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Juveniles

Linda S. Williams
West Virginia University College of Law

JUVENILES

I. RIGHT TO COUNSEL AT DETENTION HEARINGS

Arbogast v. R.B.C., 301 S.E.2d 827 (W. Va. 1983).

In a decision that is difficult to reconcile with the general trend of juvenile law in this state, the West Virginia Supreme Court of Appeals held that a juvenile does not have an absolute right to counsel at a detention hearing unless it is held in conjunction with a preliminary hearing.[1]

In *Arbogast v. R.B.C.* the appellant was a seventeen year old boy who was arrested pursuant to a warrant charging him with armed robbery. As required by the West Virginia Code,[2] he was immediately taken before the juvenile referee for a detention hearing.

At the time of the detention hearing a juvenile petition had not yet been filed against R.B.C. As a result of the detention hearing the appellant was transferred to the Princeton Detention Facility to await a preliminary hearing. The appellant was not represented by counsel at the detention hearing.

Several days later a preliminary hearing was held in which the referee found probable cause that the appellant was a delinquent. He was returned to the Princeton Facility until his eighteenth birthday, at which time he was to be transferred to the Upshur County jail. Meanwhile, the state procurred an indictment charging the appellant with armed robbery and filed a motion to have his case transferred from the court's juvenile to its criminal jurisdiction. A transfer hearing was held and appellant's case was transferred to the court's criminal jurisdiction. The defendant appealed the transfer order, alleging that he was denied his right to counsel at the detention hearing and that the court's order and the charges against him must therefore be dismissed.

The appellant asserted that he had an absolute right to counsel at the detention hearing because a warrant had already been issued for his arrest, which had begun the adversary proceedings against him. Surprisingly, the West Virginia Supreme Court of Appeals disagreed. The court relied on its earlier decision in *State ex rel. Kearns v. Fox*,[3] which held that the right to counsel in juvenile proceedings attaches when the "formal" proceedings are instituted by filing a juvenile petition under West Virginia Code section 49-5-7.[4] Prior to the filing of the petition, the *Kearns* case permitted the judge

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[1] Arbogast v. R.B.C., 301 S.E.2d 827, 829 (W. Va. 1983).

[2] W. VA. CODE § 49-5-8(d) (Supp. 1983).

[3] 268 S.E.2d 65 (W. Va. 1980).

[4] *Id.* at 66-67. W. VA. CODE § 49-5-7 provides in part:

The Petition shall contain specific allegations of the conduct and facts upon which the petition is based, including the approximate time and place of the alleged conduct; a statement of the right to have counsel appointed and consult with counsel at every stage of the proceedings; and the relief sought.

or referee to proceed informally.[5] The court in *Arbogast* also held that the juvenile statutes do not explicitly grant a juvenile the right to counsel at a detention hearing. Therefore, the court held that a juvenile is not entitled to counsel at a detention hearing unless it is held in conjunction with a preliminary hearing.[6]

Several problems with this decision are immediately apparent. In deciding the *Arbogast* case, the court dealt only with statutory interpretation and wholly failed to consider the constitutional issues raised by the appellant. Furthermore, the correctness of the court's statutory interpretation is subject to dispute. First, it must be noticed that the statute governing juvenile proceedings in this state reads, "[t]he child shall have the right to be effectively represented by counsel *at all stages of proceedings under the provisions of this article*."[7] Nowhere does the Code provide that a juvenile has the right to counsel only once "formal" proceedings have begun. In fact, a logical interpretation of the statute would suggest otherwise. Section 49-5-8 of the West Virginia Code governing juvenile detentions provides that a child who is taken into custody prior to a detention hearing, must immediately be informed, in writing, of his right to counsel.[8] It is difficult to understand this statutory requirement if the juvenile may not avail himself of the right to counsel at the detention hearing. Section 49-5-8(d) provides that the judge or referee at the detention hearing must again inform the defendant of his right to counsel.[9] It must be questioned why the legislature included these rights if it did not intend for them to be exercised.

Another problem with the *Arbogast* decision is that it makes a juvenile's right to counsel turn on the timing of the proceedings rather than on their nature. Under *Arbogast* a juvenile fortunate enough to have his detention hearing and preliminary hearing held simultaneously will have a right to counsel for both proceedings. However, a juvenile who has a detention hearing first and a preliminary hearing later will only have a right to counsel at the later proceeding.

