IN THE

SUPREME COURT OF OHIO

IN RE: JUSTIN H. ANDREW, a minor child.	:	**NO. 07-0728**
	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
	:	Court of Appeals Case Number C-060226
	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)
Prosecuting Attorney

Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney
Counsel of Record
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3012, Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

David H. Bodiker (0016590)
Ohio Public Defender

Elizabeth R. Miller (0077362)
Assistant State Public Defender
Counsel of Record
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Cincinnati, Ohio 43215
(614) 466-5394; Fax No. (614) 752-5167

COUNSEL FOR DEFENDANT-APPELLANT, JUSTIN H. ANDREW

FILED
JAN 02 2008
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES . . . . . ii.

STATEMENT OF THE CASE . . . . . 1.

STATEMENT OF THE FACTS . . . . . 2.

ARGUMENT . . . . . 4.

FIRST PROPOSITION OF LAW: PURSUANT TO R.C. 2151.352, AN ADULT, UNDER JUVENILE COURT JURISDICTION, MAY WAIVE HIS RIGHT TO COUNSEL WITHOUT THE REPRESENTATION OF HIS PARENTS, GUARDIAN OR CUSTODIAN - PRECISELY BECAUSE HE IS AN ADULT. . . . . . 4.

CONCLUSION . . . . . 11.

PROOF OF SERVICE . . . . . 11.

TABLE OF AUTHORITIES

PAGE

CASES:

In re: Justine Andrew, 1st Dist. No. C-060226, 2007-Ohio-1021, ¶ 12 . . . . . 8.

In re: R.B., 166 Ohio App.3d 626, 852 N.E.2d 1219. . . . . 7-9.

In re: Gault (1967), 387 U.S. 1, 87 S.Ct. 148. . . . . 9.

In re: Johnson (1995), 106 Ohio App. 3d 38 . . . . . 9,10.

In re: Kimble (1996), 114 Ohio App. 3d, 136, 140, 682 N.E.2d 1066 . . . . . 9.

In re: Kuchta, Not Reported in N.E.2d, 1999 WL 157439 (Ohio App. 9 Dist.) . . . . . 8.

In re: Miller (1997), 119 Ohio App. 3d 52, 56, 694 N.E.2d 500 . . . . . 9,10.

In re: Pope, Not Reported in N.E.2d, 2002 WL 91525 (Ohio App. 1 Dist.), 2002-Ohio-241. . 7.

In re: C.S., 115 Ohio St.3d 267, 874 N.E.2d 1177, 2007-Ohio-4919. . . . . 5,6.

In re: Smith (1991), 77 Ohio App. 3d 1, 601 N.E.2d 45 . . . . . 9.

STATUTES:

R.C. 2151.011(B)(5) . . . . . 4,5.

R.C. 2151.11(B)(2) . . . . . 5.

R.C. 2151.352 . . . . . 4,8.

R.C. 2152.02(C)(b) . . . . . 4.

APPELLATE RULES:

App. R. 9(C) . . . . . 8.

JUVENILE RULES:

Ohio Juv. R. 3 . . . . . 5,9.
Ohio Juv. R. 29(B) . . . . . 9.

IN THE

SUPREME COURT OF OHIO

IN RE: JUSTIN H. ANDREW, a minor child.	:	NO. 07-0728
	:	
	:	MERIT BRIEF OF PLAINTIFF-APPELLEE
	:	
	:	

STATEMENT OF THE CASE

Justin Andrew, age 15, was adjudicated a delinquent child in November of 2002.

In November 2005, a complaint was filed alleging that on or about March 3, 2005, Justin Andrew, then aged 17, was a delinquent child for allegedly violating the terms of his parole by leaving his placement. On June 11, 2005, Justin turned 18 years old.

On February 7, 2006, Appellant, Justin Andrew was adjudicated to be a parole violator by the Hamilton County Juvenile Court. His parole was revoked and he was committed to the Ohio Department of Youth Services (DYS).

On March 9, 2007, the Court of Appeals affirmed.

STATEMENT OF THE FACTS

On February 7, 2006, Justin Andrew was present in the Hamilton County Juvenile Court for a parole violation hearing.[1] 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.[2] Neither his parents nor his guardians were present at the hearing.

