

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
(Cite as: 2006 WL 902598 (N.J.Super.A.D.))

H Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Peter R. HENRIQUES, Defendant-Appellant.
Submitted March 22, 2006.
Decided April 10, 2006.

On appeal from the Superior Court of New Jersey,
Law Division, Cumberland County, 98-01-0092.
Yvonne Smith Segars, Public Defender, attorney for
appellant ([M. Virginia Barta](#), Assistant Public De-
fender, of counsel and on the brief).

[Zulima V. Farber](#), Attorney General, attorney for
respondent (Joie Piderit, Deputy Attorney General, of
counsel and on the brief).

Before Judges [CONLEY](#), [WEISSBARD](#) and
[WINKELSTEIN](#).

PER CURIAM.

*1 This appeal arises from the murder of Nielsa Ma-
son, a high school classmate of defendant's. At the
time, defendant was sixteen. Following a waiver to
the Superior Court and a jury trial, defendant was
convicted of purposeful and knowing murder,
[N.J.S.A. 2C:11-3\(a\)\(1\),\(2\)](#). A thirty-year custodial
term without parole was imposed, along with the
necessary penalties. On appeal, defendant contends:

POINT I: DETECTIVES ELWELL'S AND PAR-
ENTI'S OPINION, HEARSAY AND CREDIBIL-
ITY TESTIMONY DENIED DEFENDANT HIS
RIGHT TO A FAIR TRIAL (Partially Raised Be-
low).

POINT II: THE TRIAL JUDGE ERRED IN FAIL-
ING TO HOLD A HEARING ON THE RECORD
TO DETERMINE IF TWO OF THE SITTING
JURORS HAD A SPECIAL RELATIONSHIP

WITH THE FAMILY OF THE VICTIM.

POINT III: DEFENDANT'S STATEMENTS MUST
BE SUPPRESSED BECAUSE THEY RE-
SULTED FROM HIS ILLEGAL ARREST,
WITHOUT A WARRANT AND WITHOUT
PROBABLE CAUSE, AND BECAUSE SUBSE-
QUENT POLICE CONDUCT DEPRIVED THIS
JUVENILE DEFENDANT OF PARENTAL
PRESENCE PRIOR TO AND DURING HIS
[ALMOST SEVEN HOURS] INTERROGATION.

POINT IV: DEFENDANT WAS DENIED EFFEC-
TIVE ASSISTANCE OF COUNSEL AT THE
JUVENILE REFERRAL HEARING (Not Raised
Below).

POINT V: THE JUVENILE WAIVER STATUTE
VIOLATES DEFENDANT'S DUE PROCESS
RIGHTS BECAUSE IT ALLOWS WAIVER
BASED UPON A JUDGE'S FACT FINDING ON
LESS THAN PROOF BEYOND A REASON-
ABLE DOUBT (Not Raised Below).

We have considered these contentions in light of the
applicable law and the record. Points IV and V are of
insufficient merit to warrant further discussion. *R.*
2:11-3(e)(2). We, however, agree that defendant's
police statements were the inadmissible fruits of an
illegal arrest. We also agree that the intentional separa-
tion of defendant's mother during his interrogation,
along with the other circumstances, rendered his
statements involuntary. As a result, a new trial is war-
ranted, obviating the need for us to address the issues
raised in points I and II although we briefly comment
on point I in light of the need for a new trial.

The facts which formed the basis for the jury's verdict
are, to put it mildly, strange. On April 28, 1997, de-
fendant and Nielsa were attending the Cumberland
Regional High School. She was last seen at around
5:45 p.m. in the gym but when her father arrived
shortly thereafter to pick her up, he was not able to
find her. Around 9:00 p.m., the school custodian
found Nielsa's body in the shower area of the boys'
locker room. The crime scene revealed smudges of
blood on the shower room wall and bloody drag

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marks on the floor leading to Nielsa. She was fully clothed, except for her right shoe and was lying in the center of the shower area, on her back. Her head was in a pool of blood. She had sustained multiple facial contusions and lacerations, [lacerations of her liver](#), internal hemorrhage and a [fractured larynx](#). Bloody paper towels and a black shoe were found in the trash cans in the shower room and adjoining bathroom. There was no evidence of rape, but defendant's sperm was found inside her body indicating sexual contact within twelve to twenty-four hours previously. Three latent palm prints were found on the shower walls which were subsequently matched to defendant.

*2 The first suspect the police focused upon was a student at Cumberland Regional's alternative school, Sherwood Collins. He had previously had a sexual relationship with Nielsa. According to Nielsa's father, Collins was at the school while he was looking for Nielsa and seemed to be avoiding him. And, too, later that evening, after Nielsa had been reported missing to the State Police but before her body was found, Nielsa's mother received a phone call from a high school student, Ryneka Woods, who claimed to have been Collins's girlfriend at the time. Woods told Nielsa's mother that Nielsa was dead and could be found in the boys' locker room. Woods claimed she knew this information because "somebody" had called her house and told her, but she could not recall who that "somebody" was. After this phone call, Nielsa's mother received a call from Collins. According to Nielsa's mother, Collins said:

Mrs. Mason, Nielsa's there she's dead, honest. Go there now maybe she's still alive maybe she's not dead. Go there now, honest, Mrs. Mason. Go there now.^{FN1}

[FN1](#). Collins admitted calling Nielsa's mother, but not until later, and only to tell her the body had been found.

