WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138. (1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.D., 2012 ONCA 841
DATE: 20121130
DOCKET: C48312

Laskin, Feldman and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M.D. (a young person)

Appellant

Mark C. Halfyard and Lance C. Beechener, for the appellant

Emile A. Carrington, for the respondent

Heard: April 24, 2012

On appeal from the conviction entered by Justice Fern M. Weinper of the Ontario Court of Justice, sitting in the Youth Justice Court on October 24, 2007.

Watt J.A.:

[1] M.D., who was 14 years old, spoke to the police twice about a robbery he had committed. The first time, one of the officers made notes of what M.D. said about the robbery. The second time, about an hour after the first, the discussion was videotaped.

[2] Special rules govern the admissibility of statements made by young persons to police officers tendered for admission at the young person's trial. Compliance with these rules is essential if the prosecutor seeks to rely on the statements to establish the young person's guilt.

[3] At M.D.'s trial, the prosecutor conceded that the first statement recorded in a police officer's notebook was not admissible. The prosecutor tendered, and the judge admitted, the videotaped interview that began about an hour after the first statement had concluded.

[4] M.D. says that the judge was wrong when she admitted the videotaped statement because that statement was tainted by its connection to the first statement. These reasons explain why I think the judge was wrong to admit the videotaped statement and would allow the appeal and order a new trial.

THE BACKGROUND FACTS

[5] Little need be said about the circumstances of the underlying offence, but some detail is essential to an appreciation of the circumstances surrounding the police interviews that yielded the statement admitted at trial.

The Robbery

[6] In the early afternoon of April 15, 2006, two men and a woman left a convenience store with their purchases and walked towards their car. Their progress was impeded by an older man and a youth. The older man produced a

handgun, pointed it at one of the men, then pressed it against the man's neck to reinforce his demand for the man's wallet. In the end, the only property taken from the victims was a cell phone.

The Identification and Arrest

[7] In the weeks that followed the robbery, one of the victims reported to the police that he had seen the youthful robber around the area in which the robbery had occurred. On one occasion, police arrested the wrong man as the robber. The victim could not identify this person in a photo line up. Police released the man from custody.

[8] About three weeks after the robbery, on May 4, 2006, the same victim saw the appellant on a mountain bike across the road from a convenience store. A police officer arrested the appellant and advised him of his right to counsel. The appellant's mother arrived shortly after.

[9] The appellant was taken to the 23 Division police station. There, the victim who had called police about seeing the suspect by the convenience store identified the appellant as the robber in a "show-up" procedure.

The First Interview

[10] The appellant was lodged in an interview room at 23 Division after he had been booked on the robbery. The investigating officer, who had been summoned

to the station after the appellant's arrest, briefed a colleague about the allegations.

[11] The officers entered the interview room where the appellant was seated. They wanted to see whether the appellant wished to say anything to them about the robbery, to give his side of the story. The interview room did not have any video equipment. The investigating officer, Det. Peacock, would speak to the appellant and his colleague, Det. Alkins, would take notes about what was said.

[12] The discussion in the interview room lasted 12 minutes, starting at 9:41 pm. Det. Peacock confirmed the appellant's understanding of the reason for his arrest (the charge of robbery), his right to counsel, and his right to call anyone. The appellant declined to call a lawyer, his mother, or his brother.

[13] Det. Peacock then asked the appellant some questions. The appellant answered. Det. Alkins noted the conversation:

> Q. Do you understand why you are here?
>
> A. Yeah, I robbed that guy at the store.
>
> Q. Do you remember the date it was?
>
> A. Not sure about the date. I think a few weeks ago. I think a Saturday.
>
> Q. Do you remember the time?
>
> A. Not really, I think it was afternoon.
>
> Q. What did the guys look like that you robbed?

A. One tall guy, I dealt with the most, a shorter guy, he was with --- there was a driver, I think it was a girl.

Q. Where did the robbery happen?

A. At the convenience store….

Q. Who were you with?

A. I wasn't with him. I met him. I didn't know he was going to do it. I swear.

Q. What is his name?

A. I think Kyle Smith.

…

[*some questioning about Kyle Smith ensues*]

Q. Who had the gun?

A. Kyle did.

Q. Was it real?

A. I don't know. It looked real.

Q. Tell me what happened.

A. Went to the plaza to eat, saw Kyle. Kyle said, you're going to help me rob these guys. He showed me a gun, not sure if it's real. I scared. That's what he said. Kyle went to this guy with his gun. Kyle went up to the guy with his gun and started robbing him, a big guy went to Kyle and I said don't touch him twice.

