pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-00271-DG

N.C., A CHILD UNDER EIGHTEEN (18) **APPELLANT**

VS.

COMMONWEALTH OF KENTUCKY **APPELLEE**

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BRIEF FOR APPELLEE

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SPECIAL PROSECUTOR FOR
ATTORNEY GENERAL

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CERTIFICATION

It is hereby certified that service of this brief has been made pursuant to CR 76.12 and CR 5.03 by mailing a true and complete copy of same to the Hon. Robert K. Strong, Assistant Public Advocate, Dept. of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; Hon. Terry Geoghegan, Nelson County Commonwealth Attorney, 116 E Stephen Foster Avenue, Bardstown, KY 40004; Judge, Nelson District Court, 200 Nelson County Plaza, Bardstown, KY 40004; Hon. Charles C. Simms, III, Judge, Nelson Circuit Court, Division I, 200 Nelson County Plaza, Bardstown, KY 40004 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, KY 40601. This is to further certify that the undersigned did not remove the record from the trial court. It is so certified on this 26th day of July, 2012.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes oral arguments are not necessary in this case as this Court has routinely addressed Miranda warning issues and can address this issue in the same manner.

COUNTERSTATEMENT OF POINT AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On March 3, 2009, Nelson County High School Assistant Principal, Mike Glass (hereinafter Glass) asked School Resource Officer, Deputy Steve Campbell (now Sheriff Campbell, hereinafter "Campbell") to assist him in an investigation concerning an empty bottle of Hydrocodone found discarded on the floor of one of the student bathrooms. . (Video Recording from suppression hearing dated May 4, 2009, time 2:36:10 p.m. [hereinafter VR]). N.C., a student at the school, appeared as the name on the bottle. (VR 5/4/09; 2:27:04) Glass and Campbell asked N.C. to accompany them to Glass's office. Once there, Glass asked if N.C. knew why he was there. N.C. replied that he did not.

After being prompted about the pill bottle, N.C. admitted that it belonged to him and that he had, "done something stupid." N.C. then told Glass that he had given his last two pills to another student. According to Glass, all of these statements were made within a minute of being questioned. (VR 5/4/09; 2:34:49). Glass then called N.C.'s mother and she picked N.C. up from the school. Campbell explained to N.C. that he would be charged criminally. No further statements were made and Campbell did not detain N.C.

The entire conversation lasted approximately ten minutes with N.C. never being taken into police custody. Defense counsel moved to suppress N.C.'s statement. The Nelson District Court overruled Defense counsel's motion and Nelson Circuit Court affirmed the ruling from the District Court.

ARGUMENT

I. THE ONLY ISSUE PRESERVED FOR APPEAL IS WHETHER N.C. WAS "IN CUSTODY" AT THE TIME OF HIS INTERROGATION.

The Appellant goes through much analysis focusing on labeling Glass as a state actor for *Miranda* purposes. However, that issue was not addressed in Appellant's Appeal to the Nelson Circuit Court; therefore it has not been properly preserved.

Appellant's Statement of Appeal reads "The only issue is whether [N.C.] was 'in custody' at the time of the interrogation." (R. 22). Appellant's Statement of Appeal goes on to read "A person is considered 'in custody' under circumstances which would lead a reasonable person to conclude he was not free to leave. *Stanbury v. California*, 511 U.S. 318 (1994). Generally, 'the inquiry is simply whether there was … restraint on freedom of movement of the degree associated with formal arrest.' *Id.* at 321." (R. 23).

Two prerequisites are necessary to invoke the necessity of Miranda warnings; (1) custodial interrogation and (2) state action. *Welch v. Commonwealth*, 149 S.W.3d 407, 410 (Ky. 2004). The Appellant's Statement of Appeal only brings up the issue of custodial interrogation and never mentions whether state action was present. Therefore, the issue of state action was not properly preserved for this Court to consider.

II. GLASS WAS NOT A STATE ACTOR FOR MIRANDA PURPOSES.

Alternatively, the Commonwealth will address the state action argument out of an abundance of caution.

In determining whether a questioner is a state actor "courts must determine whether the interrogation was such as to likely result in disclosure of information which would lead to facts that would form the basis for prosecution." *Welch* at 411.

The Appellant relies on *New Jersey v. T.L.O.* to hold that a teacher is a state actor. However, the Appellant misses the real crux of *New Jersey v. T.L.O.*, which holds that school officials are not required to seek a warrant when conducting a search of a student.

