

OPINION NO. 72-071

Syllabus:

1. Any construction of Section 2151.354, Revised Code, that would allow commitment of an "unruly" child to the legal custody of the Ohio Youth Commission would be a violation of due process of law, and therefore an improper construction.

2. Both the existing Juvenile Code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio Youth Commission can be made permanent, which hearing requires the presence of the youth involved.

To: William J. Ensign, Director, Ohio Youth Commission, Columbus, Ohio
By: William J. Brown, Attorney General, August 22, 1972

I am in receipt of your request for my opinion, which states the following questions:

"Can those courts in Ohio, authorized to dispose of juvenile cases commit an 'UNRULY' child to the Ohio Youth Commission permanently under the current provisions of the Ohio Revised Code, without first declaring the child to be 'DELINQUENT'?"

"Can those Courts in Ohio authorized to dispose of juvenile cases, change a commitment from 'temporary' to 'permanent' without the hearing specified in Ohio Revised Code 2151.28 (F)? If not, how should the Ohio Youth Commission respond to such commitment changes made without a hearing?"

Your first question involves a consideration of Section 2151.354, Revised Code, which concerns the disposition of an unruly child, and which reads as follows:

"If the child is adjudged unruly the court may:

"(A) Make any of the dispositions authorized under section 2151.353 of the Revised Code;

"(B) Place the child on probation under such conditions as the court prescribes;

"(C) Suspend or revoke the operator's or chauffeur's license issued to such child suspend or revoke the registration of all motor vehicles registered in the name of such child.

"If after making such disposition the court finds, upon further hearing, that the child is not amenable to treatment or rehabilitation under

such disposition, the court may make a disposition otherwise authorized under section 2151.355 of the Revised Code."

The question you have presented involves an interpretation of the last paragraph of Section 2151.354. Its language allows, for an "unruly child, a disposition authorized under Section 2151.355, Revised Code, which includes, among others, a permanent commitment to the legal custody of the Ohio Youth Commission. "Treatment or rehabilitation under such disposition" refers to those dispositions mentioned in Divisions (A), (B) and (C) of Section 2151.354.

Division (A) allows any disposition authorized for neglected or dependent children under Section 2151.353, Revised Code. It allows home placement with court directed supervision; the transfer of temporary custody to the Department of Public Welfare, a county department of welfare that administers child welfare, a county children services board, any other certified organization, a parent or relative, a probation officer for foster home placement, and any institution or agency in this State or another authorized and qualified to provide the care, treatment, or placement that the child requires.

The above dispositions are the ones designed for treatment or rehabilitation and applicable to "unruly" children under Section 2151.353, although the Section also contains another authorization concerning permanent custody which is by its nature only applicable to neglect or dependency cases, and an authorization to commit to the temporary custody of the Ohio Youth Commission for diagnosis, "as provided by division (B) of Section 5139.05 of the Revised Code."

It is important, at this juncture, to notice that the commitment to the temporary custody of the Ohio Youth Commission is not for treatment or rehabilitation, but for "the sole purpose of obtaining * * * a diagnosis." Section 5139.05 (B), Revised Code. The Youth Commission is authorized to do no more than examine, diagnose and submit a report of its findings to the committing court. Therefore, a commitment to the temporary custody of the Youth Commission for diagnosis is not such a disposition as is contemplated by the last paragraph of Section 2151.354, which refers only to those dispositions which include the potential of treatment or rehabilitation.

Division (B) of Section 2151.354 authorizes usual probationary placement and Division (C) allows the court to suspend or revoke either the driver's license or the registration of any motor vehicle registered in the name of such child.

These are the dispositions contained in Section 2151.354 for the "unruly" child. But this Section continues, and authorizes the court to use those dispositions available for "delinquent" children, as found in Section 2151.355, when it is possible for the court to "find, upon further hearing, that the child is not amenable to treatment or rehabilitation under such disposition."

From this language it seems essential that, as a first step, the court would be required to make a prior disposition involving treatment or rehabilitation. It seems clear that, as a second step, after making such a disposition, the court must have the required "further hearing"; and, as a third step, at such hearing, the court must find that the child is not amenable to the "treatment or rehabilitation under such disposition" as was previously

made. If the court has not tried any of the authorized treatment or rehabilitation dispositions, it would be unable to find either that a disposition was made, or that the child is not amenable to treatment or rehabilitation under a particular disposition.

After these three steps have been completed, Section 2151.354 provides for dispositions authorized for delinquent children under Section 2151.355, which includes committing the child to the legal custody of the Ohio Youth Commission.

It would seem, however, that the above statutory interpretation would not be consistent with those principle of due process of law, which are contained in Kent v. United States, 383 U.S. 541 (1966); In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970); McKeiver v. Pennsylvania, 403 U.S. 328 (1971); In re Whittington, 391 U.S. 341 (1967); and Gesicki v. Oswald, 336 F. Supp. 365, 336 F. Supp. 371 (1971), aff'd mem., 32 L. Ed. 2d 113 (May 15, 1972).

