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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-432 / 88-1187

STATE OF IOWA,

Appellee,

507

vs.

RONDOLD REECE WRIGHT,

Appellant.

Appeal from the Iowa District Court for Polk County, Harry Perkins and Peter A. Keller, Judges.

Appellant appeals his conviction for sexual abuse in the third degree. **REVERSED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant State Public Defender, for the appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; and James Smith, Polk County Attorney; for the appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

SCHLEGEL, P.J.

Appellant appeals his conviction of sexual abuse in the third degree. The incident occurred when he was a minor. The juvenile court waived its jurisdiction, and the defendant was convicted as an adult. We reverse the trial court.

Appellant contends he was denied his constitutional right to confront and cross-examine witnesses during the juvenile court hearing which led to the juvenile court's waiver of jurisdiction. He complains that the State introduced a juvenile probation officer's report recommending a waiver of juvenile court jurisdiction, even though the author of the report was unavailable for testimony or cross-examination.

Rondold Reece Wright, who was seventeen years old at the time, was accused of sexual abuse in the third degree. Initially, the State filed a delinquency petition in juvenile court. However, the State then filed a motion asking the juvenile court to waive its jurisdiction so Wright could be tried as an adult. After a waiver hearing, the juvenile court did waive its jurisdiction. Wright was subsequently tried as an adult and convicted.

Wright has appealed from his conviction. His sole issue is a challenge to something which occurred during the juvenile court waiver hearing. He complains that the State introduced a juvenile probation officer's report

recommending a waiver of juvenile court jurisdiction, even though the author of the report was unavailable for testimony or cross-examination due to National Guard duty.

Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. On issues concerning violation of constitutional safeguards, however, this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the record under which the ruling on those constitutional rights was made. State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Appellant contends he was denied the right to confront and cross-examine the juvenile probation officer who had prepared a report regarding the waiver of jurisdiction under Iowa Code section 232.45(4). A hearing is required under section 232.45(2) of the Iowa Code. Section 232.45(5) states that all relevant and material evidence shall be admitted. The State argues that section 232.45(5) means that all relevant evidence must be admitted, regardless of the opportunity to cross-examine witnesses. In order to properly interpret this code section, it must be read in light of the previous interpretations of the hearing requirement by the Iowa Supreme Court and the requirements imposed by the United States Constitution.

The Iowa Supreme Court discussed the requirements of a hearing in In re Brown, 183 N.W.2d 731, 733 (Iowa 1971).

Brown dealt with a juvenile court proceeding under the old code section 232.72 (1966); however, the principles set out regarding hearing procedure are still valid. The present statute still requires a hearing. The only real change is that the rules of evidence have been relaxed slightly to allow for the admission of evidence normally excluded by technical rules. The court in State v. Anthony, 239 N.W.2d 850, 851 (Iowa 1976), reiterated the position in Brown by stating: "[T]he hearing afforded must be a meaningful one, including the production of evidence relied on in asking the transfer and the right to cross-examine with the assistance of counsel." The importance of the officer's report is unquestioned. The Iowa Code specifically requires the officer to file a report and the judge obviously relies on that report. If the appellee's argument is correct, the State need only present the report which would, in effect, reduce the hearing to a meaningless formality. Iowa law has sufficiently adhered to the importance of cross-examination at a hearing, that it is necessary for the legislature to specifically deny the juvenile the opportunity. This is especially true when the probation officer's report is in question. The Iowa legislature has failed to specifically deny cross-examination to the juvenile at the waiver hearing and therefore it must be allowed.

The United States Constitution also appears to require constitutional safeguards at a waiver hearing. The United States Supreme Court in Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), discussed the nature of a juvenile court hearing waiving jurisdiction. In Kent, the juvenile was denied a hearing and denied access to certain social service documents. In addition, the court failed to set forth reasons for the waiver of jurisdiction. The court in Kent observed that "[b]ecause the state is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases." Kent, at 383 U.S. 555, 86 S. Ct. 1054, 16 L. Ed. 2d 94. The court expressed concern at this deprivation but declined to hold that juveniles are entitled to the same protections as adults in criminal proceedings. Id. The court then drew the distinction between an ordinary juvenile proceeding and a waiver of jurisdiction.

> It is clear beyond dispute that the waiver of jurisdiction is a critically important action determining vitally important statutory rights of the juvenile.
>
> [P]etitioner--then a boy of 16--was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the exclusive jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and

> transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.

Kent, at 383 U.S. 556, 86 S. Ct. 1055, 16 L. Ed. 2d 95.

The court in Kent recognized the importance of a waiver hearing and that it represents a tremendous difference in punishment for the juvenile. If a juvenile is entitled to mere access to social reports in order to get a fair hearing, how can he not be entitled to cross-examine the maker of those reports? Examination of the reports without an opportunity to point out defects through cross-examination would render the requirement in Kent meaningless.

One year after the decision in Kent, the United States Supreme Court specifically required cross-examination in juvenile proceedings. "We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." In re Gault, 387 U.S. 1, 56, 87 S. Ct. 1428, 1459, 18 L. Ed. 2d 527, 562. The holding in Gault appears to place the requirement of cross-examination on juvenile proceedings in general and,

given the increased importance of a waiver proceeding as stated in Kent, the requirement must apply there also.

The failure of the juvenile court to allow for the cross-examination of the probation officer improperly denied appellant the right to confront and cross-examine the witnesses against him in violation of the sixth and fourteenth amendments to the constitution. Cross-examination is required by Iowa law and by the United States Constitution and therefore, the transfer was invalid. The district court was without jurisdiction to convict the defendant and his conviction must be reversed.

REVERSED.

Oxberger, C.J., and Hayden and Sackett, JJ., concur; Habhab and Donielson, JJ., dissent.

HABHAB, J. (dissenting)

I respectfully dissent. As the United States Supreme Court noted in Breed v. Jones, 421 U.S. 519, 537-38, 95 S. Ct. 1779, 1789-90, 44 L. Ed. 2d 346, 360 (1975), "the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court," the only requirements being that the waiver hearings "measure up to the essentials of due process and fair treatment." Kent v. United States, 383 U.S. 541, 562, 86 S. Ct. 1045, 1057, 16 L. Ed. 84, 98 (1966).

I do not read Kent nor Breed to require the application of the right of confrontation to waiver proceedings. See Matter of Welfare of T.D.S., 289 N.W.2d 137, 140 (Minn. 1980). The waiver proceedings, while quite pivotal for the juvenile, do not result in an adjudication of guilt, but only a determination of whether jurisdiction over the juvenile will be retained. As such, the full panoply of trial rights is inapplicable to waiver proceedings. See id. at 141.

Donielson, J., joins this dissent.