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Procedural Due Process in the Juvenile Courts of West Virginia

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COMMENT

PROCEDURAL DUE PROCESS IN THE JUVENILE COURTS OF WEST VIRGINIA

With the publication of the following Comment by the Honorable Richard A. Warmuth, Judge of the Common Pleas Court of Marshall County West Virginia, the West Virginia Law Review continues the practice initiated in Volume 75 of providing a forum for practitioners and members of the judiciary who have neither the time nor the resources to prepare an extensive lead article. In so doing, the Board of Editors hopes to become more responsive to the needs of the legal profession in the State of West Virginia.

The United States Supreme Court has, in recent years, extended to the nation's juvenile courts many aspects of procedural due process once considered applicable only to the adult criminal courts. This has led to some apprehension on the part of many judges in the juvenile courts that the juvenile courts will become "miniature criminal courts," and that the basic juvenile court doctrine of *parens patria* will be destroyed.

The current trend of decisions began with *Kent v. United States*[1] decided in 1966. In this case, the Juvenile Court of the District of Columbia waived its jurisdiction and permitted a juvenile to be prosecuted as an adult criminal in the district court. The minor had been questioned by the police and had admitted robbery, rape, and burglary. Motions were made in the juvenile court for a hearing, for access to the court's social records, and asserting that the court's waiver order was invalid for failure to state a reason for granting the waiver. Each of these motions was denied. Subsequently, the juvenile was indicted and tried in the district court and was sentenced to thirty to ninety years in prison. The District of Columbia Court of Appeals affirmed the conviction. The case was reversed by the United States Supreme Court and remanded to the district court for de novo hearing on the issue of waiver.

Justice Fortas wrote the majority decision which held that the order waiving jurisdiction of the juvenile court was invalid because of the court's failure to grant the hearing to the juvenile, to permit his counsel to have access to social records, and for failure to state

[1]383 U.S. 541 (1966).

reasons for the waiver in its order. The Court refused to extend the full complement of procedural rights due adult criminals to the juvenile courts, but, in this instance, placed a great deal of emphasis on the outcome of the proceeding for the juvenile defendant. The Court stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[2]

The West Virginia Code provides, in regard to waiver, the following:

> If the child be over sixteen years of age at the time of the commission of the offense, the court may, if the proceedings originated as a criminal proceeding in a court other than a juvenile court, enter an order transferring the case back to the court of origin, or to any court in the county having criminal jurisdiction; or if the case originated on petition in juvenile court, the court may enter an order showing its refusal to take jurisdiction and permit the child to be proceeded against in accordance with the laws of the State governing the commission of crimes or violation of municipal ordinances.[3]

While the quoted statute does not provide for a waiver hearing, a prior section does provide that upon the filing of a petition in the juvenile court, the judge shall set a time and place for a hearing upon the facts.[4] This would provide for the situation insofar as proceeding on a petition is concerned. The statutes are silent on cases transferred from other courts and then waived to another court by the juvenile court.

The Supreme Court of Appeals of West Virginia, in the latest case to be heard concerning waiver, *State v. McCardle*,[5] has ruled that before a juvenile can be transferred to adult court, he must receive reasonable notice and a meaningful hearing. In this case, a sixteen year old boy was arrested for possession and sale of marijuana. The appellate court determined that "there was, in fact, no hearing at all. . . . The court on its own preconceived notion of this defendant's [the juvenile's] reputation . . . determined that he should be tried as an adult."[6] The court said further:

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[2]*Id.* at 554.
[3]W. VA. CODE ANN. § 49-5-14(3) (1966).
[4]W. VA. CODE ANN. § 49-5-7 (1966).
[5]194 S.E.2d 174 (W. Va. 1973).
[6]*Id.* at 177.

> Even though, in the instant case, the defendant's parents were present at the purported hearing and counsel was there, it is undisputed that no actual notice was given and no opportunity whatever was afforded to prepare a defense to the proposed waiver of juvenile jurisdiction. That no adequate notice was afforded the defendant is supported by the undisputed fact that the waiver hearing was held on the same day the petition charging him with delinquency was filed.[7]

It appears, in light of *Kent*, that full hearings for all waivers will be required in the juvenile courts and that courts waiving jurisdiction will be required to give their reasons on the record.

The next landmark decision of the Supreme Court in the juvenile justice field is the well known *Gault*[8] case. On Monday, June 8, 1964, Gerald Gault and a friend were taken into custody by the Sheriff of Gila County, Arizona, as the result of a verbal complaint by a neighbor who complained about telephone calls made to her which contained lewd remarks. The boy's parents were at work and were not notified that he was taken into custdy. Gerald Gault was taken to the Children's Detention Home. That evening, after Gerald did not come home, his brother found out that he was in custody and the brother and mother went to the Detention Home. Mrs. Gault was orally advised that her son was in detention for making an obscene telephone call and that a hearing would be held at 3:00 o'clock the next afternoon in juvenile court. A written petition charging only that Gerald was a "delinquent minor" was filed but not served on, or shown to, either Gerald or his parents. The complaining party was not present at the hearing and no witnesses were sworn. No transcript or memorandum was made at the proceeding. Juvenile Officer Flagg said that Gerald had admitted making the lewd remarks after he had been questioned out of the presence of his parents, without counsel and without being advised of his right to silence. Neither of Gerald's parents were advised of his right to be represented by counsel and of the right to appointed counsel if they could not afford a lawyer. The juvenile was found delinquent and committed to the Arizona State Industrial School "for the period of his minority unless sooner discharged by due process of law." The parents filed a petition for a writ of habeas corpus which was dismissed by the Maricopa County Superior Court. The United States Supreme Court reversed, holding that the juvenile was denied due process of law.

