two previous committees to restrict the Book's accessibility to eighth-graders with written parental permission but to leave the Book on the library shelf—in apparent disregard of its own outlined procedures—has the appearance of "the antithesis of those procedures that might tend to allay suspicions regarding [the School Board's] motivations." *Pico*, 457 U.S. at 875

The circumstances surrounding the School Board's vote to remove the Book cannot help but raise questions regarding the constitutional validity of its decision. Nevertheless, as we are unable at this juncture to identify, as a matter of law, the single decisive motivation behind the School Board's removal decision, we have no sound basis on which to test that decision for compliance with the requirements of the First Amendment. In the absence of an undisputed statement by the School Board as a single voting body, we are faced with diverse, conflicting and frequently ambivalent statements of twelve individuals, which statements need to be further developed at trial.

III
CONCLUSION

Construing the summary judgment evidence in the instant case in the light most favorable to the School Board, we cannot conclude as a matter of law that a genuine issue of material fact does not exist as to whether the motivating factor behind the School Board's decision to remove *Voodoo & Hoodoo* was one that violated the students' First Amendment right freely to access ideas and receive information. Accordingly, we reverse.

REVERSED and REMANDED.

Footnotes

[1] According to the Book, voodoo originated from African slaves' religious practices in Roman Catholic areas of the New World, such as Spain, Haiti, and the Dominican Republic, that were continued in North America, whereas hoodoo is traceable to the influence of Protestant religious practices on African tribal religion, having evolved from slaves that were transported from British-held territories, most notably Jamaica.

557 F.3d 1177
United States Court of Appeals,
Eleventh Circuit.

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INCORPORATED, Miami–Dade County Student Government Association, Plaintiffs–Appellees,
v.
MIAMI–DADE COUNTY SCHOOL BOARD, Rudolph F. Crew, Defendants–Appellants.

No. 06–14633.
|
Feb. 5, 2009.

CARNES, Circuit Judge:

Juan Amador was outraged when he read the inaccurate portrayal of life in Cuba that was contained in a book on the shelves of the library where his young daughter went to school. He asked that the book be removed from the shelves, explaining that "[a]s a former political prisoner from Cuba, I find the material to be untruthful. It portrays a life in Cuba that does not exist." *ACLU of Fla., Inc. v. Miami–Dade County Sch. Bd.,* 439 F.Supp.2d 1242, 1247 (S.D.Fla.2006). After a lengthy review process, the School Board removed the book.

Illustrating something akin to Newton's Third Law of Motion, the action the School Board took at Amador's request caused an equal and opposite reaction from another parent and two organizations. They promptly sued the Board. Agreeing with their claims that the School Board's action violated the First Amendment and the Due Process Clause, a federal district court enjoined the Board from removing the book. *Id.* at 1294. This is the Board's appeal.

I.

The Miami–Dade County Public School District has forty-nine copies of the book, *A Visit to Cuba,* and its Spanish-language counterpart, *¡Vamos a Cuba!,* spread out among thirty-three of its elementary and middle schools. *Id.* at 1249. (For convenience we will refer to all forty-nine copies by the Spanish language title *Vamos a Cuba.*) The *Vamos a Cuba* book is part of a series of books which "targets readers between the ages of 4 to 8 years old, and [is] written to provide basic information about what life is like for a child" in various countries. *Id.* at 1248. The "A Visit to" series also includes books about various other countries. The school district has at least one copy of those other "A Visit to" books in some of its elementary and middle school libraries. *Id.* at 1248-49. The "A Visit to" series is located in the libraries' nonfiction (history, geography, cultures) section.

The books in the "A Visit to" series all follow the same "formulaic format." *Id.* at 1254. They offer the young reader "superficial introductions to geography, people, customs, language, and daily life." *Id.* at 1249 n. 8. "The large-print texts are accompanied by color photos of varying quality and relevance." *Id.* For example, the thirty-two pages of *Vamos a Cuba* contain general statements about Cuba's geography ("Cuba is a country in the *Caribbean Sea,* south of Florida."), people ("Most Cubans live in cities."), customs ("Cubans dress to keep cool in the hot weather."), language ("Most people in Cuba speak Spanish."), and daily life ("People in Cuba eat, work, and go to school like you do."). *Id.* at 1247 n. 4, 1249 n. 8.

On April 4, 2006, Juan Amador, the father of a young girl at Douglas Elementary, filed a "Citizen's Request for Reconsideration of Media" to have *Vamos a Cuba* removed from the library at his daughter's school. *Id.* at 1247. On the request form Amador identified himself as a former political prisoner and complained that the material in the book was not truthful and "portrays a life in Cuba that does not exist." *Id.* Amador also wrote that, "I believe [*Vamos a Cuba*] aims to create an illusion and distort reality." He recommended that the book be replaced by one "that truly reflects the plight of the Cuban people of the past and present."