The following was the colloquy between the Court and Andrew:

THE COURT:	All right. You do have the right to be represented by a lawyer in this matter. If you wish to have a lawyer represent you I can continue this one time so that you can arrange either for a private lawyer or a public defender. In the alternative, if you wish you can go ahead today without a lawyer. What do you want to do? Go ahead today without a lawyer or get a continuance so you can talk to one?
JUSTIN ANDREW:	(Inaudible) continuance to talk to (inaudible).
THE COURT:	Is it going to be a public defender?
JUSTIN ANDREW:	(Inaudible).
THE COURT:	Okay.
JUSTIN ANDREW:	I have somebody (inaudible). She was (inaudible).
THE COURT:	Amber Anderson, she's not an attorney. Is she an attorney?
JUSTIN ANDREW:	No, she's not an attorney.
THE COURT:	Okay.
JUSTIN ANDREW:	(Inaudible) paperwork and my lease for my apartment and (inaudible).

---

[1] T.p. 3

[2] T.p. 5

THE COURT: Okay. Sir, if there anything you want to say?

MR. WADE: I just talked to Ms. Anderson and she's somewhat his fiancee. I guess since he's asked for a continuance, nobody (inaudible), I guess that could be one of his witnesses.

THE COURT: Right. I was just thrown when you said she was here to represent you. Okay. I'll need an in-date.

JUSTIN ANDREW: Sir, I mean, it wouldn't be necessary for her to (inaudible) represent me (inaudible). I mean (inaudible) make a difference.

THE COURT: Who to represent you?

JUSTIN ANDREW: (Inaudible).

THE COURT: Represent - - if you want her here on your behalf, if you want her here as a witness, that's up to you. Here - - when I'm talking about representation I'm talking about in terms of a lawyer represent you. I know you've obviously had a number of contacts with Juvenile Court before. It looks to me like you have typically had a public defender represent you in the past, so - -

JUSTIN ANDREW: (Inaudible).

THE COURT: So you don't want a lawyer?

JUSTIN ANDREW: (Inaudible).

THE COURT: Okay. We'll go ahead today without a lawyer, then.

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.[3] The entry specified the sentence, stating that "Adjudged to be in violation of parole rules and conditions.

---

[3] T.p. 10-11

Parole status revoked and defendant is ordered to be returned to the Department of Youth Services for a period of re-institutionalization."[4]

ARGUMENT

FIRST PROPOSITION OF LAW: PURSUANT TO R.C. 2151.352, AN ADULT, UNDER JUVENILE COURT JURISDICTION, MAY WAIVE HIS RIGHT TO COUNSEL WITHOUT THE REPRESENTATION OF HIS PARENTS, GUARDIAN OR CUSTODIAN - PRECISELY BECAUSE HE IS AN ADULT.

In this appeal, the issue is the meaning and effect of the portion of R.C. 2151.352 that states:

> "Counsel must be provided for a child not represented by the child's parent, guardian or custodian."

Appellant Andrew would have this Court adopt a rule of non-waivability wherein an adult, aged 18, 19 or 20, could never waive his right to counsel unless advised by his parent, guardian or custodian. The State submits that such reading of R.C. 2151.352 runs counter to the Juvenile Rules, the Revised Code, caselaw and common sense.

"Child" for Jurisdictional Purposes

Andrew is correct when he states that under Ohio's statutory scheme, if a person is adjudicated delinquent prior to the age of 18, the juvenile court retains exclusive jurisdiction over that person's progress through the juvenile system as a result of that adjudication.[5] However, while a juvenile in Andrew's position is considered a "child" for jurisdictional purposes in juvenile court, this statutorily conferred status for jurisdictional purposes does not mandate a per se rule that an adult, aged 18, 19 or 20, can never waive his right to counsel.

---

[4] Decision of Magistrate, February 7, 2006.

[5] R.C. 2152.02(C)(b); R.C. 2151.011(B)(5)

Indeed, Ohio Juv. R. 3 specifically provides that the right to counsel may be waived.[6]

R.C. 2151.11(B)(2) specifically defines an "Adult" as:

> "Adult" means an individual who is eighteen years of age or older."

In R.C. 2151.011(B)(5), "Child" is defined as:

> "a person who is under 18 years of age."

The definition goes on to explain that a child adjudicated unruly prior to attaining 18 years will be considered a "child" for jurisdictional purposes until he attains the age of 21.

In sum, the Juvenile Rules clearly indicate that a juvenile can waive his right to counsel. The Revised Code acknowledges the distinction between a child (under 18) and an adult (over 18). Yet, Andrew would have this Court ignore the realities of these definitions, and adopt a rule of non-waivabilty whenever an adult wishes to waive his right to counsel unrepresented by his mom or dad. This Court recently rejected just such a non-waivabilty rule in ***In re: C.S.***.[7] In ***In re: C.S.***, this Court held that. . .

