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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-257 / 89-1346

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IN THE INTEREST OF J.W.H., A Child,

Appellant.

Appeal from the Iowa District Court for Iowa County, Michael J. Newmeister and Robert E. Sosalla, Judges; and Sylvia A. Lewis, Juvenile Referee.

A child was adjudicated to be delinquent due to the commission of the crime of operating a motor vehicle while intoxicated. He has appealed the delinquency adjudication and the subsequent dispositional order. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

William D. Olson of Charnetski, Olson & Lacina, Grinnell, for appellant.

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and Judy Sheirbon, Assistant Attorney General; for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, J.

The child in question, J.W.H., is a boy born in November 1972. He was adjudicated to be delinquent due to the commission of the crime of operating while intoxicated. In a subsequent dispositional order, the juvenile court placed J.W.H. on probation to the juvenile court office, under several conditions; one of these conditions of probation is that the child not drive a motor vehicle for six months, regardless of the outcome of administrative proceedings at the Department of Transportation concerning the status of J.W.H.'s license.

J.W.H. has appealed the delinquency adjudication and the resulting dispositional order.

At approximately 11:30 P.M. on March 17, 1989, J.W.H. was taken into custody for operating a motor vehicle while intoxicated. The arresting officer testified that he found the child's driving erratic and had seen him driving left of center on several occasions. The officer gave the child several field sobriety tests which the child allegedly failed. The officer then radioed the Iowa County Sheriff's Office to ask the dispatcher to make contact with the child's mother. The only information given to the mother at this point was that the child was in custody in Marengo.

Once at the police station the child and his mother were forced to wait until a breath test could be arranged. They were separated by a partition during this time. The officer informed both the child and mother of the implied

consent advisory and the child agreed to take the breath test. After the testing procedure the officer informed the mother that she could stop J.W.H. from talking to him if she wished. The child stated he would talk to the officer and the mother agreed.

The child made several admissions to the officer which were admitted by the trial court. However, the breath test results were ruled inadmissible. On August 6, 1989 a dispositional hearing was held, and probation restrictions were imposed. The child appeals the ruling adjudicating him to be a delinquent and the subsequent dispositional order.

J.W.H. contends the juvenile court should have excluded from evidence certain admissions he made to a police officer after his arrest. He argues he had not made a valid waiver of his right to counsel because neither he nor his mother had been adequately advised of their right under Iowa Code section 232.11(2) to confer prior to a waiver of counsel.

J.W.H. also challenges that part of the dispositional order which provides, as a condition of probation, that he may not drive a motor vehicle for six months. J.W.H. contends the question of driving privileges should be resolved by the Department of Transportation in administrative proceedings pursuant to Iowa Code chapters 321 and 321J.

Juvenile delinquency proceedings are not criminal prosecutions; they are special proceedings that serve as an ameliorative alternative to the criminal prosecution of children. In re J.D.S., 436 N.W.2d 342, 344 (Iowa 1989). Our scope of review is de novo. Id. at 343. We give weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses, but are not bound by them. Id.

J.W.H. contends certain admissions made to an officer while in custody should have be excluded. He challenges these admissions based on the officers alleged failure to inform him or his mother of the rights under Iowa Code section 232.11(2). Section 232.11(2) provides in part:

> The child's right to be represented by counsel shall not be waived by a child less than sixteen years of age without the written consent of the child's parent, guardian, or custodian. The waiver by a child who is at least sixteen years of age is valid only if a good faith effort has been made to notify the child's parent, guardian or custodian that the child has been taken into custody and of the alleged delinquent act for which the child has been taken into custody, the location of the child, and the right of the parent, guardian or custodian to visit and confer with the child.

The Iowa Supreme Court discussed the necessity of satisfying all four requirements in State v. Walker, 352 N.W.2d 239 (Iowa 1984). The legislature has demanded that painstaking care must be taken to obtain parental consent before questioning a juvenile. Id. at 242. For the child who is at least sixteen years of age, the statute replaces written parental consent with the requirement that good

faith efforts be made to notify the parent, and to provide the notified person with four explicit facts about the juvenile's circumstances: (1) that the child has been taken into custody and (2) of the alleged delinquent act for which the child has been taken into custody, (3) the location of the child, and (4) the right of the parent, guardian or custodian to visit and confer with the child. Id. The court in Walker held that a parent must be informed of all four facts. Id. In Walker the father was not informed of the nature of the delinquent act, nor was he told of his right to visit and confer with the defendant. Id. In this case the officer only told the mother that she could prevent J.W.H. from talking to him. The mother was not specifically informed of her right to visit and confer with the child, nor did she do so.

The court in Walker stated very clearly that the parent must be informed of the four facts. The statute listed very specifically the four items of information which the officers must make a good faith effort to convey to the contacted parent. Id. In enacting this statute, our legislature apparently believed that each of the four-part message would tend to impress upon a parent the importance of going to the side of the child and giving the child parental advice. Id. The only thing the officer even partially impressed upon the child's mother was that she could prevent him from answering the officer's questions. She was not informed in any way that she could talk to her

son and discuss what the answers to the officer's questions would be, and therefore make an informed decision whether or not to answer those questions.

The failure of the officer to adequately inform the mother of her right to visit and confer with her child did not constitute a valid waiver of his statutory right to counsel. Statements made without a valid waiver under section 232.11(2) are per se inadmissible. In re J.A.N., 346 N.W.2d 495, 498 (Iowa 1984). Therefore, we reverse the juvenile court's ruling holding that the statements were admissible. We also remand for retrial in a new proceeding before the juvenile court, on the allegation of juvenile delinquency.

The child also contends the restrictions placed on his operation of an automobile went beyond the jurisdiction of the juvenile court. The restrictions provided that J.W.H. could not drive for six months. Because this issue may arise upon rehearing, we consider this issue on this appeal.

The probation order may require a child to comply with specified conditions imposed by the court concerning conduct and activities, subject to being returned to the court for violation of those conditions. Iowa Code section 232.2(41). The probation order placed a restriction on the child's driving activity for six months. This was clearly an action within the court's jurisdiction and discretion. There was evidence the child had been caught drinking and

driving at an earlier date, though he was under the legal limit. In addition, the child admitted to drinking at least once a week. Neither the child nor his mother seem to be able to accept the possibility of an alcohol abuse problem. The restriction was entirely reasonable and necessary to promote J.W.H.'s rehabilitation and to protect the community.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I am unable to agree with the majority's application of the Walker test's fourth prong to the facts of this case. Rather than being merely told she had the right to confer with her son, J.W.H.'s mother was permitted to be seated directly across from him during the interrogation process. Additionally, at no time did the officers in question deny her the opportunity to converse with J.W.H. Indeed, under such circumstances, the only conclusion which one might draw is that J.W.H.'s mother was given the opportunity to speak with her son if she so chose. I also note that J.W.H.'s mother was told she could advise J.W.H. not to answer questions under these facts; I would hold that the waiver requirements of Iowa Code section 232.11 have been complied with by the law enforcement personnel.