

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

No. 358457

Eaton Circuit Court

Family Division

LC No. 21-020559-DL

In re AE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

AE,

Respondent-Appellant.

No. 358458

Eaton Circuit Court

Family Division

LC No. 21-020558-DL

Before: GLEICHER, C.J., and BOONSTRA and CAMERON, JJ.

GLEICHER, C.J. (*concurring*).

The lead opinion holds that children prosecuted for truancy have a right to counsel under MCL 712A.17c(2) and MCR 3.915(a). In my view, children at risk of losing their liberty also have a *constitutional* right to counsel under the Due Process Clauses of the United States and Michigan Constitutions. I write separately to explain my reasoning, and to make a couple of additional points.

In re Gault, 387 US 1, 36; 87 S Ct 1428; 18 L Ed 2d 527 (1967), explained that a child accused of “delinquency”

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 and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him. . . . [T]he 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 a state institution until the juvenile reaches the age of 21. [Quotation marks and citation omitted.]

A “delinquency” proceeding as described in *Gault* potentially “subject[s] [a child] to the loss of his liberty for years,” and “is comparable in seriousness to a felony prosecution.” *Id.* Under Michigan law, truancy and other status offenses permit a court to deprive a child of his or her liberty by ordering placement outside the home. *Gault* teaches that when a child’s liberty is at stake, a court must appoint counsel when a child’s parent cannot afford to hire a lawyer. For this reason, *Gault* supports that children such as AE and EE had a right to counsel grounded in the Due Process Clauses of the United States and Michigan Constitutions, which also means that the denial of this right should be considered structural error.¹

Even when a child is not at risk of losing her liberty, there may be serious and long-lasting collateral consequences of an adjudication for a status offense. As stated in Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 Duke Forum for Law & Social Change 139, 141 (2011), available at <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1020&context=dfslsc>> (accessed February 27, 2023):

Prosecuting students for truancy often generates harmful direct and collateral consequences: incarceration, fines, involuntary community service, recursive court involvement, loss of driving privileges, imposition of curfews, specification of conditions of probation that require students to meet unrealistic school performance standards, unwarranted disclosures of personal information, investigations of family dependency and neglect, mental health consequences, monitoring students through radio frequency identification technology (RFID), grade reductions, and others.

Many of these consequences strongly resemble the penalties exacted for the commission of serious crimes. “[T]hese conditions often tether a juvenile to the court system indefinitely, a harsh consequence for children who are not committing ‘crime.’” Rivkin and McGee, *Truancy Lawyering in Status Offense Cases: An Access to Justice Challenge*, American Bar Association (October 28, 2014), available at <<https://www.americanbar.org/groups/litigation/committees/>

¹ “Although our Due Process Clause is interpreted coextensively with the Due Process Clause of the United States Constitution,” Michigan Courts may independently determine whether our state Constitution provides due process protections beyond those identified by the federal courts. *Mays v Snyder*, 323 Mich App 1, 66; 916 NW2d 227 (2018).

childrens-rights/articles/2014/truancy-lawyering-status-offense-cases-access-to-justice-challenge/> (accessed February 27, 2023). A lawyer's guidance may help a child and his or her family avoid a spiral of escalating punishments, instead directing them toward more holistic solutions to truancy.

MCL 712A.17c goes part of the way toward fully protecting a child's right to counsel, providing for the appointment of counsel in proceedings brought under MCL 712A.2(a) or (d):

(1) In a proceeding under section 2(a) or (d) of this chapter or a proceeding regarding a supplemental petition alleging a violation of a personal protection order under section 2(h) 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.

(2) In a proceeding under section 2(a) or (d) of this chapter, the court shall appoint an attorney to represent the child if 1 or more of the following apply:

- (a) The child's parent refuses or fails to appear and participate in the proceedings.
- (b) The child's parent is the complainant or victim.
- (c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
- (d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.
- (e) The court determines that the best interests of the child or the public require appointment.

MCL 712A.2(a) and (d), however, set forth a hodge-podge of statutory violations requiring the appointment of counsel, including murder and arson offenses and "lesser included offense[s]" of those listed, but not the possession of certain weapons or the possession or delivery of many controlled substances. This case illustrates the difficulties in parsing whether a child has been charged with a form of "delinquency" or a "status offense" not included within the reach of MCL 712A.17c(2), such as being a minor in possession of alcohol. Because most of the offenses for which children may be adjudicated place them at risk of out-of-home confinement, I believe that due process requires the appointment of counsel whenever a child's liberty may be threatened as a consequence of the offense charged and the family lacks the resources to retain counsel.

Regardless of the source of the right to counsel, lawyers representing children owe their clients the same ethical obligations as those appointed to represent adults. Here, throughout the proceedings that followed the preliminary hearing, the attorneys and the court failed to effectively address Elmoore's control of his children's access to counsel. Attorney after attorney withdrew from representation of the children rather than seeking the court's aid in meaningfully dealing with Elmoore's interference. And the court never instructed Elmoore to desist.

We do not know why the Elmoore children failed to attend school for so many days. The evidence suggests that their absences were not due to Internet issues. Were the children precluded

from attending school by a parent who was using the family computer or in some other way? It is possible and unknown. Only by confidentially exploring a child's potential conflicts with a parent can a lawyer do her job. The court and the attorneys who represented the children apparently believed that Elmoore had a right to prevent his children from meeting confidentially with their lawyers. A court order compelling Elmoore to allow his children to meet privately and confidentially with their counsel was one solution to Elmoore's interference, but apparently was never considered.

More relevant to the contested issues presented in this case, I urge our Supreme Court to consider the adoption of a court rule requiring judges to make specific inquiries and record findings before accepting a child's waiver of counsel. A Colorado statute offers good starting point:

(c) The court may accept a waiver of counsel by a juvenile only after finding on the record, based on a dialogue conducted with the juvenile, that the juvenile:

(I) Is of a sufficient maturity level to make a voluntary, knowing, and intelligent waiver of the right to counsel;

(II) Understands the sentencing options that are available to the court in the event of an adjudication or conviction of the offense with which the juvenile is charged;

(III) Has not been coerced by any other party, including but not limited to the juvenile's parent, guardian, or legal custodian, into making the waiver;

(IV) Understands that the court will provide counsel for the juvenile if the juvenile's parent, guardian, or legal custodian is unable or unwilling to obtain counsel for the juvenile; and

(V) Understands the possible consequences that may result from an adjudication or conviction of the offense with which the juvenile is charged, which consequences may occur in addition to the actual adjudication or conviction itself.

(d) The appointment of counsel pursuant to this subsection (2) continues until:

(I) The court's jurisdiction is terminated;

(II) The juvenile or the juvenile's parent, guardian, or legal custodian retains counsel for the juvenile;

(III) The court finds that the juvenile or the juvenile's parents, guardian, or other legal custodian has sufficient financial means to retain counsel or that the juvenile's parents, guardian, or other legal custodian no longer refuses to retain counsel for the juvenile; or

(IV) The court finds the juvenile has made a knowing, intelligent, and voluntary waiver of the juvenile's right to counsel, as described in subsection (2)(c) of this section. [Colo Rev Stat Ann 19-2.5-605(2).]

This case demonstrates the need for clear-cut rules governing the process of evaluating a child's purported waiver of counsel.

One final point. This case also illustrates that an adversarial intervention for truancy resembling prosecution for a crime does not help children or their parents. The Elmoore children are now being home-schooled. An approach focused on engaging them in education rather than exerting the power of the state, thereby alienating the children and their parents, likely would have produced a far more positive outcome.

/s/ Elizabeth L. Gleicher