STATE OF MICHIGAN

COURT OF APPEALS

In re EE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

EE,

Respondent-Appellant.

FOR PUBLICATION
April 13, 2023
9:15 a.m.

No. 358457
Eaton Circuit Court
Family Division
LC No. 21-020559-DL

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

AE,

Respondent-Appellant.

No. 358458
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Before: GLEICHER, C.J., and BOONSTRA and CAMERON, JJ.

GLEICHER, C.J.

Children prosecuted for truancy have a right to counsel conferred by statute and court rule. They may also waive their right to counsel. But before accepting a waiver of counsel, a judge must find that the child unequivocally selected self-representation. The judge must also determine that the child's unequivocal decision to proceed pro se was made knowingly, intelligently, and voluntarily.

Here, the trial court ruled that the minor respondents waived their right to counsel despite that they never requested self-representation. The court exacerbated this error by neglecting to inquire regarding the children's understanding of their right to counsel, the ramifications of its waiver, or the risks of self-representation. The court's improper waiver finding and its failure to determine the children's capacity and capability to represent themselves deprived AE and EE of their right to counsel. We vacate the trial court's orders of disposition following its adjudication of guilt of school truancy, MCL 712A.2(a)(4), and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

EE and AE are brother and sister. Timothy Elmoore is their father. EE was 15 at the time of the truancy hearing, and AE was 13. Both were in the eighth grade. Even before the Covid-19 pandemic, EE and AE attended a "virtual" school with online attendance. In a 2021 petition for truancy brought under MCL 712A.2(a)(4), the prosecution alleged that between December 9, 2020 and March 11, 2021, EE and AE missed 28 and 25 days of school, respectively. The statute provides that a trial court may exercise jurisdiction over a juvenile if:

> The juvenile willfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought. As used in this sub-subdivision only, "learning program" means an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar. [MCL 712A.2(a)(4).]

The trial court appointed attorney Kristen Hoel as counsel for both children. At the Zoom preliminary hearing, Hoel advised that Elmoore had refused to allow her to communicate confidentially with the children. The prosecuting attorney suggested that "Mr. Elmoore can either hire an attorney to represent them in this matter . . . or . . . he can decline to have them represented." As discussed below, the prosecuting attorney's statement is only partially accurate. A parent can hire counsel for his or her children, but he cannot unilaterally foreclose his or her child's right to counsel. Rather, MCR 3.915(A)(2)(d) provides that "[t]he court *shall* appoint an attorney to represent the juvenile in a delinquency proceeding if . . . those responsible for the support of the juvenile refuse or neglect to retain an attorney for the juvenile, and the juvenile does not waive an attorney[.]" (Emphasis added.)[1] Similarly, MCL 712A.17c(1) states that "in a

[1]MCR 3.903(A)(5) explains that the term "delinquency proceeding" refers to "a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3)." MCR 3.903(B)(3) states that an " 'offense by a juvenile' means an act that violates a criminal statute, a criminal ordinance, a traffic law, or a provision of MCL 712A.2(a) or (d)." This truancy proceeding was brought under MCL 712A.2(a)(4), and falls within the definition of a "delinquency proceeding."

proceeding brought under section 2(a) . . . of this chapter . . . the court shall advise the child that he or she has a right to an attorney at each stage of the proceeding."

Parents possess a fundamental interest in the companionship, custody, care and management of their children, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92, 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). However, this right coexists with a child's right to counsel. In most situations, a parent's interest in effective representation for a child aligns with the child's right to effective and independent counsel. Usually, a parent's participation will inform and enhance the child's attorney-client relationship. At other times the parent's interest may diverge from the child's.

Here, the attorneys and the court inaccurately assumed that Elmoore could control his children's access to counsel. Elmoore's failure to cooperate with his children's right to counsel was a recurring theme and contributed to the error that ensued.

After learning that Hoel had never spoken to her clients, the court nevertheless took testimony from the Eaton Regional Education truancy court coordinator. And Hoel conducted cross-examinations regarding both children. When the prosecutor requested that the petition be authorized, Hoel advised that Elmoore had informed her that "he will represent his children." Hoel argued that "the petitions against the children should be dismissed, and set a petition against or a complaint against Mr. Elmoore would be more appropriate."

