

IN THE SUPREME COURT OF OHIO

IN RE: JUSTIN H. ANDREW,
a minor child

CASE NO. 07-0728

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

REPLY BRIEF OF APPELLANT JUSTIN ANDREW

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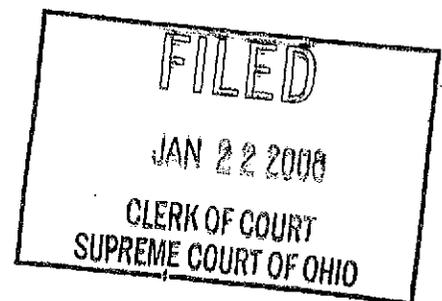


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STATEMENT OF THE CASE AND FACTS

Appellant rests on his Statement of the Case and Facts as were raised in his Merit Brief.

PROPOSITION OF LAW

A person over the age of eighteen is still considered a “child” and is subject to the protections of the juvenile code, including R.C. 2151.352 and the requirement that “[c]ounsel must be provided for a child not represented by the child’s parent, guardian, or custodian,” and the jurisdiction of the juvenile court when that person was adjudicated delinquent prior to the age of eighteen. R.C. 2152.02(C); Article I, Sections 10 and 16 of the Ohio Constitution; and Fifth, and Fourteenth Amendments to the United States Constitution.

I. “Child” for Jurisdictional Purposes

In its Answer, the State concedes that “a juvenile in Andrew’s position is considered a ‘child’ for jurisdictional purposes in juvenile court” until he attains the age of twenty-one. Answer, pp. 4-5. It follows then, that if a juvenile court retains jurisdiction over that child, he is entitled to the protections and procedures provided in the Juvenile Code, including R.C. 2151.352. R.C. 2151.01(B).

The General Assembly enacted Chapters 2151 and 2152 of the Revised Code to provide juvenile courts with procedures that protect the rights of every child in the juvenile justice system. Specifically, R.C. 2151.01 provides:

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for criminal prosecutions of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child’s parents only when necessary for the child’s welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

Contrary to the State’s contentions, the General Assembly’s expressed intention was to keep persons—even those who turn 18, 19, or 20—within the purview of the juvenile justice

system in certain circumstances. Revised Code sections 2151.011(B)(5) and 2152.02(C)(6) specifically provide that a child who attains the age of eighteen after previously being adjudicated delinquent, is still considered a “child,” and is subject to the provisions of the Juvenile Code. Because Justin was a “child” and was within the jurisdiction of the juvenile court, he possessed the same rights as every other child in juvenile court and was entitled to counsel pursuant to R.C. 2151.352.¹

In its brief, the State rejects this notion and essentially asks this Court to create a third class of persons—those who are subject to the juvenile court’s jurisdiction but have turned eighteen or older. But Ohio’s judicial system recognizes that when a child is subject to juvenile court proceeding—no matter his age—juvenile law applies. Likewise, when a person is subject to criminal court proceedings—no matter his age—the criminal law applies. Notwithstanding the clear distinctions between criminal and juvenile court, the State’s argument suggests that children who have obtained the age of eighteen, in juvenile court, are subject to a yet-unenacted version of the law. But there is nothing in Ohio’s law to support such a distinction. Had the General Assembly wanted to create this third class, as the State suggests, it would have enacted separate laws to address children in juvenile court who have turned 18 years old.

Justin was a “child” for purposes of the juvenile court proceeding at issue here. R.C. 2152.02(C)(6). The juvenile court recognized this when it committed Justin to the Department of Youth Services, rather than the Department of Rehabilitation and Correction. Answer, p. 4 citing “Decision of Magistrate, February 7, 2006.” Because R.C. 2151.01 requires a juvenile court to apply the protections of the Juvenile Code to each and every child, the First District

¹ The First District Court of Appeals found that Justin was not entitled to counsel under R.C. 2151.352 and does not indicate whether Justin had a right to counsel at all.

Court of Appeals erred when it failed to order the trial court appoint counsel for Justin under R.C. 2151.352 simply because he was eighteen years old.

II. “Non-waivability”

The State argues that Justin is trying to create a “rule of non-waivability whenever an adult wishes to waive his right to counsel unrepresented by his mom or dad.” Answer, pp. 3-5. First, as was established above and as the State admits, Justin was not an “adult,” and was deemed to be a “child” under the Ohio Revised Code. See R.C. 2151.011(B)(5) and 2152.02(C)(6). Answer, p. 4. Second, as was recently pronounced by this Court and was outlined in Justin’s Merit Brief, a child can waive his right to counsel in juvenile court so long as his waiver is knowing, intelligent, and voluntary. See Appellant’s Merit Brief, pp. 8-9, citing In re C.S. 115 Ohio St.3d 267, 2007-Ohio-4919, at ¶106. In order for a child’s waiver to be knowing, intelligent, and voluntary, he must be “counseled and advised by his parent, custodian, or guardian,” or afforded the opportunity to consult with an attorney prior to waiving this vital constitutional right. Id. at ¶98.

