

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: M.W.,  
adjudicated delinquent child

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11-0215

Case No. \_\_\_\_\_

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

C.A. Case No. 94737

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF MINOR CHILD-APPELLANT M.W.**

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## EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

### II. Introduction

Children are not expected to care for themselves—they need adults to guide and protect them. Unlike adults, children cannot walk into a drug store and receive a flu shot without being accompanied by a parent, guardian, or custodian. Why then, should children be interrogated by law enforcement without any involvement by their parent, guardian, or custodian, or an attorney?

Constitutional rights, such as the right to counsel and the Fifth Amendment privilege against self-incrimination, are applicable to children. In re Gault (1967), 387 U.S. 1, 36. Therefore, statements resulting from custodial interrogations of children are admissible only after a showing that the procedural safeguards have been followed. Miranda v. Arizona (1966), 384 U.S. 436. But, children need more protections than adults.

This Court has found that “It is now commonly recognized that courts should take ‘special care’ in scrutinizing a purported confession or waiver by a child.” In re C.S., 115, Ohio St. 3d 267, 2007-Ohio-4919, citing In re Manuel R. (1988), 207 Conn. 725, 737-738, and Haley v. Ohio (1948), 332 U.S. 596, 599. The need for special care is well-founded, as research shows that most juveniles are not able to understand their Miranda rights.

For example, one study reported that the majority of juveniles who received Miranda warnings did not understand them well enough to waive their rights; that only 20.9% of juveniles, compared with 42.3% of adults, exhibited understanding of all four components of a Miranda warning; and that 55.3% of juveniles, compared with 23.1% of adults, manifested no comprehension of at least one of the four warnings. Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1152 (1980). Further, even when juveniles are able to understand the words of a Miranda warning, they are not equipped to

effectively exercise their rights. See Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol’y & L. 3, 11 (1997); Kimberly Larson, *Improving the “Kangaroo Courts”: A Proposal for Reform in Evaluating Juveniles’ Waiver of Miranda*, 48 Vill. L. Rev. 629, 649-53 (2003). Additionally, “social expectations of obedience to authority and children’s lower social status make them more vulnerable than adults during interrogation.” Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219, 230 (2006).

Almost four years ago, this Court recognized that in Ohio, children have a right to counsel at all stages of the proceedings that is both statutory and constitutional. C.S. at ¶83, citing R.C. 2151.352; C.S. at ¶78, citing Gault at 36. This Court held that “the word ‘represent’ in the fifth sentence of R.C. 2151.352 means to counsel or advise the child in a delinquency proceeding.” C.S. at ¶98. This Court also held, “If the child is not counseled by his parent guardian or custodian and has not consulted with an attorney, he may not waive his right to counsel.” Id.

Under Gault and R.C. 2151.352, children have a right to legal representation at “all stages of the proceedings” against them. Therefore, if interrogation is a “stage of the proceedings,” then C.S. should control. Because children are questioned by law enforcement in Ohio every day without a parent or the advice of counsel, whether C.S. governs interrogations of children is of great public interest.

## **II. Discussion**

In C.S. this Court recognized that, “[i]n essence, the fifth sentence of R.C. 2151.352 is an “independent advice/interested adult” standard that we have declined to adopt, absent legislative action, in other circumstances.” Id. at fn. 3, citing In re Watson, 47 Ohio St.3d 86, 89-90. It

reasoned that “[t]hough there may be a number of policy reasons to support the legislative imposition of a bright-line rule requiring a juvenile to consult with an attorney before waiving his constitutional rights \* \* \* we do not believe that it is required by the Due Process Clause.” *Id.* But, although a child’s right to representation by a parent or attorney is not required by the Due Process Clause, it is required by statute.

Specifically, R.C. 2151.352, provides, “A child \* \* \* is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code.” Accordingly, if interrogation is a stage of the proceedings outlined in Chapter 2151 or 2152, then R.C. 2151.352 applies.

Revised Code section 2151.311 provides the procedure that applies when a child is apprehended. A child who is taken into custody must be returned to the child’s parents or taken to juvenile court or detention; but, the child may be held for processing in any place where an adult placed under arrest can be held, for a limited period of time. R.C. 2151.311(A)-(C). “[P]rocessing,” as it is used in R.C. 2151.311(C)(1) means “interrogating” the child. R.C. 2151.311(D)(2).