The court found probable cause to charge both children with truancy, continuing, "I am also obviously very concerned about the reason for that and . . . the reluctance of the father to participate in the court proceedings here." Turning to Elmoore, the court inquired, "And, Mr. Elmoore, are you wishing to have Ms. Hoel continue to represent your children?" Elmoore replied that he was not. The court excused Hoel, ruling, "[T]he children then will not retain or not have court appointed attorneys for them at their father's insistence."

During the preliminary hearing the court also determined to show cause Elmoore for preventing his children from attending the Zoom hearing. Elmoore insisted that they were "present" with him, although they apparently never appeared on the screen. The ground for the court's show cause as stated in its signed order was "failing to present children for court hearings."

Ten days after the preliminary hearing, the court conducted a pretrial hearing and the promised show cause hearing. The court inquired of Elmoore whether the children were "going to be represented by counsel that you're hiring, or are they going to be unrepresented?" Elmoore responded, "I'll make that decision at a later date." The court scheduled a trial of the children's cases and turned to the show cause hearing for Elmoore, offering him the option of a court-appointed attorney or self-representation. Elmoore chose to be represented by court-appointed counsel.

Elmoore and the children later appeared in-person for hearings regarding the truancy petitions and the show cause order with a retained attorney, Gidget James. Before the prosecutor could even call a witness, James moved to withdraw, declaring:

> I have not even had an opportunity to speak with these children. . . . Dad won't allow me to speak with them. . . . [H]e did say I could speak with them if he is present, and I tried that, but he is dictating every answer. So . . . I'm unable to even present a defense for them [']cause I don't even know their position on what has taken place.

James added that her firm had been retained to represent Elmoore, and she only belatedly learned that she was expected to represent the children in the truancy cases while her colleague represented Elmoore regarding the contempt charge.

The prosecuting attorney expressed that the children "should be given another opportunity at an attorney, given that they are juveniles." She added "that it should be made very clear to their parents that they cannot come up here and represent them as their parents. They - - the children would be up here representing themselves, and I think that's something that should be taken into account." The court indicated that it would appoint counsel for the children "because they shouldn't have to represent themselves." At the prosecuting attorney's suggestion, however, the court announced that it would also consider appointing only "stand-by" counsel for the children:

> *[The Prosecutor]*. Just given the fact that the attorney has been an issue multiple times with this case, I would just ask that any attorney that be appointed, um, if they do not wish to have the attorney represent them as the attorney, that the attorney remains as stand-by counsel.
>
> * * *
>
> *The Court*. Yes, I will do that. And if, you know, if the . . . father does what he's done in the past and says he won't deal with them, we'll have them by stand-by, and then that won't necessitate that the children will have to represent themselves, but they'll have an attorney sitting by them if they have any questions.

The prosecutor then made a plea offer directly to the unrepresented children. The court asked the children if they understood the offer, and AE replied that she did. At that point the prosecutor apparently had second thoughts and put on the brakes, proposing that further questioning await the appointment of counsel. The court turned to Elmoore, reminding him that he was charged with contempt for "failing to make your children available for court hearings; . . . [and] for . . . not sending your children to school, as the law provides[.]" Because neither Elmoore nor the children had counsel, the court adjourned both the truancy and the show cause proceedings.

The court then appointed Raymond Nicol to represent the children. Two days before the scheduled truancy hearing, Nicol moved to withdraw. During a Zoom hearing, Nicol advised that he had been "blocked" by Elmoore from communicating with the children. Citing a federal case, Nicol asserted that "where there is a conflict between a party and their counsel [that] is so great it

results in a lack of communication preventing an adequate defense," the attorney should be allowed to withdraw.[2] The prosecutor urged that Nicol "be asked to stay on as standby counsel."