In C.S., this Court recognized and “reinforce[d] the vital role a parent can play in a delinquency proceeding” and attempted to balance the delicate relationship between the important role that a parent plays in the juvenile court process with a juvenile’s rights and his ability to waive those rights. Id. ¶¶94-98; 102. This Court found that a child may waive his right to an attorney, but only after he consults with a parent, custodian, guardian, or counsel: “Only if the child has some adult to advise him may the child knowingly and voluntarily waive his right to counsel.” Id. at ¶96, citing In re R.B. 166 Ohio App.3d 626, 2006-Ohio-264.

Relying on this Court’s holding in C.S., the State urges this Court to find that it previously rejected a non-waivability rule. Answer, pp. 5-6. In so doing, the State misinterprets

this Court's holding in C.S. and misunderstands Justin's argument here. Answer, p. 5. In C.S., this Court stated,

[w]e further hold that in a delinquency proceeding, a juvenile may waive his constitutional right to counsel, [* * *], 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.

¶ 98. Contrary to the State's contentions, this language does not suggest that a child—whether he is twelve or twenty years old—can *never* waive his right to counsel in juvenile court; instead, it suggests that the child must either have the opportunity to consult with his parent, custodian or guardian, or, if none is present, then he must consult with an attorney before he can waive his right to counsel.

Justin further disagrees with the State's contention that courts have concluded that an eighteen year old is not a "child" for waiver of counsel purposes in juvenile court. Answer, pp. 7-8. The State cites In re R.B., 166 Ohio App.3d 626, 2006-Ohio-264, for the proposition that "a child's status as a minor (under 18) has legal significance." Answer, p. 7. In R.B., the Second District Court of Appeals addressed R.B.'s age only because the court found that a presumption exists against a child's ability to afford counsel. R.B. at ¶30. The Second District did not comment on a child's age for waiver purposes; instead, it emphasized the importance of counsel in juvenile court proceedings. Id. at ¶32.

The State also cites In re Pope, 1st Dist. No. C-010306, 2002-Ohio-241, for the proposition that courts are placing "legal significance on a person turning 18 years of age in juvenile court proceedings." Answer, p. 7. But Pope was decided in 2002—five years before this Court decided C.S. Further, in Pope, the First District only mentioned the age of the child because it felt the fact the child had turned eighteen would impact the juvenile court's

dispositional options on remand. Pope at ¶13. Pope's age had no impact on the court's underlying waiver analysis. Id. at ¶13.

The State also cites In re Kuchta (March 10, 1999), 9th Dist. No. 2768-M, 1999 Ohio App. LEXIS 955, to support its theory that those in juvenile court who are eighteen deserve fewer protections than those provided by the Juvenile Code. Answer, p. 8. In Kuchta, the Ninth District cited to an App.R. 9(C) statement, which acknowledged that both the child and his mother had signed the waiver of counsel form, even though he had turned eighteen. Notably, this had no effect on the child's ability to waive counsel and no effect on the ultimate outcome of the case. Further, this case was decided in 1999—long before C.S. was decided.

Accordingly, Justin maintains that pursuant to the language in R.C. 2151., R.C. 2152., and this Court's precedent in C.S., a child who is subject to a juvenile delinquency proceeding in juvenile court, cannot waive his right to counsel until he has had the opportunity to consult with his parent, custodian, guardian, or an attorney.

III. Valid Waiver

The State suggests that this Court requires a juvenile court to employ a totality of the circumstances test to determine the validity of a child's waiver of counsel in juvenile court. Answer, p. 6, citing C.S., at ¶97. First, it is clear that even if this was the proper test, the First District did not employ any test because it found that Justin was not entitled to counsel under at all. In re: Justin Andrew, 1st Dist. No. C-060226, 2007-Ohio-1021. But had the First District Court of Appeals applied the test as pronounced by this Court in C.S., it would have found that the juvenile court did not obtain a valid waiver because Justin appeared without a parent, custodian, or guardian and was not afforded the right to speak with an attorney, prior to his purported waiver of his right to counsel.

