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IN RE: **MICHAEL ROGER JOHNSON** AN ALLEGED DELINQUENT CHILD, Defendant-Appellant

NO. 7998

COURT OF APPEALS, SECOND APPELLATE DISTRICT, **MONTGOMERY COUNTY,** OHIO

1983 Ohio App. LEXIS 14017

October 25, 1983

CASE SUMMARY:
PROCEDURAL POSTURE: Defendant appealed from a judgment of the **Montgomery County** Juvenile Court (Ohio) that adjudicated him as a delinquent after he was found guilty of aggravated murder in violation of Ohio Rev. Code § 2903.01(B), rape in violation of Ohio Rev. Code § 2907.02(A)(1), abuse of a human corpse in violation of Ohio Rev. Code § 2927.01(B), and kidnapping in violation of Ohio Rev. Code § 2905.01(A)(3).

OVERVIEW: Defendant, while a young teenager, was found guilty of the aggravated murder, rape, kidnapping, and abuse of the corpse of another teenager. Defendant was adjudicated as a delinquent child and committed to the legal custody of youth services for care and rehabilitation. Defendant appealed, and the court affirmed. The court held that (1) defendant was not entitled to Miranda protections during his polygraph exams because at the times the exams were administered defendant was not charged, arrested or considered a suspect and he was free to leave the police station, (2) defendant's waiver of his Miranda rights was voluntary despite his age because he was sufficiently familiar with police procedures and was intelligent enough to understand his rights and waiver of them, (3) false statements made by police to defendant with respect to his accomplice's failure of a polygraph test did not render defendant's confession involuntary, and (4) the trial court properly determined that defendant was competent to be tried in a delinquency hearing because a preponderance of the evidence showed that given his age he was capable of understanding the proceedings and assisting in his defense.

OUTCOME: The court affirmed the judgment that adjudicated defendant as a delinquent.

CORE TERMS: juvenile, confession, polygraph, adult, competency, interview, involuntary, murder, assignments of error, delinquency, voluntariness, exam, intelligently, knowingly, incapable, assisting, waived, youth, rape, juvenile proceedings, false statement, interrogation, incompetent, aggravated, totality, clinical, warnings, food, police station, written statements

LexisNexis(R) Headnotes

Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation
Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver
Criminal Law & Procedure > Interrogation > Voluntariness

HN1 The touchstone for invoking the protections afforded by Miranda is a "custodial interrogation."

Criminal Law & Procedure > Interrogation > Voluntariness

HN2 Even where Miranda does not apply, it is generally established that confessions will be admissible where they are shown to be voluntary. The burden is upon the prosecutor to prove voluntariness.

Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview
Criminal Law & Procedure > Interrogation > Voluntariness

HN3 Determination of whether a statement is involuntary requires more than a mere color-matching of cases. It requires careful evaluation of all the circumstances of the interrogation. Voluntariness is a matter of law to be decided by the court rather than a question of fact, since ultimately it is an admissibility issue. The controlling standard for review of the voluntariness of a confession is the totality of circumstances test. Factors which are ordinarily considered in determining voluntariness include the youth of the accused and his opportunity to consult with a parent, guardian, lawyer, or adult friend; his education; intelligence; length of detention; type of questioning, whether constitutional warnings were given and waived, and coercion in the form of deprivation of food or sleep.

Criminal Law & Procedure > Interrogation > Voluntariness

HN4 Confessions obtained by subterfuge are not necessarily involuntary.Even where a police officer falsely relates to a defendant that his accomplice has incriminated him, the deceptive statement does not render a subsequent confession inadmissible or the result of improper coercion.

Criminal Law & Procedure > Pretrial Motions & Procedures > Competency to Stand Trial
Family Law > Delinquency & Dependency > Delinquency Proceedings
Governments > Legislation > Statutory Remedies & Rights

HN5 A juvenile has no statutory right in Ohio to plead that he is incompetent to stand delinquency proceedings.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview
Criminal Law & Procedure > Pretrial Motions & Procedures > Competency to Stand Trial
Criminal Law & Procedure > Defenses > Right to Present

HN6 Since the right not to be tried while incompetent is a due process/fundamental fairness right in adult criminal trials, it should be applicable to juvenile proceedings unless counterbalanced by some essential end of the juvenile justice system. The right of a juvenile to present his defense not only as fundamental, but also as functionally essential, and therefore not outweighed by other desirable aspects of the juvenile system.

