Circuit Court for Prince George's County
Case No. JA-18-0001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 191

September Term, 2018

IN RE: D.A.

Arthur,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: July 9, 2019

15-year-old D.A. challenges the juvenile court's denial of his motion to suppress, arguing that the court erred in finding that he knowingly and intelligently waived his *Miranda* rights. D.A. claims that his question whether a lawyer would be provided "like right now?" showed that he did not fully understand his rights and that Detective Sesay's answer further misled him, thereby nullifying his earlier waiver of *Miranda*. The juvenile court found that D.A. did, in fact, understand his rights and that nothing Detective Sesay did nullified D.A.'s earlier waiver. We conclude that these factual determinations were not clearly erroneous, and therefore, we affirm.

BACKGROUND

On December 31, 2017, at around 9:00 p.m., police officers placed D.A. in custody at the police station because they suspected that he was involved in a robbery. Detective Sesay advised D.A. of his *Miranda* rights (right to silence and right to counsel) by reading verbatim the "Advice of Rights and Waiver Form" out loud.[1] D.A. then checked and initialed the section of the form indicating that he understood the rights. *Id.*

Immediately afterwards, Detective Sesay asked D.A. if he would like "to make a statement at this time without a lawyer?" The following interaction ensued:

> D.A.: And, so, when you say a lawyer like – it would – one would be like just given to me like right now?
>
> Detective Sesay: The likelihood of them coming here right now, it is not going to happen, but as far as you wanting to

[1] Pertinent to this appeal, that form states: "You have the right to talk to a lawyer before you are asked any questions and to have a lawyer with you while you are being questioned[;]" and "[i]f you want a lawyer, but cannot afford one, a lawyer will be provided to you at no cost."

> make a statement now, without a lawyer, meaning you – you want to talk to me without a lawyer present right now.

D.A. then gave no audible response to the detective's answer, and after Detective Sesay prompted D.A. with a question, D.A. proceeded to speak with the detective and made incriminating statements.

The State filed a petition in the Circuit Court for Prince George's County alleging that D.A. committed robbery and several other offenses. D.A. moved to suppress the statements he made during the interview with Detective Sesay because, he argued, he did not knowingly and voluntarily waive his *Miranda* rights. Specifically, D.A. argued that Detective Sesay's answer to D.A.'s question about when a lawyer would be provided confused D.A., nullifying his earlier waiver.

The juvenile court denied D.A.'s motion to suppress because it found that D.A. properly waived his *Miranda* rights. In particular, the court found that: (1) D.A. voluntarily signed the "Advice of Rights and Waiver Form," thereby waiving his rights; (2) Detective Sesay did not coerce D.A. into waiving his rights; (3) D.A. had the requisite intelligence to make a voluntary and knowing waiver; and (4) nothing that Detective Sesay did nullified D.A.'s previous waiver.

After an adjudicatory hearing, the juvenile court found D.A. involved on all counts. D.A. timely appealed, arguing that his motion to suppress should have been granted.

DISCUSSION

In *Miranda v. Arizona*, the Supreme Court held that the Fifth Amendment to the United States Constitution provides safeguards that protect an accused person during custodial interrogation. 384 U.S. 436 (1966). The Court held that:

> 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.

Id. at 444. To be voluntary, a waiver must be made free from coercion, intimidation, or deception. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). A waiver is made knowingly and intelligently if it is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* Courts look to the totality of the circumstances to determine whether an adult waived his or her *Miranda* rights voluntarily, knowingly, and intelligently. *Id.*

The Supreme Court has also held that the "totality-of-the-circumstances approach is adequate" to determine whether a juvenile suspect properly waived the *Miranda* rights:

> The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and 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.

Fare v. Michael C., 442 U.S. 707, 725 (1979). Our Court of Appeals has expressly adopted this totality of the circumstance test for evaluating *Miranda* waivers made by juveniles and

treats a juvenile's access to a parent prior to or during an interrogation as just one of many factors to be considered.[2] *McIntyre v. State*, 309 Md. 607, 617-622 (1987).