Q. Do you want to tell us this on video?

A. Yeah. I'll tell you everything.

Q. Before we get going I will read you something.

[14] On the *voir dire* to determine the admissibility the videotaped interview, the appellant testified that Det. Peacock slapped him on the face five times during the first interview. The slapping started when the appellant denied that anyone else had been involved in the robbery or that a gun had been produced.

[15] Both detectives agreed that they had not complied with the requirements of s. 146 of the *Youth Criminal Justice Act,* S.C. 2002, c. 1, ("*YCJA*") when they first spoke to the appellant.

The Interlude

[16] At the conclusion of the first interview, the appellant was left alone in the interview room for about an hour until the officers escorted him to a second room with video recording equipment.

The Second Interview

[17] The second interview, which was videotaped, involved the appellant and the same police officers who had participated in the first interview. The second interview lasted about an hour.

[18] Prior to any discussions about the circumstances of the offences with which the appellant was charged, Det. Peacock explained to the appellant the charges of robbery and using an imitation firearm in the commission of an indictable offence. The officer told the appellant that if he were found guilty, he could be sent to a detention center. Det. Peacock later advised the appellant that

he could also be sentenced as an adult to a maximum term of imprisonment for life.

[19] Det. Peacock then explained to the appellant that a statement included anything the appellant said, did, or wrote during the interview, and confirmed the appellant's ability to read and to write. The officer advised the appellant about the evidentiary use of his statement in later proceedings and apprised him of its recording.

[20] Det. Peacock read the secondary caution to the appellant, then explained and confirmed the appellant's understanding of his several rights including:

- the right to silence;
- the right to counsel, including duty counsel;
- the right to apply for legal aid;
- the right to speak to a lawyer, parent, adult relative, or another appropriate adult and to have them present during the statement; and
- the right to stop at any time during the making of the statement.

For each right he explained, Det. Peacock asked the appellant whether he understood what the officer had said. The appellant confirmed his understanding. Det. Peacock then asked the appellant to explain the meaning of each right. The appellant did so.

[21] After concluding the discussion about the appellant's rights as a young person charged with a criminal offence, Det. Peacock continued:

> PEACOCK - Since you've been in custody at 23 Division, here at 23 Division, you've had the opportunity to speak to your mom on the telephone?
>
> [D.] - Yes.
>
> PEACOCK - Okay … And a short time after that, I came in along with this officer here and we talked to you about certain things.
>
> [D.] - Yes.
>
> PEACOCK - And at that time you expressed an interest in providing a statement, is that correct?
>
> [D.] - Yes.
>
> PEACOCK - Okay … And even back then when I asked if you wanted to talk to a lawyer at that time you declined as well you didn't want to speak to a lawyer, is that correct?
>
> [D.] - Yes.
>
> PEACOCK - So what we'll do now, is I want you to take me back, if you don't know the dates with the exact times that's fine. I want you to take me back, and you tell me the story of what happened in your mind on that date.
>
> [D.] - Right now?
>
> PEACOCK - And then what I'll do is ask you some questions afterwards, okay?

The interview continued.

The Positions of Counsel at Trial

[22] Trial counsel for the Crown (who is not counsel on the appeal) sought admission of the videotaped interview only, but asked the trial judge to find that what the appellant had said during the first interview was voluntary. She contended that even if the failure to videotape the interview made its voluntariness and accuracy suspect, the evidence of the investigating officers provided a sufficient evidentiary basis upon which to make a finding of voluntariness.

[23] Crown counsel at trial submitted that the videotaped interview was voluntary, compliant with s. 146 of the *YCJA*, and untainted by the earlier interview that was voluntary but not compliant with s. 146.

[24] Trial counsel for the appellant (who is also not counsel on the appeal) contended that the first interview was not voluntary. The interview was suspect because the police had failed to videotape the interaction even though recording equipment was readily available at 23 Division. The appellant's evidence about Det. Peacock's assault on him also raised a reasonable doubt about voluntariness.