Whether a child is represented during his interrogation or not, courts are required to take “‘special care’ in scrutinizing a purported confession or waiver by a child.” *Id.* at ¶106, citing Haley v. Ohio (1948), 332 U.S. 596, 599. Because in R.C. 2151.311, the General Assembly has provided that interrogation of a child is a “stage of the proceedings,” this Court’s decision in C.S. provides the special care that must be given to a child who is apprehended and interrogated by law enforcement.

M.W.’s First Proposition of Law concerns the fifth sentence of R.C. 2151.352, “Counsel must be provided for a child not represented by the child’s parent, guardian, or custodian” and

whether C.S.'s holding regarding that sentence should apply to interrogations of children. The Second Proposition of Law addresses situations in which children execute written waivers of their Miranda rights before confessing to police. Because interrogation is a stage of the proceedings under Chapter 2151 of the Revised Code, this Court's holding in C.S. should control interrogations of children and written waivers of Miranda rights tendered by children.

### **III. Conclusion**

Ohio's juvenile courts and law enforcement officials need this Court's guidance to ensure that every child's right to counsel is upheld uniformly at every stage of the proceedings under the Juvenile Code. Accordingly, this Court should accept jurisdiction in this case and vacate M.W.'s adjudication. In the alternative, this Court should reverse the decision of the court of appeals, suppress M.W.'s confession, and remand to the juvenile court for further proceedings.

### **STATEMENT OF THE CASE AND FACTS**

On August 22, 2009, a complaint was filed, alleging that fifteen-year-old M.W. was delinquent for aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree if committed by an adult, with a gun specification. Although the State sought to transfer the case for criminal prosecution, the court found M.W. amenable, and retained jurisdiction in the juvenile court.

The complaint alleged that on August 19, 2009, M.W. and another juvenile robbed the victim at gunpoint. The police interrogated M.W. when neither of his parents was present. M.W. was not given an opportunity to consult with his mother, father, or an attorney before the interrogation. Officer Borden testified that Sargent Shoulders gave M.W. a statement of his rights before he was interrogated and that M.W. signed the rights form and answered Shoulders' questions. The statement reflects that M.W. told Shoulders that he "watched [the co-defendant]

Alonte's back" during a robbery on August 19, 2009, and that Alonte had the gun. The state presented M.W.'s written statement at trial.

After trial, the court found M.W. delinquent of aggravated robbery with a firearm specification, and committed him to the Ohio Department of Youth Services for a minimum of one year on each, to be served consecutively, maximum of M.W.'s twenty-first birthday.

On appeal, M.W. raised three assignments of error:

I. The trial court violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, which were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution and R.C. 2151.352.

II. The trial court committed plain error and violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, because those statements were elicited in violation of M.W.'s constitutional right against self-incrimination.

III. M.W. was denied effective assistance of counsel as guaranteed by the Fourteenth Amendment to the United States Constitution and

The Eighth District considered M.W.'s first and second assignments of error through his third assignment of error, and affirmed M.W.'s adjudication. Op. at ¶10-26. Specifically, as to the alleged right-to-counsel violation, the court found that an "investigatory interrogation" is not a "stage" of the proceedings under R.C. 2152.352; rather, it found that "a juvenile proceeding does not commence until the filing of a complaint." Op. at ¶16, citing In re Forbess, 3d Dist. No. 2-09-20, 2010-Ohio-2826 at ¶33. Therefore, the court found that since the complaint had not yet been filed, R.C. 2152.352 and this Court's holding in In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919 did not apply. Op. at ¶17. As to the alleged Miranda violation, the court found, under the totality of the circumstances, that M.W.'s written waiver of his right to counsel at interrogation was voluntarily given, and that C.S. did not apply. Op. at ¶22; 17.