In addition, a police dog tracked a scent at the high school on the night of the crime, and then subsequently tracked a scent in Collins's neighborhood to his back door.^{FN2}

[FN2](#). The dog's handler could not state that the scent the dog tracked was Collins's scent, or even that the scent detected at the school was the same scent detected in

Collins's neighborhood.

A search warrant was obtained and at approximately 3:00 a.m. on April 29, the police went to Collins's house. When Collins saw the police, he began shaking uncontrollably. However, he denied involvement in Nielsa's death, and no physical evidence was found to link him to the crime, either from his home, his family's vehicles, or his clothing.^{FN3} Furthermore, although Collins had been observed near the crime scene on the night of the murder, the police believed his alibi was approximately eighty percent secure based upon information they had received from other students and teachers as to his attendance that day in the alternative high school program.^{FN4}

[FN3](#). The police admitted, however, that there were numerous trash bags filled with clothing in Collins's living area and basement and that they did not search through about half a dozen in the basement.

[FN4](#). In this respect, the jury was told that students and teachers placed Collins in attendance at the high school between 3:30 and 7:30 p.m. However, Collins's whereabouts could not be accounted for during a break in the alternative school program that occurred sometime between 5:15 and 5:45, although he was observed briefly during a fire drill that occurred at about 5:30 p.m. In addition, the substitute teacher who taught between 5:45 and 7:30 p.m. could only account for Collins's attendance during one of those hours, and she could not remember whether he attended the first or second session. But, at the beginning of the last period, close to 6:00 p.m., the alternative school coordinator observed Collins playing checkers. Finally, at approximately 7:00 p.m., during the timeframe Collins should have been attending the alternative school, Collins was observed walking through the gymnasium, near the boys' locker room.

On the other hand, witnesses claimed that Collins confessed to the crime on two separate occasions. First, a nurse who participated in collecting DNA samples and a rape kit from Collins claimed that when he asked Collins why he was at the hospital Collins responded because "I killed someone."

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(Cite as: 2006 WL 902598 (N.J.Super.A.D.))

Collins denied making the statement. He claimed he told the nurse only that he was at the hospital because “they are trying to charge me with murder.” The prosecution downplayed this evidence, noting that: (1) the police were not advised of this confession for at least a week-until May 7, 1997; and (2) the police officers who accompanied Collins to the hospital did not hear the statement when it was made and therefore it was Collins's word against that of the nurse.

Collins's second confession came in May 1997 while he was playing basketball in Seabrook. Collins got into an argument with another player, who told Collins that “he belonged in jail.” A witness overheard Collins respond that “if he belonged in jail he would be there by now.” The witness further claimed that Collins said “I killed her,” and admitted that “the wrong guy” had been “locked up” for the crime, but Collins said he did not care. At trial, Collins admitted that he engaged in “trash talking” while playing basketball in Seabrook. However, he denied ever talking about defendant or Nielsa's death.

***3** The evidence as to Nielsa and defendant is as follows. Between approximately 3:00 and 4:45 p.m. on the day of her death, Nielsa attended track practice. Defendant also attended track practice that day. According to the girls' track coach and one of Nielsa's teammates, Nielsa appeared worried and upset at the start of practice, stating that she had “made a mistake” that day. It was later determined that she and defendant recently had engaged in sexual relations.

Around 5:00 p.m., defendant walked through the gym. At the time some boys were playing basketball. At around 5:15 p.m., Nielsa walked through the gym. At approximately 5:30 p.m. there was a fire drill. Nielsa was observed sitting alone on top of a trash can in a school hallway. About fifteen to twenty minutes later, Nielsa again walked into the gym. She was followed by defendant. After briefly looking around, Nielsa immediately turned around and walked out of the gym, followed by defendant. Nielsa did not appear alarmed in any way. This was the last time she was seen alive.

During this timeframe, Nicholas Demianczuk, one of several boys who were playing basketball in the gym, ran into defendant as he entered the boys' locker room. Demianczuk described defendant as appearing startled. Defendant asked Demianczuk if he had seen

Nielsa, and if he could have a ride to Gouldtown. About five minutes later, as Demianczuk was leaving the locker room, he observed a person's legs in the shower room. It appeared that the person was either lying or sitting down. Demianczuk later told his friends about what he had seen, but otherwise he thought nothing of it.

After speaking to Demianczuk, defendant exited the locker room and walked through the gym several times. Defendant's last observed trip through the gym occurred after 7:00 p.m. On one or more of his trips through the gym, defendant asked the boys if they had seen Nielsa and if he could have a ride to Gouldtown. Defendant appeared “a little nervous.” However, he was not covered in blood.

During this time period, defendant approached Nielsa's father who was looking for Nielsa. The two had met on a few previous occasions when the father had picked up Nielsa after school. Defendant appeared angry and upset; his voice was argumentative, excited, complaining, and he was out of breath and perspiring. As they walked through the school looking for Nielsa, defendant kept repeating that Nielsa had said she would give him a ride home, but he had looked all over and could not find her. Shortly thereafter, defendant left the school.

On April 29, 1997, the State Police began to focus on defendant as a suspect. Without a warrant, they picked him up at his home and took him to the police station. His mother followed him to the station but she was kept separate from him at all times. The police obtained a form from her giving them permission to interview defendant alone. Over the ensuing questioning between 10:45 a.m. and 5:24 p.m., during which there were two or three short breaks, defendant had no contact with his mother and only had one or two sodas to drink. He eventually made what the officers thought were incriminating statements.