The court then engaged EE and AE in the following colloquy regarding their representation by counsel:

> *The Court*. And, [AE], I see you there on the picture; what would you like to say as far as your representation at trial?
>
> *AE*. (Inaudible).
>
> *The Court*. Let me ask you the question. You do understand you have a trial on this coming Monday; do you understand that?
>
> *AE*. Yes.
>
> *The Court*. Okay. And you've heard your appointed attorney's motion to withdraw: is that what you want?
>
> *AE*. Yes.
>
> *The Court*. You want him to withdraw? No, don't look to your dad; look to me.
>
> *AE*. I'm looking to you.
>
> *The Court*. Okay. Do you want him to withdraw? I mean, let me tell you this, trial is going to go on Monday. You have basically three choices, either you use your court appointed attorney or you hire your own attorney or you represent yourself; those are your three choices. What is the choice?
>
> *AE*. I'll say yes.
>
> *The Court*. Say yes to what; you have three choices.
>
> *AE*. *I'll say yes to withdraw the attorney*.
>
> *The Court*. Okay. But then what are you going to do in place. Are you going to represent yourself or are you going to hire another attorney?
>
> *AE*. We'll decide later. I'll decide on that later.
>
> *The Court*. You understand trial's on Monday.

[2] Elmoore was not Nicol's client, the children were.

AE. I understand.

The Court. Okay. Thank you. And [EE], are you there?

EE. Here.

The Court. Mr. Elmoore, you need to be quiet right now. I need to talk to your son.

Mr. Elmoore. Well, I'm just telling him to come around the camera. I can still speak.

The Court. Okay. Thank you. Can you see me okay, [EE]?

EE. Yes.

The Court. And you understand you have a trial on Monday, do you understand that?

EE. Yes.

The Court. And so again, you have the same three choices, either you can use the court appointed attorney or you can hire your own attorney or you can represent yourself; which of those three options do you want to do?

EE. *Tell ya later*.

The Court. Okay. You understand I'm not going to adjourn the trial? It's going to happen. Do you understand that?

EE. Yes.

The Court. Okay. Thank you. [Emphasis added.]

The court then denied Nicol's motion to withdraw:

> Mr. Nicol, because of the unique circumstances in this case, . . . normally I would let you withdraw. What I'm going to let you do, however, is not participate unless you're asked to. So, I just would like to have you in the courtroom during the trial. Okay. And if your [clients] come to you and ask you to represent them, you'll do the best that you can understanding that there will be no other adjournment. And that will not be held against you, . . . but if you could just be in the courtroom if they wish to consult with you.

At the joint truancy hearing held two days later, the court did not revisit the subject of self-representation with the children. The children represented themselves. They asked the prosecution's witnesses a handful of questions and offered no evidence. They did not consult Nicol during the hearing. The trial court found beyond reasonable doubt that AE and EE had committed the offense of truancy.

II. ANALYSIS

Represented in this Court by the Juvenile Justice Clinic at the University of Michigan Law School, the children make several arguments centering on the trial court's ruling that they would represent themselves. The children also challenge the sufficiency of the evidence supporting their truancy adjudications. We find the arguments related to counsel dispositive.[3]

In re Gault, 387 US 1, 36; 87 S Ct 1428; 18 L Ed 2d 527 (1967), arose from a delinquency proceeding in which a 15-year-old boy was committed "as a juvenile delinquent" to a state "industrial school" until his 21st birthday. His offense involved his alleged use of "vulgar, abusive or obscene language," a misdemeanor. Gault did not have counsel at any point, and was never advised that he had a right to counsel. The United States Supreme Court reversed the lower court's judgment, holding that in a delinquency proceeding, a juvenile needs 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 and submit it." The Court summarized, "The child requires the guiding hand of counsel at every step in the proceedings against him." *Id.* (quotation marks and citation omitted). The right to counsel in *Gault* rested on the Due Process Clause of the Fourteenth Amendment, which

> 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. [*Id.* at 41.]