469 U.S. 325, 340 (1985). The Court in *T.L.O.* reasoned that although students have an interest in privacy it must be measured against a school's substantial interest in maintaining order in the classroom and on school grounds. *Id.* at 339.

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools -- Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss* v. *Lopez*, 419 U.S., at 580. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582-583; *Ingraham* v. *Wright*, 430 U.S., at 680-682. *Id.* at 339-340.

Glass testified that students are to take any medications they have to the school nurse. (VR 5/4/09; 2:28:10) When Glass was alerted to the existence of a pill bottle with a student's name on it he became concerned. Glass was furthering a school interest in enforcing the rules to keep good order within the school.

The issue of whether a school official is a state actor and required to give Miranda warnings prior to questioning a student has not been addressed by this Court. However, many other states have addressed this issue. The New Hampshire Supreme Court held that "[l]aw enforcement officers are responsible for the investigation of criminal matters and maintenance of general public order," whereas school officials "are charged with fostering a safe and healthy educational environment that facilitates learning and

promotes responsible citizenship." *State of New Hampshire v. Tinkham*, 719 A.2d 580, 583 (N.H. 1998).

The Court of Appeals of Virginia addressed facts extremely similar to the facts at hand. In *J.D. v. Commonwealth*, an associate principal questioned a student in the associate principal's office with the principal and school resource officer present. 591 S.E.2d 721, 723 (Va. Ct. App. 2004). The court in *J.D.* held the associate principal was not a state actor for Miranda purposes because he was conducting a school related investigation, not working at the direction of the police. *Id.* at 725.

The holding in *J.D.* is consistent with the view of many other states. See, e.g., *In re Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995); *In re Corey L.*, 203 Cal. App. 3d 1020, 250 Cal.Rptr. 359, 361 (Cal. Ct. App. 1988); *S.A. v. State*, 654 N.E.2d 791, 797 (Ind. Ct. App. 1995); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1369 (Mass. 1992); *State v. Biancamano*, 666 A.2d 199, 203 (N.J. Super. Ct. App. Div 1995); *In re Harold S.*, 731 A.2d 265, 268 (R.I. 1999); In re V.P., 55 S.W.3d 25, 33 (Tex. App. 2001); *State of Florida v. J.T.D.,* 851 So.2d 793 (Fla. App. 2003); *In re Brendan G.*, 372 N.Y.S.2d 473 (N.Y. Sup. Ct. 1975).

Mr. Glass also testified that N.C. was later taken in front the board for possible expulsion. (VR 5/4/09; 2:32:20). The school moved forward with school disciplinary proceedings as that was the purpose of the questioning of N.C. by Glass regardless of the presence of Campbell.

A School official's main concern is educating students. This primary goal is what drives educators. Seeking criminal charges against students does not fit in with this primary goal. Glass was attempting to discover if a school procedure had been violated

and if so why. He was not doing so as a state actor; therefore he should not be treated as one.

III. N.C. WAS NOT "IN CUSTODY" WHEN QUESTIONED BY GLASS.

In *United States v. Miranda*, the United States Supreme Court held that the prosecution could not use statements, "whether exculpatory or inclupatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444 (1966). The Court went on to write, "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 activity in any significant way." *Id* at 444 (emphasis added). All Fifth Amendment protections are considered coextensive with Section Eleven of the Kentucky Constitution. *Commonwealth v. Cooper*, 899 S.W.2d 75, 78 (Ky. 1995).

In *C.W.C.S. v. Commonwealth* the court held that statements given at school, by a fourteen year old student during questioning from a police detective and a social worker without *Miranda* warnings or a parent present, should not be suppressed because the child was not in custody. 282 S.W.3d 818 (Ky. 2009). In *C.W.C.S.*, the Detective and social worker went to a middle school to question the fourteen (14) year old after siblings made allegations of sexual abuse. The questioning lasted twenty (20) minutes with no *Miranda* warnings given. The Detective informed C.W.C.S. that he did not have to discuss the matter and he could return to class, but the child chose to answer the questions. Police arrested and detained C.W.C.S. later that day on Sodomy charges.

In determining whether C.W.C.S.'s statements should have been suppressed, the court noted "it has always been held that the *Miranda* warning is not necessarily required absent the prerequisite of custodial interrogation." *Id.* at 821. The court quoted *Stansbury v. California* holding that "in determining whether an individual is 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." *C.W.C.S.* at 821 (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994)). "The determination is based on objective circumstances, not the subjective belief of the defendant's or the officers." *C.W.C.S.*, at 821-822 (citing *Stansbury v. California*, 511 U.S. 318, 323 (1994). "The Court must 'examine all of the circumstances surrounding the interrogation' and the relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. *C.W.C.S.*, at 822 (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994)).