***4** In this respect, according to Detectives Elwell and Parenti, during an untaped “preinterview,” defendant initially admitted to only a friendship with Nielsa. When pressed, he admitted having had sex with her the previous Friday, April 25. He initially said that after track practice he saw Nielsa who offered him a ride home. After that encounter, he claimed that he had no further contact with her. When presented with the fact that a witness had observed him in the boys'

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locker room, and with the physical evidence gathered from the crime scene, defendant became anxious and agitated; at one point he began to cry, pulled his shirt over the top of his head, and stated "I didn't put those holes in her neck." When asked how he knew about holes, he stated that he had read about it in the paper.

According to the police officers' notes, defendant then made the following statements, placing himself at the crime scene:

My fingerprints are on her because I put my hand on her neck to check her pulse. One shoe on, one shoe off. I saw her die. I put my hand on her pulse, then she touched my leg. [Wearing khakis.] She had on a dress with two black straps going across her upper thigh in front. I took off my coat and put it on her. Someone took her jewelry. A girl in my first period class saw her with the jewelry on. I saw her necklace, bracelet and black ribbon on the floor. When I came in she was moving. Then I go to Mr. Bailey. He was on the treadmill running. So there is physical evidence on the door and the window. Went back to the gym to see her. And she wasn't moving. Someone took her coat. She had a red and black windbreaker on.

Defendant also said that he had attempted to get help from the athletic director, who waved him off as he banged on the glass of the exercise room door,^{FNS} making defendant angry, and causing him to give up because he was panicked and scared. He then re-entered the shower area where Nielsa died in his arms.

^{FNS}. This statement was confirmed by the athletic director who admitted that somebody had banged on the exercise room door in an unsuccessful attempt to obtain his immediate attention.

At this point in the questioning, defendant became more reticent, giving non-verbal answers, and answering some questions but not others. The detectives asked defendant specifically if he had killed Nielsa because she was pregnant to which he responded, "I didn't kill her because she was pregnant." Finally, when the detectives inquired as to whether defendant had a lot of anger inside and if that was how Nielsa had died, defendant stated, according to the detectives, "I raged. I just went off."

The police took a taped statement from defendant between 4:03 and 5:24 p.m. It was, for the most part, the same as defendant's earlier statements. The most significant difference between the untaped and taped statements, however, was that on the tape defendant did not repeat what the detectives thought were the most incriminating statements: "I didn't kill her because she was pregnant" and "I raged. I just went off."

According to the detectives, defendant agreed to speak on tape about what he had seen, but he expressed an unwillingness to repeat some of his earlier statements and that was why they were not taped. But during trial, the defense questioned whether defendant had ever made the alleged incriminating untaped statements. In this regard, the defense obtained an admission from Elwell that the search warrants the police obtained with respect to defendant's home and school locker-significantly after defendant had been arrested-did not mention that defendant had confessed to the crime or had made incriminating statements to the police. One would have thought that those statements, if made, would have been the linchpins for the warrants.

I.

Admissibility of Defendant's Statements

*5 Defendant contends that his police statements should have been suppressed because: (1) they were obtained after an illegal arrest without probable cause and (2) they were obtained after defendant was deprived of his mother's presence during the administration of *Miranda*^{FN6} warnings and the subsequent interrogation and, therefore, they were involuntary based upon the totality of the circumstances, including the fact that defendant was only sixteen years old, had no prior experience with law enforcement, was a special education student, and was questioned for almost seven hours during which time he showed signs of emotional distress. The statements were admitted by the trial judge following a three-day hearing. The evidence presented during that hearing was as follows. At approximately 8:30 a.m. on April 29, 1997, Detective William Johnson, Sergeant George Holmes, and two uniformed State Troopers went to defendant's home. Johnson asked defendant's mother for permission to bring defendant to the station for

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questioning, and she consented. At the time, the police viewed defendant as a suspect in the murder. However, no *Miranda* rights were issued at that time and the police did not advise defendant or his parents that defendant was a suspect.

[FN6.Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 \(1966\).](#)

Defendant was in his underwear when the police arrived. Accompanied by an officer, he was allowed to get dressed. He was not offered an opportunity to consult with his parents before being placed in the back of the police vehicle and transported to the station.^{FN7}

[FN7.](#) The uniformed officers remained at defendant's home in anticipation of obtaining a search warrant.

Defendant's mother drove to the station in her own vehicle, following the police. The reason for that is unclear from the record. In his first explanation, Johnson stated that the police suggested that defendant's mother travel separately. He testified: "We had requested also that she come to the station behind us in order to speak with the lead investigators at the station regarding any further interview of [defendant]." Later, however, Johnson suggested that it was defendant's mother's idea to travel separately to the station; he testified: "I don't remember a specific reason why she didn't accompany us in our car. I think-I think she wanted to follow us down in her vehicle. In case she wanted to leave the station, she wanted to have some degree of mobility."

The detectives spoke with defendant's mother at the station. Defendant was not present during this discussion. They informed her that defendant was a suspect in Nielsa's murder and therefore the police wanted to **interview** him. They asked for permission to **interview** him alone-impressing upon her the notion that **juveniles** are often afraid of their **parents'** reaction and therefore hesitant to disclose the truth in their presence. She executed a consent to **interview** form. She also executed a form that stated that both defendant and she had been advised of their *Miranda* rights. In fact, defendant had not been issued *Miranda* rights at the time his mother executed that form.