CONCLUSION

Children, such as Justin, who are adjudicated delinquent prior to the age of eighteen are entitled to the protections of the Juvenile Code—including the right to appointed counsel under R.C. 2151.352. Therefore, this Court should adopt the first proposition of law and remand the matter to the First District Court of Appeals for a determination consistent with its holding in C.S.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

BY: 

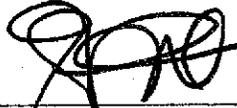
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by regular U.S. Mail this 22nd day of January, 2008 to the office of Phillip R. Cummings, Assistant Hamilton County Prosecutor, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202.



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IN THE SUPREME COURT OF OHIO

IN RE: JUSTIN H. ANDREW,
a minor child

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CASE NO. 07-0728

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

APPENDIX TO

REPLY BRIEF OF APPELLANT JUSTIN ANDREW

LEXSEE 1999 OHIO APP LEXIS 955

IN RE: JUSTIN KUCHTA

C.A. NO. 2768-M

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA COUNTY

1999 Ohio App. LEXIS 955

March 10, 1999, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF MEDINA, OHIO. CASE NO. 9704 DQ 1000.

DISPOSITION: Judgment affirmed.

COUNSEL: PATRICK F. MAYNARD, Attorney at Law, Medina, Ohio, for Appellant.

DEAN HOLMAN, Medina County Prosecutor, and JOSEPH F. SALZGEBER, Assistant Prosecutor, Medina, Ohio, for Appellee.

JUDGES: DANIEL B. QUILLIN. BAIRD, P. J., SLABY, J. CONCUR. (Quillin, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6(C), Article IV, Constitution.)

OPINION BY: DANIEL B. QUILLIN

OPINION

DECISION AND JOURNAL ENTRY

Dated: March 10, 1999

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

QUILLIN, Judge.

Appellant Justin Kuchta appeals from his adjudication as a delinquent child in the Medina County Court of Common Pleas, Juvenile Division. We affirm.

I.

On April 22, 1997, a complaint was filed in the juvenile court, alleging that Kuchta was delinquent for having committed crimes that, if committed by an adult, would constitute misuse of a credit card, in violation of R.C. 2913.21(B)(2), and receiving stolen property, [*2] in violation of R.C. 2913.51(A). On May 7, 1997, an adjudicatory hearing was held pursuant to Juv.R. 29. The juvenile court's entry relating to that hearing states as follows:

This matter came on for an adjudicatory hearing on the 7th day of May, 1997. The child was present in Court with his parents Tim and Sue Kuchta, Det. Foraker of the Median Co. Sheriff's Office and Probation Officer, Shayne Anderson.

The Court explained all rights to the juvenile and right of counsel was waived; at which time the juvenile entered a plea of denial.

It is therefore ordered that this matter be set for a denial hearing on July 1, 1997 at 9:00 A.M.

A waiver of counsel form was also filed May 7, 1997. The form is signed by Kuchta and his mother; however, the portion stating that the waiver was made "in open Court" is crossed out, and no signature appears in the line designated "Judge/Referee."

A dispositional hearing was held on July 1, 1997. The juvenile court's entry from that hearing reads in relevant part as follows:

This matter came on for hearing on the 1st day of July, 1997. The child was present in court with his mother and father. The State of Ohio was represented [*3] by Anne E. Eisenhower, Assistant Prosecuting Attorney.

The court addressed the child pursuant to Juvenile Rule 29. The court, being satisfied the child understood his rights, accepted a change of plea to admission.

The child waived the presentation of evidence, and the court found the child to be a Delinquent Child as to Count I, for **MISUSE OF CREDIT CARD**; in violation of *section 2913.21(B)(2) O.R.C.*, which would be a felony of the fourth degree if committed by an adult. The court further found the child to be a Delinquent Child as to Count II, for **RECEIVING STOLEN PROPERTY**; in violation of *section 2913.51(A) O.R.C.*, which would be a misdemeanor of the first degree if committed by an adult.

(Emphasis *sic*.) The juvenile court then sentenced Kuchta accordingly. Kuchta timely appealed.

After filing his notice of appeal, Kuchta requested a transcript of the proceedings before the juvenile court. The juvenile court responded in a journal entry by stating that "due to a technical malfunction, there is no usable audio tape of these proceedings, therefore no audio tape of these proceedings can be provided." Kuchta then submitted a proposed statement [*4] of the proceedings, pursuant to *App.R. 9(C)*. The State objected to Kuchta's proposed *App.R. 9(C)* statement and filed a substitute statement. The juvenile court adopted the State's *App.R. 9(C)* statement, which is the record before this court.

II.

Kuchta asserts three assignments of error. We address each in turn.

A.

The juvenile court erred in violation of juvenile's right to counsel under the *Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution*, Article One Section Sixteen [*sic*] of the Ohio Constitution, *R.C. 2151.352*, *Juv.R. 4(A)* and *Juv.R. 29(B)*.

