Guardian Ad Litem in Criminal Cases

In re Gault, 387 U.S. 1 (1967).

The problems in this case relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. There appears to be little current dissent from the proposition that the Due Process Clause has a role to play in delinquency proceedings. The problem is to ascertain the precise impact of the due process requirement upon such proceedings.

Gerald Gault, fifteen years old, was taken into custody when a neighbor made a complaint that he and a friend made lewd phone calls to her. No actions were taken to notify Gault's parents that he had been taken into custody. When Gault's mother learned that he was taken to the Children's Detention Home she went there and was told that a hearing would be held the following day. Officer Flagg, the deputy probation officer, filed a petition with the court on the day of the hearing stating that Gault was a delinquent. Gault's parents never received a copy of this petition and did not learn of it until the habeas corpus hearing six months later.

At the hearing the complainant did not appear, no one was sworn, no transcript or recording was made, and no memorandum or record of the substance of the proceeding was prepared. The only information about that proceeding comes from the testimony of the Juvenile Court Judge who apparently questioned Gault about the phone calls during the hearing. There was conflict was to what Gault said during the questioning. Gault's mother recalled that he said that he only dialed the number and handed the phone to his friend, while the judge testified that Gerald admitted to making one of the lewd statements.

After the hearing, Gault was taken back to the detention center and was then released then released three days later. There was no explanation as to why Gault was not released after the hearing. The Gaults then received a hand-written note from Officer Flagg informing them that there would be a hearing the following Monday. At that hearing the complainant was again not present. Also, at this hearing a "referral report" was made by the probation officers which was not disclosed to Gault's parents. Gault was then committed as a juvenile delinquent to the State Industrial School "for the period of his minority, until 21, unless sooner discharged by due process of law."

Notice of Charges. No notice was given to Gerald Gault's parents when he was taken into custody. The only written notice the Gaults eventually received was a note on plain paper from the officer at the detention center that a judge had set further hearings on Gerald's delinquency.

Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity."

Right to Counsel. 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. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to

ascertain whether he has a defense and to prepare to submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." Just as in *Kent v. United States*, 383 U.S. 541 (1966), we indicated our agreement with the United States Court of Appeals of the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in the state institution until the juvenile reaches the age of 21.

Confrontation, Self-incrimination, Cross-examination. The question is whether Gerald's admission was improperly obtained and relied on as the basis of decision. Mrs. Cook, the complainant, and the recipient of the alleged lewd telephone call, was not called as a witness. Gerald's mother asked the Juvenile Court Judge why Mrs. Cook was not present and the judge replied that "she didn't have to be present." So far as appears, Mrs. Cook was spoken to only once by telephone. Gerald had been questioned by the probation officer after having been taken into custody. Any admissions Gerald may have made at this time do not appear in the record. Neither Gerald nor his parents were advised that he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a "delinquent."

We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique but not in principle depending upon the age of the child and the presence and competence of parents. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

The judgment of the Juvenile Court was stated by the judge and to be based on Gerald's admissions in court. Apart from the "admissions," there was nothing upon which a judgment or finding might be based. There was no sworn testimony. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.

<u>McDonnell v. Juvenile Court</u>, 864 P.2d 565 (Colo. 1993).

The guardian ad litem (GAL) for J.M. responded to our order to show cause and raises the issue of whether the Department of Institutions (DOI) has the authority to contract with facilities such as the Glen Mills School, an out of state facility. The GAL asserts that the juvenile court's order can be justified as an exercise of the court's power to limit actions of the DOI that exceed the General Assembly's statutory grant of authority.

Section 19-2-1101(3), 8B C.R.S. (1993 Supp.), states: "Once a juvenile is committed to the department of institutions, he shall remain in a facility directly operated by the department of institutions or in a secure facility contracted for by the department of institutions." The power to contract is provided by law. Therefore, the question is whether the General Assembly limited

the DOI's power to contract to in-state facilities.

The General Assembly was aware that the DOI was sending juveniles out of state and intended the phrase "any governmental unit or agency or private facility or provider" contained in section 19-2-1110(1), C.R.S. (1992 Supp.), to be read in conformity with the plain meaning of the term, not as "any [Colorado] governmental unit or agency or private facility or provider" as the GAL urges.

People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

The trial court found that the child M.W. was "medically determined to be unavailable" because of the "possible harm to the child" in having her testify. Adequate evidence in the record supports that finding.