## ARGUMENT

### PROPOSITION OF LAW I

**A child has the right to counsel at all stages of the proceedings against him. Because Ohio's General Assembly has designated interrogation as a stage of the proceedings, a child must be represented by his parent, guardian, custodian, or an attorney before the child can waive his right to counsel pursuant to Miranda.**

In In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919, this Court held “through R.C. 2151.352, the legislature provided a statutory right to counsel that goes beyond constitutional requirements.” C.S. at ¶83, citing In re Williams, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶15, citing State ex rel. Asberry v. Payne, 82 Ohio St.3d 44, 46, 1998-Ohio-596. Specifically, R.C. 2151.352 provides that “[a] child \* \* \* is entitled to representation by legal counsel at *all stages* of the proceedings under this chapter or Chapter 2152. of the Revised Code.” (Emphasis added.)

The question then, is what is meant by “all stages of the proceedings”? Unmistakably, a “court proceeding” which is defined as “all action taken by the court,” is a stage of the proceedings. Juv.R. 2(G); R.C. 2151.352. In R.C. 2151.352, the General Assembly used the term “at all stages of the proceedings” in the first sentence of the statute, but used the word “hearing” in the seventh and eighth sentences of the statute. This suggests that “hearings” in R.C. 2151.352 and “court proceedings” in Juv.R. 2, are analogous, and that they are different from, and merely a subset of, “all stages of the proceedings.” R.C. 2151.352. Simply put, if the General Assembly intended for R.C. 2151.352 to only apply to “court proceedings” or “hearings,” it would have said so. The canon, *expressio unius est exclusio alterius*, (expression of one thing suggests the exclusion of others) is relevant here, and supports that the General Assembly intended the right to counsel to apply to juveniles in a larger context than just “court proceedings.”

Further, the second paragraph of R.C. 2151.352 also indicates that the statutory right to counsel applies to any child taken into custody, as it specifically provides that a child in custody who has been arrested be permitted to communicate with an attorney or a relative or other person so as to obtain counsel, as per R.C. 2935.14. R.C. 2151.352.

Revised code 2151.352 provides that a child has a right to counsel at “all stages of the proceedings” under Chapter 2151 and 2152 of the Revised Code. Therefore, because interrogation is identified as a “stage of the proceedings” under Chapter 2151 of the Code, then a child’s right to counsel attaches at interrogation. Specifically, R.C. 2151.311 provides the procedure that applies when a child is apprehended. Under R.C. 2151.311(A)(1) and (2), a child who is taken into custody must be returned to the child’s parents or taken to juvenile court or detention. Under R.C. 2151.311(C), a child may be held for processing in any place where an adult placed under arrest can be held, for a limited period of time. And, “processing,” under R.C. 2151.311(C)(1), is defined as “interrogating” the child. R.C. 2151.311(D)(2).

Through R.C. 2151.311, the General Assembly has designated the interrogation of a child to be a stage of the proceedings. Therefore, just as Ohio has created a right to counsel that goes beyond constitutional requirements, it has created a right to “representation” by a child’s parent, guardian, or custodian at all stages of the proceedings, including interrogation. R.C. 2151.352.

Because a child has the right to counsel at interrogation pursuant to R.C. 2151.311 and 2151.352, it follows that this Court’s holding in C.S. should apply to waivers of counsel at interrogation. In C.S. this court held that “represent” in the fifth sentence of R.C. 2151.352 means “to counsel or advise the juvenile,” and that a juvenile may waive his right to counsel, but only “if he is counseled or advised by his parent, custodian, or guardian.” C.S. at ¶98. “If the

juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.” *Id.*

Constitutional rights, such as the right to counsel and the Fifth Amendment privilege against self-incrimination, are applicable to juveniles. *In re Gault* (1967), 387 U.S. 1. Statements resulting from custodial interrogations are admissible only after a showing that the procedural safeguards have been followed. *Miranda v. Arizona* (1966), 384 U.S. 436. Additionally, the United States Supreme Court has emphasized that the admissions and confessions of juveniles require special attention. *Haley v. Ohio* (1948), 332 U.S. 596. Indeed, “[w]aiver by minors must be scrutinized closely since the validity of the waiver is affected by the factors of age, emotional stability, and emotional capacity.” *In re Smalley* (1989), 62 Ohio App.3d 435, 445.