*6 Immediately thereafter, Detectives Parenti and Elwell began what turned out to be the almost seven-hour interrogation. To be sure, Parenti advised defendant of his *Miranda* rights before the interview, and he advised defendant that his mother had consented to his being interviewed, showing defendant the forms his mother had already executed. But neither defendant nor his mother were ever affirmatively offered the option of consulting each other; indeed it is very clear that that was studiously avoided. The statements we have previously set forth were the result.

Based upon the *Miranda* hearing evidence, the trial judge found that, although "neither the juvenile [n]or his mother were asked if they wanted to see each other during" the time they were at the police station, "[t]here [was] no evidence ... that the police denied either the mother or the defendant the right or opportunity to be in the presence of each other during the time that the defendant was held in the police station." The judge also found that defendant had knowingly and intelligently waived his *Miranda* rights and that, considering the totality of the circumstances, defendant's statements to the police were voluntarily made. We, of course, should uphold these findings if they are supported by substantial, credible evidence. [State v. Locurto, 157 N.J. 463, 470-75 \(1999\)](#); [State v. Bey, 112 N.J. 123, 142 \(1988\), cert. denied, 513 U.S. 1164, 115 S.Ct. 1131, 130 L. Ed.2d 1093 \(1995\)](#); [State v. Smith, 307 N.J.Super. 1, 10 \(App.Div.1997\), certif. denied, 153 N.J. 216 \(1998\)](#). But we owe no deference to the conclusions on issues of law. [Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 \(1995\)](#).

a.

Fruits of an Unlawful Arrest

Defendant contends that he was arrested without probable cause and that, therefore, his statements to the police were obtained in violation of his Fourth Amendment rights and should be suppressed for that reason. [U.S. Const. amends. IV, XIV](#); [N.J. Const. art. 1, ¶ 7](#). This issue was not raised below. Although meritorious, the State's brief fails to even acknowledge it as an issue, much less as not raised below. Regardless of trial counsel's failure to raise it, it cannot be ignored.

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
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There is no question here that the police did not have a warrant to seize defendant, nor were there any applicable exceptions, much less probable cause. Indeed, the State does not contend that prior to the interrogation, the police had probable cause to arrest defendant. The police suspected him of the crime based upon information they had obtained from witnesses who placed him with Nielsa near the time of her murder. But they did not then know that latent prints on the shower wall where his, or that he and Nielsa recently had engaged in sex. Their suspicions could not have been said to have, at the time, been “well grounded.” State v. Waltz, 61 N.J. 83, 87 (1972). See, e.g., State v. Pineiro, 181 N.J. 13, 28 (2004).

*7 But, was defendant “under arrest”? That is, would a reasonable person in defendant's situation have believed he or she was free to leave police custody. State v. Stovall, 170 N.J. 346, 355 (2002); State v. Worlock, 117 N.J. 596, 620 (1990). See also Dunaway v. New York, 442 U.S. 200, 207, 212-13, 99 S.Ct. 2248, 2253, 2256-57, 60 L. Ed.2d 824, 832, 835-36 (1979) (defendant who was involuntarily seized, never informed that he was free to leave, and would have been restrained if he had refused to go with the police to the police station, was under arrest).

Here, defendant was a suspect in Nielsa's murder. Four police officers showed up at his home with two remaining behind in anticipation of a search warrant; the police never asked for defendant's consent to an interview and instead relied solely on his mother's consent; they did not give defendant an opportunity to consult with his parents before leaving for the police station; they placed defendant, alone, in the back of the police car; and defendant was not told that, notwithstanding his mother's consent, he was not required to go with them to the police station—a fact of particular significance because defendant was only sixteen years old at the time, was a special education student, and had no prior involvement with the criminal justice system. At the police station, defendant was placed in an interrogation room and questioned for almost seven hours without being offered an opportunity to consult with any outsider, much less his mother. No reasonable person under these circumstances would have thought himself or herself free to leave.

This was, indeed, an illegal arrest interrogation. “As a general rule, a confession obtained through custodial interrogation after an illegal arrest should be excluded unless the chain of causation between the illegal arrest and the confession is sufficiently attenuated so that the confession was ‘sufficiently an act of free will to purge the primary taint.’ “ State v. Worlock, supra, 117 N.J. at 621 (quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 416-17, 9 L. Ed.2d 441, 454 (1963)). That inquiry requires a “value judgment” informed by three factors, the temporal proximity between arrest and confession, any intervening circumstances, and the purpose and flagrancy of police misconduct. State v. Barry, 86 N.J. 80, 87, cert. denied, 454 U.S. 1017, 102 S.Ct. 553, 70 L. Ed.2d 415 (1981). See Dunaway v. New York, supra, 442 U.S. at 216-19, 99 S.Ct. at 2258-60, 60 L. Ed.2d at 838-40; State v. Chippero, 164 N.J. 342, 353-58 (2000); State v. Johnson, 118 N.J. 639, 653 (1990); State v. Worlock, supra, 117 N.J. at 622.