Criminal Law & Procedure > Pretrial Motions & Procedures > Competency to Stand Trial

HN7 Ohio Rev. Code § 2945.37(A) provides in part that a defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this

section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Criminal Law & Procedure > Defenses > Alibi

HN8 Ohio Rev. Code § 2903.01(B), in part provides that no person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit rape.

Evidence > Hearsay > Exemptions > Confessions > Corpus Delicti Doctrine

HN9 There must be some evidence outside of a confession, tending to establish the corpus delicti, or substance of the offense, before the confession is admissible.

COUNSEL: [*1] LEE C. FALKE, Prosecuting Attorney for **Montgomery County,** Ohio, By: DAVID M. DALTON, Assistant Prosecuting Attorney, Appellate Division, 7th Floor, **Montgomery County** Administration Building, 451 West Third Street, Dayton, Ohio 45422, Attorney for Plaintiff-Appellee

DANIEL J. O'BRIEN, Suite 300, 345 West Second Street, Dayton, Ohio 45402, Attorney for Defendant-Appellant

JUDGES: WILSON, J., and WEBER, J., concur.

OPINION BY: BROGAN, P.J.

OPINION

OPINION

David Rowell, a juvenile, was murdered February 6, 1982. Appellant Michael Johnson (Michael) was adjudicated a delinquent child by **Montgomery County** Juvenile Court on August 24, 1982 following a hearing to the court.

Michael, then age 14, was found in violation of R.C. 2903.01(B) aggravated murder; R.C. 2907.02(A)(1) rape; R.C. 2927.01(B) abuse of a human corpse; and R.C. 2905.01(A)(3) kidnapping, in connection with the Rowell murder. The juvenile court committed Michael to the legal custody of the Department of Youth Services for care and rehabilitation until age 21. From the adjudication of deliquency Michael has appealed, setting forth three assignments of error.

During their investigation of the Rowell case, [*2] Moraine Township police conducted interviews and polygraph examinations of a number of potential witnesses, including Michael. (Tr. Vol. 2; 154, 171-72). On February 13, and again on March 3, 1983 Michael underwent polygraph examinations at the Centerville police station. He was not a suspect.

Prior to both polygraph exams, an officer came to Michael's home and explained to both he and his mother that Michael did not have to take the polygraph if either of them objected. On each occasion, Michael and his mother signed releases and consent forms in an officer's presence. (Tr. Vol. 2, 259,

State's Ex's. 16 and 10).

Michael was transported on each occasion to the police station where the examinations were administered in the same surroundings by Detective Walker (Tr. Vol. 2; 64-67, 239, 257-60). Before both exams Det. Walker advised Michael of his *Miranda* rights and asked Michael follow-up questions to insure he understood those rights (Tr. Vol. 2; 150-52, 155-57; State's Ex's. 11 and 13). Det. Walker also asked Michael to read the pre-interview form containing *Miranda* warnings which Michael signed on each occasion.

Each examination lasted approximately 3 1/2 hours, [*3] which was the usual time for such an interview (Tr. Vol. 2; 153, 157-58). Upon conclusion of the first exam, Det. Walker informed Michael the results indicated he was withholding information (Tr. Vol. 2; 160). Detective Walker asked Michael if he would consider taking another exam at a later date.

After the second polygraph, on March 3, 1982 Det. Walker left the room to analyze the results and Michael slept undisturbed for approximately forty-five minutes (Tr. Vol. 2; 239). After Michael awoke, Det. Walker informed him the results again indicated deception and that his acquaintance Keith Wampler had implicated himself in the Rowell murder. (Tr. Vol. 2; 251, 191, 238). There-upon, Michael confessed his own involvement (Tr. Vol. 2; 160-62).