The juvenile court erred by accepting juvenile's admission without determining whether it was made with an understanding of the allegation and the consequence of admission, renders the plea not voluntary, knowing and intelligent, in violation of the *Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution* and Article 1, Section Sixteen [*sic*] of the Ohio Constitution and *Juvenile Rule 29*.

We address Kuchta's first and second assignments of error together. In his first assignment of error, Kuchta contends that he did not [*5] make a voluntary, knowing, and intelligent waiver of counsel. In the second assignment of error, Kuchta argues that his plea admitting the two charges was not voluntary, knowing, and intelligent. Kuchta's arguments are not well taken.

Under *R.C. 2151.352* and *Juv.R. 4(A)*, a juvenile is entitled to representation by counsel at all stages of a delinquency proceeding. *Juv.R. 29(B)* requires the juve-

nile court to perform certain duties at the beginning of an adjudicatory hearing, including:

(2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under *Juv.R. 30* where the complaint alleges that a child fifteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;

(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel; [and]

*** to counsel of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have [*6] a record of

Inform any unrepresented party who waives the right all proceedings made, at public expense if indigent.

If a juvenile enters an admission, the juvenile court must further comply with *Juv.R. 29(D)*:

The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with the understanding of the nature of the allegations and the consequences of the admission;

The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

A voluntary, knowing, and intelligent waiver of the right to counsel must affirmatively appear on the record. *In re Montgomery (1997)*, 117 Ohio App. 3d 696, 700, 691 N.E.2d 349.

We find that the record shows that both Kuchta's waiver of counsel and his admission to the complaint were made voluntarily, knowingly, and intelligently. The juvenile court's journal entry relating to the waiver of Kuchta's right to counsel states: "The Court [*7] explained all rights to the juvenile and right of counsel was waived[.]" The journal entry from the dispositional hearing, wherein Kuchta entered his admission, states in pertinent part: "The court addressed the child pursuant to *Juvenile Rule 29*. The court, being satisfied the child understood his rights, accepted a change of plea to admission." The *App.R. 9(C)* statement similarly reads in relevant part:

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.

[At the dispositional hearing,] Judge Heck addressed [Kuchta] pursuant to *Juvenile Rule 29*. The Judge then acknowledged that [Kuchta] did not [*8] have an attorney with him, and inquired as to whether he still wished to proceed without counsel. [Kuchta] then indicated that he still wished to proceed without counsel.

[Kuchta] then changed his plea, with respect to both charges set forth in the complaint, from denial to one of admission to the charges as alleged. The Court, being satisfied that [Kuchta] understood his rights, accepted his change of plea to admission.

The record demonstrates that the juvenile court personally explained to Kuchta his right to counsel and that Kuchta waived that right. The record further shows that the juvenile court met its obligations under *Juv.R. 29* with respect to Kuchta's admission. The first and second assignments of error are overruled.

B.

Juvenile's conviction should be set aside and the charges dismissed where the totality of the circumstances demonstrate that juvenile court [*sic*] erred by transmitting the *App.R. 9(C)* statement of the proceedings without hearing and by encouraging and providing the time, place and opportunity for law enforcement officer [*sic*] and a probation officer employed by the court to provide juvenile with advice as to the plea [*9] juvenile should present to the court, to juvenile's severe prejudice and detriment.

In his third assignment of error, Kuchta makes two separate assertions. First, he argues that the juvenile court erred by settling and transmitting the *App.R. 9(C)* statement without first having a hearing on the matter. Second, Kuchta argues that his convictions were tainted because his probation officer and a law enforcement officer were permitted to counsel Kuchta as to what plea he should have entered. We find these contentions to be without merit.

Under *App.R. 9(C)*, an appellant may prepare a statement of the evidence or proceedings before the trial court to be used as the record in the matter. The appel-

lant's statement must then be served on the appellee. The appellee may then object or propose amendments to the statement as proposed by the appellant. After the filing of the appellee's objections or proposed amendments, "the statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to *App.R. 10*, and, as settled and approved, the [*10] statement shall be included by the clerk of the trial court in the record on appeal." *Id.*

In the case at bar, the procedure outlined in *App.R. 9(C)* was followed. Kuchta argues that there should have been a hearing before the statement was settled and approved and that the statement submitted by the juvenile court was inaccurate. However, the rule makes no provision for a hearing before the statement is settled and approved by the trial court. If an appellant believes that errors have been made in the statement as settled and approved by the trial court, the proper recourse is to raise the matter before this court. See *App.R. 9(E)*. Kuchta failed to utilize these procedures. We find no error in the settlement and approval of the *App.R. 9(C)* statement.