Specifically, if an interpretation of the Juvenile Code allowing commitment of "unruly" children to the Ohio Youth Commission is accepted, we would be treating "unruly" children as if they were "delinquent" children. The language of Kent v. United States, supra, at 556, would seem applicable:

"There is evidence * * * that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults, nor the solicitous care and regenerative treatment postulated for children."

The analogy to Gault is also obvious. Prior to Gault, the courts did not extend due process criminal procedural rights to the juvenile court because they labeled the juvenile court a "civil" court rather than a "criminal" one. The Supreme Court in Gault repudiated distinctions based on the civil label-of-convenience. They noted that in many states there is no assurance delinquents will be kept separated from adult criminals, and that juveniles may be placed in or transferred to adult penal institutions after having been found delinquent by a juvenile court. This is still true in Ohio, for if we allow commitment of "unruly" children to the Ohio Youth Commission, such children will be mingled with delinquents, and may be transferred to an institution that houses adult criminals. Section 5139.24, Revised Code. See State v. Fisher, 17 Ohio App. 2d 183 (1969), and In re Tsesmelles, 24 Ohio App. 2d 153 (1970).

Since Gault, the court in Winship has held the "beyond a reasonable doubt" standard applicable in the juvenile court as far as delinquency proceedings are concerned. Since the standard of proof used in "unruly child" cases, is "clear and convincing evidence" under both the Juvenile Code, Section 2151.35, Revised Code, and Juvenile Rules, Juv. R. 29 (E), commitment of "unruly" children via our proceedings based on "clear and convincing" evidence would appear to be violation of Gault and Winship, and therefore a denial of due process of law.

Also, prior to Gault, juvenile law authorities argued that "delinquency" was not "crime", and a finding of delinquency did not involve the stigma of a conviction for crime. While this distinction is logically proper, it was found to be factually incorrect and unacceptable by the Gault court.

The Gault court, supra, at 22 n.30, noted that "fact and pretension" may not coincide. They said, speaking of the delinquent, "[i]t is disconcerting, however, that this term has come to involve only slightly less stigma than the term "criminal" applied to adults.³¹" In footnote 31, the court said "[t]he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision * * *'; or, as used in the Ohio Revised Code, "unruly" child. It would be "pretension" to argue that we can protect the "unruly" child from the stigma of delinquency when we use the most severe disposition for him that is allowable for a "delinquent" child. It is just as difficult today, to distinguish between an "unruly" child and a "delinquent" Gault court found it to distinguish between a "delinquent" and a "criminal." This is especially true in Ohio where the Ohio Youth Commission has statutory authority to transfer any child in its legal custody to a state reformatory.

The most recent case to receive the attention of the Supreme Court of the United States was Gesicki v. Oswald, supra. It lends much support to the above arguments, though it concerned the New York "Wayward Minor" Statute, New York Code of Criminal Procedure, Sections 913-a through 913-dd, a statute applicable to those between sixteen and twenty-one. The definition of "wayward minor", Section 913-a, is similar to our definition of "unruly" child. It provided for treatment, not punishment, though it contemplated commitment to adult penal institutions. A three-judge Federal Court acknowledged, at 366 F. Supp. 377, that Section 913-dd provided, "that an adjudication under §913-a may not disqualify the minor from public employment or deprive him or her of any right or privilege. Nor is a wayward minor 'denominated a criminal . . . nor shall such determination be deemed a conviction.'"

A similar distinction is currently being advanced to distinguish between the "unruly" child and the "delinquent" in Ohio, though it is used to support the argument that we need not extend the Gault-Winship due process rights to the unruly child proceedings since we do not visit upon the unruly child the stigma of delinquency.

Judge Kaufman, speaking about this nomenclature problem for the Gesicki court, at 377, continued as follows:

"Of the two points, the second is at the same time the least tenable and the most pernicious, because it suggests that constitutional protections can be circumvented by 'soft' language. Professor Lon Fuller has aptly captured in a sentence the potential for eroding due process guarantees were labels unquestionably accepted as describing reality: 'When an attempt is made to hide the harsh realities of criminal justice behind euphemistic descriptions, a corrupting irony may be introduced into ordinary speech that is fully as frightening as Orwell's "Newspeak"'. "

The District Court, as did the Supreme Court of the United States in Wirship, distinguished the Wayward Minor Statute from the Juvenile Code. They did note, as a point of distinction, that the Juvenile Code could be distinguished because juveniles in New York may not be incarcerated in adult prisons. This distinction is not available in Ohio.

