

[Cite as *State v. D'Allesandris*, 2011-Ohio-1126.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23889
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-2595
v.	:	
	:	
ANDREW D'ALLESANDRIS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 11<sup>th</sup> day of March, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Andrew D'Allesandris appeals from his conviction and sentence for Gross Sexual Imposition of a person under the age of thirteen, in violation of R.C. 2907.05(A)(4), and Rape by force or threat, in violation of R.C. 2907.02(A)(2).

D'Allesandris contends that the trial court erred in overruling the motion to suppress his written confession, because he had invoked his right to counsel.

{¶ 2} We conclude that the evidence in the record supports the trial court's conclusion that D'Allesandris did not invoke his right to counsel before custodial interrogation. Therefore, the trial court did not err in overruling the motion to suppress, and the judgment of the trial court is Affirmed.

I

{¶ 3} In August 2009, D'Allesandris was taken into custody following a sexual assault complaint involving a twelve-year-old. Police Officer Daryl Wagner placed D'Allesandris under arrest and transported D'Allesandris the three-quarters of a mile to the police station. Officer Wagner testified that it took about two minutes to transport D'Allesandris from the residence where he was arrested to the Centerville Police Department.

{¶ 4} During the trip to the police department, D'Allesandris asked what was about to happen; Officer Wagner responded that D'Allesandris would be photographed and fingerprinted, and a detective would talk to him afterwards. Officer Wagner further testified that he did not question D'Allesandris during the ride to the police department. While Officer Wagner processed D'Allesandris at the police station, D'Allesandris never requested an attorney. Officer Wagner then turned D'Allesandris over to Detective Matt Brown.

{¶ 5} Using a pre-interview form, Detective Brown read D'Allesandris his constitutional rights, which included the right to counsel. D'Allesandris read the waiver of his rights aloud, and signed a pre-interview form in which he agreed to speak to Detective Brown without an attorney present. During the interview, D'Allesandris completed a

four-page written statement, signing each page.

{¶ 6} During the hearing on the motion to suppress the written confession, evidence was submitted that D'Allesandris asked Officer Wagner, "When [he'd] be able to speak to a lawyer." D'Allesandris contends that this constituted an invocation of his right to counsel. D'Allesandris's father, Ronald D'Allesandris, allegedly told D'Allesandris's mother over the phone that D'Allesandris needed to invoke his right to counsel. D'Allesandris's mother testified at the hearing that she was at the residence when D'Allesandris was arrested and relayed to D'Allesandris the message from his father that he should ask for an attorney several times. Officer Wagner and D'Allesandris's mother agree that these statements were not made in Officer Wagner's presence.

{¶ 7} D'Allesandris testified that while being transported to the police station he asked when he would be able to speak to an attorney. Officer Wagner testified that this question was never asked – not on the way to the police station, not when D'Allesandris was being booked, and not at any other time. Accordingly there were no notes made of this statement in the police report, nor was it mentioned to Detective Brown when Officer Wagner spoke with him prior to the interview.

{¶ 8} The trial court found that D'Allesandris did not ask when he would be able to speak to an attorney, and overruled the motion to suppress. The trial court also held, in the alternative, that even if D'Allesandris had asked the officer when he would be able to speak to an attorney, this was not an unambiguous, unequivocal, invocation of the right to counsel under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶ 9} D'Allesandris pled no contest and was sentenced to an aggregate prison term of

ten years. D'Allesandris appeals from his conviction and sentence.

## II

{¶ 10} Although D'Allesandris has not set forth express assignments of error, as required by App. R. 16(A)(3), we infer his sole assignment of error to be as follows:

{¶ 11} THE TRIAL COURT ERRED BY OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS HE MADE WHILE IN POLICE CUSTODY.

{¶ 12} D'Allesandris contends that prior to his interview at the police station by Detective Brown, he invoked his right to counsel by asking Officer Wagner when he could speak to an attorney, while being transported to the police station.

{¶ 13} The Ohio Supreme Court has held that, "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372.

{¶ 14} There was a conflict in the testimony concerning whether D'Allesandris asked Officer Wagner when he could speak to an attorney. Officer Wagner denied that

D'Allesandris made inquiry. The trial court found, by a preponderance of the evidence, that D'Allesandris did not inquire when he could speak to an attorney. There is competent, credible evidence in the record, in the form of Officer Wagner's testimony, to support that finding.

{¶ 15} D'Allesandris was processed at the police station, and never made further reference to consulting an attorney. D'Allesandris was also read his rights by Detective Brown prior to any questioning; at this point D'Allesandris never asked for an attorney. D'Allesandris signed a waiver of rights form prior to questioning, which D'Allesandris read out loud. It was only after all of these warnings and advice that D'Allesandris wrote out and signed the four-page statement that he gave police.

{¶ 16} From all of the evidence in the record, the trial court could properly find that D'Allesandris never invoked his right to counsel. Consequently, we find it unnecessary to address the trial court's alternative finding that the inquiry D'Allesandris alleged that he made about when he could have an attorney did not constitute an unambiguous, unequivocal invocation of Miranda rights. D'Allesandris's sole assignment of error is overruled.

III

{¶ 17} D'Allesandris's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN and FROELICH, JJ., concur.

Copies mailed to:

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