> "In a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel."

If this Court chooses to interpret the word "juvenile" as equivalent to the legal term of art "child" in the juvenile code, Andrew's position of a per se rule of non-waivabilty should be sustained. However, the State submits that the law does not mandate such an interpretation - and indeed, contemplates just the contrary.

---

[6] See Ohio Juv. R. 3.

[7] 115 Ohio St.3d 267, 874 N.E.2d 1177, 2007-Ohio-4919.

Indeed, this Court specifically rejected the notion of any rule of non-waivability in *C.S.*:

> "We are also persuaded by the reasoning of the Supreme Court of Connecticut in its rejection of the notion of nonwaiver. As that court noted, "a per se rule of nonwaivability might actually frustrate a principal goal of juvenile law of encouraging children to accept reasoniblity for their transgressions and take an active role in their rehabilitation. * * * Without minimizing the significance of this inevitable tension [between the juvenile courts' roles of protecting society and nurturing and rehabilitating juveniles], we are persuaded that allowing a child to make an informed and deliberate choice about legal representation, if properly supervised by the trial court, can advance both the goal of control and that of treatment. * * * To mandate the presence of counsel * * * might serve to reduce the child's own sense of involvement and might enhance his perception of his own role as merely that of spectator. * * * [W]e believe that the waiver of counsel decision, *in itself*, can be a significant rehabilitative moment for the child." (Emphasis sic.) *In re: Manuel R.* (1988), 207 Conn. 725, 734-736, 543 A.2d 719."

Moreover, the "totality of circumstances" test used to determine the validity of a person's waiver of counsel in juvenile court <u>clearly</u> contemplates that one may validly waive counsel without a parent in certain circumstances. The presence or absence of the person's parent or guardian is but a <u>factor</u> to be considered. This Court said:

> "We agree with the Supreme Court of Nebraska's recent holding that a totality-of-the-circumstances analysis is the proper test to be used in ascertaining whether there has been a valid waiver of counsel by a juvenile. *In re: Dalton S.* (2007), 273 Neb. 504, 514, 730 N.W.2d 816. See also, *Fare v. Michael C.* (1979), 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (applying totality-of-circumstances test to juvenile's waiver of rights). The judge must consider a number of factors and circumstances, including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings. *In re: Dalton S.*, 273 Neb. 515, 730 N.W.2d 816. Accord *Michael C.*, 442 U.S. at 725, 99 S.Ct. 2560, 61 L.Ed.2d 197."

In other words, the absence of an 18, 19 or 20 year old's parents when he waives counsel is a factor to consider in determining the validity of the waiver - not the determinative factor. The totality of circumstances test itself is an implicit rejection of Andrew's notion of a rule of non-waivability.

It would be an absurd result to have a rule in juvenile court where a man of 20 years of age could never waive counsel in the absence of his mom or dad - when that same 20 year old man, alone, could validly waive counsel as an adult in common pleas court an hour later when being tried on a murder charge. Indeed, it is this common-sense approach that has led courts to conclude that a 18 year old is not a "child" for waiver of counsel purposes in juvenile court.

For instance, the Court of Appeals in ***In re: R.B.***[8] specifically embraced the notion that a child's status as a minor (under 18) does have legal significance:

> "We also find instructive a decision of the Greene County Juvenile Court. In *In the Matter of J.C.T.* (Aug. 3, 2005), No. 37420, Judge Robert Hutcheson ruled as follows:
>
> A minor child has a right to an attorney in a Juvenile Court proceeding, regardless of the parents' financial ability and/or willingness to hire counsel for their child. The law requires appointment of counsel if the child does not independently have the means to hire counsel." (Emphasis added.)

In ***In re: Pope***,[9] the Court of Appeals noted the legal significance of a person turning 18 years of age in juvenile court proceedings:

> ". . . Pope's appointed appellate counsel notified this court at oral argument that Pope is not presently confined, but is on parole. And relief for Pope in this appeal may well present only a hollow victory.

---

[8] 166 Ohio App.3d 626, 852 N.E.2d 1219.

[9] Not Reported in N.E.2d, 2002 WL 91525 (Ohio App. 1 Dist.), 2002-Ohio-241.

> Since Pope is now eighteen years of age, new considerations and limitations for disposition confront the juvenile court. . . ."

In ***In re: Kuchta***,[10] the Court of Appeals implicitly acknowledged that an 18 year old boy need not have had his mom present when he waived counsel by quoting with approval the App. R. 9(C) statement:

> ". . . Just prior to the [adjudicatory] hearing, [the prosecutor] had explained to [Kuchta] that he had a right to an attorney. [Kuchta] decided that he did not wish to be represented by an attorney in this matter and signed a Waiver of Counsel form. Although he was now eighteen years of age, [Kuchta's] mother signed the waiver form as well. Once in court, Judge Heck acknowledged that [Kuchta] had signed a Waiver of Counsel form. The Judge again advised [Kuchta] of his rights, and directly questioned him concerning whether he still wished to waive his right to counsel. [Kuchta] replied in the affirmative. (Emphasis added.)"

It is apparent from reading the Court of Appeals' decision in Andrew's case that the Court found Andrew's age of majority to be key in finding a valid waiver of counsel:

> "Andrew's second assignment charges the trial court with error in failing to appoint counsel. Counsel must be provided for a child not represented by his parent, guardian, or custodian. [* * *] 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, and Andrew's second assignment of error is overruled."[11]

Valid Waiver

Andrew claims the First District failed to consider whether the juvenile court obtained a valid waiver of his right to counsel. However, this is incorrect. The Court specifically stated:

---

[10] Not Reported in N.E.2d, 1999 WL 157439 (Ohio App. 9 Dist.)

[11] ***In re: Justine Andrew***, 1st Dist. No. C-060226, 2007-Ohio-1021, ¶ 12, citing R.C. 2151.352 and ***In re: R.B.***, 166 Ohio App.3d 626, 2006-Ohio-264.

> We hold that the record sufficiently shows that Andrew's waiver of counsel was knowingly, voluntarily, and intelligently made.[12]

This finding was supported by the record.

In most juvenile proceedings, a person may in fact waive the right to counsel with permission of the court.[13] 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".[14] 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."[15]

In the present case, the court obviously complied with the requirements of Juv.R. 29(B) in order to determine whether Andrew's right to counsel was voluntarily, knowingly, and intelligently waived. The court conducted an extended colloquy with Andrew concerning the right to counsel, explaining that Andrew had a right to be represented by a lawyer and that the hearing would be continued if he wished to speak with one.[16] Andrew 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 Andrew was actually requesting that she be present in the court as a form

---

[12] ***Id.*** at ¶ 11.

[13] ***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.

[14] ***In re: Gault*** (1967), 387 U.S. 1, 87 S.Ct. 148.

[15] ***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).

[16] T.p. 3-4.

of support.[17] The court further explained to Andrew that when talking about representation, he was talking about a lawyer, not a family member, friend, or significant other.[18]

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.[19] At the start of the trial the court asked if the defendant was indeed, Justin Andrew. It then noted that Andrew was over the age of 18 at the time of this hearing.[20] 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.[21] Once the court made mention of a public defender, Andrew obviously stated that he wished to proceed without a lawyer.[22]

---

[17] ***Id***. at 4-5.

[18] ***Id***. at 5.

[19] ***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).

[20] T.p. 3

[21] ***Id***.

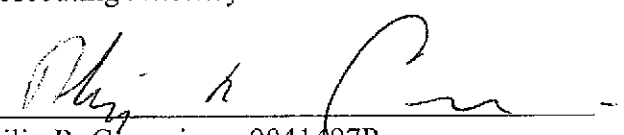
[22] T.p. 5.

CONCLUSION

R.C. 2151.352 should not be interpreted as a per se rule of non-waivability for an 18, 19 or 20 year old adult who wishes to waive counsel in the absence of his parent. The well-settled "totality of circumstances" test should continue to guide the determination of the voluntariness of a waiver of counsel.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

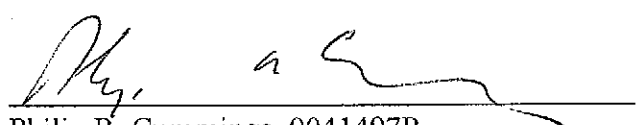


Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3012

Attorneys for Plaintiff-Appellee

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to Elizabeth R. Miller (0077362), Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Cincinnati, Ohio 43215, counsel of record, this 31 day of December, 2007.



Philip R. Cummings, 0041497P
Assistant Prosecuting Attorney