[25] Counsel for the appellant at trial urged exclusion of the videotaped interview on the basis that it was tainted by what had happened in the first interview. The time period between the two interviews was brief. The same

officers were involved in both interviews. The second was simply a continuation of the first, as is indicated by the reference to the initial interview in the second. The failure to remove the taint of the first interview, to make a clean break and begin anew, spelled exclusion for the second.

The Ruling of the Trial Judge

[26] The trial judge was satisfied beyond a reasonable doubt that the first statement was voluntary. She concluded that the evidence on the *voir dire* rebutted the "presumption of involuntariness" created by the failure to record the interview when recording equipment was readily available. She rejected the appellant's claims of threatened and actual violence by Det. Peacock. What would have rendered the first interview inadmissible, had it been tendered for reception, was the failure of investigators to comply with s. 146 of the *YCJA*.

[27] The trial judge examined the relationship between the first and second interview to determine the link or nexus between them. She concluded that the videotaped interview would have taken place even if the first interview had not occurred. Neither the disqualifying factor that rendered the first interview inadmissible (non-compliance with s. 146 of the *YCJA*) nor the fact that the first statement had been made rendered the videotape interview inadmissible. The failure to comply with s. 146 of the *YCJA*, fatal to the admissibility of the first statement, exerted no influence on the videotaped interview that began with a

lengthy discussion and confirmed understanding of the requirements of s. 146. The appellant wanted to give his side of the story, an intention confirmed by his demeanour during the videotaped interview.

THE GROUNDS OF APPEAL

[28] The appellant advances a single ground of appeal. He says that the trial judge was wrong to admit the videotaped interview as evidence. The two interviews were so closely linked in time and circumstances that the second was merely a continuation of the first. The failure to remove the taint of the first from the second rendered the second as inadmissible as its predecessor.

Ground #1: The Error in Admitting the Videotaped Interview as Evidence

[29] A convenient point of departure for the discussion that follows is a summary of the arguments advanced by the parties on appeal.

The Arguments on Appeal

[30] For the appellant, Mr. Halfyard says the derived confessions rule holds that subsequent statements of an accused made after an earlier inadmissible statement are also inadmissible, provided there is a sufficient connection between the statements and a failure to extinguish the taint of the earlier from the making of the later. The rule, he submits, originally developed in connection with the voluntariness requirement of the confessions rule at common law, applies

with equivalent vigour where the contaminant is failure to comply with the requirements of s. 146(2) of the *YCJA*.

[31] To engage the derived confessions rule in this case, Mr. Halfyard contends, requires a temporal or causal connection between the tainting failure in the first statement (failure to meet the requirements of s. 146(2) of the *YCJA*) and the making of the second statement. The necessary connection may reside in the continuation of the tainting feature in the second statement or the fact that the making of the first statement was a substantial factor contributing to the making of the second statement.

[32] In this case, Mr. Halfyard continues, the trial judge erred in her application of the derived confessions rule. Here, Mr. Halfyard says, the videotaped interview was a continuation of the first interview. Further, the fact that the first interview took place was a substantial factor that contributed to the second interview. No fresh start intervened to rid the second of the taint of the first.

[33] Mr. Halfyard points out that the interviews were only an hour apart. The same investigators conducted both and followed the same question and answer approach. The first interview ended with a question, “do you want to tell us this on video?”, and the second included a reference to what the appellant had said in the first. The subject-matter discussed in both interviews was the same, as

was the purpose of the interviews. No “fresh start” eliminated the taint, thus the videotaped interview should have been excluded.

[34] For the respondent, Mr. Carrington acknowledges that the application of the derived confessions rule is not confined to cases in which the underlying taint is the involuntariness of the first statement. Other contaminants include *Charter* violations, which are subject to the application of s. 24(2) of the *Charter*, and, as here, failure of the first statement to satisfy the demands of s. 146(2) of the *YCJA*.

[35] Mr. Carrington says that the principal focus and essential inquiry under the derived confessions rule is the nature and extent of the connection between the first and second (or subsequent) statement. Although the derived confessions rule may be engaged by either the continued presence of the contaminating features in the second statement or by the substantial contribution of the first statement to the making of the second, it will generally be easier to make out a case for exclusion under the rule when both conditions are present.