This prosecution is premised on alleged truancy, not "delinquency" as that term was used in *Gault*.[4] Truancy is sometimes referred to as a "status offense," and has been described as a "noncriminal behavior that would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult." *Juvenile Status Offenses Fact Sheet*, Center for Children and the Law, American Bar Association, available at

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[3] Although the trial court failed to make the necessary findings regarding truancy on the record contrary to MCL 712A.2(a)(4), the evidence sufficiently supports that the children were truant. We note, however, that the prosecution's evidence was unchallenged by respondents. On remand, the prosecution will be required to prove truancy beyond a reasonable doubt. In particular, the prosecution must prove and the court must find on the record that "the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems[.]" *Id.* The record supports that "learning program personnel" repeatedly attempted to meet with Elmoore and the children, but were thwarted by Elmoore's refusal to engage with them. The trial court should address the evidence presented in light of this statutory mandate.

[4] The child in *Gault* was prosecuted under an Arizona statute specifying that a "delinquent child" included one who "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof." *In re Gault*, 387 US 1, 8; 87 S Ct 1428; 18 L Ed 2d 527 (1967) (quotation marks and citation omitted).

<http://act4jj.org/sites/default/files/ckfinder/files/factsheet_17.pdf> (accessed February 15, 2023). The United States Supreme Court has never clearly held that due process requires that child status offenders must be afforded counsel. *Gault* suggests that when a child's liberty is at stake, however, the appointment of counsel may be required for those whose parents cannot afford to retain counsel.

Michigan children adjudicated guilty of truancy are potentially subject to a loss of their liberty, but only when a court is convinced that either the child or society would face a risk of harm with home placement. Under MCL 712A.2(a)(4), a family court may take jurisdiction of a juvenile if it finds that the juvenile meets the criteria for truancy spelled out in the statute. If the court finds that the juvenile is truant, it "*shall* order the juvenile returned to this or her parent if the return of the juvenile to his or her parent would not cause a substantial risk of harm to the juvenile or society." MCL 712A.18(1) (emphasis added). If a court determines that a return to home would "cause a substantial risk of harm to the juvenile or society," the court may "place the juvenile in a suitable foster care home subject to the court's supervision," MCL 712A.18(1)(c), or "place the juvenile in or commit the juvenile to a private institution or agency . . ." MCL 712A.18(1)(d), or "commit the juvenile to a public institution . . ." MCL 712A(1)(e). And if a court finds that "the juvenile has violated a court order under section 2(a)(2) to (4)," the court may "order the juvenile to be placed in a secure facility." MCL 712A.18(1)(k).

We need not decide today whether the children in this case had a right to counsel under the Due Process Clauses of either the United States or Michigan Constitutions, particularly since that issue was not raised or briefed by the parties. Rather, we hold that the children had a right to counsel in the truancy proceedings under MCL 712A.17c and MCR 3.915(a). This case hinges on a related issue: whether the trial court correctly determined that the children were properly required to represent themselves without the assistance of counsel.

Although the right to counsel involved here arises from a statute and a court rule rather than the Constitution, a court must "indulge every reasonable presumption against waiver" of the right to counsel, and should not allow a defendant to proceed pro se if any doubt casts a shadow on the waiver's validity. *People v Williams*, 470 Mich 634, 641-642; 683 NW2d 597 (2004) (quotation marks and citations omitted). Self-representation presents "dangers and disadvantages," and "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta v California*, 422 US 806, 834-835; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Although this case does not implicate the Sixth Amendment, the jurisprudence surrounding self-representation in criminal cases informs our analysis.

Whether made by a child or an adult, a request for self-representation must be clear and unequivocal. This prerequisite protects an accused from the consequences of a poorly considered or inadvertent waiver of a right to counsel, and aids the court in discerning the accused's intent and protecting the right.

The presence of counsel helps to maintain the integrity of the judicial process. For those unwilling participants in the process known for their "immaturity, irresponsibility, impetuousness, and recklessness," *Miller v Alabama*, 567 US 460, 476; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (cleaned up), an unequivocal waiver of counsel is equally or more essential. MCL 712A.17c(1)

encapsulates this principle by mandating that in a proceeding such as this one, the court must "advise the child that he or she has a right to an attorney at each stage of the proceeding," MCL 712A.17c(1), and must appoint an attorney if, among other reasons, "the child does not waive his or her right to an attorney." MCL 712.17c(2)(c). The statute permits a juvenile to waive his or her right to counsel, but the waiver "shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made." MCL 712A.17c(3).