At Detective Walker's request, Michael reduced his statement to writing in the form of a "letter of apology." (Tr. Vol. 2; 163; State Ex's. 12). Detective Walker asked Michael if he would repeat his statement for Detective Mullins. Michael agreed to a tape-recorded interview with Det. Mullins.

Detective Mullins asked Michael if he understood the rights Det. Walker had explained and that he could refuse to continue. Michael indicated [*4] he understood his rights. Michael was offered the use of a telephone, which he declined and food, which he ate (Tr. Vol. 2; 265-66).

At the conclusion of the taped interview Michael asked to see his parents (State's Ex. 16; Tr. Vol. 2 and Vol. 3 AH 3). Arrangements were made for a meeting before Michael was taken to juvenile detention.

A suppression hearing was held June 11 and 21, 1982 on Michael's motion to suppress his oral and written statements. By written opinion on June 30, 1982, the juvenile court held that Michael knowingly, intelligently, and voluntarily waived his constitutional rights based on the totality of circumstances reflected in the record, and thus overruled his motion to suppress. (*Decision*, June 30, 1982).

Michael asserts as his first assignment of error that he did not knowingly and intelligently waive his *Miranda* rights and that his oral and written statements were involuntary.

Initially, we need not determine whether Michael's waiver of *Miranda* rights was voluntary or involuntary. Implicit in the claim that Michael did not knowingly and intelligently waive his *Miranda* rights is the assumption that *Miranda* applies to this [*5] non-custodial stationhouse polygraph interview. It does not. ***HN1*** The touchstone for invoking the protections afforded by *Miranda* is a "custodial interrogation." *See Miranda v. Arizona* (1966), 384 U.S. at 444; *See also Oregon v. Mathiason* (1977), 429 U.S. 496.

Michael was given *Miranda* warnings, the protections of which he expressly waived. During both polygraphs, Detective Walker was in street clothes rather than in uniform. While at the stationhouse

Michael was not charged, arrested, photographed, fingerprinted, nor considered a suspect. Michael asserts he had no transportation to leave the police station. However, Detective Mullins had promised to take Michael to school following the exam. (Tr. Vol. 259-60). Thus Michael in fact had transportation and could have asked t leave.

Under these circumstances Michael could not have reasonably concluded he was deprived of his freedom so as to constitute a "custodial interrogation." Accordingly *Miranda* has no application here. *See Oregon v. Mathiason, supra; United States v. Cortez* (6th Cir. 1970), 425 F. 2d 452. *People v. Rodney P.* (N.Y. 1967), 233 N.E. 2d 255; *People v. Yukl* (N.Y. 1969), 256 [*6] N.E. 2d 172, 174. *See also: Green v. United States* (D.C. App. 1971), 275 A. 2d 555; *Hicks v. United States* (D.C. Cir. 1967), 382 F. 2d 158; and *Hunter v. State* (Alaska, 1979) 590 P. 2d 888.

Additionally, Michael claims various factors rendered his subsequent oral and written statements involuntary. He alleges his youth, immaturity, lack of consultation with an adult, length of the interview, and a false statement made by police officers were circumstances which caused his statements to be involuntary.

Admittedly, voluntariness is a special concern in the case of a juvenile's confession. *In re Gault* (1967), 387 U.S. 1, at 55. However, **HN2** even where *Miranda* does not apply, it is generally established that confessions will be admissible where they are shown to be voluntary. The burden is upon the prosecutor to prove voluntariness. *Lego v. Twomey* (1972), 404 U.S. 477, 491.

There were not present in this case some of the gross abuses that have led the Court in other cases to find confessions involuntary, such as beatings, see *Brown v. Mississippi*, 297 U.S. 278, or "truth serums," see *Townsend v. Sain*, 372 U.S. 293. But "the blood of the accused is not [*7] the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S., at 206. **HN3** Determination of whether a statement is involuntary "requires more than a mere color-matching of cases." *Reck v. Pate*, 367 U.S. 433, 442.It requires careful evaluatio of all the circumstances of the interrogation. *Mincey v. Arizona* (1978), 437 U.S. 404.

