

Implied waiver by juvenile was sufficient when admonished by magistrate during confession.[In the Matter of C.M.](12-3-8C)

On February 22, 2012, the Waco Court of Appeals held that Family Code section 51.095 does not require an express waiver of rights, that an implicit waiver can be inferred from the actions and words of the person being interrogated.

¶ 12-3-8C. **In the Matter of C.M.**, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12)

Facts: An armed robbery of a convenience store committed with a shotgun took place a short distance from the place C.M. was residing with his cousin, Charles, and Charles's wife, Laura. At this time, C.M. was fifteen years old. Shortly after the robbery, a neighbor called the police to report a suspicious person attempting to enter Charles and Laura's residence through the back door. Multiple officers had been dispatched to the scene to attempt to locate the robber, some of whom were in uniform and some were not. An officer came to the residence and asked to search the residence because of the neighbor's report to make sure that no one had broken into the residence. Laura was the only person at home and gave consent.

At one point during the search for the robber, a suspect was spotted and chased, but that person escaped. A short time later, an officer spotted C.M. in an alley a short distance away peering around a corner of a building. When he saw an officer and a deputy constable, C.M. turned and tried to walk away. The officers took off running after C.M. and told him to stop, which he did. C.M. was frisked for weapons and walked back with the officers to the residence.

At the residence, C.M. was told not to leave and to wait next to Charles's vehicle. C.M. sat down on the back of Charles's truck and waited. Hines, a detective, and at least one other officer stood with CM. and had a conversation with CM. about what he had been doing that day and why he was not in school. During this time other officers were in the vicinity of CM. and were armed, although the officers testified that no weapon was pointed at CM. at any time and the weapons were unholstered only during the protective sweep of the residence. Additionally, some of the officers at the scene carried patrol rifles but the officers testified that they were pointed at the ground in a safety circle position and not at CM. While sitting on Charles's truck, the officers observed that CM. seemed to be very nervous and shaking. He was dressed in a t-shirt and shorts, which the officers believed was odd for the weather that day, which was cool. CM. was not handcuffed at any time prior to the conclusion of the second statement made in the patrol car.

C.M.'s initial story regarding his whereabouts that day were shown to be untrue, and after a short conversation of approximately five to ten minutes, Hines confronted C.M. by telling him that they knew what had happened that morning and that CM. might as well be truthful with the officers. At this point, CM. admitted that he had robbed a store with a shotgun. He had stolen a shotgun from a friend in Dallas and had hidden it under his bed wrapped in a towel. CM. committed the robbery so he could get the money to return to Dallas, his hometown. CM. contended

that he had thrown down the money and shotgun while he was being chased. This is the first statement of which C.M. complains.

Hines then took CM. to an unmarked police car so they could discuss what had happened in a quieter environment. Hines got into the driver's side and CM. got into the passenger side front seat. Another officer had already activated a recording device in the vehicle. Hines asked CM. similar questions except in more detail and CM. again confessed to stealing the shotgun and committing the robbery with the shotgun that was loaded. CM. stated that if the store clerk had resisted that he would have shot the clerk. CM. did not seem overly nervous or upset during this interview but was calm and matter-of-fact. After this discussion, Hines told CM. that he was under arrest and that he would be taken to juvenile detention. This was the second statement of which CM. complains. CM. was then left in the vehicle for a short time when another officer came and asked him to exit the vehicle, at which time he was then handcuffed.

Multiple officers spoke with Charles and Laura during this time. Laura consented to a search of C.M.'s room and the residence. Charles and Laura both testified that they asked to speak to C.M., but were not allowed to do so. Both stated that if they had been allowed to speak to CM. they would have advised him against making any statements until after speaking with an attorney and that they believed that CM. would have listened to their advice. Charles asked to accompany CM. to the police station but the officers told him no and that he could not speak with CM. until he was taken to juvenile detention. CM. did not have any prior adjudications as a juvenile; however, Charles testified that CM. had been in trouble before but had not been caught when he lived in Dallas.