When examining the totality of the circumstances, our courts recognize that an officer's misstatements or misleading comments about the scope of an accused's *Miranda* rights during an interrogation may, depending on the case, nullify otherwise proper *Miranda* warnings and render an accused's waiver constitutionally defective. *State v. Luckett*, 413 Md. 360, 380-384 (2010) (detective's incorrect comments to suspect that suspect's statements during interrogation "not directly related to 'the case'" were not

[2] While the Supreme Court held in *Fare v. Michael C.* that states satisfy their constitutional obligation by applying a totality of the circumstances test when examining juvenile *Miranda* waivers, 442 U.S. 707, 725 (1979), some of our sister states have taken the opportunity to adopt additional measures to ensure that juvenile waivers are made knowingly and voluntarily. *McIntyre*, 309 Md. at 621-622 (acknowledging states that had then adopted an "interested adult rule"); Note, *Juvenile* Miranda *Waiver and Parental Rights*, 126 HARV. L. REV. 2359, 2362 (2013) (pointing out that while 35 states employ the totality of the circumstances test identified in *Fare v. Michael C.*, 14 states "take additional steps to safeguard juvenile suspects"). But, as noted, Maryland's Court of Appeals specifically declined such an opportunity and instead adopted the totality of the circumstances approach. *McIntrye*, 309 Md. at 621-22. Were we free to do so, we might well adopt additional protections to ensure that juvenile waivers are made knowingly and voluntarily. *See, e.g.*, Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 82 (2008) ("[P]reteen suspects are rarely able to appreciate the typical *Miranda* warnings presented to them, thus making any waiver of questionable validity."); *see also* Note, *supra* at 2359, 2364-65 (recognizing that police questioning of juvenile suspects can threaten parents' substantive due process rights to the care and custody of their children). We are not, however, writing on a clean slate. *McIntyre* is settled law in this State that only the courts above us can change. *Shaarei Tfiloh Congregation v. Mayor & City Council of Balt.*, 237 Md. App. 102, 145 (2018) ("This Court is bound by the Court of Appeals precedent.") (Cleaned up). Moreover, this case is not a good vehicle for seeking such a change as the issue was not preserved below. MD. RULE 8-131(a) (appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court").

covered by *Miranda* nullified prior proper *Miranda* warnings); *Lee v. State*, 418 Md. 136, 151-157, 162 (2011) (officer's improper statement to suspect implying their conversation was confidential—"just between you and me, bud"—nullified suspect's prior waiver). The State has the burden of proving that a *Miranda* waiver was made voluntarily, knowingly, and intelligently. *McIntyre*, 309 Md. at 614-15.

In reviewing the decision to grant or deny a motion to suppress, this Court considers only the evidence contained in the record of the suppression hearing. *Rush v. State*, 403 Md. 68, 82-83 (2008). "We review the evidence and the inferences that may be reasonably drawn in the light most favorable to the prevailing party." *Id.* at 83. While the juvenile court's factual findings are accepted unless clearly erroneous, this Court undertakes its "'own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case.'" *Id.* (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004)).

The real issue here is not whether D.A. properly waived his *Miranda* rights when he signed and initialed the "Advice of Rights and Waiver Form."[3] The crux of D.A.'s

[3] DA raises two additional issues, to which we respond in summary form. *First*, D.A. argues that Detective Sesay's mere recitation of the *Miranda* warnings and D.A.'s signature on the waiver form are insufficient to constitute a valid waiver. But, in the two main cases relied on by D.A. for this point—*In re Lucas F.* and *In re Joshua David C.*—we concluded that signed waivers were insufficient given the defendants' young ages (10 years old), though we acknowledged "[t]he paper writing[s] superficially satifise[d] *Miranda*'s dictates." *Lucas F.*, 68 Md. App. 97, 103-04 (1986); *Joshua David C.*, 116 Md. App. 580, 594-596 (1997). Here, in contrast, D.A. was a 15-year-old high school student at the time of his police interview and the circuit court made a specific finding, under the totality of the circumstances, that he had the requisite intelligence to fully understand the nature of the rights that he was giving up. *See Logan v. State*, 164 Md. App. 1, 41 (2005) (recognizing that a suspect's signing of a waiver form is "usually strong proof" of a waiver's validity) (cleaned up). We must and do defer to that factual finding. *Second*, D.A.

appeal is that the State failed to meet its burden that he knowingly and intelligently waived his *Miranda* rights because Detective Sesay's answer to D.A.'s question misled D.A., nullifying D.A.'s prior waiver. Because we hold that the juvenile court did not commit clear error when it found D.A. was not confused about the rights that he relinquished, we affirm.

The record is arguably unclear about whether D.A. fully understood his right to counsel. D.A. argues that his question evidenced that he did not understand the specifics of his right because it betrayed confusion about whether a lawyer would be provided to him both before and during questioning. The State argues that the inquiry concerning waiver was essentially over when D.A. signed the waiver form, and at most, he manifested confusion about the *procedure* concerning when a lawyer could arrive to meet with him. The State asserts that D.A.'s intention was to give a statement to Detective Sesay regardless of when a lawyer would be provided because he wanted to get home as soon as possible.