In Ohio, in order to determine whether a juvenile has waived his right to remain silent and to have the assistance of counsel at interrogation, the court must examine the totality of the circumstances surrounding the waiver. *In re Watson* (1989), 47 Ohio St.3d 86, 89. “The totality-of-the-circumstances approach requires an inquiry into all the circumstances surrounding the interrogation[, including] the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.” *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of syllabus.

But now, following *C.S.*, whether a child is “represented” by the child’s parent at interrogation is a determination to be made before a court can evaluate other factors under the totality-of-the-circumstances test. That is because this Court has held, “[i]f the juvenile is not

counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.” C.S. at ¶98.

In this case, law enforcement interrogated M.W. without ensuring that he had been properly counseled and advised about his right to an attorney, either by his parent, guardian, custodian, or an attorney. Therefore, M.W.’s right to counsel at the interrogation could not be waived. Accordingly, this Court should accept jurisdiction in this case and vacate M.W.’s adjudication. In the alternative, this Court should reverse the decision of the court of appeals, suppress M.W.’s confession, and remand to the juvenile court for further proceedings.

## **PROPOSITION OF LAW II**

**If a written waiver of Miranda rights has been executed, the juvenile court judge must consider the form used and the juvenile’s literacy level to ensure that the child has an intelligent understanding of the document and an appreciation of the gravity of signing it.**

In C.S., this Court held, “If a written waiver [of counsel] has been executed, the juvenile court judge must consider the form used and the juvenile’s literacy level to ensure that the juvenile has an intelligent understanding of the document and an appreciation of the gravity of signing it.” Id. at ¶109. Although waivers of Miranda need not be in writing, the same special scrutiny outlined by this Court in C.S. regarding written waivers of counsel by children should be provided to children who execute written Miranda waivers.

The United States Supreme Court has emphasized that the admissions and confessions of juveniles require special attention. Haley v. Ohio (1948), 332 U.S. 596. And, applying the standard from C.S. for determining whether a written waiver is valid makes sense. In this case, the interrogating officers paid no special attention to M.W., a fifteen year-old child with ADHD, who had no parent present to assist and advise him. One officer testified that neither he nor his partner determined whether M.W. knew how to read; instead, he stated that M.W. “looked at the

paper” he signed, but did not read it out loud before he signed it. The officer also testified that he did not determine M.W.’s level of education during the interrogation.

More importantly, this Court’s pronouncement of a uniform standard for evaluating children’s written waivers of counsel executed at any stage of the proceedings is needed to ensure that all children’s rights to counsel are protected at every stage of the proceedings.

Accordingly, this Court should accept jurisdiction in this case and vacate M.W.’s adjudication. In the alternative, because M.W.’s adjudication was tainted by his invalid written waiver of his Miranda rights, this Court should reverse the decision of the court of appeals, suppress M.W.’s confession, and remand to the juvenile court for further proceedings.

### CONCLUSION

This Court should accept M.W.’s appeal because it raises a substantial constitutional question, involves a felony-level offense, and is of great public and general interest.

Respectfully submitted,

Office of the Ohio Public Defender



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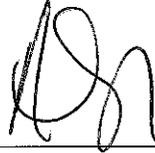
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COUNSEL FOR M.W.

**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Minor Child-Appellant M.W.**, was served by ordinary U.S. Mail, postage-prepaid, this 7<sup>th</sup> day of February, 2011, to the office of Richard Hanrahan, Assistant Cuyahoga County Prosecutor, Appeals Division, 8<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



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Counsel of Record

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IN THE SUPREME COURT OF OHIO

IN RE: M.W.,  
adjudicated delinquent child

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Case No. \_\_\_\_\_

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

C.A. Case No. 94737

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF MINOR CHILD-APPELLANT M.W.**

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94737

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IN RE: M.W.  
A Minor Child

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL 09115470

**BEFORE:** Boyle, J., Rocco, P.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** December 23, 2010

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

DEC 23 2010

GERALD E. FLERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.

MARY J. BOYLE, J.:

Appellant, M.W., appeals the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, which found him delinquent by reason of committing aggravated robbery and placed him in the custody of the Ohio Department of Youth Services ("ODYS"). We affirm.

