

**IN THE  
SUPREME COURT OF OHIO**

**NO. 2007-0728**

**IN RE: JUSTIN ANDREW,**  
**a minor child**

On Appeal from the Hamilton County  
Court of Appeals, First Appellate  
District

Court of Appeals  
Case Number C-060226

<b>MEMORANDUM IN RESPONSE</b>
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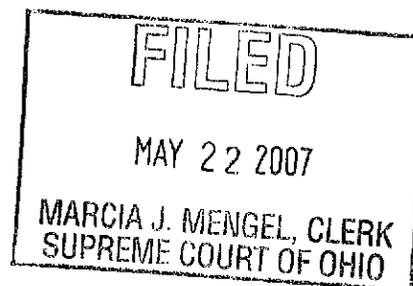


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**Facts:**

On February 7, 2006, Justin Andrew was present in the Hamilton County Juvenile Court for a parole violation hearing.<sup>1</sup> At the outset of the hearing the court addressed the issue of counsel. Justin was not represented at the hearing, and after a colloquy with the court waived his right to counsel.<sup>2</sup> At the conclusion of the hearing, the court adjudicated Appellant a parole violator, and revoked Appellant's parole based upon the recommendation of his parole officer.<sup>3</sup> The entry specified the sentence, stating that "Adjudged to be in violation of parole rules and conditions. Parole status revoked and defendant is ordered to be returned to the Department of Youth Services for a period of re-institutionalization."<sup>4</sup>

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<sup>1</sup>T.p. 3.

<sup>2</sup>T.p. 5.

<sup>3</sup>T.p. 10-11.

<sup>4</sup>Decision of Magistrate, February 7, 2006.

## ARGUMENT

### **FIRST PROPOSITION OF LAW: ANDREW'S RIGHTS TO COUNSEL AND DUE PROCESS WERE NOT VIOLATED AS HE WAS OVER 18 AT THE TIME OF THE PAROLE VIOLATION HEARING AND THE RECORD SUFFICIENTLY SHOWED HIS WAIVER OF COUNSEL WAS VOLUNTARILY MADE.**

Counsel must be provided for a child not represented by his parent, guardian, or custodian.<sup>5</sup>

Andrew appeared alone in court for the parole-violation hearing. But Andrew was over the age of 18 at the time - not a "child." The statute was inapplicable.

Moreover, the record reflects that Andrew's waiver of counsel was voluntarily made.

In most proceedings a juvenile may in fact waive the right with permission of the court.<sup>6</sup>

Before permitting a waiver of counsel the court is required to "make an inquiry to determine that the relinquishment is...voluntarily, knowingly, and intelligently made".<sup>7</sup> The court's inquiry should "encompass the totality of the circumstances, including the age of the juvenile, his emotional stability, mental capacity, and prior criminal experience."<sup>8</sup>

In the present case, the court obviously complied with the requirements of Juv.R. 29(B) in order to determine whether Andrews' right to counsel was voluntarily, knowingly, and intelligently waived. The court conducted an extended colloquy with Andrews concerning the right to counsel, explaining that Andrews had a right to be represented by a lawyer and that the hearing would be

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<sup>5</sup>R.C. 2151.352; see, also, *In re: R.B.*, 166 Ohio App.3d 626, 2006-Ohio-264.

<sup>6</sup>*In re Kimble* (1996), 114 Ohio App. 3d, 136, 140, 682 N.E.2d 1066 (citing *In re Smith* (1991), 77 Ohio App. 3d 1, 601 N.E.2d 45). See Also, Juv.R. 3.

<sup>7</sup>*Gault*, 387 U.S. at 42.

<sup>8</sup>*In re Miller* (1997), 119 Ohio App. 3d 52, 56, 694 N.E.2d 500 (citing *In re Johnson* (1995), 106 Ohio App. 3d 38).

continued if he wished to speak with one.<sup>9</sup> Andrews stated that he wished to be represented by a woman named Amber Anderson, his fiancé. Ms. Anderson is not a lawyer, and through the colloquy the court determined that Andrews was actually requesting that she be present in the court as a form of support.<sup>10</sup> The court further explained to Andrews that when talking about representation, he was talking about a lawyer, not a family member, friend, or significant other.<sup>11</sup>

Additionally, the court clearly based its decision on *In re Miller* and *In re Johnson*, both of which held that a totality of the circumstances analysis was the appropriate inquiry for trial judges to determine whether a waiver of counsel was given knowingly, voluntarily, and intelligently.<sup>12</sup> At the start of the trial the court asked if the defendant was indeed, Justin Andrew. He then noted that Andrew was over the age of eighteen (18) at the time of this hearing.<sup>13</sup> Furthermore, the court noted that Andrew had a number of contacts with the Juvenile Court system and that, typically, he had been represented by a public defender.<sup>14</sup> Once the court made mention of a public defender, Appellant obviously stated that he wished to proceed without a lawyer.<sup>15</sup>

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<sup>9</sup>T.p. 3-4.