Kuchta also argues that he was prejudiced because his entry of a plea was counseled by his parole officer and a detective of the Medina County Sheriff's Department. The *App.R. 9(C)* statement discloses the following from the adjudicatory hearing:

Judge Heck read aloud the two charges set forth in the complaint filed in this matter, and asked [Kuchta] whether he had received a copy of that complaint. [Kuchta] replied [*11] in the affirmative. The Judge then informed [Kuchta] of the possible plea alternatives--to enter pleas of "admit" or "deny" to the respective charges. [Kuchta] and his parents were uncertain of which pleas he wished to enter. Judge Heck therefore left the courtroom to allow [Kuchta] time to discuss the matter with his parents, his probation officer, and Detective Foraker. Subsequently, after the Judge had returned to the courtroom and resumed with the hearing, [Kuchta] entered pleas of "deny" to both charges set forth in the complaint.

We find no prejudice in Kuchta's interaction with the detective and the probation officer, because Kuchta entered a denial. The record does not demonstrate any further plea counseling by the detective and the probation officer that resulted in Kuchta's later plea of admission. Accordingly, the third assignment of error is overruled.

III.

Kuchta's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing [*12] the County of Medina, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*.

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN

FOR THE COURT

BAIRD, P. J.

SLABY, J.

CONCUR

(Quillin, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6(C), Article IV, Constitution.)

LEXSEE 2002 OHIO 241

IN RE: TAJUAN POPE

APPEAL NO. C-010306

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2002 Ohio 241; 2002 Ohio App. LEXIS 223

January 25, 2002, Decided

NOTICE:

[**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeal From: Hamilton County Juvenile Court. TRIAL NO. 00-022205Z.

DISPOSITION: Juvenile court's judgment was reversed and cause was remanded.

HEADNOTES

CATEGORY: DELINQUENCY - PROCEDURE/RULES

SYLLABUS

Before a juvenile can be adjudicated delinquent upon an admission to the allegations of a complaint, Juv.R.29(D) imposes an affirmative obligation upon the magistrate to address the child personally and to determine (1) that the admission is voluntary and made with the understanding of the nature of the allegations and the consequences of the admission, and (2) that the child understands that, by admitting to the facts, he or she is waiving the right to challenge witnesses and evidence against him or her, the right to remain silent, and the right to introduce evidence at the adjudicatory hearing.

Because an admission waives the juvenile's right to challenge the allegations in the complaint, the procedure under Juv.R. 29(D) for accepting an admission is deemed analogous to a guilty plea entered in a criminal proceeding pursuant to Crim.R. 11(C); therefore, in proceedings pursuant to Juv.R. 29(D), as in proceedings [**2] pursuant to Crim.R. 11(C), the record must adequately demonstrate that the juvenile has received sufficient informa-

tion to make a knowing, intelligent, and voluntary admission.

Juv.R. 29(D) seeks to protect the same constitutionally guaranteed rights secured to criminal defendants--the rights to confront witnesses and to compulsory process, and the privilege against compulsory self-incrimination--therefore, the currently accepted standard in Ohio for reviewing a juvenile court's compliance with Juv.R. 29(D) and the waiver of those rights (whether the juvenile court has substantially complied with Juv.R. 29(D)) must be modified to require that, before accepting a juvenile's admission, the magistrate or court personally address the juvenile to ensure that he or she has been meaningfully informed of the Juv.R. 29(D)(2) rights and the effect of a waiver of those rights.

A juvenile court magistrate erred by accepting an admission to a charge of delinquency based on attempted robbery, when the magistrate did not engage the juvenile in the colloquy required by Juv.R. 29(D) and thus could not have appropriately determined whether the juvenile had been meaningfully informed of [**3] his rights and whether he had knowingly, intelligently, and voluntarily waived them.

COUNSEL: Michael K. Allen, Hamilton County Prosecuting Attorney, and Ronald W. Springman, Jr., Assistant Prosecuting Attorney, for Appellee State of Ohio,.

David H. Bodiker, Ohio Public Defender, and Janine Salloum Ashanin, Assistant State Public Defender, for Appellant Tajuan Pope.

JUDGES: GORMAN, Presiding Judge. HILDEBRANDT and PAINTER, JJ., concur.

OPINION BY: GORMAN

OPINION

We have *sua sponte* removed this cause from the accelerated calendar.

GORMAN, Presiding Judge.