Here, the juvenile court found that notwithstanding D.A.'s question, he fully understood his *Miranda* rights and nothing that Detective Sesay did nullified D.A.'s previous waiver when looking at the totality of the circumstances. The court had to make

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argues that the absence of a parent or guardian during his interview, combined with his age and background, compel a conclusion that his waiver was invalid. In making this point, he also urges us to reject *McIntyre*'s totality of the circumstances test and instead adopt the interested adult rule. *McIntyre*, 309 Md. at 621-622. For the reasons already addressed in footnote 2, we cannot do so. Nor are we persuaded that the absence of D.A.'s parent or guardian in this case compels a conclusion that D.A.'s waiver was invalid under the totality of the circumstances. *Id*. at 623-625.

a number of factual determinations to reach these conclusions. In particular, the court had to interpret the meaning of D.A.'s question about whether a lawyer "would be like just given to me like right now?" From this Court's view, there was evidence in the record to find that D.A. was asking *either* a simple procedural question—when a lawyer would physically get there if he were to invoke his right to counsel, *or* a substantive question implicating confusion about his right to counsel—whether a right to have a lawyer present existed at the current moment.

The juvenile court resolved this factual issue against D.A., concluding that his question, when viewed under the totality of the circumstances, showed that he understood the right he was waiving. Supporting the court's conclusion, D.A. testified at the suppression hearing that he understood what his rights were, that he did not ask for an attorney during his interrogation, and that he knew what was going on when he decided to speak with Detective Sesay without a lawyer. The juvenile court also had the opportunity to examine D.A.'s demeanor during the interrogation by viewing the portion of the video-recorded interview in which D.A. asked Detective Sesay the at-issue question. Mindful that we must view the evidence and the reasonable inferences drawn therefrom in the light most favorable to the State, we are unpersuaded there was anything clearly erroneous about the juvenile court's conclusion that D.A.'s question did not show he was confused about his entitlement to an attorney before and during the interrogation. *Rush*, 403 Md. at 83.

The juvenile court also was not clearly erroneous in finding, under the totality of the circumstances, that D.A. was not in fact misled or confused by Detective Sesay's response. Implicit in this factual finding is a legal conclusion that Detective Sesay's response—"the

likelihood of them coming here right now, it is not going to happen"—was not a misstatement of *Miranda* like those statements found problematic in *Luckett* and *Lee*. *See* cases discussed *supra* pp. 4-5. We agree with the State that Detective Sesay's response was akin to permissible comments made during advisements that address the practical procedure for appointment of counsel. *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989) (concluding detective's statement during advisement that an attorney would be appointed "'if and when you go to court'" correctly "described [the state's] procedure for appointment of counsel" and pointing out that "*Miranda* does not require that attorneys be producible on call"); *Rush*, 403 Md. at 89-90 (detective's statement that a lawyer would be provided "'at some time'" made following advisement that suspect had a right to consult a lawyer before and during questioning "only clarified … how and when appointed counsel would be provided"). That is, Detective Sesay's response, when viewed under the totality of the circumstances, did not problematically "tie [D.A.'s] right to counsel to a future event [after the interrogation] or to [his] ability to obtain a lawyer [himself]." *Rush*, 403 Md. at 90. Instead, in answering D.A.'s "commonplace" question about when he would obtain an appointed attorney, *Duckworth*, 492 U.S. at 204, Detective Sesay accurately responded that an appointed attorney was not likely available to come to the station at 9:00 p.m. on New Year's Eve.

We can see how it would have been preferable if Detective Sesay had left no stone unturned by reiterating to D.A., a juvenile, that he would have another opportunity to make a statement if D.A. wanted to wait to meet with an attorney. But, there is no dispute that Detective Sesay correctly informed D.A. that he had a right to talk to lawyer before being

asked any questions, to have a lawyer with him while he was being questioned, to appointed counsel if he could not afford an attorney, and to stop the interview at any time. Moreover, the juvenile court reasonably concluded that D.A.'s question did not evidence confusion about his right to an attorney before and during questioning, and the court properly evaluated the totality of the circumstances surrounding the interrogation, including D.A.'s age and education level, when concluding that D.A.'s *Miranda* waiver was knowing and intelligent. Thus, any further explanation by Detective Sesay, even if advisable, was not constitutionally mandated in this particular case. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.