We note voluntariness is a matter of law to be decided by the court rather than a question of fact, since ultimately it is an admissibility issue. *Lego v. Twomey, supra*. The controlling standard for our review of the voluntariness of Michael's confession is the totality of circumstances test. *People v. Hester* (Ill. 1968), 237 N.E. 2d 466, cert. dismissed (1970) 397 U.S. 660; *Brown v. Mississippi* (1936), 297 U.S. 278.

Factors which are ordinarily considered in determining voluntariness include the youth of the accused and his opportunity to consult with a parent, guardian, lawyer, or adult friend; his education; intelligence; length of detention; type of questioning, whether constitutional warnings were given and waived, and coercion in the form of deprivation of food or sleep. *Davis v. North Carolina* [*8] (1966), 384 U.S. 737; *West v. United States* (5th Cir. 1968), 399 F. 2d 467, 469, (1969) cert. denied 393 (U.S. 1102; *see also Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 226.

At the time of his confession Michael was fourteen. The juvenile court characterized him as a "streetwise youngster" who was "sufficiently familiar with police procedures to be fully cognizant of his rights." (*Decision*, June 30, 1982). With respect to Michael's sophistication, it was shown that prior to this case Michael had been contacted by Moraine police for five other incidents. (Tr. Vol. 2; 5-7, 9-10, 11-14, 21-22, 26-27). In one of these instances, Michael made a written statement and on another

occasion he filled out and signed a waiver form (Tr. Vol. 2; 21-22, 26-27).

Based on two interviews and psychological tests, Barbara Bergman, a psychologist, testified Michael was at the low end of the average I.Q. range, could distinguish degrees of culpability and had nothing in his psychological make-up that would have prevented him from knowingly, intelligently and voluntarily waiving his rights. (Tr. Vol. 2; 32-39).

Michael's mother, Mary Johnson consented to both polygraphs [*9] and attendant interviews, although she did not actively consult with Michael during the questioning. It was shown Mrs. Johnson was functionally illiterate, had a speech impairment and was incapable of thoroughly comprehending the release and consent form which she signed. Although a juvenile's privilege against self-incrimination cannot be waived by a parent, Mary Johnson's allegedly invalid consent to the polygraph does not vitiate the voluntariness of Michael's subsequent confession. *Compare In re Collins* (1969), 20 Ohio App. 2d 319.

In the case at hand, Michael was not without an adult's assistance. David Caley, a counselor for South Community Mental Health Center was available for consultation during Michael's oral statement (Tr. Vol. 2; 267). Further, there is no evidence that Michael requested the consultation of his mother (or any adult) at any time during his interview or statement.

Michael further argues the false statement made by Moraine police that Keith Wampler had failed a polygraph and subsequently confessed so frightened Michael that his confession was involuntary. However, ***HN4***confessions obtained by subterfuge are not necessarily involuntary. [*10] *Price v. State* (1868), 18 Ohio St. 418; *Burchett v. State* (1930), 35 Ohio App. 463, 172 N.E. 555. For instance, even where a police officer falsely relates to a defendant that his accomplice has incriminated him, the deceptive statement does not render a subsequent confession inadmissible or the result of improper coercion. *Frazier v. Cupp* (1969), 394 U.S. 731; *see State v. Melchior* (1978), 56 Ohio St. 2d 15. *See also; Oregon v. Mathiason, supra.*

Applying these principles to the instant case, the fact police confronted Michael with a false statement as to his companion's involvement in the Rowell murder does not render Michael's subsequent statement involuntary.

Additionally, we note Michael was provided with food. When he fell asleep after the second polygraph, he was not disturbed until he awoke.It was shown that 3 1/2 hours was a normal duration for polygraph interviews.

Considering the totality of circumstances surrounding the confession we hold it was in fact voluntary. The trial court did not err in admitting appellant's statements into evidence. Accordingly, the assignment of error is overruled.

As his second assignment of error Michael asserts the [*11] juvenile court erred in finding him competent to be tried in a delinquency adjudication.

