[Cite as *In re T.H.*, 2013-Ohio-609.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
T.H.,	:	
Appellee,	:	No. 12AP-612
	:	(C.P.C. No. 11JU-09-11916)
(State of Ohio,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on February 21, 2013

Yeura Venters, Public Defender, and *Timothy E. Pierce*, for appellee.

Ron O'Brien, Prosecuting Attorney, and *Katherine Press*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch

TYACK, J.

{¶ 1} The State of Ohio is appealing from the granting of a motion to suppress by the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. The state assigns a single error for our consideration:

> THE TRIAL COURT ERRED BY DENYING THE STATE'S OBJECTION TO THE MAGISTRATE'S DECISION SUPPRESSING THE EVIDENCE AND STATEMENTS OF THE APPELLEE.

{¶ 2} T.H. was charged with carrying a concealed weapon in violation of R.C. 2923.12(A)(2). He allegedly had a loaded gun tucked in his underwear in his groin area when he was approached by Columbus police officers and the gun was found. T.H. was 16 years old at the time.

{¶ 3} With the assistance of counsel, T.H. entered a denial at his initial appearance.

{¶ 4} Counsel filed a motion to suppress the gun as evidence and also to suppress as evidence any statements made by T.H. at the time of T.H.'s encounter with police.

{¶ 5} An evidentiary hearing was conducted by a magistrate of the division of domestic relations, juvenile branch following which the magistrate prepared a report which read:

> Hours later at the police headquarters, [T.H.] was interviewed. He had been in custody since he left the bike and was frisked. Before the interview, his mother was not contacted at all. The brief phone call from the arrest scene did not involve anything about Miranda warnings or speaking with the police.
>
> Based on these facts, the Motion to Suppress should be granted.
>
> Regarding the stop; the police lacked reasonable suspicion that [T.H.] was armed or had been involved in discharging a firearm. While the officers had reason to cite [T.H.] for the bike riding violations; they had no sufficient basis for a pat down.
>
> Regarding the interview; it was fatally flawed by the failure to consult [T.H.]'s mother before conducting it. [T.H.] had never been Mirandized before, plus he told the police at the start of the interview that he did not wish to talk. At that point, the process should have stopped. The full interview proceeded from there.

{¶ 6} The state filed objections to the magistrate's decision and a hearing was held before a judge of the juvenile division. The judge subsequently journalized a decision and judgment entry affirming the magistrate's decision, relying heavily on his finding that the police officer failed to consult with T.H.'s mother before interviewing him and the fact that the police officers continued the interview with T.H. despite T.H. telling them he did not wish to talk to them.

{¶ 7} The merits of the motion to suppress can and should be addressed in two parts, the suppression of the handgun as evidence and the suppression of statements T.H. made to police.

{¶ 8} The temporary seizing of T.H. as a person and the subsequent discovery of the handgun found in his underwear was done without the benefit of a warrant. Warrantless searches and seizures are per se unreasonable for purposes of the Fourth Amendment to the U.S. Constitution, subject to a few, well-delineated exceptions. This has been the law since the 1967 decision of the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967).

{¶ 9} The state had the burden of going forward with a theory as to the applicability of one or more of the well-delineated exceptions and then of proving the applicability of that exception to the facts of T.H.'s case. One of the exceptions to the warrant requirement is the stop and frisk exception which allows police to stop and frisk a citizen if the police have a reasonable articulable suspicion of illegal conduct. This exception was first recognized by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The reasonable suspicion must be based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id*. at 21.

{¶ 10} We find that the state proved the reasonable articulable suspicion necessary to support the frisking of T.H. T.H. was seen riding a bicycle illegally. A police officer pulled T.H. over as a result. Police had heard gunfire and had smelled gunpowder in the area recently. They had been directed to T.H. and his acquaintances by two juveniles who seemed afraid, as the source of the gunfire. When T.H. and his acquaintances had been approached about the source of the gunfire, one in the group said it had not been gunfire at all but a firecracker going off. T.H. found this claim amusing to the point of smirking and "kind of laughing" about it. (Nov. 18, 2011 Tr. 14.) Again, the officers had actually heard the gunfire and smelled gunpowder.

{¶ 11} Given these facts, the police had a reasonable articulable suspicion that one or more in the group had firearms and that one was responsible for the gunfire the officers had heard personally. When T.H. was stopped for riding his bicycle illegally a short time later, the police had a reasonable suspicion that T.H. might be armed. The frisk demonstrated the correctness of that belief.

{¶ 12} We do not find that T.H. was illegally arrested before he was frisked. He was stopped for a violation of law which was witnessed by the police officers. In order to

frisk him, they had to temporarily restrain him of his liberty. The fact that his hands were temporarily held behind his back during the restraint did not elevate the restraint to an arrest. Given the suspicion that T.H. had a firearm, some effort to restrict his use of his hands while he was under police control was reasonable. The gun was obtained as the result of a legal stop and frisk, not as the result of an illegal arrest.

{¶ 13} Since the state demonstrated the applicability of the stop and frisk exception to the warrant requirement, the trial court should not have suppressed the firearm as evidence. To that extent, the juvenile court erred.

{¶ 14} The statements made by T.H. to police were, however, correctly suppressed. The state had the burden of showing that T.H. knowingly, intelligently and voluntarily waived his right to remain silent. *See Miranda v. Arizona*, 384 U.S. 474 (1988). The state did not meet that burden.

{¶ 15} The trial court judge who reviewed the magistrate's decision wrote:

> The Court finds that the interview was **fatally flawed** by the failure to consult with the Minor Child's mother before its commencement. The officers indicated that they informed the Minor Child of his *Miranda* rights, but they never actually Mirandized the Minor Child before he informed officers that he did not wish to talk. Further, he had no meaningful opportunity to speak to a parent or adult friend. Thus, the Magistrate found, and the Court agrees, that the Minor Child did **not** make a knowing, intelligent, and voluntary waiver of his rights. Considering his age, education and cultural background along with the lack of effort by the officers to substantively engage his parent, the Court agrees that all of the evidence obtained during questioning of the Minor Child must be suppressed.

(Emphasis sic.) June 25, 2012 Decision and Judgment Entry, at 5.

{¶ 16} T.H. had been in police custody for a significant period of time (estimated at 15 minutes) before the police questioned him at greater length than happened at the scene of his arrest. He had been put in handcuffs and transported in a police cruiser to an interrogation room in police headquarters. When police gave him a printed form waiving his rights, he balked at signing it, indicating that he did not have anything to say. A police officer kept asking him to sign the form and indicated that the form just told T.H. what his rights were.

{¶ 17} T.H. did not have the benefit of consulting with either his mother or an attorney about giving up his constitutional right to remain silent. He was 16 years old with a 9th grade education. He was situated in an environment which the Supreme Court of the United States has recognized as coercive for an adult. *See Miranda*. Although a juvenile can give an incriminating statement without consulting with a parent or an attorney, the access to a trusted adult or attorney is a factor which can be considered in assessing voluntariness.

{¶ 18} Given the facts of this case, the juvenile court could reasonably find that T.H. did not knowingly, intelligently and voluntarily give up his right to remain silent. Therefore, the juvenile court correctly suppressed T.H.'s statements as evidence.

{¶ 19} The assignment of error is sustained in part and overruled in part. The decision of the juvenile court to suppress the gun as evidence is vacated and the case is returned to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, for further appropriate proceedings.

Judgment affirmed in part and reversed in part; case remanded for further proceedings.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).