



Cite as: 2010 (8) AELE Mo. L. J. 101

ISSN 1935-0007

Civil Liability Law Section – August 2010

Civil Liability for Improper Interrogation of Minors

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This is the continuation of a two-part article. To read Part One, click [here](#).

“Overbearing” tactics did not amount to fabrication of evidence

In [Gausvik v. Perez](#), #02-35902, 345 F.3d 813 (9th Cir. 2003), the court found that a police officer was not shown to have used investigative techniques in child abuse investigation that were “so coercive and abusive” that he knew or should have known that they would yield false information. The officer had probable cause for arrest of a suspect even if portions of his affidavit supporting the arrest were inaccurate as to the number of child victims who had told the officer the arrestee had sexually abused them.

In this case, a police officer’s foster daughter told him that she had been sexually abused by members of the community. The officer and a child protective services employee drove his foster daughter through the area and asked her to identify homes in which she had allegedly been abused. One of the homes she identified belonged to a man who she said had sexually abused her and her three siblings, as well as his own three children and his girlfriend’s child, who lived with them.

The officer interviewed a number of the man's children, and one of them, a child suffering from cerebral palsy, stated during a two-hour interview that he had been sexually abused by his parents and his parents' friends. The other three children in the man's household denied being sexually abused during the interviews. Medical examinations indicated that the results on two of these children were suggestive of sexual abuse, and a third was "consistent" with sexual abuse. An examination of the fourth child found test results consistent with rectal penetration.

The officer then arrested the man and submitted an affidavit of probable cause to the trial court, stating that the arrestee "has been identified by at least 8 child victims as having been sexually abused by [him]" and also stating that all of the four children in his household tested positive for abuse.

The county prosecutor charged the man with sexual abuse of the child with cerebral palsy. Two of the other children in the household subsequently stated that they had also been sexually abused by the man, so the charges were amended. The arrestee was convicted at trial after all three of these children testified against him, and sentenced to 260 months in prison.

His conviction was subsequently overturned after he served five years in prison for a hearing on the reliability of the victims' accusations. The prosecutor then dismissed all charges, and the arrestee filed a federal civil rights lawsuit against the officer, the city, and various other officials.

The officer sought qualified immunity, which was denied by the trial court, which found that there was a genuine issue of material fact whether the officer used investigative techniques that were so coercive and abusive "that he knew or should have known those techniques would yield false information."

A federal appeals court reversed. It found that the arrestee failed to establish that the investigating officer deliberately fabricated evidence and also found that the information he had at the time of the arrest gave him probable cause to make the arrest. It also rejected the argument that his investigative techniques were so coercive that he knew or should have known that they would elicit false information.

"Overbearing tactics" in interviewing the children, standing alone, do not establish a deliberate fabrication of evidence claim, the court noted. Additionally, while the officer stated in his affidavit that three of the children tested "positive" for sexual abuse, while in fact the tests were only "suggestive" or "consistent" with sexual abuse, he did have positive statements by two children, his foster daughter and the child with cerebral palsy, both identifying the arrestee as having sexually abused them.

Accordingly, there was no showing that the officer continued the investigation despite knowing that the suspect was innocent. Further, while his affidavit may have been careless or inaccurate in stating that eight children, as opposed to two, had accused the

arrestee of sexually abusing them, his foster daughter had, in fact, told him that the suspect abused at least eight child victims.

Under the circumstances, the officer did have probable cause for the arrest, the appeals court found, even without considering the contested portions of his affidavit. There was no showing that any inaccuracies in the affidavit were “intentional or deliberate.” The officer was therefore entitled to qualified immunity from liability.

An interesting aspect in the case of [Michaels v. New Jersey](#), #99-5486, 222 F.3d 118 (3rd Cir. 2000) was that even if the techniques used to interview the child complainants were improper and coercive, a nursery school teacher indicted and prosecuted for alleged sexual abuse of the children could not recover damages since these interrogation techniques did not violate her own constitutional rights. Additionally, the prosecutors were entitled to absolute immunity for presenting the children’s testimony to the grand jury and at trial.

Questioning in connection with non-criminal proceedings

Minors are sometimes questioned in connection with some proceedings in which the point may be potential alteration of custodial arrangements, and in which the procedural and substantive rights commonly going along with criminal proceedings may not apply.

In [Murray v. Earle](#), #08-50603, 2009 U.S. App. Lexis 11882 (Unpub. 5th Cir.), for example, in a lawsuit arising from the interrogation of an 11-year-old minor, then in foster care, regarding the death of a two-year-old child, 6th Amendment claims against an assistant prosecutor were properly dismissed since no arrest or formal judicial proceeding had then been initiated.