Upon motion of Michael's counsel and pursuant to Juv. R. 32(A) (4), the juvenile court ordered a social history and mental examination to determine Michael's mental state and thereby evaluate his competency. Dr. Sastry of the Dayton Area Forensic Psychiatry Services Center conducted part of this examination.

Based on the psychiatric evaluations and testimony presented at a hearing on April 22, 1982 the juvenile court found Michael competent for purposes of a delinquency proceeding. (*Decision*, May 10, 1982). In reaching its decision the court accepted as factual the clinical *findings* of Dr. Sastry, but it discounted his *opinion* on the ultimate issue of competency.

Michael asserts it was error for the court to reject the opinion of the court-appointed expert. It is argued Michael was incapable of fully appreciating the nature and consequences of the charges and of assisting counsel at trials shown by Dr. Sastry's testimony. Further, Michael argues the standard employed by the juvenile court concerning competency is unascertainable from its decision.

Initially, we note [*12] ***HN5***a juvenile has no statutory right in Ohio to plead that he is incompetent to stand delinquency proceedings. This is primarily due to the civil nature and rehabilitative philosophy of juvenile proceedings. However, the United States Supreme Court has held that failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of due process. *Pate v. Robinson* (1966), 383 U.S. 375. *See also Drope v. Missouri* (1975), 420 U.S. 162.

HN6Since the right not to be tried while incompetent is a due process/fundamental fairness right in adult criminal trials, it should be applicable to juvenile proceedings unless counterbalanced by some essential end of the juvenile justice system. *See In re Gault* (1967), 387 U.S. 1; *In re Winship* (1971), 403 U.S. 528. We view the right of a juvenile to present his defense not only as fundamental, but also as functionally essential, and therefore not outweighed by other desirable aspects of the juvenile system, under the *Gault-Winship-McKeiver* test.

Although R.C. 2945.37(A) provides the standard by which an adult defendant may overcome the presumption [*13] of competency, no such statutory standard exists for juveniles. ***HN7***R.C. 2945.37(A) provides in part:

A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense.

In finding Michael competent to be adjudicated, the juvenile court recognized the distinction between competency to stand trial as an adult and competency for a juvenile delinquency adjudication. In its decision the court stated:

. . . the standards for determining whether or not a juvenile is competent to be tried in a delinquency hearing is that, if by a preponderance of the evidence presented, the court determines that because of his *present* mental condition, the juvenile is incapable of understanding the nature and objective of the proceedings against him, *or* of presently assisting in his defense, the court must find that the juvenile is not competent to stand trial. This standard is adopted from the adult criminal standard. The norms, however, that [*14] apply to a juvenile in making this competency determination must necessarily differ . . . .

(*Decision*, May 10, 1982, p. 4, emphasis in original).

We accept the juvenile court's adoption of the adult competency standard, provided that in applying it,

the court assesses juveniles by juvenile norms rather than adult norms. In the instant case, the juvenile court found:

. . . based upon a preponderance of the evidence presented, the alleged delinquent does not possess the maturity or intelligence of an adult. *He does, however, possess the present capacity to effectively communicate with and assist counsel in his defense, and when compared with other fourteen-year-old youths, he possesses a "normal" capacity to understand the nature of the charges against him.*

(*Decision*, May 10, 1982, p. 6, emphasis added). Accordingly, we find no error in the juvenile court's application of this standard. Further, Appellant's claim that the court did not expressly state a competency standard is without merit.

In reaching its decision, the court examined Dr. Sastry, who testified that Michael: 1) showed no character disorder or mental illness, 2) thought clearly and logically, 3) thought [*15] in a concrete manner, but had problems thinking abstractly, 4) had judgment appropriate to his age level, 5) had difficulty understanding the terminology used in the mental evaluation; 6) possessed physical, social, and intellectual development normal for a child of his age, 7) had an overall normal profile for a child his age, 8) recognized the importance of being honest with his attorney so as to best tell his side of the case, and 9) wanted to be cooperative with counsel in hearings relating to the charges. (Tr. Vol. 1; 41-42).