The district has a four-tiered administrative procedure for reviewing requests to remove books from the district's libraries. In this case, Amador followed the administrative review process from start to finish. The School Committee considered the book in light of the district's fifteen written criteria for evaluating books for its school library collections. The School Committee's vote was seven to one in favor of retaining *Vamos a Cuba* in the Douglas Elementary library. The seventeen-member District Committee also voted to retain the book by a vote of 15 to 1. The superintendent adopted the District Committee's recommendation. Amador appealed the superintendent's decision to the School Board the same day and the School Board took up his appeal at its next meeting.

In its April 18, 2006 meeting, the Board heard comments from guest speakers in the community and considered the issue of removing *Vamos a Cuba* from the libraries. In its June 14, 2006 meeting, Board members spoke about their views on the subject, and a majority of the Board voted for

removal of *Vamos a Cuba.* Board chairman Augustin Barrera began the discussion for the Board. He stated that the "issues before us, to me are quite clear, it's issues of inaccuracies, it's issues of omissions, because sometimes the words that are not said are more powerful than those words which are said, and sometimes there's generalities, which is how this book is portrayed." Chairman Barrera continued by saying that the problem with the book is that it "gives a lack of information, and it's in that lack of information that I think we as the Cuban community are offended." and, "if it was up to me, I would replace the whole series, because those books do not do justice to those 24 countries, and I think we owe it to the students in Miami–Dade County public schools to give them the best education possible.

Board member Ana Rivas Logan spoke next. She said that "from the very first day" she reviewed *Vamos a Cuba* she had "found the book extremely offensive, inaccurate, full of omissions." Board member Logan requested to "replace the series with a new and updated series, which is nothing different than what we're going to be doing across this county, and across this state, and probably across this nation in every single school."

After Logan spoke, Board member Frank Bolanos and vice-chair Perla Tabares Hantman noted that *Vamos a Cuba* did not tell the truth about the Cuban experience.

Board member Evelyn Langlieb Greer explained that the "beauty" of the administrative procedure for requesting that a book be removed from the library was that "it takes the emotion and the politics out" of the decision-making process "and substitutes professional judgment." She explained that "once a book is in a system, and has enjoyed the consent of the administrative, of being in the system, it can only be legitimately removed in this country based on serious, material, irrevocable and clear inaccuracies and biases." She did not believe that was the case here given the 22 professional educators who reviewed the book and recommended to keep it.

Board member Martin Karp explained that "the author's intent in *Vamos a Cuba* was not to say anything about the politics of the country, and the harsh realities that exist there, but sometimes, as our Chair said, when you do not say anything or avoid addressing real problems, you say a lot." He said that the way to handle the problem "is to give our children a more accurate, age appropriate picture."

Finally Board member Robert Ingram spoke about the politicalization of this issue. He referred to threats he and his family received in the wake of his decision.

After all Board members who wished to speak had done so, Board member Logan made a motion. Her motion was to reject the superintendent's decision to retain the *Vamos a Cuba* book in the Douglas Elementary library and to replace the entire "A Visit to" series in the district's libraries "with updated books that are more actual to real life in these countries." The motion was approved by a vote of 6 to 3. The Board's decision, as contained in its written order, provided:

> Upon a review of the complete Record of the proceedings below, the Superintendent's recommendation sustaining the District Materials Review Committee's decision is hereby rejected. The foregoing is based upon the findings reflected by the record of these proceedings, and more specifically the finding that the book is inaccurate and contains several omissions. It is further ordered that, this book and the series it is a part of, be replaced, throughout the school district, with a more accurate set of books that is more representative of actual life in these countries.

About a week later the American Civil Liberties Union of Florida, Inc. and the Miami–Dade County Student Government Association filed a complaint, pursuant to 42 U.S.C. § 1983, against the School Board. The plaintiffs requested that the district court enjoin the School Board from enforcing its removal order.

The district court agreed and issued a preliminary injunction. The defendants filed a notice of appeal from the district court's preliminary injunction order.

II.

A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes by the burden of persuasion a likelihood of success on the merits. *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.,* 887 F.2d 1535, 1537 (11th Cir.1989).

We generally review preliminary injunctions only for an abuse of discretion, but we review *de novo* the legal conclusions on which they are based. *SEC v. Unique Fin. Concepts, Inc.,* 196 F.3d 1195, 1198 (11th Cir.1999). But that changes in First Amendment free speech cases like this one. We review *de novo* the core constitutional fact relating to the Board's motive. In such cases, we " 'make an independent examination of the whole record,' " *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984). We will review for clear error only the district

court's findings of ordinary historical facts.

III.

A.