Additionally, the assistant prosecutor was entitled to qualified immunity, as it was not “well established” that a minor had any 6th Amendment right to counsel in connection with the filing of a petition in an action affecting the parent-child relationship.

Miranda, minors, and parental presence

Not long after [Miranda v. Arizona](#), #759, 384 U.S. 436 (1966), was decided, the U.S. Supreme Court, in the case of [In re Gault](#), #116, 387 U.S. 1 (1967), made it clear that juveniles have the right against self-incrimination and the right to counsel, and that this applies in the juvenile justice system in terms of accusations of delinquency, as well as in adult criminal prosecutions.

This has been interpreted as extending the protections of Miranda to juvenile custodial interrogations, so that a juvenile's waiver of Miranda rights must be "knowingly, voluntarily and intelligently" made.

Courts have generally used one of two tests for the validity of a waiver of Miranda rights by a juvenile.

Federal courts and the majority of states use a "totality of the circumstances: approach. Factors taken into consideration include the minor's age, level of intelligence, experience (including experience with the criminal justice system), background, education, physical condition, mental capacity, and any alleged abuse by police. The presence or absence of an adult advisor, such as a lawyer, guardian or parent prior to any Miranda waiver by the juvenile is also a factor to be consider under the totality of the circumstances test as to whether the waiver was knowingly, voluntarily, and intelligently made. See [Fare v. Michael C.](#), #78-334, 442 U.S. 707 (1979).

It is worth noting, in passing, that the U.S, Supreme Court, in [Yarborough v. Alvarado](#), # 02-1684 541 U.S. 652 (2004) rejected the argument that the age of a juvenile suspect should be a factor in determining whether they are considered to be in custody for Miranda purposes.

Having such an adult present before and during an interrogation may be given great weight, especially in outweighing any deficit in the juvenile's intelligence, maturity, or experience. See [State v. Presha](#), 748 A.2d 1108 (N.J. 2000).

At the same time, courts applying the totality of the circumstances test will not use the presence or absence of an adult as the per se sole deciding factor as to whether a waiver was proper or a confession should be suppressed. In [State v. Barnaby](#), 950 S.W.2d 1 (Mo. Ct. App. 1997), for example, the court commented that "While parental protection is of great importance in affecting the totality of the circumstances involved, our courts have not held that a parent's absence makes a resulting statement illegal per se."

A second, minority approach taken by a smaller number of states, either by statute or case law, is a per se approach, insisting on certain additional procedural safeguards that are mandatory for the legal interrogation of a juvenile. The details of such safeguards vary greatly among the states taking this approach. In such states, juveniles being questioned are given additional procedural rights not guaranteed by federal constitutional law. A few examples follow:

- In Colorado, [Colo. Rev. Stat. Sec. 19-2-511](#) limits the admissibility of a juvenile suspect's statements to those made in the presence of a parent or guardian after both the minor and the parent or guardian have been advised of the minor's Miranda rights.

- In Connecticut, [Conn. Gen. Stat. Sec. 46b-137](#) requires, for the admissibility of a juvenile suspect's confession or statements, that they be made with a parent or guardian present, with both having been told of the minor's Miranda rights.
- In Illinois, [705 Ill. Comp. Stat.405/5-170](#) provides that a minor under 13 years of age suspected of either sexual assault or murder must be represented by a lawyer during a custodial interrogation.
- In Kansas, minors under age 14 must have consulted with an attorney, parent or guardian during their custodial interrogation, or their statements are not admissible. [In re B.M.B.](#), 955 P/2d 1303 (Kan. 1998).

A number of states have what some call a "two-tier: approach, in which a "per se" test is applied to the youngest juveniles below a certain designated age, and the totality of the circumstances test is applied to interrogations of older juveniles. Under [Mont. Code Ann. Sec.41-5-331](#), for any waiver by a minor under the age of 16 to be effective, it must be agreed to by the juvenile's lawyer, parent, or guardian.

What is clear from all of this is that, when it comes to the custodial interrogation of minors, reading of U.S. Supreme Court cases on the subject, while necessary and essential, is certainly not sufficient. The interrogator must be intimately familiar with the statutes and case law of his or her own jurisdiction, and know the factors that will be looked at by the courts as to the validity of a Miranda waiver.

The interrogator must also know whether there are any specific additional procedural safeguards that have been imposed by their state for juvenile custodial interrogation, and which juveniles they apply to, as this may also vary by age, or by the type of crime being investigated. Must parents be notified of the interrogation? Must they be present? Must they consent to a juvenile's waiver?

Written policies and procedures with respect to the interrogation of juveniles are essential to making sure that everyone in a department or agency has the right answers to such questions, and acts in the manner required by law.

AELE Monthly Law Journal

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