

OPINION NO. 67-068**Syllabus:**

1. In the juvenile court 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 parent 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.

2. Inasmuch as an indigent adult may in juvenile court be found guilty of only a misdemeanor, there is no present requirement that counsel must be appointed to defend him.

3. Juvenile courts have inherent power to appoint counsel for indigents.

4. There is no provision under the statutes which permits the juvenile court to authorize compensation to attorneys appointed to represent indigents.

5. There is no present requirement that the common pleas

court appoint counsel for an indigent indicted for a misdemeanor.

6. There is no authority for a common pleas court to appoint counsel for an indigent accused at the time of arrest.

To: Robert O. Stout, Marion County Pros. Atty., Marion, Ohio
By: William B. Saxbe, Attorney General, July 26, 1967

You request my opinion on the following questions:

"1. In view of the recent cases concerning the right of indigents to court-appointed counsel, in what situations or type cases must an attorney be appointed for (a) an indigent juvenile, (b) an indigent adult charged in juvenile court. (The penalties under Juvenile Code for a adult offenders is imprisonment not more than one year).

"2. Does the Juvenile Court have inherent power to appoint counsel for an indigent?

"3. Is there any provision under the statutes, which by construction, would permit the court authorizing compensation at the present time?

"4. The Common Pleas Court is faced with a similar situation with adults charged with serious crimes and who desire a preliminary examination. We are aware of no authority for the appointment of counsel by the Common Pleas Court prior to the return of an indictment. Then, the statute only authorized compensation for felony indictments.

"(a) Must the Common Pleas Court now appoint counsel for an indigent indicted for a misdemeanor?

"(b) Is there any authority, other than inherent power of a Common Pleas Court, to appoint counsel at the time of arrest, if determined that the defendant is indigent."

As reflected in your request and the letter attached thereto of the Honorable Edward J. Ruzzo, Judge of the Juvenile Court of Marion County, your inquiries are generated as a result of the recent decisions of the United States Supreme Court in Kent v. United States, 383 U.S. 541, 16 L Ed 2d 84, 86 S Ct 1045 (March 21, 1966) and In re Gault, 35 Law Week 4399 (May 15, 1967).

Headnote 11 of Kent, which is mentioned by Judge Ruzzo in his letter, is misleading when it says:

"Counsel must be afforded to a minor in proceedings involving the question whether the Dis-

trict of Columbia Juvenile Court should waive its exclusive jurisdiction and authorize the minor to be subjected to a felony prosecution in the District Court."

The fact is that Kent had counsel retained for him by his Mother and accordingly the question of counsel was not at issue. Further, it had previously been provided that in the District of Columbia minors were entitled to counsel in waiver proceedings.

However, even though Kent was based to a substantial extent on both the Juvenile Court Act of the District of Columbia, and apparently inconsistent decisions of the Court of Appeals for the District of Columbia Circuit, the opinion of Mr. Justice Fortas portended his conclusions which were to be adopted by the court in Gault.

In Kent he had commented:

"While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, 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.

"This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further."

In the Juvenile Court of Gila County, Arizona, Gerald Francis Gault, age 15, was committed for delinquency. The Gault case arrived in the United States Supreme Court on appeal from a judgment of the Supreme Court of Arizona affirming the dismissal of a petition for a writ of habeas corpus. In reversing the Arizona Supreme Court, the United States Supreme Court held as follows:

1. Notice, (of the delinquency hearing) to comply with due process requirements, must be given sufficiently in advance of scheduled court pro-

ceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity.

2. The 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 parent 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.

3. The constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.

4. Absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of confrontation and in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

The question of waiver of the foregoing rights is alluded to at various points in the opinion but I believe that any substantial reliance on such allusion is dangerous in the light of previous announcements of the court that waiver of a constitutional right will not be lightly presumed.

The power of a court to appoint counsel, even in the absence of a statute, cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment. Powell v. Alabama, 77 L Ed 158 (172); 287 U.S. 45 (73).

It appears that the only provision for appointing and compensating counsel for an indigent accused appears in Sections 2941.50 and 2941.51 of the Revised Code. Section 2941.50, supra, is prefaced with the provision:

"After a copy of an indictment has been served or opportunity had for receiving it, or if indictment be waived under Section 2941.021 [2941.02.1] of the Revised Code, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel * * *."

Accordingly, we have statutory provision for appointing counsel who will be compensated only after indictment or after waiver of indictment.

The question of the requirement for the appointment of counsel for preliminary hearing has, to date, been disposed of by holdings that, in Ohio, failure to appoint counsel prior to arraignment deprives an accused of none of his constitutional rights. Dean v. Maxwell, Warden, 174 Ohio St. 193; Everhart v. Maxwell, Warden, 175 Ohio St. 514 (516); Freeman v. Maxwell, Warden, 177 Ohio St. 93 (94). See also United States ex rel. Cooper v. Reincke, 333 F. 2d 608 (1964).

Accordingly, I advised in Opinion 65 - 189, Opinions of the Attorney General for 1965:

"The Court of Common Pleas is not authorized by state law (specifically Sections 2941.50 and 2949.51, Revised Code) to pay for providing counsel at the preliminary hearing of an indigent person accused of a felony."

Regarding the question of the requirement to appoint counsel for an indigent charged with a misdemeanor there have been at least three intermediate federal courts which have held that this must be done. Harvey v. Mississippi, 340 F. 2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F. 2d 106 (5th Cir. 1965); Evans v. Rives, 126 F. 2d 633, U.S.C.C.A. for the District of Columbia (1942). The first two of these cases involved convictions in state courts. The Court of Appeals for Lucas County recently had occasion to consider this question in City of Toledo v. Frazier, 10 Ohio App. 2d 51 (April 19, 1967) and, although the decision of the court below was reversed on other grounds, branches 2, 3, and 4 of the syllabus held:

"2. There is no statutory or constitutional requirement in Ohio that a defendant charged with a misdemeanor in violation of a city ordinance which parallels a state statute be apprised of his right to counsel and, if indigent, to an assignment of counsel by the court at public expense.

"3. The rule of Gideon v. Wainwright, 372 U.S. 335, applies only to felony cases.

"4. The law of Ohio should be followed until a mandate comes from the Supreme Court of the United States that the concept of the right to counsel at public expense under the Sixth Amendment should be embraced within the due process clause of the Fourteenth Amendment applicable to state criminal procedure."

With respect to compensation by the public of an attorney for services under appointment by a court in defending an indigent accused in the absence of a statute providing therefor, I am unaware of any decisions in Ohio. However, the great weight of authority supports the view that in the absence of statute, an attorney who has been assigned by the court to defend an indigent accused cannot recover compensation therefor from the public. 130 A.L.R. 1440. Throughout the cases on the subject I find that two principles are reiterated; first, that compensation for public service belongs exclusively to the legislative department of government, and second, that the duty of attorneys to furnish gratuitous service is correlative to the rights and privileges which have been conferred upon them.

With respect to your last question regarding appointment of counsel by the court of common pleas at the time of arrest, it must be remembered that the court has not yet acquired jurisdiction. Jurisdiction of the court of common pleas is invoked by the return of a valid indictment. Dowell v. Maxwell, Warden, 174 Ohio St. 289. Therefore, there is no authority for a common pleas court to appoint counsel for an indigent accused at the time of arrest.

It is, therefore, my opinion and you are hereby advised:

1. In the juvenile court 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 parent 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.

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