According to West Virginia Code section 49-2-8, the "issue at the detention hearing shall be whether the child shall be detained pending further court proceedings."[10] Other guidelines for detention hearings are also contained in this section of the Code:

> The judge, referee or magistrate shall inform the child of his right to remain silent, that any statement may be used against him and of his right to counsel,

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[5] 268 S.E.2d at 67.
[6] 301 S.E.2d at 829.
[7] W. VA. CODE § 49-5-1(c) (Supp. 1983) (emphasis supplied).
[8] W. VA. CODE § 49-5-8(c) (Supp. 1983).
[9] W. VA. CODE § 49-5-8(d) (Supp. 1983).
[10] *Id.*

> and no interrogation shall be made without the presence of a parent or counsel. If the child or his parent, guardian or custodian has not retained counsel, counsel shall be appointed as soon as practicable.[11]

The serious nature of a detention hearing is ascertainable from these provisions. In order for a juvenile to meaningfully participate in this proceeding, and for his rights to be adequately protected, he must be represented by counsel. Without legal guidance provided by counsel, a juvenile defendant cannot be expected to fully understand the proceedings against him. Certainly, if anything he says may be used against him, he will not be able to participate fully and to provide the judge with the reasons why he should not be detained unless he has the right to counsel. Without counsel, a detention hearing is a catch-22 situation for the juvenile.[12]

Finally, the court's decision in *Arbogast* is wrong because it fails to consider the nature of the interest at stake in a detention hearing. When the court finds that a juvenile must be detained, his liberty is taken from him. According to the West Virginia Constitution, "No person shall be deprived of life, liberty, or property, without due process of law . . . ."[13] In *In re Gault*, the United States Supreme Court held that:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[14]

Although *Gault* dealt with a delinquency hearing rather than a detention hearing, the determinative factor is that the child's liberty is at stake in both situations. As Justice Neely previously noted, "Shakespeare instructs us well that merely changing the name of an object does not change its true character; 'What is in a name? that which we call a rose by any other name would smell as sweet'."[15]

In light of the serious problems with this decision, and given its inconsistency with West Virginia juvenile law generally,[16] it is very likely that this

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[11] *Id.*

[12] The West Virginia Supreme Court of Appeals recognized the importance of a juvenile's understanding the proceedings against him in State *ex rel.* J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981). In that case the court held that a juvenile could not waive his constitutional right to counsel unless he did so upon the advice of his counsel.

[13] W. VA. CONST. art. III, § 10.

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

[15] State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 325 n.5 (W. Va. 1977) (quoting Romeo and Juliet, Act II, Sc. ii).

[16] *See generally*, State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977) (holding that juvenile status offenders must be treated in a fashion consistent with *parens patriae* power); State

case will be overruled whenever the supreme court of appeals has an opportunity to confront the issue again.

II. STATUS OFFENDERS

State ex rel. L.D.M. v. Lucas, No. 15851 (W. Va. Mar. 31, 1983) (per curiam).

According to the West Virginia Supreme Court of Appeals, a juvenile status offender who violates his probation order by committing a second status offense, has not committed an act which would be a crime if done by an adult. He, therefore, must continue to be treated as a status offender rather than a criminal juvenile delinquent.[17]

L.D.M. was a fifteen-year-old who was adjudged delinquent for habitually being absent from school. He was originally placed in a children's home, but was later placed on probation and returned to his parent's custody. L.D.M.'s probation officer filed a second petition against him alleging that he had violated his probation order by again failing to attend school. The petition stated that L.D.M.'s violation of the probation order was an act which would be a crime if committed by an adult. The trial court found that the petitioner had violated his probation and ordered him delivered to the Commissioner of Corrections at Salem for a thirty-day examination. The petitioner appealed his incarceration. L.D.M. asserted that his incarceration at Salem violated statutes concerning juvenile detention and was inconsistent with previous decisions concerning the incarceration of status offenders.[18]

The key issue in the case was whether a juvenile who violated a probation order by committing a status offense had committed an act which, if committed by an adult, would be a crime. The West Virginia Supreme Court of Appeals relied on various statutory provisions in holding that the juvenile was still a status offender. Section 49-5-16 of the West Virginia Code states that:

> A child charged with or found to be delinquent solely under subdivision (3), (4), or (5) [§ 49-1-4] section four, article one of this chapter, shall not be housed in a detention or other facility wherein persons are detained for criminal offenses

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ex rel. J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981) (holding that a juvenile defendant cannot waive his right to counsel during proceedings against him); and State *ex rel.* E.K.C. v. Daughtery, 298 S.E.2d 834 (W. Va. 1982) (holding that the nature of the interest of a juvenile probationer is no less valuable than that of an adult probationer, and juveniles must be assured full due process guarantees).