MCR 3.915(A)(3) similarly provides that a

> juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on subrule (A)(2)(e).[5] The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.

In *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), our Supreme Court established three "requirements" that must be met before a court grants a criminal defendant's request for self-representation. These requirements dovetail with MCR 3.915 and MCL 712A.17c. "First," the Court declared, "the request must be unequivocal." *Anderson*, 398 Mich at 367. Here, the children never "requested" self-representation. Rather, the trial court asked AE whether she wanted Nicol to "withdraw," and proceeded to tell her: "You have basically three choices, either you use your court appointed attorney or you hire your own attorney or you represent yourself; those are your three choices. What is the choice?" AE eventually replied that she would "say yes to withdraw the attorney." AE never requested self-representation even equivocally, and never agreed to it on the record. When given the same three choices, EE responded that he would "tell ya later." Like AE, EE never requested self-representation and his answers to the court's inquisition fall far short of an unequivocal request to proceed pro se.

Anderson's second requirement is that "once the defendant has unequivocally declared his desire to proceed Pro se the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily." *Id*. at 368. Even were we to hypothetically assume that AE and EE unequivocally requested self-representation, the trial court never inquired regarding whether they understood this choice, or were forced into it by their father. This inquiry was particularly critical under the circumstances presented, as the record supports that Elmoore, not the children, created a conflict with appointed counsel and that Elmoore, not the children, was the force driving the trial court's decision to deprive the children of counsel. And in violation of MCL 712A.17c(1), the court failed to "advise the child that he or she has a right to an attorney at each stage of the proceeding." The court began the truancy trial by announcing that it had appointed Nicol as standby counsel and that "at the last hearing" the "two minors . . . decided they did not" want Nicol to represent them. But the court never re-engaged the children regarding their right to

[5] MCR 3.915(A)(2)(e) states that "[t]he court shall appoint an attorney to represent the juvenile in a delinquency proceeding if . . . the court determines that the best interests of the juvenile or the public require appointment."

counsel, or whether they had reconsidered the wishy-washy answers they had given at the previous hearing.

Michigan's Rules of Professional Conduct apply with equal force to attorneys for parents and for children. A child's right to counsel, like an adult's, encompasses the right to zealous representation by an independent advocate, as MCR 3.915(A)(1) and (2) reflect. A parent may not foreclose his or her child's access to counsel. MCR 3.915(A)(2)(d). Counsel for a juvenile must also be competent. MRPC 1.1. In the juvenile law context, a competent attorney understands that a parent may not impede a child's right to counsel, and that an attorney representing a child does not simultaneously represent the child's parent. On remand, we encourage the court to take steps to ensure that the children be afforded a meaningful opportunity to consult with counsel and to knowingly, understandingly, and voluntarily relinquish their right to counsel, if they unequivocally decide to do so.

Anderson's "third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Anderson*, 398 Mich at 368. There is no evidence that the children behaved inappropriately while conducting their own defense. Relatedly, however, MCR 3.915(2)(e) requires that a court appoint an attorney for a juvenile in a delinquency proceeding if "the court determines that the best interests of the juvenile or the public require appointment." The court's failure to consider the children's best interests compounded its other errors. Given the pitfalls of self-representation even for adults, the circumstances under which self-representation will serve a child's best interests are likely to be extremely rare.

Finally, we note that the trial court's errors were not remedied by appointed counsel's continued presence in the courtroom; "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." *People v Dennany*, 445 Mich 412, 446; 519 NW2d 128 (1994). This is not a criminal proceeding and the right to counsel we have considered is rooted in non-constitutional sources. Applying plain error review, we hold that the trial court's error in depriving the children of counsel seriously affected the fairness and integrity of the proceedings, necessitating reversal. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We vacate the orders of disposition, and reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra
/s/ Thomas C. Cameron