Thus, whether suppression is warranted based upon an unlawful arrest will depend upon the facts of each case. State v. Chippero, supra, 164 N.J. at 353; State v. Worlock, supra, 117 N.J. at 622. In Dunaway v. New York, supra, 442 U.S. at 203, 99 S.Ct. at 2251-52, 60 L. Ed.2d at 829-30, for instance, the defendant was illegally arrested, but given *Miranda* warnings before he confessed. The *Miranda* warnings rendered the statement voluntary for Fifth Amendment purposes, but the Supreme Court suppressed it on Fourth Amendment grounds. The Court concluded that the defendant had been “seized without probable cause in the hope that something might turn up,” and, notwithstanding the *Miranda* warnings, the Court held that the defendant “confessed without any intervening event of significance.” Id. at 218, 99 S.Ct. at 2260, 60 L. Ed.2d at 840. To hold otherwise, the Court observed, would encourage police to make arrests without a warrant or probable cause, “ ‘know [ing] that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.’ “ Id. at 217, 99 S.Ct. at 2259, 60 L. Ed.2d at 839 (quoting Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261, 45 L. Ed.2d 416, 426 (1975)).

*8 In State v. Chippero, supra, 164 N.J. 342, following an illegal arrest and nine hours of interrogation with administration and waiver of *Miranda* rights, defendant confessed to a murder and was, subse-

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quently, convicted. We concluded the confession was admissible because during the interrogation the police obtained information that provided probable cause for an arrest, thus constituting an “intervening event” sufficient to break the causal requirement. Our Supreme Court disagreed. In addressing all three of the necessary factors in the facts of that case, it said:

[E]ven if the information was new, we find that the discovery of defendant's statements about the crime scene did not constitute an intervening circumstance sufficient to erase the taint of the illegal arrest. To introduce a confession obtained after an illegal arrest, “the State should show some ‘demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause.’” Worlock, supra, 117 N.J. at 623-24 (quoting Brown, supra, 422 U.S. at 611, 95 S.Ct. at 2265, 45 L. Ed.2d at 432 (Powell, J., concurring)). Here, even if the allegedly new information could constitute probable cause, the existence of probable cause was not found by a judge, and defendant had no time to himself free from the pressure of the interrogation. Rather, from his arrest to his confession, he was in custody and in the presence of police officers. He spoke with neither family nor counsel. The eleventh-hour discovery by police officers of allegedly new information, which could have been—and in all likelihood was—acquired a day earlier is a weak reed on which to rest the State's claim of intervening circumstances. In our view, the causal chain between defendant's arrest and confession essentially was unbroken.

Regarding the temporal-proximity factor, the Appellate Division found that “any taint from the arrest was purged by the long period that elapsed before defendant confessed.” We have noted before that the impact of the temporal-proximity factor “may be ambiguous [and] is the least determinative” and that “[a] long detention may cause a defendant to forget the shock of the initial arrest or it may compound the taint of the confession.” Worlock, supra, 117 N.J. at 623 (citing Dunaway, supra, 442 U.S. at 220, 99 S.Ct. at 2260-61, 60 L. Ed.2d at 841 (1979) (Stevens, J., concurring)). In this case, however, the temporal-proximity factor is unpersuasive. The mere passage of time ordinarily does not purge the taint of an illegal arrest. *Ibid.*

See also [People v. Austin, 688 N.E.2d 740, 743 (Ill.App.Ct.1997)] (stating that passage of time alone is not sufficient to purge taint of illegal arrest), *appeal denied*, 698 N.E.2d. 544 (Ill.1998), *cert. denied*, 525 U.S. 1033, 119 S.Ct. 575, 142 L. Ed.2d 479 (1998). In the absence of intervening circumstances, the nine-hour interrogation of defendant exacerbated the illegality of his detention and thus militates in favor of suppression. See Dunaway, supra, 442 U.S. at 220, 99 S.Ct. at 2260-61, 60 L. Ed.2d at 841 (Stevens, J., concurring) (“If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one .”). A contrary rule would encourage police officers who arrest without probable cause to conduct lengthy interrogations in an effort to purge the unlawful arrest of its unconstitutional taint.

*9 [State v. Chippero, 164 N.J. at 358-62.]

Here, first, there is a close proximate link between the arrest and defendant's statements to the police, as there was in *Chippero*. Second, there are even fewer intervening circumstances to dissipate the taint than in *Chippero*. Indeed, the only intervening circumstance could be the issuance of *Miranda* warnings. But that alone does not necessarily dissipate the taint. See Dunaway v. New York, supra, 442 U.S. at 216-17, 99 S.Ct. at 2259, 60 L. Ed.2d at 838-39. Third, the illegal arrest coupled with the intentional removal of defendant from any parental guidance, plainly designed to facilitate what the police hoped would be incriminatory statements, is police conduct that should not be encouraged. It is our “value judgment” that these circumstances render defendant's statements inadmissible fruits of an illegal arrest.

b.

Voluntariness

Custodial interrogations by law enforcement officers are deemed inherently coercive. For statements made during custodial interrogations to be admissible, the State must prove beyond a reasonable doubt that the defendant waived his right against self-incrimination and that his or her decision to do so was knowing, intelligent, and voluntary in light of all circumstances. State v. A.G.D., 178 N.J. 56, 67 (2003); State v. Presha, 163 N.J. 304, 313 (2000); State v. Reed,

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
(Cite as: **2006 WL 902598 (N.J.Super.A.D.)**)