Procedural History and Facts

On August 22, 2009, a complaint was filed against M.W., alleging that he was delinquent for aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree if committed by an adult, with a gun specification. The complaint further alleged that M.W. was 15 years old at the time of the offense. He pleaded not guilty to the charge. The state sought to transfer the case to the general division and have M.W. tried as an adult. Although the court found probable cause to do so, it ultimately decided that M.W. was amenable to the juvenile justice system and retained jurisdiction. The matter proceeded to an adjudicatory hearing before a magistrate.

The allegations giving rise to the complaint were that in the late evening of August 19, 2009, M.W., along with another juvenile, robbed the victim at gunpoint in the vicinity of Tremont and Jefferson avenues in Cleveland. Among other things, the state offered into evidence a written statement signed by M.W. wherein he confessed to his involvement in the robbery. Specifically, he stated

the following: "I watched [the co-delinquent]'s back, I kept anyone from walking up on him or watched for the police." He further stated that the co-delinquent carried the firearm. He also acknowledged that the money was supposed to be split between the two of them, but that the co-delinquent was caught before they had a chance to divide the money.

The magistrate ultimately found that the state proved the allegations of the complaint beyond a reasonable doubt, thereby finding M.W. delinquent of the charge of aggravated robbery and the three-year firearm specification. The trial judge subsequently adopted and affirmed the magistrate's decision and placed M.W. in the custody of the ODYS for an indefinite term consisting of a minimum period of 12 months and a maximum period not to exceed his attainment of 21 years of age.

M.W. appeals, raising the following three assignments of error:

"[I.] The trial court violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, which were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution and R.C. 2151.352.

"[II.] The trial court committed plain error and violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial

statements to the police, because those statements were elicited in violation of M.W.'s constitutional right against self-incrimination.

"[III.] M.W. was denied effective assistance of counsel as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution."

For the ease of discussion, we will address these assignments of error out of order and together where appropriate.

#### Ineffective Assistance of Counsel

In his third assignment of error, M.W. argues that his trial counsel was ineffective for failing to file a motion to suppress his written statement. According to M.W., the statement arose out of the police's unlawful interrogation of him, where he was not provided counsel despite not having knowingly, voluntarily, and intelligently waiving his *Miranda* rights. We disagree.

To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688. When reviewing counsel's performance, this court must be highly deferential and "must

indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.* at 694.

"[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

Thus, we must determine from the record whether a motion to suppress would have been granted if M.W.'s trial counsel had filed one. If so, M.W.'s counsel was ineffective for failing to file it.

Relying on the arguments asserted in his first two assignments of error, i.e., that he was denied his right to counsel during the police's interrogation of him and that he did not knowingly, voluntarily, and intelligently waive this right, M.W. argues that, had his trial counsel filed a motion to suppress his statement on either grounds, the trial court would have granted it. We will address each of his arguments in turn.

*Right to Counsel*

M.W. argues that his statement was taken in violation of his right to counsel under R.C. 2151.352, which provides juveniles with the right to counsel that goes beyond constitutional requirements. See *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶83. Specifically, R.C. 2151.352 provides that “[a] child \* \* \* is entitled to representation by legal counsel at all stages of the proceedings under this chapter of Chapter 2152 of the Revised Code.”<sup>1</sup> Relying on *In re C.S.*, M.W. contends that this right to counsel under R.C. 2151.352 is absolute, even for purposes of an interrogation, and that it cannot be waived when neither his parent nor attorney has counseled him regarding a waiver of this right. We find M.W.’s argument unpersuasive.

First, as recently recognized by the Third District, R.C. 2151.352 does not consider an “investigatory interrogation” as a “stage” of the proceeding under the statute. *In re Forbess*, 3d Dist. No. 2-09-20, 2010-Ohio-2826, ¶33. Indeed, a juvenile proceeding does not commence until the filing of a complaint. *Id.* Thus, because no complaint had been filed against M.W. at the time of the police interrogation, R.C. 2151.352 does not apply. And while M.W. did have a Fifth Amendment right to counsel under *Miranda*, he never exercised that right.

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<sup>1</sup> Chapter 2152 of the Ohio Revised Code specifically deals with juvenile offenses, with the commencement of juvenile delinquency proceedings beginning with the filing of a complaint. *Wright v. State* (1990), 69 Ohio App.3d 775, 781, 591 N.E.2d 1279.