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[7] *Id.* at 177-78.

[8] *In re* Gault, 387 U.S. 1 (1966).

Justice Fortas, again writing the decision for five members of the Court, listed four essentials of due process which were applicable to juvenile court proceedings. These essentials were written notice of the charges; advice on the privilege against self-incrimination; information on the right to counsel; and the right to confrontation and cross-examination, in the absence of a valid confession by the juvenile.

The Court did not rule on the right to appeal or on the right to a transcript of the proceedings, nor did the Court rule on the sixth amendment right to a public trial. The Court did say that "[A] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution".

In West Virginia, the Code provides for a written petition and a hearing upon the facts,[9] service of summons upon the persons named in the petition,[10] an answer,[11] and the right to counsel.[12]

The *Gault* decision raises some interesting questions. In the majority opinion, Justice Fortas refers to "state institutions" and to "institutions." Can it be that the requirements of *Gault* must be met by the courts only in cases where commitment to an institution is contemplated by the judge? Could the judge at the outset of the hearing announce that he has "no intention to commit" and be freed of the procedural requirements of *Gault*? Does the exclusionary evidence principle of the fourth amendment apply? Are juvenile courts required to give the juvenile a "speedy and public" trial? Is it necessary that every juvenile be given a full *Miranda* warning in every case? Is a jury trial required in juvenile proceedings? What quantum of proof is necessary for a finding of delinquency in the juvenile court? The Court in *Gault*, obviously, did not require the juvnile courts to apply all of the constitutional rights which might be claimed by a defendant in a criminal case. Several of the questions of *Gault* must remain unanswered, for the time being, and await furture decisions by the Court. However, the questions concerning the right to a jury trial and the quantum of proof have been answered by subsequent decisions.

In *McKeever v. Pennsylvania*,[13] a juvenile, age sixteen years,

[9]W. VA. CODE ANN. § 49-5-7 (1966).
[10]W. VA. CODE ANN. § 49-5-8 (1966).
[11]W. VA. CODE ANN. § 49-5-9 (1966).
[12]W. VA. CODE ANN. § 49-5-13 (1966).
[13]403 U.S. 528 (1971).

was charged with robbery, larceny, and receiving stolen property. The juvenile court denied counsel's motion for a jury trial. The juvenile was found delinquent and placed on probation. The state supreme court affirmed the juvenile court. The United States Supreme Court decision, written by Justice Blackmun, joined by Justice White and Justice Stewart, held that a jury trial is not the constitutional right of a juvenile. The Court stated that:

> There is a possibility at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal proceeding.
>
> The juvenile concept held high promise. We are reclutant to say that, despite disappointments of grave dimensions, it still does not hold promise . . . .[14]

The West Virginia Code provides that an interested person may demand, or the judge of his own motion may order, a jury trial of twelve persons to try any question of fact.[15] The West Virginia Supreme Court of Appeals has held in *Neuman v. Wright*[16] that the right, given by this statutory provision, to demand a jury trial is absolute and that it is reversible error for the court to refuse that demand when it is properly made in a case where an issue of fact is raised.

The United States Supreme Court addressed itself to the question of quantum of proof in juvenile delinquency proceedings in 1970, in the *Winship* case.[17] This matter came up from New York, which had a statute authorizing determination of juvenile delinquency on a preponderance of the evidence. The twelve year old juvenile had stolen $112.00 from a woman's pocketbook. He was found delinquent and committed to a state training school where he could, possibly, be confined for a period as long as six years. The United States Supreme Court held that although the fourteenth amendment did not require that a juvenile delinquency hearing conform with all the requirements of a criminal trial, nevertheless, juveniles were constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory stage when the juvenile was charged with an act which would constitute a crime if committed by an adult.

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[14]*Id.* at 545-47.

[15]W. VA. CODE ANN. § 49-5-6 (1966).

[16]126 W. Va. 502, 29 S.E.2d 155 (1944).

[17]*In re* Winship, 397 U.S. 358 (1970).

The dissent by Justice Burger, joined by Justice Stewart, stated:

> My hope is that today's decision will not spell the end of a generously concerned program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts . . . .[18]

Apparently, *Winship* is intended to apply to delinquency findings only when the child is charged with violating a criminal law. What about a delinquency finding for truancy, incorrigibility, running away, or associating with immoral or vicious persons, none of which are criminal offenses?

No cases have been decided in West Virginia concerning the application of *Winship* but it is reasonable to assert that any finding of delinquency which may result in commitment to an institution and loss of liberty should be governed by the law of the case.

In predicting future applications of adult criminal procedural safeguards to juvenile court proceedings by the United States Supreme Court, it is interesting to note that Justices White and Stewart, who concurred in the *Gault* decision, are still on the Court and in the opinion of some Court watchers are now the "swing" votes. They joined in the decision in the *McKeever* case which would not extend the constitutional right of jury trials to juvenile cases. Justice Stewart joined with Justice Burger in the dissent in *Winship*. It, therefore, appears that the Court will not be eager to extend additional adult criminal procedural rights to juvenile court proceedings, and that the fears of many concerning the transformation of the juvenile court into a "mini" criminal court can be laid to rest.

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[18] *Id.* at 376.