C.M. was taken to the Bryan Police Department to see a magistrate. C.M. was in an interview room for approximately an hour waiting for the magistrate to arrive. There is no dispute that C.M. was in custody at this time. Gore, a magistrate, arrived and met with C.M. in the interview room. She reviewed the required warnings and advised C.M. of his rights as required by section 51.095(a)(5)(A) of the Family Code. C.M. signed an acknowledgment that he had been read and had his rights explained to him by the magistrate, that he understood them, and had asked any questions he had regarding them. This was electronically recorded both visually and aurally. The magistrate asked C.M. if he still wanted to talk with the detectives and C.M. responded affirmatively. Gore also testified at the suppression hearing that she believed that C.M. understood his rights and that he voluntarily wanted to speak with the officers. C.M. was interviewed by Hines and another detective and made a statement similar to the statement recorded in the police vehicle. This statement by C.M. is the third statement of which C.M. complains.

C.M. filed a motion to suppress each of these statements, which was denied after a hearing by the trial court. C.M. did not testify at the suppression hearing. After the motion was denied, C.M. pled true to the offenses of aggravated robbery and possession of a prohibited weapon, a sawed-off shotgun. In the disposition phase, the trial court accepted the disposition of a determinate sentence of fifteen years' confinement to be served in the custody of the Texas Youth Commission for the aggravated robbery which had been agreed-upon by the State and C.M.

Held: Affirmed

Memorandum Opinion: In his third issue, C.M. argues that the third statement should have been suppressed because he did not affirmatively waive each of the rights set forth in section 51.095(a)(1)(A) and therefore the statement was not made in compliance with section 51.095(a)(5).

Relevant Statutes

Section 51.095(a)(5)(A) of the Family Code provides the statement of a child made while in custody is admissible if:

(5) the statement is made orally under circumstances described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning.

TEX. FAM.CODE ANN. § 51.095(a)(5)(A) (West 2008). The warnings required to be given by section 51.095(a)(1)(A) are as follows:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time.

TEX. FAM.CODE ANN. § 51.095(a)(1)(A) (West 2008).

Article 38.22, section 3(a) of the Texas Code of Criminal Procedure provides that no oral statement of an accused shall be admissible unless:

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning.

TEX.CODE CRIM. PROC. ANN. art. 38.22 (West 2005).

Analysis

The language in section 51.095 of the Family Code is substantially the same as that contained in article 38.22 of the Code of Criminal Procedure with the exception that the Family Code requires that a magistrate administer the warnings to the child. The Court of Criminal Appeals has determined that article 38.22 does not require an express waiver of rights. *Rocha v. State*, 16 S.W.3d 1, 12 (Tex.Crim.App.2000). Additionally, this Court has previously held that there is no requirement that a juvenile explicitly waive his rights pursuant to section 51.095 of the Family Code or article 38.22 of the Code of Criminal Procedure. *See In re J.L.*, No. 10-06-00246-CV, 2007 Tex.App. LEXIS 8909 at *13,2007 WL 3298920 (Tex.App.-Waco Nov. 7, 2007, no pet.) (mem.op.). Rather, an implicit waiver can be inferred from the actions and words of the person being interrogated. *See Joseph v. State*, 309 S.W.3d 20, 23 (Tex.Crim.App.2010) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1760, 60 L.Ed.2d 286 (1979)); *see also Marsh v. State*, 140 S.W.3d 901, 911 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd) (*construing* TEX. FAM.CODE ANN. § 51.095 consistently with Tex.Code Crim. Proc. Ann. art. 38.22).

As shown on the video recording of the third statement, C.M. was read the required warnings by the magistrate. During that meeting with the magistrate, C.M. indicated he understood his rights, including his right to have an attorney present and to terminate the interview at any time. C.M. stated he understood those rights and answered affirmatively when the magistrate asked him if he still wanted to talk with the detectives. Following this, appellant proceeded to give his statement to the detectives. Based on this implied waiver, the trial court's denial of the motion to suppress because C.M. knowingly and intelligently waived his rights is supported by sufficient evidence. C.M.'s third issue is overruled.

Conclusion

Having found no error in the trial court's denial of the motion to suppress the statements, we affirm the trial court's orders of adjudication and disposition.