[*P1] Appellant Tajuan Pope appeals from his commitment to the Ohio Department Youth Services ("DYS") ordered by the juvenile court on April 9, 2001, pursuant to his adjudication as a delinquent child. In his first and third assignments of error, Pope contends that his procedural due-process rights, guaranteed by the *Fifth* and *Fourteenth Amendments to the United States Constitution*, were violated because the juvenile court magistrate adjudicated him delinquent at a time when he was incompetent. We do not reach this issue because we hold that the magistrate did not comply with *Juv.R. 29(D)* before accepting Pope's admission to the allegations [**4] contained in the complaint. Therefore, as he argues in his second assignment of error, his admission was not entered knowingly, intelligently, and voluntarily.

[*P2] On May 15, 2000, Pope, then sixteen years old, along with several associates, planned to rob a pizza deliveryman. Although Pope had left the scene before the robbery, his associates used what was later learned to be a BB gun in their theft of keys and \$ 10 from the deliveryman. On March 16, 2001, Pope appeared with his court-appointed counsel before the juvenile court magistrate, charged with the aggravated robbery of the deliveryman and with a firearm specification. The state subsequently reduced the offense from aggravated robbery to robbery and dismissed the firearm specification and an unrelated disorderly-conduct charge. The state and Pope then negotiated a plea agreement by which he entered an admission to the reduced offense of attempted robbery.

[*P3] At the hearing, Pope did not file a suggestion of incompetency. His counsel merely informed the magistrate, "Your Honor, mom has--has indicated to me that he has some, I think, mental issues at this stage. She'd like to be able to drop some medicine off * * *." The magistrate [**5] then adjudicated Pope delinquent, continued the case, and sent the matter to the juvenile court judge for disposition.

[*P4] At a hearing on March 26, 2001, the court conducted an extensive hearing to consider the alternatives for Pope's placement. The court was apprised by Pope's counsel that Pope had a bipolar disorder. His medical history included hospitalization, referrals to treatment programs, and treatment by different psychiatrists and psychologists. The court's probation department recommended a continuance to investigate the feasibility of Pope's placement in the Bridges Program. At the conclusion of the hearing, the court ordered a psychological evaluation by the court clinic and continued the hearing in progress.

[*P5] At an April 9, 2001, hearing, Pope's probation officer informed the court that the Bridges Program had no space available for Pope. The report of the psychiatric evaluation ordered by the court noted that Pope had a history of hyperactivity stemming from a bipolar disorder. His medical history also included manic episodes and psychotic features, including auditory and visual hallucinations. The psychiatric evaluation concluded, "If the diagnosis I and previous psychiatrists [**6] have rendered is correct, Mr. Pope will need to undergo long-term treatment--perhaps for the rest of his life--to control the symptoms of his severe mood disorder." The clinic psychiatric evaluation also stated,

[*P6] Mr. Pope has incurred 27 charges in Juvenile Court since 1995. Fourteen of these resulted in delinquency findings, and two charges resulted in unruliness findings. Mr. Pope knew that he had recently accepted a plea bargain in Juvenile Court in which he admitted guilt in an attempted robbery charge. *He was not clear about the full implications of this, but did seem able to understand my explanation of his current legal situation.* [Emphasis added.]

[*P7] At the hearing Pope denied that he had been involved in the attempted robbery. Still, his counsel did not suggest to the court that Pope was incompetent, and the court did not refer him for a competency evaluation pursuant to *Juv.R. 32(A)(4)*.

[*P8] The record demonstrates that the court struggled to find a program that could address Pope's mental disorder, but ultimately determined that no available alternative program was adequate. Therefore, the court concluded that, because Pope was a danger to himself and to others, [**7] the only option was to commit him to DYS for an indefinite period of six months to age twenty-one. The court recommended his placement in Belmont Pines, the DYS psychiatric unit. The court also stated that, if space became available for Pope in the Bridges Program at the end of June, he should be placed there.

[*P9] Juvenile court proceedings "must measure up to the essentials of due process and fair treatment." *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 533-534, 91 S. Ct. 1976, 1980-1981, 29 L. Ed. 2d 647, quoting *Kent v. United States* (1966), 383 U.S. 541, 562, 86 S. Ct. 1045, 1057, 16 L. Ed. 2d 84. This court has repeatedly observed that, before a juvenile can be adjudicated delinquent upon an admission to the allegations of a complaint, *Juv.R.29(D)* imposes an affirmative obliga-

tion upon the magistrate to make certain determinations on the record. See, e.g., *In re Etter* (1998), 134 Ohio App. 3d 484, 488, 731 N.E.2d 694, 697. Thus, *Juv.R. 29(D)* prohibits the magistrate from accepting an admission unless the magistrate has addressed the child personally and has determined (1) that the admission is voluntary and made with the understanding [**8] of the nature of the allegations and the consequences of the admission, and (2) that the child understands that, by admitting to the facts, he or she is waiving the right to challenge witnesses and evidence against him or her, the right to remain silent, and the right to introduce evidence at the adjudicatory hearing.