In *C.W.C.S.* the officer told the defendant he was free to leave. The Appellant would have the Court believe that the absence of this fact alone is enough to differentiate this case from *C.W.C.S.* However, the court in *C.W.C.S.* went on to hold that "(s)ince his movements were not restricted in a degree associated with arrest, C.W.C.S. was simply not in custody for *Miranda* purposes." *Id.* at 822. The Appellant has not presented any other evidence showing N.C. was "restricted in a degree associated with arrest" that is in any way discernible from *C.W.C.S.*

Glass testified that he would not expect N.C. to leave the office when the questioning occurred. The Appellant attempts to spin this honest expectation by Glass to

mean that N.C. could not leave. However, the test to be applied is not what Glass or even N.C. would have believed but the test is the objective circumstances. In the instant case Glass, accompanied by Campbell, took a student into his office. Glass prompted the student with a pill bottle recovered in a school bathroom. It is against the school's policy to allow students to possess their prescription pills for several reasons one which surely is to keep a student from giving pills to other students. The case at hand was simply a school administrator looking into the possible violation of a school policy and not an investigation of criminal activity.

In *C.W.C.S.* the court was unwilling to hold that all students, by virtue of being in school, suffer a restriction of movement equivalent to arrest such that *Miranda* warnings must always be given when a student is questioned by police officers. *Id.* at 822. Rather, the court found that being asked to accompany the detective to the office did nothing to restrict C.W.C.S.'s movements any more than any other student going to the principal's office. *Id.* N.C.'s movements were never restricted further than any other student who is called to the office for any number of routine reasons. Furthermore, both Glass and Campbell admitted they never intended to detain N.C. (VR 5/4/09; 2:36:00 and 2:43:00 respectively).

All Glass and Campbell knew was that one of N.C.'s medicine bottles was found in a bathroom. Glass was simply inquiring about the prescription bottle when N.C. quickly and spontaneously admitted that he had done something wrong by giving his last two pills to another student (VR 5/4/09; 2:34:39). N.C. was not being interrogated on suspicion of criminal behavior (unlike C.W.C.S. where the officer already had evidence

of a crime occurring) therefore N.C. could not be considered "in custody" within the *Miranda* meaning.

Further evidence indicates N.C. was never in custody. Glass testified that had N.C. asked to leave the office he could have left. (VR 5/4/09; 2:30:12). Both adults agreed during the hearing that had N.C. requested either an attorney or a parent, he would have been allowed to speak to one. (VR 5/4/09; 2:36:50 and 2:43:40 respectively). Moreover, when asked what would have happened had N.C. refused to answer questions, Glass stated that a parent would have been called. (VR 5/4/09; 2:36:00). Neither Glass nor Campbell indicated that N.C. was formally detained. While N.C. may not have been free to leave school grounds, or leave the office, it is clear Campbell never took him into custody.

Ultimately, in *C.W.C.S.*, a case with much more egregious and compelling facts (i.e. a child younger by three years, detectives with a clear agenda to question and detain pending criminal charges and no school personnel present) the court chose not to suppress the confession. Therefore, on the facts at hand, N.C.'s statement should not be suppressed.

J.D. v. Commonwealth, discussed *supra*, out of Virginia lends similar facts. In *J.D.* an associate principal questioned a student suspected of larceny with the school resource officer and the school principal present. 591 S.E.2d 721, 723 (Va. Ct. App. 2004). The court held J.D. was not "in custody" because he was not restrained and no one indicated J.D. was under arrest. *Id.* at 725. The Virginia court went on to hold that the school resource officers "mere present during [the associate principal's] questioning

did not convert the questioning into a custodial interrogation by a law enforcement officer." *Id.* at 725.

CONCLUSION

N.C. was not "in custody" when the questioning occurred because no decision had been made to pursue a criminal charge as no one had enough evidence to realize a crime had occurred. All of the questioning in this matter came from an assistant principal who was acting in his official capacity. However, such capacity does not lead to school personnel being considered state actors as he was seeing if school conduct violations had occurred. For these reasons the Commonwealth requests this Court to affirm the decision of the Nelson District Court.

Respectfully submitted,

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APPENDIX

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