The question before us, therefore, is whether the traumatic effect of testifying in court can properly form the basis of a finding that a child sexual abuse victim is unavailable.

We hold that "unavailability," can be met when the court makes a particularized finding that the child's emotional or psychological health would be substantially impaired if she were forced to testify and that such impairment will be long standing rather than transitory in nature.

People in Interest of M.A.G., 732 P.2d 649 (Colo. App. 1986).

The trial court ordered the change of custody of delinquent child, M.A.G., from his father to ACDSS and placing the child in private hospital care for a limited period, and requiring ACDSS to pay the cost of the placement.

ACDSS appeals, contending that when a child is in its custody it alone has the authority to determine the child's placement and that the court erred in ordering ACDSS to pay the entire cost of the treatment.

With respect to the authority to determine placement, the court has exclusive jurisdiction to determine the placement of a child adjudicated delinquent. People in Interest of T.W., 642 P. 2d 16 (Colo. App. 1981).

With respect to the order requiring ACDSS to pay costs, Section 19-3-133(4)(d), C.R.S. (1986 Repl. Vol. 8B) requires a decree providing for placement of a child to be accompanied by an order obligating the parent to pay a fee, based on the parent's ability to pay, to cover the costs of the GAL and providing for the residential care of the child.

The court has the authority to place the child, but erred in requiring ACDSS to pay all costs. The father should be required to contribute to the extent of his ability to pay.

People v. Simpson, 51 P.2d 1022 (Colo. App. 2001).

Requiring adult presence at an initial appearance is of "critical significance to any knowing and intelligent waiver of a constitutional right by a juvenile." People in Interest of S.A.R., 860 P.2 573, 573 (Colo. App. 1993). The presence of a parent or guardian at a juvenile's providency hearing assures the court that the juvenile is provided with parental guidance and moral support, as well as some assurance that any waiver of the juvenile's rights will be made knowingly and intelligently.

People v. S.M.D., 864 P.2d 1103 (Colo. 1994).

In this interlocutory appeal under C.A.R. 4.1, the prosecution seeks reversal of an order of the Adams County District Court, granting the motion of S.M.D., a juvenile defendant, to suppress a statement he made to the investigating officers during a custodial interrogation. S.M.D. was taken into custody in connection with a murder. Several officers of the Thornton Police Department interrogated S.M.D. in the presence of B.B., who had been appointed his guardian ad litem in a juvenile dependency and neglect proceeding, unrelated to the present action. Holding that the custodial interrogation had not complied with section 19-2-210, 8B C.R.S. (1993 Supp.), since the guardian ad litem was neither his guardian nor counsel representing the defendant, the district court suppressed the juvenile's custodial statement.

Section 19-2-210(1), 8B C.R.S. (1993 Supp.), of the Children's Code states in pertinent part: No statements or admissions of a juvenile made as a result of the custodial interrogation of such juvenile by a law enforcement official concerning delinquent acts alleged to have been committed by the juvenile shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation and the juvenile and his parent, guardian, or legal or physical custodian were advised of the juvenile's right to remain silent and that any statements made may be used against him in a court of law, of his right to the presence of an attorney during such interrogation, and of his right to have counsel appointed if he so requests at the time of interrogation; except that, if a public defender or counsel representing the juvenile is present at such interrogation, such statements or admissions may be admissible in evidence even though the juvenile's parent, guardian, or legal or physical custodian was not present.

This court has previously found that the purpose in enacting the statute is to ensure that a juvenile during police interrogation is advised and counseled concerning his or her Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel by someone whose interests are consistent with those of the child.

The testimony of the GAL demonstrates that he was acting in the capacity contemplated by the statute. B.B., an attorney, had been appointed as S.M.D.'s guardian ad litem in a dependency and neglect action, had appeared with S.M.D. in court on several occasions, and had established a rapport with him.

For purposes of the statute, the Department of Social Services was S.M.D.'s legal

custodian, the "person legally responsible for his care." In complying with the Department of Social Services' request to go down to the police station, B.B. was acting in a representative capacity on behalf of the Department of Social services in representing and protecting the welfare and best interests of S.M.D.

We find that, in complying with the Department of Social Services' request and acting on behalf of the Department, the GAL was representing and protecting the welfare and best interests of the accused juvenile at the custodial interrogation.