<sup>10</sup>Id. at 4-5.

<sup>11</sup>Id. at 5.

<sup>12</sup>*In re Miller* (1997), 119 Ohio App. 3d 52, 56, 694 N.E.2d 500 (citing *In re Johnson* (1995), 106 Ohio App. 3d 38).

<sup>13</sup>T.p. 3

<sup>14</sup>Id.

<sup>15</sup>T.p. 5.

This extended colloquy between the court and Appellant not only satisfied Juv.R. 29(B), but also examined the totality of the circumstances, satisfying the requirements as articulated in the cases *In re Miller* and *In re Johnson*.

**SECOND PROPOSITION OF LAW: A JUVENILE COURT DOES NOT COMMIT REVERSIBLE ERROR DESPITE AN INCOMPLETE RECORD OF THE PROCEEDING, WHEN THE APPELLANT FAILS TO FILE AN APP.R. 9(C) STATEMENT IN ACCORDANCE WITH APPELLATE RULES, THUS FAILING TO SUPPLEMENT THE RECORD.**

Andrew argues that the juvenile court erred when it failed to make a complete record in violation of Juv.R. 37(A), which requires that all juvenile proceedings be recorded in their entirety.

The rule states, in pertinent part:

“Record of proceedings. The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases...and proceedings before magistrates...The record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device.”<sup>16</sup>

However, “in the event that the record is incomplete or unavailable, App.R. 9(C) permits the appealing party to prepare a statement of the evidence or proceedings to permit proper appellate review.”<sup>17</sup> This remedy is available because “unfortunately, recording equipment occasionally malfunctions.”<sup>18</sup> The Ohio Supreme Court has held that because the Appellate Rules provide a

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<sup>16</sup>Juv.R. 37(A).

<sup>17</sup> *In re: G.W.* (2006), 2006 Ohio 5327, P8, 2006 Ohio App. LEXIS 5320.

<sup>18</sup>*State v. Ward* (2003), 2003 Ohio 5650, P28, 2003 Ohio App. LEXIS 5035.

remedy that preserves the right to full review in such situations, the failure of recording equipment does not result in prejudice per se.<sup>19</sup>

App.R. 9(C) specifically provides that, “if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection.”<sup>20</sup> So, when “all or part of the transcript of a trial court proceeding is unavailable due to malfunctioning recording equipment, the appellant bears the burden of attempting to reconstruct the record with a narrative prepared pursuant to App.R. 9(C).”<sup>21</sup>

Accordingly, “the Ohio Supreme Court held that ‘when a juvenile court fails to comply with the recording requirements of Juv.R. 37(A) and an appellant attempts but is unable to submit an App.R. 9(C) statement to correct or supplement the record, the matter must be remanded to the juvenile court for rehearing’.”<sup>22</sup> In the present case, Andrews has not even attempted to submit an App.R. 9(C) statement to correct or supplement the record. Therefore, Andrew has failed to meet his burden, no prejudice can be shown, and the matter need not be remanded. Thus, Appellant’s second proposition of law lacks merit and is properly overruled.

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<sup>19</sup>*Id.* (citing, *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355, syllabus).

<sup>20</sup>App.R. 9(C).

<sup>21</sup>*State v. Ward* at P28 (citing, *State v. Drake*, (1991), 73 Ohio App.3d 640, 647, 598 N.E.2d 115; *Thomas v. Hedge* (Feb. 6, 1987) Portage App. No. 1707, 1987 Ohio App. LEXIS 5797. See, also, *State v. Davis* (1991), 62 Ohio St.3d 362, 347, 581 N.E.2d 1362; *State v. Elder* (1989), 65 Ohio App.3d 463, 584 N.E.2d 779).

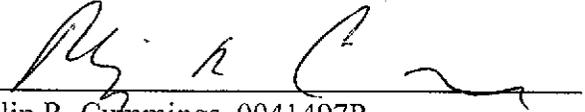
<sup>22</sup>*In re: G. W.* at P9 (quoting, *In re: B.E.*, 102 Ohio St. 3d 388, 2004 Ohio 3361, 811 N.E.2d 76, emphasis added).

**CONCLUSION**

Jurisdiction is properly denied.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

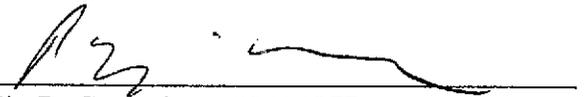


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**PROOF OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to, David H. Bodiker (0016590), Ohio Public Defender and Molly J. Bruns (0070972), Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long Street, 11<sup>th</sup> Floor, Columbus, Ohio 43215 counsel of record, this 21 day of May, 2007.



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