[*P10] Because an admission waives the juvenile's right to challenge the allegations in the complaint, the procedure under *Juv.R. 29(D)* for accepting an admission is deemed analogous to a guilty plea entered in a criminal proceeding pursuant to *Crim.R. 11(C)*. See *In re Christopher R.* (1995), 101 Ohio App. 3d 245, 247, 655 N.E.2d 280, 282. Therefore in proceedings pursuant to *Juv.R. 29(D)*, as in proceedings pursuant to *Crim.R. 11(C)*, the record must adequately demonstrate that the juvenile has received sufficient information to make a knowing, intelligent, and voluntary admission. See *In re Etter*, 134 Ohio App. 3d 484, 731 N.E.2d at 698.

[*P11] In a criminal context, before accepting a guilty plea, the court must personally address the adult defendant and ensure that he or she has been "meaningfully informed" of those constitutional rights delineated [**9] in *Crim.R. 11(C)*, known as "Boykin" rights, and the effect of a waiver of those rights. See *Crim.R. 11(C)*; see, also, *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274; *State v. Ballard* ((1981), 66 Ohio St. 2d 473, 423 N.E.2d 115, paragraphs one and two of the syllabus. In proceedings affecting juveniles, the United States Constitution imposes an obligation to proceed with the same basic requirements of due process and fairness applicable in an adult criminal proceeding. See *In re Gault* (1967), 387 U.S. 1, 12-13, 87 S. Ct. 1428, 1436, 18 L. Ed. 2d 527; see, also, *In re Booker*, 1999 Ohio App. LEXIS 3378 (July 23, 1999) Hamilton App. No. C-980214, unreported.

[*P12] *Juv.R. 29(D)* seeks to protect the same rights secured to criminal defendants in *Boykin*--the rights to confront witnesses and to compulsory process, and the privilege against compulsory self-incrimination. Therefore, we modify the currently accepted standard in Ohio for reviewing a juvenile court's compliance with *Juv.R. 29(D)* and the waiver of those rights: whether the juvenile court substantially complied with *Juv.R. 29(D)*. See *In re Etter*, 134 Ohio App. 3d 484, 731 N.E.2d at 698; [**10] see, also, *In re Christopher R.*, 101 Ohio App. 3d 245, 655 N.E.2d at 282. We hold that, before accepting a juvenile's admission, the magistrate or court

must personally address the juvenile to ensure that he or she has been meaningfully informed of the *Juv.R. 29(D)(2)* rights and the effect of a waiver of those rights. See *State v. Ballard*, paragraph two of the syllabus. We further hold that the juvenile's counsel cannot waive the juvenile's rights on behalf of his or her client, because *Juv.R. 29(D)* requires the court to address the juvenile personally before accepting the admission. See *In re Etter*, 134 Ohio App. 3d at 490-491, 731 N.E.2d at 698-699.

[*P13] Here, the magistrate did not enter into the colloquy required by *Juv.R. 29(D)*. Therefore, the magistrate could not have determined if Pope had been meaningfully informed of his rights and had thus knowingly, intelligently, and voluntarily waived them. See *Juv.R. 29(D)*.

[*P14] Pope's appointed appellate counsel notified this court at oral argument that Pope is not presently confined, but is on parole. Any relief for Pope in this appeal may well present only a hollow victory. Since Pope is now eighteen [**11] years of age, new considerations and limitations for disposition confront the juvenile court. The dilemma for a juvenile court in cases of severe mental disorders is no better illustrated than by Pope's entreaty to the judge:

[*P15] I'm going to be good. * * * I will not mess up no more. * * * I'm going to die. I want to go home. Every day they take me away from my family all the time. I can't go home to my son. I just got offered a job. I can't do work, do nothing. I'm going to die. I'm going to die. Man, she said she was going to help me. Mama, she promised she was going to help me.

[*P16] Nevertheless, we have no recourse but to sustain Pope's second assignment of error and to vacate his admission to the magistrate prior to disposition.

[*P17] Having vacated Pope's admission on the ground that the magistrate did not comply with *Juv.R. 29(D)*, we do not address his claim that he was not competent to enter an admission or that his trial counsel was ineffective. As we have noted before, however, a juvenile court may consider a juvenile's mental capacity in determining whether his waiver of *Juv.R. 29(D)* rights was knowing, intelligent and voluntary. See *In re Johnson* (1995), 106 Ohio App. 3d 38, 41, 665 N.E.2d 247, 248. [**12] Pope's competency to enter an admission may well be an issue for the court to resolve on remand.