[36] Mr. Carrington reminds us that the determination of issues like voluntariness and the nature and extent of the connection between the two statements involve largely, if not entirely, questions of fact. The findings made by the trial judge on both issues are owed substantial deference on appellate review, all the more so in the absence of any allegation that the trial judge

misapprehended the governing principles or the evidence adduced on the *voir dire*.

[37] In the end, Mr. Carrington says, the trial judge properly concluded that the first statement was voluntary, not tainted by a failure to videotape it or by improper police conduct. The trial judge properly applied the derived confessions rule in deciding to admit the second statement. The tainting feature of the first statement was remedied at the outset of the second by a full explanation and confirmed understanding of each of the requirements of s. 146(2) of the *YCJA*. There was minimal reference to the fact and content of the first statement during the second interview and the appellant, despite his youth, made it clear that he wanted to provide *his* side of the story about the robbery.

The Governing Principles

[38] The parties differ little on the legal principles that are at work in this case. They depart common ground, however, on the result the application of those principles should yield in this appeal. For discussion purposes, I have collected the applicable principles under three headings:

i. the voluntariness issue;

ii. the requirements of s. 146(2) of the *YCJA*; and

iii. the derived confessions rule.

The Voluntariness Issue

[39] The confessions rule is concerned with voluntariness, broadly defined: *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 32. The application of the confessions rule is contextual, requiring a trial judge to take into account all relevant circumstances in order to determine whether the prosecution has established the voluntariness of the confession beyond a reasonable doubt: *Oickle*, at paras. 47, 68, and 71.

[40] Recording police interviews of persons suspected or accused of crime can be of inestimable value in assessing their voluntariness at trial. Video recordings permit the trial judge to be an ear and eyewitness to the interview tendered for admission: *Oickle*, at para. 46. The *Oickle* court was not prepared, however, to consider non-recorded interrogations as inherently suspect: *Oickle*, at para. 46.

[41] In this province, where a suspect is in custody in a place where recording facilities are available and police deliberately set out to interrogate the suspect without giving thought to the creation of a reliable record of the interview process, the resulting non-recorded statement is inherently suspect: *R. v. White* (2003), 176 C.C.C. (3d) 1 (Ont. C.A.), at para. 21; *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.), at paras. 65-67. In these circumstances, the trial judge must decide whether there was a suitable substitute for a recording to

satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt: *White*, at para. 21; *Moore-McFarlane*, at paras. 65-67.

[42] The application of the voluntariness rule to individual cases is contextual: *Oickle*, at para. 47; *Moore-McFarlane*, at para. 64. A disagreement with a trial judge about the weight to be assigned to individual items of evidence constitutes no basis upon which an appellate court can set aside a finding of voluntariness: *Oickle*, at para. 22. Trial judges' findings of voluntariness are entitled to deference here. Interference with those findings should only occur where the trial judge has committed legal error in determining the test for voluntariness or has made overriding and palpable errors of fact: *Moore-McFarlane*, at para. 68.

The Requirements of s. 146(2) *YCJA*

[43] Section 146(1) of the *YCJA* affirms that the law relating to the admissibility of statements made by persons accused of committing offences applies to young persons in similar circumstances, but is subject to the provisions of s. 146.

[44] Section 146(2) of the *YCJA* enacts an admissibility rule that applies to oral and written statements made by a young person under 18 to a peace officer or other person in authority on arrest or detention, or where a person in authority has reasonable grounds to believe the young person has committed an offence. Like common law admissibility rules, s. 146(2) is exclusionary by nature, but inclusionary by exception.

[45] To gain entry by exception to the general rule of exclusion, the oral or written statement of the young person to a person in authority must satisfy the cumulative requirements of s. 146(2) of the *YCJA*:

> 146. (2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless
>
> (a) the statement was voluntary;
>
> (b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding that
>
> (i) the young person is under no obligation to make a statement,
>
> (ii) any statement made by the young person may be used as evidence in proceedings against him or her,
>
> (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and
>
> (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with

> paragraph (c), if any, unless the young person desires otherwise;
>
> (c) the young person has, before the statement was made, been given a reasonable opportunity to consult
>
> (i) with counsel, and
>
> (ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and
>
> (d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

[46] Several features of s. 146(2) warrant examination in the circumstances of this case.