[17] State *ex rel.* L.D.M. v. Lucas, No. 15851 (W. Va. Mar. 31, 1983) (per curiam).

[18] W. VA. CODE § 49-5-16(a) (1980) (setting forth the policies and procedures of correctional and detention facilities); State *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977); State *ex rel.* H. K. v. Taylor, 289 S.E.2d 673 (W. Va. 1982) (holding that status offenders may not be housed with juveniles who have committed acts which would be crimes if they were adults).

> or for delinquency involving offenses which would be crimes if committed by an adult.[19]

Section 49-1-4(5) defines "delinquent child" as one "[w]ho willfully violates a condition of a probation order or a contempt order of any court."[20] The court applied these statutory provisions to L.D.M. and determined that he was only a status offender. The commission of a second status offense, therefore, should not result in the treatment of a juvenile as an adult.

The laws pertaining to the incarceration of juveniles in this state are generally quite progressive. The incarceration of status offenders is particularly frowned upon and may be utilized only when "the child is so totally unmanageable, ungovernable, and anti-social that he or she is amenable to no treatment or restraint short of incarceration in a secure prison-like facility."[21] Additionally, in *State ex rel. H.K. v. Taylor* the supreme court of appeals held that a status offender may not be housed with juveniles who have committed criminal acts even for the duration of a medical examination.[22] Applying the progressive principles enunciated in prior juvenile case law, the court found L.D.M.'s confinement at Salem to be a violation of the West Virginia Code and ordered his release.

The final result of *L.D.M.* is that a status offender who violates his probation order by committing a second status offense remains a status offender and may not be housed in a facility with juveniles who have committed criminal acts. The logic of the decision is clear. A juvenile offender who commits a second offense no more serious than the first should not be subjectd to significantly greater punishments.

III. PROBATION REVOCATIONS

State ex rel. E.K.C. v. Daugherty, 298 S.E.2d 834 (W. Va. 1982).

The interests of a juvenile probationer are no less valuable than those of an adult probationer.[23] Therefore, the West Virginia Supreme Court of Appeals held that a juvenile offender threatened with the revocation of his probation must be afforded all the constitutional protections afforded an adult in a probation revocation proceeding.[24]

E.K.C. was adjudged delinquent by the circuit court and ordered committed to the Cabell County Youth Center at Ona. The commitment was suspended, however, and E.K.C. was placed on probation. One of the condi-

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[19] W. VA. CODE § 49-5-16 (Supp. 1983).
[20] W. VA. CODE § 49-1-4(5) (1980).
[21] State *ex rel.* Harris v. Calendine, 233 S.E.2d 318, 331 (W. Va. 1977).
[22] 289 S.E.2d 673, 678 (W. Va. 1982).
[23] State *ex rel.* H.K. v. Taylor, 289 S.E.2d 673 (W. Va. 1982).
[24] 298 S.E.2d 834 (W. Va. 1982) (syllabus point one by the court).

tions of his probation was that if E.K.C. were suspended from school for any reason, he could be placed in a detention home or placed on house arrest. Twice E.K.C. was suspended from school, and twice incarcerated in the center at Ona without a hearing. Eventually his probation was revoked by the court.

On appeal, the petitioner asserted that he was deprived of his due process rights by being incarcerated and by having his probation revoked without the opportunity for a hearing.

Although the supreme court had never articulated the rights of a juvenile probationer, it had decided a similar case involving a juvenile parolee.[25] In *State ex rel. J.R. v. MacQueen*[26] the court had held that a juvenile parolee's interests are no less valuable than the interests of an adult parolee. Therefore, a juvenile must be afforded the same constitutional protections in a parole revocation proceeding as an adult.[27] The court based its holdings in *MacQueen* on a series of United States Supreme Court cases which had increasingly granted to juveniles the full procedural protections they had been denied under the doctrine of *parens patriae*.[28]

Having acknowledged that juveniles are entitled to the same due process rights as adults, the court in *State ex rel. E.K.C.*, proceeded to determine what procedures were necessary for the protection of those rights. The court noted that the United States Supreme Court had applied essentially the same standards to both parole and probation revocation proceedings.[29] Additionally, the procedures set forth in these cases were expressly adopted by the West Virginia court in *Dobbs v. Wallace*[30] concerning an adult petitioner's rights to a parole revocation hearing, and in *Louk v. Haynes*[31] concerning an adult petitioner's rights to a probation revocation hearing.

