

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE No. 2014-1560
PLAINTIFF-APPELLEE,

vs. : ON APPEAL FROM THE HAMILTON
COUNTY COURT OF APPEALS
TYSHAWN BARKER, : FIRST APPELLATE DISTRICT
DEFENDANT-APPELLANT. :
COA CASE No. C 1300214

REPLY BRIEF OF APPELLANT TYSHAWN BARKER

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Statement of the Case and Facts

Tyshawn Barker rests on the Statement of the Case and Facts presented in his Merit Brief.

Argument

First Proposition of Law

When applied to a child, the statutory presumption that a custodial statement is voluntary under R.C. 2933.81(B) violates due process. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

The State is incorrect that this issue is not properly before this Court because it was not raised at the trial level. (State's Brief at 5). The issue was properly preserved because trial counsel filed a motion to suppress Tyshawn's statements, which was denied after a hearing.

Further, on appeal, the court reviewed the issue and affirmed, albeit based upon an argument not raised below. (State's Brief at 7). The First District held that R.C. 2933.81(B) governed the case, that the statute provides a presumption that the statements are voluntarily made if the interrogation is electronically recorded, and reasoned that "[n]othing in the record refutes the presumption that Tyshawn's statements were made voluntarily." *State v. Barker*, 1st Dist. Hamilton No. C-130214, 2014-Ohio-3245, ¶ 12. Review in this Court is proper however, because the U.S. Supreme Court has held that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Finan. Servs.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991).

The State also asserts that R.C. 2933.81 enhances Fifth Amendment rights by making it easier for courts to review interrogations. (State's Brief at 8). That would be true if R.C. 2933.81

provided that all interrogations must be recorded, or that all interrogations for certain types of crimes must be recorded in order for the interrogations to be reviewed. But instead, the statute provides a presumption of voluntariness for electronically recorded statements involving certain offenses, which weakens a defendant's Fifth Amendment rights. R.C. 2933.81(B).

Further, the statute provides the same standard for all interrogations, even those involving children. R.C. 2933.81(B). This is insufficient, because the U.S. Supreme Court has long recognized that children need greater protections than their own immaturity can provide. *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *see also In re Gault*, 387 U.S. 1, 15-18, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Youthfulness heightens vulnerability, which in turn renders voluntariness more problematic. *See Barry C. Feld, Kids, Cops, and Confessions: Inside the Interrogation Room* 42 (2013). And, the American Academy of Child and Adolescent Psychiatry and the International Association of Chiefs of Police recommend that interrogations of all children be recorded. American Academy of Child & Adolescent Psychiatry, *Interviewing and Interrogating Juvenile Suspects* (2013); http://www.aacap.org/AACAP/Policy_Statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx (accessed August 4, 2015).

Because the R.C. 2933.81(B) mandates fewer protections, not enhanced protections for children like Tyshawn, he asks this Court to find that R.C. 2933.81(B) cannot be applied to interrogations involving children.

Second Proposition of Law

The statutory presumption of voluntariness created by R.C. 2933.81(B) does not affect a reviewing court's analysis of whether a defendant waived his *Miranda* rights. Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.

In its brief, the State asserts that the “presumption of R.C. 2933.81 was not applied in this case[.]” *Answer* at 14. But, this is not true. The First District expressly applied the presumption of voluntariness found in R.C. 2933.81 to Tyshawn’s case. *Op.* at ¶ 12. Specifically, although the First District acknowledged that “[w]hether a defendant has voluntarily, knowingly and intelligently waived his *Miranda* rights may be inferred from the totality of the circumstances[.]” it found that “[w]here, as here, the interrogation of the defendant is recorded electronically, the statements made are presumed to have been made voluntarily.” *Id.* The court concluded, “Nothing in the record refutes the presumption that Tyshawn’s statements were made voluntarily.” *Id.* Accordingly, the First District reasoned that R.C. 2933.81 eliminates the need to apply the totality-of-the-circumstances test where an interrogation is videotaped. *Id.*; *see also State v. Washington*, 1st Dist. Hamilton No. C-130213, 2014-Ohio-4178, ¶ 29 (“Pursuant to the statute, the suspect then has the burden of proving that [his] statements * * * were not voluntary”); *State v. Bell*, 1st Dist. Hamilton No. C-140345, 2015-Ohio-1711, ¶ 36 (finding that under R.C. 2933.81(B), where the suspect has been accused of murder and his interrogation is audibly and visibly recorded, his statements are presumed voluntary); *see also In re K.C.*, 1st Dist. Hamilton No. C-140307, 2015-Ohio-1613, ¶ 25 (“We note that R.C. 2933.81(B), which would have shifted the burden to K.C. to show that her statements were not voluntary, does not apply because the interview was not both audibly and visually recorded.”).

The State avers that a juvenile may overcome the presumption in R.C. 2933.81 by demonstrating that his age rendered his waiver invalid. *Answer* at 11. This is because the statute

improperly shifts the burden of demonstrating that a waiver was knowingly, intelligently, and voluntarily made to the defendant. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602 (1966) (“a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”), citing *State v. Parker*, 44 Ohio St.2d 172, 177, 339 N.E.2d 648 (1975), *Escobedo v. Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 34 (“If a defendant later challenges a confession as involuntary, the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of the evidence.”). There is no constitutional justification for shifting the burden when a suspect is accused of murder and the interrogation is videotaped, because as the Court reasoned in *Miranda*, “Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.” *Miranda* at 475.

Further, more recently the Supreme Court recognized that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.” *Dickerson v. United States*, 530 U.S. 428, 444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Therefore, if the federal government is not permitted to set aside the framework established in *Miranda*, it follows that a state legislature is likewise prohibited from doing so. *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (“If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery[.]”), quoting *United States v. Peters*, 9 U.S. 115, 136, 3 L.Ed. 53 (1809).

It is well established that the State cannot use the custodial statements made by a defendant during interrogation without first advising the defendant of his constitutional rights and obtaining a knowing, intelligent, and voluntary waiver of those rights. *Miranda* at 475. And, where a defendant challenges his custodial statements, the burden of demonstrating such waiver rests squarely on the shoulders of the prosecution. *Id.* Thus, by attaching a presumption of voluntariness to the custodial statements of suspects accused of murder, R.C. 2933.81 undermines the protections of *Miranda*. Accordingly Tyshawn respectfully requests that this Court find that the presumption of voluntariness in R.C. 2933.81(B) unconstitutional, in violation of due process.

Conclusion

For all the foregoing reasons, Tyshawn asks this Court to find that R.C. 2933.81(B) is unconstitutional, reverse the judgment of the court of appeals, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing **Reply Brief of Appellant Tyshawn Barker** was forwarded by regular U.S. Mail this 4th day of August, 2015 to the office of Rachel L. Curran, Assistant Hamilton County Prosecutor, 230 East 9th Street, Suite 4000 Cincinnati, Ohio 45202.

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