133 N.J. 237, 250-51 (1993). See also Jackson v. Denno, 378 U.S. 368, 376-77, 84 S.Ct. 1774, 1780-81, 12 L. Ed.2d 908, 915-16 (1964); State v. Cook, 179 N.J. 533, 562-63 (2004); State v. Pillar, 359 N.J.Super. 249, 268-72 (App.Div.), cert. denied, 177 N.J. 572 (2003). As to the voluntariness of a defendant's statements, courts consider whether the statements were " 'the product of an essentially free and unconstrained choice by its maker,' ... or whether the defendant's 'will has been overborne and his capacity for self-determination critically impaired....' " State v. P.Z., 152 N.J. 86, 113 (1997) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 2047, 36 L. Ed.2d 854, 862 (1973)). "This issue can be resolved only after an assessment of the 'totality of the circumstances' surrounding the statement." *Ibid.* (quoting Arizona v. Fulminante, 499 U.S. 279, 285-86, 111 S.Ct. 1246, 1251-52, 113 L. Ed.2d 302, 315 (1991)). "Among the factors to consider in determining voluntariness are the suspect's age, education, intelligence, previous encounters with law enforcement, advice received about his or her constitutional rights, the length of detention, the period of time between administration of the warnings and the volunteered statement, and whether the questioning was repeated and prolonged in nature or involved physical or mental abuse." State v. Timmendequas, 161 N.J. 515, 614 (1999), cert. denied, 534 U.S. 858, 122 S.Ct. 136, 151 L. Ed.2d 89 (2001). Accord State v. Miller, 76 N.J. 392, 402-03 (1978).

***10** Particular care must be taken with juveniles and their right to consult with a parent or legal guardian. State v. Presha, *supra*, 163 N.J. at 314-15 (noting the important role of parents in the context of juvenile interrogations, particularly in modern times with the State's increased focus on the apprehension and criminal prosecution of youthful offenders). As the Court was aware, the parent can serve:

as a buffer between the juvenile, who is entitled to certain protections, and the police, whose investigative function brings the officers necessarily in conflict with the juvenile's legal interests. Parents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation.

[*Id.* at 315.]

Thus, juvenile interrogations should be considered under the following standards:

[C]ourts should consider the totality of the circumstances when reviewing the admissibility of confessions by juveniles in custody. Moreover, courts should consider the absence of a parent or legal guardian from the interrogation area as a highly significant fact when determining whether the State has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary.

... Regardless of the juvenile's age, law enforcement officers must use their best efforts to locate the adult before beginning the interrogation and should account for those efforts to the trial court's satisfaction.

[*Id.* at 308.]

The absence of a parent is a "highly significant factor," which should be given "added weight when balancing it against all other factors." *Id.* at 315. Alleviating the significance of the adult's role in the overall balance serves to protect the rights of juveniles "in a manner consistent with constitutional guarantees and modern realities." *Ibid.*

With juveniles, the focus is upon voluntariness. State ex rel. S.H., 61 N.J. 108, 114 (1972); State ex rel. Carlo, 48 N.J. 224, 233-34 (1966). In State v. Presha, *supra*, 163 N.J. 304, the defendant was almost seventeen years of age at the time of the interrogation and was familiar with the criminal justice system based upon his fifteen prior arrests. In the presence of his mother, the police read him his *Miranda* rights. He indicated that he understood his rights and waived them, signing the *Miranda* card. Defendant's mother also signed defendant's *Miranda* card. The police advised defendant's mother that she had the right to be present during the **interview** of her son but after conferring with her, defendant decided that he did not want her present in the interrogation room. Defendant's mother agreed, and she left the interrogation room. However, well into the questioning but before the defendant had confessed, she asked to rejoin her son. The police refused her request. *Id.* at 307-11. Based upon this, defendant claimed his confession was involuntary. Considering the totality of these circumstances, however, the Court concluded that the defendant voluntarily waived his rights and his statements were admissible. *Id.* at 317-18. In particu-

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(Cite as: 2006 WL 902598 (N.J.Super.A.D.))

lar, the Court noted:

*11 We emphasize that, because of his advanced age and the fact that he had been arrested on fifteen prior occasions, defendant was familiar with the criminal process at the time of his statement. Further, the police afforded defendant numerous breaks in the interrogation, time enough for him to reevaluate his decision to proceed without a **parent**. He elected to continue, notwithstanding his mother's absence. Moreover, we view as especially important the fact that [defendant's mother] was present at the outset of the encounter with the police, before any questioning of her son. She had the opportunity to offer support to defendant, to witness the signing of the *Miranda* card, and she consented to her initial absence from the interrogation area.

All of those facts—defendant's age and familiarity with the criminal process, his clear desire to be interviewed without a **parent** present, the presence of a **parent** at the outset of the questioning, and his fair treatment by police—compel us to conclude that defendant's will was not overborne by investigators, the critical factor in this inquiry. Although we have assigned greater weight to [defendant's mother] absence than did the trial court and Appellate Division, our conclusion under all the circumstances is consistent with theirs.

[*Ibid.*]

But the Court observed that it would be difficult for prosecutors to carry their burden in any case in which the police acted deliberately to exclude a **parent** or legal guardian from an interrogation, emphasizing that it was merely “reaffirm[ing]” its long-held “belief that a **parent** or legal guardian should be present in the interrogation room, whenever possible.” *Id.* at 315.^{FN8} See also [Gallegos v. Colorado](#), 370 U.S. 49, 53-55, 82 S.Ct. 1209, 1212-13, 8 L. Ed.2d 325, 328-29 reh'g denied, 370 U.S. 965, 82 S.Ct. 1575, 81 L. Ed.2d 835 (1962); [Haley v. Ohio](#), 332 U.S. 596, 599-601, 68 S.Ct. 302, 303-04, 92 L. Ed. 224, 228-29 (1948); [State ex rel. S.H.](#), *supra*, 61 N.J. at 114-16; [State ex rel. Carlo](#), *supra*, 48 N.J. at 240-43; [State ex rel. O.F.](#), 327 N.J.Super. 102, 117 (App.Div.1999); [State ex rel. J.F.](#), 286 N.J.Super. 89, 94-101 (App.Div.1995).

FN8. The *Presha* Court also adopted a new, bright-line rule for juveniles under the age of fourteen, whereby parentless confessions of such juveniles would be inadmissible as a matter of law unless the parent or guardian was unwilling to be present or truly unavailable. [163 N.J. at 315](#). See also [State ex rel. Q.N.](#), 179 N.J. 165, 172-73 (2004) (parentless confession of juvenile should not have been suppressed where parent was unwilling to attend interrogation).

[State ex rel. O.F.](#), *supra*, 327 N.J.Super. 102, is instructive. There, we held that the interrogation of a **juvenile**, O.H., should be suppressed because, among other reasons, the **juvenile's** mother had been excluded from the **interview**. We reached this conclusion based upon the case law that existed at the time of defendant's **interview** in 1997, and notwithstanding the fact that the mother had consented to her son being interviewed alone, as occurred in the present case. We stated:

*We emphatically reject the State's contention that the exclusion of the mother from the **interview** was permissible because she had given her consent. ... [F]or purposes of this opinion, we will assume that ... [defendant's mother] acceded to [the police officer's] request to **interview** the child outside her presence. In our judgment, that request should never have been made. Indeed, as a consequence of the Supreme Court's decisions in *State in Interest of Carlo* and *State in Interest of S.H.*, the officer's duty is to persuade the **parent** or guardian to attend the **interview**.*

*12 [*Id.* at 117 (emphasis added).]

Here, following the three day *Miranda* hearing, the trial judge found that although “neither the **juvenile** [n]or his mother were asked if they wanted to see each other” during the time they were at the police station, “there [was] no evidence ... that the police denied either the mother or the defendant the right or opportunity to be in the presence of each other during the time that the defendant was held in the police station.” He further concluded that defendant had knowingly and intelligently waived his *Miranda* rights and, considering the totality of the circumstances, defendant's statements to the police were voluntarily made. As we have said, we acknowledge

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
(Cite as: 2006 WL 902598 (N.J.Super.A.D.))

the deference we owe the trial judge with respect to his factual findings. *See, e.g. State v. Locurto, supra, 157 N.J. at 474.* But we are convinced that the totality of the circumstances simply do not support his conclusions and that, as a matter of law, he erred in minimizing defendant's separation from his mother.

Defendant was only sixteen years old and a special education student. Unlike the **juvenile** in *Presha*, he had no prior involvement in the criminal justice system. Most significant to us is the studious separation of defendant from his **parents** at the outset. This was just not giving the mother an opportunity to confer, which she freely declined. To the contrary, the police affirmatively encouraged her separation. This is evident from the following testimony offered by Detective Elwell:

Q. Now, when you were telling the prosecutor about the permission to **interview** the **juveniles** form, ... you started to tell the prosecutor something about your preference, but you never finished that answer. Do you remember that?

A. Yes.

Q. What was your preference?

A. We would [prefer] to **interview juveniles** without the **parent** being present.

Q. Did you tell [defendant's mother] that?

A. Yes.

Q. How did you tell her; what were your words?

A. I told her it was our preference to **interview** him alone without her being present.

Q. And did you tell her why that was your preference?

A. Yes, I did.

Q. What reason did you give her?

A. I told her that it's been our experience in dealing with **juveniles** that a lot of times they're hesitant to

disclose the truth about a situation if their **parent** is present.

Q. And you told her that before you asked her to sign the form[,] right?

A. Yes.

Detective Parenti testified in a similar manner:

Q. Now, sir, did you indicate whether or not you wanted to speak to him with or without her?

A. Yes.

Q. Tell us about that. What did you say?

A. We-we told her that we'd prefer to speak to him alone.

Q. And why did you tell her that?

A. Well, usually it's better when you **interview** somebody for a serious crime like that that they be alone, as long as they're not the **juvenile** that's like 8 years old or 10 years old. As long as he's old enough to understand what's going on.

13It's usually easier without the **parents. Sometimes the kids fear their **parents**. They feel what's going to happen to them from the **parents** is going to be worse than what would happen to them from the court system, and a lot of times they're not as easy to come forward with what actually happened.*

....

Q. So what did you believe your responsibility was as a police officer in attempting to interrogate a **juvenile**?

A. I don't think I fully understand the question, sir.

Q. I'm inquiring about your obligation to notify the **parent** before you even question a **juvenile**. What did you think your responsibility was?

A. To let her know what her rights were and what his rights were under *Miranda*.

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
(Cite as: **2006 WL 902598 (N.J.Super.A.D.)**)

Q. And do you think that giving them an opportunity to speak together would have helped dispense with that obligation as a police officer?

A. I don't think that there's anything that says that we have to do it that way, sir.

Q. But do you think that making a voluntary and knowing decision would have helped [defendant's mother] or any **parent** speak with their child who's locked up?

A. I don't think so. I mean, I think she wanted to find out what the truth was as much as we did.

Q. Well, that's not really what I asked you. I didn't ask you what you thought she thought. I asked you in your experience as a police officer in dispensing the obligation of notification, doesn't it make sense to have the **parent** talk with the **juvenile**?