Second, we find M.W.'s application of *In re C.S.* misplaced. In that case, the Ohio Supreme Court held that "in a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards articulated below, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.* at ¶98. The Court's holding, therefore, is limited to a "delinquency proceeding"; it has no bearing on a juvenile's waiver of *Miranda* rights during a police interrogation prior to the commencement of a delinquency proceeding.

Accordingly, because we find no violation of M.W.'s right to counsel under R.C. 2151.352, we cannot say that his trial counsel was ineffective for failing to move to suppress M.W.'s statement on this basis.

#### *Voluntariness of the Waiver and Statement*

M.W. also argues that his statement should have been suppressed because he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights, thereby rendering his confession inadmissible. We disagree.

"Juveniles are entitled both to protection against compulsory self-incrimination under the Fifth Amendment and to *Miranda* warnings where applicable. Any statements made by a suspect may not be used in evidence where those statements were made during a custodial interrogation unless

*Miranda* warnings were properly given to the suspect.” (Internal quotations and citations omitted.) *In re Forbess*, 2010-Ohio-2826, at ¶27. See, also, *In re Gault* (1967), 387 U.S. 1, 54, 87 S.Ct. 1428, 18 L.Ed.2d 527; *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. A suspect, therefore, may either waive or invoke his *Miranda* rights, including his Fifth Amendment right to counsel, and, if a request for counsel is made, the interrogation must not recommence until counsel is present. *In re Forbess* at ¶28.

In determining whether a juvenile has properly waived his *Miranda* rights, the reviewing court must examine the totality of the circumstances surrounding the waiver, “including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.” *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶57, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus.

Based on our review of the record, we find that M.W.’s waiver of his right to counsel was voluntarily given. First, M.W. testified at trial that he was told his *Miranda* rights prior to making a statement and that he understood such rights. Aside from M.W.’s own admission, the factors we must consider support our conclusion that the waiver was voluntarily made. Here, the record reveals

that M.W. has had prior experiences with the police and that he has been adjudicated delinquent in other cases. M.W., who was 15 at the time of the interrogation, further exhibited the mental and emotional capacity to voluntarily waive his rights. According to the detective, M.W. acted "normal" and was not under the influence of drugs or alcohol at the time of the interrogation. There was no evidence that M.W. had a diminished understanding, and he openly admitted that he could read. Further, the interrogation lasted only 35 minutes. Based on all these circumstances, we do not believe that M.W.'s trial counsel was ineffective for failing to move to suppress his statement based on an involuntary waiver of *Miranda* rights.

Finally, to the extent that M.W. also implies that his statement is rendered involuntary because his mother was not present, the Ohio Supreme Court has expressly rejected this argument. See *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210. Indeed, "a juvenile's confession is not rendered involuntary where the juvenile does not have either a parent or an attorney present." *In re Howard* (1997), 119 Ohio App.3d 33, 694 N.E.2d 488.

Accordingly, because we find that a motion to suppress on either ground would have been futile, we cannot say that M.W.'s trial counsel was ineffective.

The third assignment of error is overruled.

Admission of the Statement

In his first two assignments of error, M.W. contends that his statement was erroneously admitted into evidence for the same reasons that his trial counsel was ineffective, i.e., the statement was taken in violation of his right to counsel under R.C. 2151.352, and he did not voluntarily waive his *Miranda* rights. But based on our previous discussion, we find no error, plain or otherwise. See Crim.R. 52(B). Accordingly, the first two assignments of error are overruled.

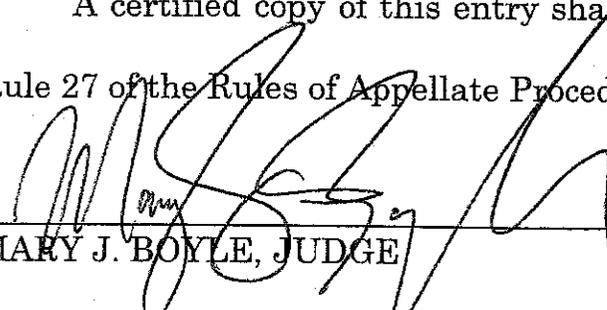
Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



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MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR