THE MAGISTRATE… THE JUVENILE…THE STATEMENT KEEPING IT LEGAL

TAKING JUVENILE STATEMENTS

KAMERON D. JOHNSON
TRAVIS COUNTY JUVENILE PUBLIC DEFENDER
2201 POST ROAD, SUITE 201
AUSTIN, TX 78704
OFFICE 512.854.4128 FACSIMILE 512.854.4148
EMAIL: KAMERON.JOHNSON@CO.TRAVIS.TX.US

THE MAGISTRATE…THE JUVENILE…THE STATEMENT
KEEPING IT LEGAL

Introduction

> Children 'generally are less mature and responsible than adults,' they often lack the 'experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' and they 'are more vulnerable or susceptible to … outside pressures'" than adults. In the specific context of police interrogation, events that 'would leave a man cold and unimpressed can overawe and overwhelm a teen.'[1]

The taking of statements of individuals accused or involved in criminal activity is an essential and vital part of criminal jurisprudence. Arguably no other evidence is more powerful to a prosecution than a statement given by an accused that implicates or admits involvement in a crime.

Throughout this country's history courts have wrestled with ascertaining the proper balance between law enforcements taking of statements and confessions against the rights of those accused of criminal behavior and the protections afforded individuals under the United States Constitution.

The right against self-incrimination coupled with the right to have counsel are well established and formulate a bedrock of the basic rights afforded to individuals facing the prosecutorial arm of government. Federal relief is provided by the United States Constitution and state relief in Texas is provided under the Texas Constitution, the Juvenile Code and the Code of Criminal Procedure. The U.S. Constitution is the floor of protections while the Texas Constitution is the ceiling of protections.[2]

Article 38.23 of the Code of Criminal Procedure is the Texas Exclusionary Rule.[3] It provides for the exclusion of evidence illegally obtained by police officers or private individuals.[4] It is important to note that the Texas Exclusionary Rule, unlike the federal rule, provides for protection from illegal activity conducted by private individuals and not just state actors.

Miranda and Escobedo

On the night of January 19, 1960, Danny Escobedo's brother-in-law was fatally shot. In the early hours of the next morning, at 2:30 a.m., Mr. Escobedo was arrested without a warrant and interrogated by police.[5] Mr. Escobedo made no statement to the police during his interrogation and was released the next day pursuant to a writ of habeas corpus obtained by his attorney who had been retained.

---

[1] *J. D. B. v. North Carolina*, 131 S. Ct. 2394; 180 L. Ed 2d 310 (June 16, 2011. (The United States Supreme Court has held courts must consider a child's age when determining if child was in custody, when the age of child was known to the officer, or objectively apparent to a reasonable officer.

[2] *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

[3] TEX. CODE CRIM. PROC. ART. 38.23(a).

[4] TEX. CODE CRIM. PROC. ART. 38.23(a); *State v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996).

[5] *Escobedo v. Illinois*, 378 U.S. 478; 84 S. Ct. 1758; 12 L. Ed. 2d 977.

A little over a week later on January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with Mr. Escobedo, told the police that Danny Escobedo had fired the fatal shots. Later that evening Mr. Escobedo and his sister, the widow of the deceased, were arrested and taken to police headquarters. En route to the police station, the police "…handcuffed the defendant behind his back," and "one of the arresting officers told the defendant that DiGerlando had named him as the one who shot" the deceased. The Defendant testified, without contradiction, that the "detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime," and that he replied, "I am sorry but I would like to have advice from my lawyer." A police officer testified that although the Defendant was not formally charged "he was in custody" and "couldn't walk out the door."

Shortly after Mr. Escobedo reached police headquarters, his retained lawyer arrived. Mr. Escobedo's attorney made numerous attempts to speak with his client but was refused repeatedly. Also, the Defendant during the course of the interrogation repeatedly asked to speak to his lawyer however he was repeatedly told by the police that his lawyer 'didn't want to see him.' After further interrogation the Defendant, Escobedo gave incriminating statements to police which were used at trail against him which resulted in the Defendant being convicted of murder.

In a 5-4 decision the United States Supreme Court reversed the Defendant's conviction and opined that his constitutional rights were violated under the Fifth Amendment and Sixth Amendment of the United States Constitution.[6]

In 1966 the Supreme Court issued the landmark case of *Miranda v. Arizona*.[7] In *Miranda*, the defendant was arrested at his home and taken to a police station, and questioned by two police officers. The defendant was a suspect in a rape and burglary case. The Court in the landmark decision opined that both inculpatory and exculpatory statements made in response to police interrogation when an individual is in custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of his right against self-incrimination prior to questioning by police. The Court held further that the defendant must not only understand these rights, but must voluntarily waive them prior to the taking of the statement. These *Miranda rights* have become a basic and mandatory part of police procedure in the United States.

Family Code

Section 51.095 of the Texas Family Code sets forth strict guidelines for obtaining custodial statements from juveniles.[8] . Section §51.095 provides in pertinent part

> (a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:
>
> (1) the statement is made in writing under a circumstance described by Subsection (d) and:
>
> (A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:
>
> (i) the child may remain silent and not make any statement at

[6] *Escobedo v. Illinois*, 378 U.S. 478; 84 S. Ct. 1758; 12 L. Ed. 2d 977.

[7] *Miranda v. Arizona*, 384 U.S. 436; 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966).

[8] TEX. FAM. CODE §51.095.

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;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.

In order for a custodial written statement to be admissible, the following sequence of events must occur:

1) the officer must take the child to a magistrate;
2) the magistrate must then inform the child of his rights to remain silent, to have an attorney appointed and present during questioning and to terminate the interview at any time;
3) the child must knowingly, intelligently and voluntarily waive his rights;
4) the officer may then take a statement from the child; and
5) upon completion of the statement, the child shall be taken before the magistrate again and sign the statement in the presence of the magistrate (and outside the presence of the officer), who will then certify the statement.[9]

[9] TEX. FAM. CODE §51.095(a)(1). There is recent caselaw from the Texarkana circuit that holds the officer may be present during the magistrate warnings of a written statement *See Herring v. State,* 2012 WL 333772, No. 06–11–00109–CR, (Tex.App.-Texarkana, Feb. 2, 2012); *but see Diaz v. State,* 61 S.W.3d 525, 527 (Tex.App.-San Antonio 2001, no pet.) ("[n]o law enforcement personnel are allowed to be present during the warnings,....").

In order for a custodial oral statement to be admissible steps 1 through 3 must occur, and they must occur on an electronic recording device. Additionally, each voice on the recording must be identified and the attorney given a copy of the statement not later than the 20th day before the hearing.[10] Just as officers are allowed during the magistrate warnings preceding a written statement, caselaw holds that officers can be present during the warnings made by a magistrate on a recording device.[11] There is also a provision of 51.095 that gives the magistrate the discretion to review the video taped statement with the child to ensure that it was given voluntarily.[12] If the magistrate decides to utilize subsection (f), the statement is inadmissible unless there is a determination that the statement was in fact made voluntarily.

As is evident from the above discussion, the procuring of a statement from a juvenile is labor intensive and requires a keen knowledge of Section 51.095. A common mistake made by magistrates when administering warnings on a video tape is that the child never voluntarily waives his rights on the tape, but merely listens to the magistrate inform him of his rights. Clearly, this procedure does not conform with the requirements of Section 51.095(a)(5)(A) and the statement should be ruled inadmissible.

[10] TEX. FAM. CODE §51.095(a)(5).
[11] *In the Matter of M.A.C.,* 339 S.W.3d 781 (Tex.App.-Eastland, 2011)
[12] TEX. FAM. CODE §51.095(f).