A. According to you?

Q. I'm asking you.

A. *According to me, sir, I think we did it exactly appropriate[ly].*

[Emphasis added.]

To the contrary, as set forth in [State ex rel. O.F., supra, 327 N.J.Super. at 117](#), under the case law that existed at the time the obligation of the police was not to encourage defendant's mother to consent to interviewing defendant alone, but rather to encourage her to attend the interrogation. To be sure, during the extended interrogation process neither defendant nor his mother affirmatively asked to consult with one another. But the point is, the police not only did not make the inquiry, but actively sought to prevent parental consultation.

We acknowledge that the police did obtain a waiver of defendant's constitutional rights directly from him. But, as we have said, this juvenile was only sixteen, was a special education child and had had no prior involvement in the justice system. Moreover, defendant only waived his rights after being advised that his mother had already consented to his being interviewed alone and after being shown the *Miranda*

card that she had executed. Under these facts, defendant's waiver can have very little weight, if any. See [State ex rel. S.H., supra, 61 N.J. at 115](#).

II.

Police Witness Opinions

Because we conclude that defendant's statements should have been suppressed, his conviction must be reversed. We, therefore, need not address his contentions in point I. However, in the event of a new trial, we offer the following.

*14 Much of the testimony presented to the jury through Detectives Elwell and Parenti included their recounting of defendant's oral and taped statements. In doing so, they repeatedly offered their opinions as to what defendant's statements meant and that critical aspects of the statements conveyed guilt. Additionally, Elwell gave his opinion, based on what non-testifying witnesses told him, that Collins's alibi was substantiated. In particular, he explained to the jury that the police took no action against Collins because, among other reasons, "Sherwood's alibi for 80 percent of the time he was in school and also the time-other times *his alibi was clarified and covered.*" (Emphasis added). He elaborated that the "80 percent" was determined from interviews with teachers and students who "told us that Sherwood was there the whole time." Elwell also offered his opinion of the credibility of Collins's confession to the hospital nurse. Specifically, he told the jury that the police took no action against Collins because, among other reasons, Collins's confession was less credible since it was given to a nurse and not a police officer.

On retrial, this type of police testimony should not recur as it has repeatedly been observed that the determination of criminal guilt or innocence and the assessment of witness credibility are issues reserved solely for the jury. [State v. Frisby, 174 N.J. 583, 593-96 \(2002\)](#); [State v. Odom, 116 N.J. 65, 77 \(1989\)](#). Admission of opinion testimony on these topics has been deemed capable of infecting the jury's deliberative process, and therefore warranting reversal of criminal convictions notwithstanding defense counsel's role in either inducing the error or failing to object to it. [State v. Vandeweaghe, 177 N.J. 229, 238-40 \(2003\)](#); [State v. Frisby, supra, 174 N.J. at 591-96](#); [State v. Jamerson, 153 N.J. 318, 338-41, 343-44](#)

Not Reported in A.2d, 2006 WL 902598 (N.J.Super.A.D.)
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(1998); *State v. Pasterick*, 285 N.J.Super. 607, 617-22 (App.Div.1995); *State v. J.O.*, 252 N.J.Super. 11, 38-42 (App.Div.1991), *aff'd*, 130 N.J. 554 (1993). The Court has emphasized:

We go to extraordinary lengths in ordinary criminal cases to preserve the integrity and neutrality of jury deliberations, to avoid inadvertently encouraging a jury prematurely to think of a defendant as guilty, to assure the complete opportunity of the jury alone to determine guilt, to prevent the court or the State from expressing an opinion of defendant's guilt, and to require the jury to determine guilt under proper charges no matter how obvious guilt may be. A failure to abide by and honor these strictures fatally weakens the role of the jury, depriving a defendant of the right to trial by jury.

[*State v. Frisby*, *supra*, 174 N.J. at 594 (quoting *State v. Hightower*, 120 N.J. 378, 427-28 (1990) (Handler, J., concurring in part and dissenting in part) (citations omitted).]

State v. Frisby, *supra*, 174 N.J. 583, is instructive. In *Frisby*, *supra*, 174 N.J. at 591-92, the defendant challenged police testimony that another suspect's testimony had been "substantiated" by others (with the police testifying as to the hearsay statements of those other individuals), and the other suspect's story was "more credible" than the defendant's. The Court found that the admission of hearsay statements of non-testifying witnesses violated the defendant's Sixth Amendment confrontation rights. *Id.* at 592-93. "Most important[ly]," the Court found that the hearsay testimony

*15 was advanced by the officers as the foundation for their wholly improper credibility evaluation in favor of [the other suspect] and against [the defendant]. Based on the hearsay evidence, the police essentially gave the jury their opinion regarding the innocence of [the other suspect] and inferentially the guilt of [the defendant]. That is not allowed.

[*Id.* at 593-94.]

Because the case had been a "pitched credibility battle" between the defendant and the other suspect, "[a]ny improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrant[ed] reversal." *Ibid.*

So too here. This case involved two possible suspects to the crime: defendant and Collins, and a "pitched credibility battle" as to which suspect was responsible for the crime. Thus, the most crucial issues before the jury were the interpretation of defendant's statements to the police, and whether the jury should credit Collins's alibi or his confessions to the crime. The police offered opinions on both of these issues. This should not recur during retrial.

Reversed and remanded.

N.J.Super.A.D.,2006.

State v. Henriques

Not Reported in A.2d, 2006 WL 902598
(N.J.Super.A.D.)

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