The parties disagree about the contours of the legal standard we should apply to decide whether it is likely that the plaintiffs will succeed on their claim that the School Board's decision to remove the *Vamos a Cuba* book from all the school district's libraries violated their First Amendment rights. The plaintiffs contend that we should apply the test enunciated by a plurality of the Supreme Court in *Board of Education v. Pico,* 457 U.S. 853 (1982). In *Pico,* a New York school board voted to remove nine books from the libraries of the school district's middle and high schools because the books, according to the school board, were "anti-American, anti-Christian, anti-Semitic, and just plain filthy," and as a result posed a "moral danger" to the students. *Id.* at 857.

All four of the justices in the *Pico* plurality gave examples of reasons for which a school board could constitutionally remove books. Justice Brennan's opinion acknowledged the students' concession that it would be "perfectly permissible" to remove a book based on its lack of "educational suitability." *Id.* at 871. Justice Blackmun, in his separate opinion, acknowledged that: "First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.' " *Id.* at 880.

Pico, however, is of no precedential value as to the application of the First Amendment to these issues. With five different opinions and no part of any of them gathering five votes from among the nine justices, *Pico* is a non-decision so far as precedent is concerned. It establishes no standard. But, even if we applied the standard from the plurality, the plaintiffs still lose if the School Board removed *Vamos a Cuba* for legitimate pedagogical reasons such as concerns about the accuracy of the book.

Plaintiffs contend that the Board acted to suppress the viewpoint expressed in *Vamos a Cuba.* The viewpoint the plaintiffs ascribe to the book, and describe as content neutral and apolitical, is one in which the people of Cuba are portrayed as eating, working, and going to school like students in the Miami–Dade County School District do. *See ACLU,* 439 F.Supp.2d at 1283. The Board's conclusion that *Vamos a Cuba* is inaccurate, according to plaintiffs, is nothing but a pretense for enforcing the politically orthodox view—especially prevalent in South Florida—that opposes the Castro regime. The Board responds that it decided to remove the *Vamos a Cuba* books because they were "inaccurate and rife with omissions in their portrayal of life in Cuba," and that reason "does not constitute viewpoint discrimination.

Here the record as a whole includes the proceedings of the School Committee and the District Committee, both of which made recommendations about *Vamos a Cuba;* the superintendent's correspondence with those committees and with the Board; the transcripts of the Board's proceedings; and the evidence presented by the Board and by the plaintiffs at the preliminary injunction hearing in the district court. Our review of the record leads us to the conclusion that under the *Pico* standard, the Board members did not "remove books from school library shelves simply because they dislike[d] the ideas contained in those books and [sought] by their removal to prescribe what shall be orthodox in politics ... or other matters of opinion." *Pico,* 457 U.S. at 872.

Under the *Pico* standard, a school board's removal motive is unconstitutional if it is based on "simply" disliking ideas contained in the books *and* on seeking to prescribe what shall be orthodox in matters of opinion. *See id.* The record shows that the Board did not simply dislike the ideas in the *Vamos a Cuba* book. Instead, everyone, including both sides' experts, agreed that the book contained factual inaccuracies. Factual accuracy in a non-fiction book is not a "matter[ ] of opinion." *See Pico,* 457 U.S. at 872. Under the *Pico* standard we are applying, the Board did not act based on an unconstitutional motive.

Indeed, the Board followed its established procedures, and even then it was to replace *Vamos a Cuba* with a book that more accurately depicted life in Cuba. The Board did not vote to remove all books on Cuba or those that held a certain viewpoint on Cuban life. The School Committee commented that *Vamos a Cuba* lacked literary merit and technical quality and that the "[a]uthor could have better researched her topic." Another committee member noted numerous factual errors.

The District Committee conducted the next level of review for *Vamos a Cuba,* and some members had concerns about its accuracy. This was the situation at the time the School Board made its decision about *Vamos a Cuba.* The Board knew that a parent of a student had found the book to be inaccurate and that some members of both the School Committee and the District Committee had concerns about the book's inaccuracies, although a majority of each had recommended leaving the book on the shelves. The Board further focused on the book's

inaccuracies when making its decision.

The consistency throughout the process of the inaccuracy complaints and the consistency of the explanations of the Board members who voted to remove the book evidence that the Board's motive was what it stated—that the book was ordered removed from school libraries because it is full of factual errors.

B.

There was no evidence at the preliminary injunction hearing that the picture of life in Cuba that *Vamos a Cuba* presents is an accurate one. No one who testified there stated, or even suggested, that it is. To the contrary, the evidence at the hearing proved beyond dispute that the book contains substantial factual errors. At the hearing six expert witnesses—three for each side—testified . None of them testified that *Vamos a Cuba* is accurate.

Although everyone agreed that *Vamos a Cuba* contains inaccuracies, the district court still concluded that "ban[ning] books because of perceived inaccuracies sweeps too broadly." *ACLU,* 439 F.Supp.2d at 1284. There are two fundamental flaws in that characterization. For one, the inaccuracies were not merely "perceived." They were undisputed. For another thing, the book was not being banned. It was being removed from a school's library shelves. The book could still be found in public libraries in the area, and it was available for purchase from any of several online book sellers. .

The overwrought rhetoric about book banning has no place here. Book banning takes place where a government or its officials forbid or prohibit others from having a book. That is what "ban" means. *See Webster's New Twentieth Century Dictionary* 144–45 (1976) (defining "ban" as "to prohibit" or "to forbid"); *see also Black's Law Dictionary* 154 (8th ed.2004) (defining "ban" as "[t]o prohibit, esp[ecially] by legal means"). The term does not apply where a school district, through its authorized school board, decides not to continue possessing the book on its own library shelves.

There is, after all, a difference between banning and "removing." The word "remove" means "to move from a place or position; take away or off." *Random House Unabridged Dictionary* 1630 (2d ed.1993); *see also Black's Law Dictionary* 1322 (8th ed.2004) (defining removal as "[t]he transfer or moving of a ... thing from one location, position, or residence to another"). That is what the Board did with the book; it did not forbid or prohibit anyone from publishing, selling, distributing, or possessing the book. Nor is it accurate to say that the Board "prohibited even the voluntary consideration of the book in schools."

C.

The School Board's educational suitability criteria for books in the school library include the requirement that "[n]onfiction information is correct, recent, and objective." As we have just explained, it is undisputed that some of the information contained in *Vamos a Cuba* is not correct, recent, and objective. The School Board majority has consistently stated that the reason it was removing the book from school library shelves was its inaccuracies. Despite all of this, the district court still concluded that the School Board's stated reason was a guise for its members' actual motive to suppress *Vamos a Cuba*'s viewpoint and "impose upon their students a political orthodoxy to which they and their constituents adhered." *ACLU,* 439 F.Supp.2d at 1272. It was, the district court believed, an act of viewpoint discrimination intended "to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed." *Id.* at 1283.

The district court's reasoning is flawed. It never comes to grips with the substance of the School Board's position, which is that representations made in *Vamos a Cuba* falsely portray a life in Cuba that does not exist and that in reality life under the Castro regime is bad—really bad. Whatever else it does in the context of school library books, the First Amendment does not require a school board to leave on its library shelves a purportedly nonfiction book that contains false statements of fact. A preference in favor of factual accuracy is not unconstitutional viewpoint discrimination.

Nor is the omission of factual information about the hardships of life in another country a political viewpoint entitled to protection. Facts about the conditions inside a country are not a viewpoint. They are facts. A book that recounts those facts accurately would not, for that reason, be political in nature. And a book that presents a distorted picture of life inside a country—whether through errors of commission or omission—does not, for that reason, become "apolitical."

Plaintiffs argue that the majority of the School Board members were Cuban Americans; Cuban Americans despise Castro and his regime; therefore, the Board's removal of the book must have been motivated by their disagreement with the book's political viewpoint instead of by its factual inaccuracies. To the extent that is an argument, it confuses interest with motive. Cuban Americans are more interested than others in removing a book that falsely portrays, to the upside, life in Castro's Cuba, but that does not mean their motive for wanting the

book removed is anything other than the fact that the book contains falsehoods. If the book accurately discussed life in Cuba, they would have no reason to have it removed.

Besides, the argument in question sweeps too widely. It would, for example, render constitutionally suspect the votes of Jewish school board members to remove a book about life in the Third Reich. It would do the same to the votes of any African American board members who wanted to remove a book about life in the antebellum South. Interest does not necessarily equate with improper motive. If some members of the Board found *Vamos a Cuba* to be offensive, the record establishes that what offended them was its inaccurate portrayal of life in Cuba.

In this case the real issue for the courts, under the assumption of law that we have made, is not the educational suitability of *Vamos a Cuba.* It is whether the Board's decision to remove the book from school library shelves was motivated by its inaccuracies concerning life in Cuba or by a desire to promote political orthodoxy and by opposition to the viewpoint of the book. We find from the evidence in this record, including the School Board majority's consistent statements that it was removing *Vamos a Cuba* from the school library shelves because of factual inaccuracies. If there had been no factual inaccuracies, the book would not have been removed. While the fact that the Board members who voted to take the action are Cuban American may explain their interest in it, that does not impugn their motive. The stated motive was not a pretext or a guise for viewpoint discrimination. The plaintiffs' First Amendment claim does not have a substantial likelihood of success on the merits. The district court should not have granted a preliminary injunction based on that claim.

IV.

In conclusion, assuming the First Amendment applies to school board decisions to remove books from school libraries, the Board's action in removing this book did not violate the First Amendment.

The preliminary injunction is VACATED and the case is REMANDED to the district court.