Yet Dr. Sastry testified Michael was not capable of fully appreciating the consequences of the charges or of assisting his attorney during trial (Tr. Vol. 1; 13, 15, 21, 28, 37). This opinion admittedly was premised on adult norms, contrary to what we consider a fair assessment of a juvenile's competency. Further, Dr. Sastry's opinion seems inconsistent with his clinical findings listed above. We conclude it was not error for the juvenile court to reject Dr. Sastry's opinion while adopting his clinical findings. *See State v. DeHaas* (1967), 10 Ohio St. 2d 230.

Further, the testimony of a physician as to an individual's competency is not [*16] dispositive of that issue as a matter of law. *Vetter v. Hampton* (1978), 54 Ohio St. 2d 227. As fact-finder, the trial court was at liberty to determine the weight and credit which this testimony deserved. *See* 43 O. Jur. 3d, *Evidence and Witnesses*, section 622.

We find there was sufficient credible evidence upon which the juvenile court could find Michael competent for adjudication based on the aforementioned standard. Thus the second assignment of error is overruled.

As his final assignment of error Michael asserts the State failed to prove each and every element of the aggravated murder charge beyond a reasonable doubt and that the adjudication of delinquency was therefore improper. Michael asserts there was no evidence of his complicity, or of his personal commission of rape, or murder.

As a result of In re Winship (1970), 397 U.S. 358, due process requires the state to prove each and every element of an offense beyond a reasonable doubt in both criminal *and* juvenile proceedings. The relevant offense nere, ***HN8***R.C. 2903.01(B), in part provides:

No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing [*17] immediately after committing or attempting to commit . . . rape . . . .

Michael first argues the State failed to place him at the scene of the murder. At the adjudicatory h earing Michael introduced an alibi through the testimony of Ted Ritchie, who testified he was with Michael on the night of David Rowell's death.

This testimony was substantially the same as Ritchie's previous testimony in the related murder prosecution of Keith Wampler, where it was introduced by the State. Since the jury *apparently* believed Ritchie's testimony in convicting Wampler, Michael claims the juvenile court in the instant case likewise should have accepted this testimony as establishing an alibi. Clearly, this contention lacks merit. It is fundamental that each case must be decided on its own particular facts. Further, the credibility of a witness' testimony is a matter for the trier of fact, and the juvenile court was at liberty to believe some, all, or none of Ritchie's testimony. *State v. DeHaas* (1967), 10 Ohio St. 2d 230.

Michael argues the testimony supporting his alibi defense was not rebutted by the State. However, the fallibility of this alibi is apparent from the inconclusiveness [*18] of Ted Ritchie's testimony. Ritchie parted company with Michael that night from 11:50 p.m. until 1:15 a.m. (Tr. Vol. 3; 149-51). During that interval Michael's whereabouts were explained by his sister who testified he was sleeping (Tr. Vol. 3; 97-98). The coroner estimated the time of David Rowell's death at 1:00 a.m. (Tr. Vol. 3; 26). An evidence technician testified he observed two sets of footprints in the snow, leading up to and away from Rowell's body, one of which was consistent with Michael's boots. (Tr. Vol. 3; 57-58, 63-65, 84). We conclude the State's circumstantial evidence, taken as a whole, was inconsistent with any *reasonable* theory of innocence. *See State v. Kulig* (1979), 37 Ohio St. 2d 157.

Further, the long-standing rule of *State v. Maranda* (1916), 94 Ohio St. 364, requires **HN9** *some* evidence outside of a confession, tending to establish the *corpus delicti*, or substance of the offense, before the confession is admissible. In the instant case, there was circumstantial evidence of the cause of death, injury to the body, rape, and an attempt at concealment. *Maranda* requires only *some* evidence outside of the confession which tends to prove [*19] *some* material element of the crime charged. *Id.*, (Syllabus). *See also State v. Ralston* (1979), 425 N.E. 2d 916.

We conclude there was sufficient evidence for the juvenile court to find all the essential elements of aggravated murder were established. R.C. 2903.01(B). The final assignment of error is denied.

A substantial factual basis existed upon which the juvenile court could reasonably adjudicate Michael Johnson a delinquent child. Hence the adjudication of delinquency is affirmed.

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