[47] First, the conditions precedent to admissibility that s. 146(2) enacts impose correlative duties on peace officers and other persons in authority to whom the young person speaks in the circumstances described in the subsection. The duties include both informational and implementational obligations.

[48] Second, informational duties are the focal point of s. 146(2)(b). The substance of the rights to which the section refers must be communicated to the

young person in language that is appropriate to the young person's age and understanding. Said in another way, the language used must fit its consumer, a young person of immature years and qualified understanding.

[49] Third, since the mandatory explanation must be appropriate to the age and understanding of the specific young person to whom authorities are speaking, reading a standardized form, without more, will not normally be enough to establish the sufficiency of the caution: *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 27. It also follows from the requirement that the explanation be appropriate to the age and understanding of the specific young person concerned that persons in authority will need to acquire some insight into the specific young person's level of comprehension: *L.T.H.*, at para. 27.

[50] Fourth, the burden falls upon the Crown to prove by clear and convincing evidence that the person in authority to whom the statement was made took reasonable steps to ensure that the young person understood his or her s. 146 *YCJA* rights. The standard of proof is proof beyond a reasonable doubt: *L.T.H.*, at para. 6.

[51] Fifth, where the Crown proves compliance with the informational component beyond a reasonable doubt, the trial judge is entitled, indeed expected to infer that the young person understood his or her s. 146 *YCJA* rights, absent any evidence to the contrary: *L.T.H.*, at para. 8. The Crown does not have

to prove that the young person in fact understood the rights and options explained under s. 146(2)(b): *L.T.H.*, at para. 21. Nor is it necessary for persons in authority to ask young persons in every case to “read back” or “recite back” the rights explained by investigators. That said, this practice may go some way to demonstrate that the explanation was at once appropriate and sufficient: *L.T.H.*, at para. 26.

[52] Sixth, the issue of whether a detained young person has received a clear explanation of his or her rights and options and whether he or she has understood those rights to the extent necessary for an effective waiver are essentially questions of fact. Findings made about the requirements of s. 146, like a finding of voluntariness, should only be overturned on appeal for some palpable and overriding error that affected the trial judge’s assessment of the facts: *L.T.H.*, at para. 55.

The Derived Confessions Rule

[53] The derived confessions rule is a common law rule that governs the admissibility of a confession that has been preceded by an involuntary, thus inadmissible confession. The derived confessions rule is not a *per se* or bright line rule that excludes all subsequent confessions on the ground that they are tainted, irrespective of the degree of their connection to the prior inadmissible

statement: *R. v. I (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, at p. 526; and *R. v. Hobbins*, [1982] 1 S.C.R. 553, at p. 558.

[54] To determine whether a subsequent statement will be excluded under the derived confessions rule because of the taint left by its involuntary and thus inadmissible predecessor, a trial judge must examine all the relevant circumstances to determine the degree of the connection between the two statements: *T. (E.)*, at p. 526. The Supreme Court of Canada has set out some of the relevant circumstances or factors to consider in determining the degree of connection between the two statements, and thus the influence of the antecedent taint: see *T. (E.)*, at p. 526; *Hobbins*, at p. 558; and *R. v. G. (B.)*, [1999] 2 S.C.R. 475, at para. 21. These include but are not limited to:

- the time span between the statements;
- advertence to the earlier statement during questioning in the subsequent interview;
- discovery of additional information after completion of the first statement;
- the presence of the same police officers during both interviews; and
- other similarities between the two sets of circumstances.

[55] The application of these factors will render a subsequent statement involuntary if either the tainting features that disqualified the first continue to be

present, or if the fact that the first statement was made was a substantial factor that contributed to the making of the second statement: *T. (E.)*, at p. 526; *G. (B.)*, at paras. 21 and 23. It will generally be easier to establish that tainting affected the first when both these conditions are present. In the end, however, what matters most and mandates exclusion is that the connection is sufficient for the second to have been contaminated by the first: *G. (B.)*, at para. 23.

[56] The inquiry required when the derived confessions rule is invoked to exclude a subsequent statement is essentially a causation inquiry that involves a consideration of the temporal, contextual, and causal connections between the proffered and earlier statements: *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), at para. 46. The inquiry is a case-specific factual inquiry: *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 578, at para. 69.