Importantly, these same standards were afforded the juvenile petitioner in *State ex rel. J.R. v. MacQueen*.[32] The court extended these procedures to apply to juvenile probation proceedings. The procedures adopted which are applicable now in juvenile parole and probation revocation proceedings are as follows:

> (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and

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[25] State *ex rel.* J.R. v. MacQueen, 259 S.E.2d 420 (W. Va. 1979).

[26] *Id.*

[27] *Id.* (syllabus point two by the court).

[28] *See generally, In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541 (1966).

[29] Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[30] 157 W. Va. 405, 201 S.E.2d 914 (1974).

[31] 223 S.E.2d 780 (W. Va. 1976).

[32] 259 S.E.2d 420.

> to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a "neutral and detached" hearing officer; and (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation.[33]

The application of these procedures to juvenile probation revocation proceedings was predictable given the court's generally protective stance on juvenile issues. The decision is another important step in granting juveniles the same amount of constitutional protection as adults have in similar proceedings.

IV. PREADJUDICATION DETENTION OF JUVENILES

State ex rel. J.W. v. LeMasters, No. 15643 (W. Va. Dec. 15, 1982) (per curiam).

In *State ex rel. J.W. v. LeMasters*, the West Virginia Supreme Court of Appeals declined to articulate more definite and objective standards for the preadjudication detention of juvenile offenders than those stated in the West Virginia Code.[34]

The petitioner in this case was adjudged delinquent on the basis of a petition filed by his mother. He was placed on probation, which he violated. A second petition was filed for the revocation of his probation and after a detention hearing, the petitioner was ordered to be held in secure detention at the Southern Regional Detention Center. The petitioner was transferred to a hospital for a time, and later, to the West Virginia Children's Home in Elkins. Alleging that the petitioner's detention at the Southern Regional Detention Center prior to a dispositional hearing was inappropriate, petitioner's counsel filed a writ of habeas corpus, requesting the court to articulate detailed standards for such preadjudication detention.

In its opinion the court noted that referees and judges are not wholly without statutory guidance when making decisions concerning preadjudication detentions. West Virginia Code section 49-5A-2 sets forth a strong policy favoring the release, rather than detention, of juveniles who are arrested or taken into custody.[35] The court also noted that other procedures for juvenile detention hearings are included in West Virginia Code subsection 49-5-8(d) which reads in part:

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[33] 298 S.E.2d at 836; *See also* 223 S.E.2d 780 (syllabus point twelve by the court).

[34] State *ex rel.* J.W. v. LeMasters, slip op. at 5 (W. Va. Dec. 15, 1982) (per curiam).

[35] W. VA. CODE, § 49-5A-2 (1980) reads:

> A child who has been arrested or who under color of law is taken into the custody of any officer or employee of the State or any political subdivision thereof shall be forthwith afforded a hearing to ascertain if such child shall be further detained. In connection with any such hearing, the provisions of article five [§ 49-5-1 et seq.] of this chapter shall apply. It shall be the duty of the judge or referee to avoid incarceration of such

> The referee or judge shall hear testimony concerning the circumstances for taking the child into custody and the possible need for detention in accordance with section two [§ 49-5A-2], article five-A of this chapter. The sole mandatory issue at the detention hearing shall be whether the child shall be detained pending further court proceedings. The court shall, if advisable, and if the health, safety and welfare of the child will not be endangered thereby, release the child on recognizance to his parents, custodians or an appropriate agency; however, if warranted, the court may require bail, except that bail may be denied in any case where bail could be denied if the accused were an adult.[35]

These statutory provisions constitute broad grants of discretionary authority to the judge or referee and provide very few specific procedural requirements. Greater specificity is necessary to ensure that a child's rights will be adequately protected prior to the disposition of his case. The court appeared to agree that more detailed standards regarding preadjudication detentions are necessary, but noted that the West Virginia Legislature had already made a commitment to study the problems in this area, and to develop the standards and criteria to be used in juvenile detention proceedings.[37]