Both Gault and Winship involved cases where the alleged misconduct of the juvenile was an act which would constitute a crime if committed by an adult. Both also involved a possible long term confinement. It is arguable that due process rights can be restricted to those cases where "a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequences that he may be committed to a state institution", In re Gault, supra, at 13, with the emphasis on "delinquent." But, the argument seems even stronger that due process guarantees should protect a child who has not committed a delinquent act but who is subject to the consequence that he may be committed to a State institution, with the emphasis on "committed to a state institution." Gesicki suggests that the present Supreme Court agrees with this argument. See also Argersinger v. Hamlin, 40 U.S.L. Week 4679 (United States Supreme Court, June 12, 1972), citing In re Gault, supra, at 4681. It seems doubtful that children could be committed to an institution which houses delinquents as a result of a juvenile court hearing which uses the clear and convincing evidence standard which is specified in Ohio for those cases involving "unruly" children without violating Winship. Considering that the children in our cases can be transferred to an adult reformatory, the argument becomes even stronger that due process guarantees apply. Also, if we interpret the statute so broadly as to allow commitment to institutions designed for delinquents, it is quite probable that Section 2151.354, Revised Code, would be declared unconstitutional using the Gesicki rationale.

Thus, I would conclude that commitment of an unruly child to the legal custody of the Ohio Youth Commission would violate the principles of due process of law established in Kent, Gault, Winship and Gesicki. Consequently, Section 2151.354 should not be so construed, because a construction which renders a statute unconstitutional should be avoided. See 10 O. Jur. 2d 242, Constitutional Law, Section 162, and cases cited therein.

Your second question concerns changing a temporary commitment to the Ohio Youth Commission to a permanent commitment without a hearing as specified by the Ohio Revised Code.

As you have stated in your request, the juvenile courts can commit a child to the temporary custody of the Ohio Youth Commission for the purpose of diagnostic study and report as provided in Section 5139.05 (B), Revised Code. Section 2151.353, Revised Code, allows such a commitment, and Sections 2151.354 (A) and 2151.355 (A), Revised Code, specifically allow the juvenile court to make dispositions in accordance with the aforementioned Section 2151.353. It must be emphasized again, however, that Section 5139.05 (B) specifically limits this temporary commitment to one for diagnostic study and report only.

Section 2151.35, Revised Code, provides for both the adjudicatory hearing and the dispositional hearing. It provides that after the child is found to be "unruly", "the court shall proceed immediately or at a postponed hearing, to hear the evidence as to the proper disposition to be made * * *." It is clear that Section 2151.35 requires a hearing, and that it contains only one exclusion, as follows: "the court may excuse the attendance of the child at the hearing in cases involving neglected or dependent children." Section 2151.28 (F), Revised Code, also very clearly provides for notice and hearing.

It is also clear that due process requires that any proper

hearing, which is going to have such serious consequences for the child, demands the attendance of the child. Certainly, this is a "critically important" action, as important as the one in Kent. See also Wempa v. Rhay, 389 U.S. 128 (1967). Since Cault there is little or no doubt that Kent is of constitutional dimension. In re Cault, supra, at 12.

Our new Ohio Rules of Juvenile Procedure are consistent with the existing Juvenile Code. Juvenile Rule 27 allows the nonattendance of the child only in neglect or dependency cases. Rule 29, concerning adjudicatory hearings, talks of informing the parties of the substance of the complaint, and would demand the presence of the child. Rule 34, concerning dispositional hearings, provides that "any party may offer evidence", and requires, at the conclusion of the hearing, that "the court shall advise the child of his right to record expungement and * * * advise the parties of their right to appeal." Without any doubt, the presence of the child is required. Rule 13 does allow, concerning temporary dispositions, ex parte proceedings; but specifies that,

"* * * where the court has proceeded without notice under subdivision (D), it shall give notice of the action it has taken to the parties and any other affected person and provide them an opportunity for hearing concerning the continuing effect of such action."

Even Rule 7, concerning detention, provides for a hearing, and specifies that notice shall be given the child and a guardian if one can be found; and further provides that if the guardian does not receive notice, that the court should rehear the matter promptly.

I must necessarily conclude, therefore, that under both our present Juvenile Code and Rules, a juvenile court cannot change a temporary commitment to the Ohio Youth Commission for diagnosis to a permanent commitment to the legal custody of the Ohio Youth Commission without a proper hearing.

If temporary commitments are changed to permanent commitments without a hearing, in spite of the specific requirements of Sections 2151.35 and 2151.28 (F), there is one possible course of action which the Ohio Youth Commission could pursue. It concerns the manner in which the Ohio Youth Commission reports its findings to the committing court following a temporary commitment for diagnosis. Section 5139.05 (B), Revised Code, provides, in part, as follows:

"When the commission has completed its examination or diagnosis of a child committed temporarily to its custody it shall submit a report of its findings and recommendations to the committing court. * * * Pending the court's disposition of the matter, the commission may retain physical custody of the child unless the court otherwise directs."

While this Section provides that the Commission shall submit a report to the committing court, it does not specify the manner in which such a report must be made. Therefore, an alternative in cases of temporary commitments would be for a representative of the Ohio Youth Commission to deliver both the report and the child to the committing court in person.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. Any construction of Section 2151.354, Revised Code, that would allow commitment of an "unruly" child to the legal custody of the Ohio Youth Commission would be a violation of due process of law, and therefore an improper construction.

2. Both the existing Juvenile Code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio Youth Commission can be made permanent, which hearing requires the presence of the youth involved.