[57] Despite its origins as a common law rule where lack of voluntariness is the contaminating factor, the derived confessions rule is of more general application. The contaminating factor may be constitutional infringement, say a breach of s. 10(b) of the *Charter*. There, the subsequent statement is tainted if the breach and impugned statement can be said to be part of the same transaction or course of conduct. The admissibility analysis in these cases is performed under s. 24(2) of the *Charter*: *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *Simon*, at para. 69; and *Plaha*, at paras. 42-45.

[58] The derived confessions rule may also be engaged where the contaminant in the prior statement is a failure to comply with s. 146(2) of the *YCJA*, or its predecessor, s. 56 of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, as repealed by *Youth Criminal Justice Act*, S.C. 2002, c. 1: *T. (E.)*, at p. 527; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at para. 28.

[59] To determine whether the derived confessions rule will warrant exclusion of a subsequent statement, a trial judge must follow a contextual and fact-based approach: *S.G.T*, at para. 29. The nature of the inquiry and the findings required in the derived confessions analysis have implications for the scope of appellate review. The admissibility of a confession that has been preceded by an involuntary (or otherwise) inadmissible confession, in other words, the application of the derived confessions rule, involves a factual determination based on factors designed to ascertain the degree of connection between the two statements: *T. (E.)*, at p. 526. This determination, like a determination of whether a statement is voluntary or compliant with s. 146(2) *YCJA*, is largely a question of fact. Appellate review of the judge's decision is limited to deciding whether the judge erred in her assessment of the evidence, failed to consider relevant circumstances, or failed to apply the correct principles: *T. (E.)*, at p. 526; *R. v. McIntosh* (1999), 141 C.C.C. (3d) 97 (Ont. C.A.), at paras. 21-22.

The Principles Applied

[60] I would give effect to this ground of appeal because, for reasons that I will explain, I am not satisfied that the trial judge properly applied the derived confessions rule when she decided to admit the appellant's videotaped police interview as evidence at trial.

[61] The derived confessions rule is a common law rule that governs the admissibility of a confession that has been preceded by an involuntary confession. In more general terms, the rule applies where a subsequent statement, sufficiently connected to an earlier inadmissible statement, is proposed for admission. The parties agree that the rule applies in the circumstances of this case where what rendered the prior statement inadmissible was a failure to comply with s. 146(2) of the *YCJA*.

[62] In this case, counsel for the Crown at trial did not seek to have the first statement admitted. The parties agreed that the first statement could not be admitted as evidence because of non-compliance with s. 146(2) of the *YCJA*.

[63] The trial Crown sought a finding from the trial judge that the first statement was voluntary even though it could not be admitted if tendered because of non-compliance with ss. 146(2)(b)-(d) of the *YCJA*. Trial counsel for the appellant argued that the statement was involuntary because the investigating officer repeatedly assaulted the appellant or that voluntariness could not be established

beyond a reasonable doubt because the police failed to videotape the interview when facilities were available to do so.

[64] The trial judge found that the first statement was voluntary. She rejected the appellant's claim of physical abuse and was satisfied that the written record of the interview prepared by Det. Alkins was sufficient to permit her to make an informed decision on the issue of voluntariness.

[65] On the evidence adduced at the *voir dire* on the voluntariness of the first statement, it was open to the trial judge:

i. to reject the evidence of the appellant that he was repeatedly assaulted by Det. Peacock;

ii. to accept the evidence of the investigating officers about why they did not videorecord the first interview with the appellant;

iii. to accept the evidence of the investigating officers about the completeness of Det. Alkins notes of the first interviews; and

iv. to conclude, on all the evidence adduced on the *voir dire*, that the initial statement, the product of the first interview, was voluntary.

[66] The voluntariness inquiry and the application of the legal test for voluntariness involve a case-specific factual inquiry. In the absence of any error in the application of the governing legal principles, error in the assessment of evidence, or failure to consider relevant circumstances, the trial judge's finding of voluntariness is entitled to deference on appellate review: *McIntosh*, at para. 21; *Oickle*, at para. 22. No such error or failure appears in the trial judge's finding of voluntariness.

[67] At trial, the appellant made no attempt to demonstrate that the first interview was also tainted by constitutional infringement. On arrest, the appellant was told the reasons for his arrest and advised of his s. 10(b) *Charter* rights. He indicated he understood both and did not want to call a lawyer. The trial judge concluded, rightly in my view, that the sole tainting factor at work in connection with the first interview and the basis on which it would be inadmissible, if tendered, was a breach of s. 146(2) of the *YCJA*.