In West Virginia Code section 49-5A-6a, the Legislature provides for the development of a comprehensive plan to establish a state-wide system of regulation for predispositional detention of juveniles. The Commissioner of the Department of Welfare and the Legislative Commission on Juvenile Law are to develop the plan, incorporating recommendations from the Department of Corrections, the Governor's Task Force on Crime and various other groups. The plan is to include the development of youth services coordinators, a plan for the effective and efficient use of juvenile detention facilities, recommendations on using regional detention centers for detention hearings, recommendations concerning the use of emergency home shelters and foster homes for detentions and various other aspects of preadjudication detentions.[38]

Of particular importance to the court in this case, is the statutory provision requiring that "standards and criteria shall be established for the use of detention."[39] Deferring to the Legislature in this case, the court declined to articulate more definite standards for predispositional juvenile detentions.[40]

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child in any jail. Unless the circumstances of the case otherwise require, taking into account the welfare of the child as well as the interest of society, such child shall be released forthwith into the custody of his parent or parents, relative, custodian or other responsible adult or agency.

[35] W. VA. CODE § 49-5-8(d) (1983 & Supp. 1983).

[37] W. VA. CODE § 49-5A-6a (Supp. 1983).

[38] *Id.*

[39] *Id.*

[40] No. 15643, slip op. at 5.

The statute provides that the plan should be presented to the Legislature no later than January 1, 1983.[41] However, no further action has been taken by the Legislature with regard to this problem.

Although the court deferred to the legislative intent in this case, it is questionable whether it will do so again. In the face of legislative inaction, the court, if it is sensitive to the needs of juvenile offenders, may have no choice but to articulate the necessary standards.

V. HEARINGS FOR REQUISITIONED RUNAWAYS

In re M.D., 298 S.E.2d 243 (W. Va. 1982).

In an important decision applying the provisions of the Interstate Compact on Juveniles,[42] the supreme court held that a court, requested to return a runaway child to a requisitioning state, should have a hearing to determine whether it is in the child's best interest to be returned.[43]

M.D. was a neglected child who ran away from home and was requisitioned by her home state of Ohio pursuant to the Interstate Compact on Juveniles. At the time she was requisitioned, M.D. was living with her older sister in Moundsville, West Virginia. The Interstate Compact on Juveniles was enacted to prevent runaway children from endangering the health, morals, and welfare of themselves and of others.[44] In the belief that such injuries are likely to occur when children have run away and are without adult supervision, the Compact calls for interstate cooperation in returning children who have run away into other states.[45]

Of particular significance to the West Virginia Supreme Court of Appeals in this case was the provision in Article IV of the Compact which reads in part:

> The judge of the court of which this application [the application for requisition] is made may hold a hearing thereon to determine whether for the purposes of this compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor, and whether or not it is in the best interest of the juvenile to compel his return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, he shall present to the appropriate court or to the executive author-

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[41] W. VA. CODE § 49-5A-6a (Supp. 1983).
[42] W. VA. CODE §§ 49-8-1 to -7 (1980).
[43] 298 S.E.2d 243 (W. Va. 1982) (syllabus point two).
[44] W. VA. CODE §§ 49-8-1 and 49-8-2 art. I (1980).
[45] *Id.*

> ity of the state where the juvenile is alleged to be located a written requisition for the return of such juvenile.[46]

Additionally, the Compact gives the judge in the state requested to return the child a reasonable time in which to test the legality of the requisition proceedings.[47]

In *M.D.* the state asserted that the proceedings were legal as long as the requisition contained all the information required by the Compact. The trial court, accepting this argument, refused to look beyond the face of the documents to determine whether it was in fact in M.D.'s best interest to be returned to Ohio.

The West Virginia Supreme Court of Appeals disagreed and stated that "[a] juvenile court must determine whether a requisitioned child falls within the legislative declaration of persons for whose benefit the Compact exists." Furthermore, the court held, "A West Virginia Court requested to return a runaway child to a requisitioning state per the Interstate Compact on Juveniles . . . should have a hearing and then decide whether it is in the child's best interest to be returned."[48]

It is not clear from the *M.D.* decision whether hearings will be required for all children who are requisitioned pursuant to the Compact, or whether the hearing requirement applies only to runaways and other status offenders. It remains to be seen whether the court will require a hearing when a juvenile previously adjudged deliquent is requisitioned.

As a result of *M.D.*, trial courts will be required to hold hearings for status offenders requisitioned under the Compact. The legality of the requisition proceedings must then be tested in a meaningful manner which will ensure that the child's best interest are adequately protected.

Linda S. Williams

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[46] W. VA. CODE § 49-8-2 art. IV (1980).

[47] *Id.*

[48] 298 S.E.2d at 245.