[68] The trial judge correctly described the standard to be applied under the derived confessions rule when she considered the admissibility of the videotaped interview. She appreciated that the videotaped interview would be inadmissible under the derived confessions rule if either the tainting features that disqualified the first statement from reception, the failure to comply with s. 146(2)(b) of the *YCJA*, continued to be present in the second, or if the fact the first statement had been made was a substantial factor contributing to the making of the second.

[69] In my respectful view, however, for reasons that I will explain, the trial judge erred in her application of the governing principles of the derived confessions rule in the circumstances of this case.

[70] When Det. Peacock and Det. Alkins first approached the appellant in the interview room without video equipment, they claimed to have done so “to build a rapport” with M.D., to find out information about the other suspect and the gun, and to see whether M.D. wanted to give “his side of the story”.

[71] Det. Peacock asked M.D. several questions that elicited admissions from him. The youth said that he robbed a guy at a convenience store on a Saturday afternoon a few weeks earlier. He described his role in the robbery and identified the person with the gun as Kyle Smith. These experienced police officers knew, or should have known, that what M.D. told them amounted to an “oral … statement” within s. 146(2) of the *YCJA*. Further, they knew, or should have known, that the oral statement was taken in violation of s. 146(2)(b) of the *YCJA* and would not be admissible if it were tendered at M.D.’s trial.

[72] When the videotaped interview began, Det. Peacock attempted to comply with the informational component of s. 146(2)(b) of the *YCJA*. This advice lasted about 20 minutes and included subjects not expressly required by the subsection but relevant to issues of voluntariness and the right to counsel. In general terms, the appellant’s responses to inquiries about his understanding of the advice

given reflected an appropriate level of comprehension except in connection with the secondary caution.

[73] The advice provided by Det. Peacock at the outset of the videotaped interview represented at once an attempt to comply with s. 146(2)(b) of the *YCJA*, to establish the voluntary nature of the interview, and to cleanse the interview of any contaminating effects of the first interview. Nowhere, however, did Det. Peacock advise M.D. in the second interview that he should not be influenced in his decision whether to speak or to say nothing by the fact that he had earlier talked to the officers or by what he had said there: *Plaha*, at para. 53. Nor was M.D. told that the prior statement would not be admissible against him at his trial: R. v. J. L., [2000] O.J. No. 299 (C.A.), at para. 5.

[74] In my respectful view, the error in this case consisted of a failure to consider all the relevant circumstances in the application of the derived confessions rule. Taken as a whole, the evidence disclosed that the tainting features that disqualified the first statement from admission continued to be present during the second and that the fact the first statement had been made was a substantial factor that contributed to the making of the second that was little more than a continuation of the first.

[75] The first interview concluded with a question from Det. Peacock about whether the appellant wanted to tell the police about the robbery on video. The

appellant agreed. Immediately after completing his s. 146(2)(b) advice at the start of the second interview, Det. Peacock reminded M.D. of his offer and the interview proceeded. The same officers conducted both interviews without M.D. having any contact with anyone else in the hour that separated the two interviews.

[76] The trial judge does not appear to have considered the effect of Det. Peacock's failure to tell M.D. about the inadmissibility of the prior statement at the outset, indeed at any time during the second interview. This admission left M.D., a 14-year-old grade 9 student, with an incomplete understanding of his jeopardy when deciding whether to speak or remain silent. In the circumstances of this case, such advice was necessary to dispel the taint associated with the first interview. Its absence cemented the connection between the two statements. In a similar way, the failure to advise M.D. that, in deciding whether to speak a second time, he should not be influenced by the fact that he had talked to the police earlier, or by what he had said then, was an essential factor that required, but did not receive consideration in the admissibility decision.

[77] In the result, I am satisfied that the trial judge erred in her application of the derived confessions rule and erred in admitting the videotaped interview as evidence at trial.

CONCLUSION

[78] I would allow the appeal, set aside the convictions, and order a new trial.

Released: November 30, 2012 "JL"

"David Watt J.A."
"I agree John Laskin J.A."
"I agree K. Feldman J.A."