[*P18] Accordingly, the judgment of the juvenile court is reversed and this case is remanded for further proceedings in accordance with law.

Judgment reversed and cause remanded.

HILDEBRANDT and PAINTER, JJ., concur.

LEXSTAT ORC 2151.01

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 15, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT

Go to the Ohio Code Archive Directory

ORC Ann. 2151.01 (2008)

§ 2151.01. Construction; purpose

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

HISTORY:

133 v H 320 (Eff 11-19-69); 148 v S 179, § 3. Eff 1-1-2002.

LEXSTAT OHIO JUV R 29

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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 29 (2007)

Rule 29. Adjudicatory hearing**(A) Scheduling the hearing.**

The date for the adjudicatory hearing shall be set when the complaint is filed or as soon thereafter as is practicable. If the child is the subject of a complaint alleging a violation of a section of the Revised Code that may be violated by an adult and that does not request a serious youthful offender sentence, and if the child is in detention or shelter care, the hearing shall be held not later than fifteen days after the filing of the complaint. Upon a showing of good cause, the adjudicatory hearing may be continued and detention or shelter care extended.

The prosecuting attorney's filing of either a notice of intent to pursue or a statement of an interest in pursuing a serious youthful offender sentence shall constitute good cause for continuing the adjudicatory hearing date and extending detention or shelter care.

The hearing of a removal action shall be scheduled in accordance with *Juv. R. 39(B)*.

If the complaint alleges abuse, neglect, or dependency, the hearing shall be held no later than thirty days after the complaint is filed. For good cause shown, the adjudicatory hearing may extend beyond thirty days either for an additional ten days to allow any party to obtain counsel or for a reasonable time beyond thirty days to obtain service on all parties or complete any necessary evaluations. However, the adjudicatory hearing shall be held no later than sixty days after the complaint is filed.

The failure of the court to hold an adjudicatory hearing within any time period set forth in this rule does not affect the ability of the court to issue any order otherwise provided for in statute or rule and does not provide any basis for contesting the jurisdiction of the court or the validity of any order of the court.

(B) Advisement and findings at the commencement of the hearing.

At the beginning of the hearing, the court shall do all of the following:

(1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;

(2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under *Juv. R. 30* where the complaint alleges that a child fourteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;

(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;

(4) Appoint counsel for any unrepresented party under *Juv. R. 4(A)* who does not waive the right to counsel;

(5) Inform any unrepresented party who waives the right to counsel of the right to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

(C) Entry of admission or denial.

The court shall request each party against whom allegations are being made in the complaint to admit or deny the allegations. A failure or refusal to admit the allegations shall be deemed a denial, except in cases where the court consents to entry of a plea of no contest.

(D) Initial procedure upon entry of an admission.

The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.

(E) Initial procedure upon entry of a denial.

If a party denies the allegations, the court shall:

(1) Direct the prosecuting attorney or another attorney-at-law to assist the court by presenting evidence in support of the allegations of a complaint;

(2) Order the separation of witnesses, upon request of any party;

(3) Take all testimony under oath or affirmation in either question-answer or narrative form; and

(4) Determine the issues by proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings; by clear and convincing evidence in dependency, neglect, and abuse cases, and in a removal action; and by a preponderance of the evidence in all other cases.

(F) Procedure upon determination of the issues.

Upon the determination of the issues, the court shall do one of the following:

(1) If the allegations of the complaint, indictment, or information were not proven, dismiss the complaint;

(2) If the allegations of the complaint, indictment, or information are admitted or proven, do any one of the following, unless precluded by statute:

(a) Enter an adjudication and proceed forthwith to disposition;

(b) Enter an adjudication and continue the matter for disposition for not more than six months and may make appropriate temporary orders;

(c) Postpone entry of adjudication for not more than six months;

(d) Dismiss the complaint if dismissal is in the best interest of the child and the community.

(3) Upon request make written findings of fact and conclusions of law pursuant to *Civ. R. 52*.

(4) Ascertain whether the child should remain or be placed in shelter care until the dispositional hearing in an abuse, neglect, or dependency proceeding. In making a shelter care determination, the court shall make written finding of facts with respect to reasonable efforts in accordance with the provisions in *Juv. R. 27(B)(1)* and to relative placement in accordance with *Juv. R. 7(F)(3)*.

HISTORY: Amended, eff 7-1-76; 7-1-94; 7-1-98; 7-1-01; 7-1-04.

LEXSTAT OHIO APP R. 9

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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Appellate Procedure
Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 9 (2007)

Rule 9. The record on appeal

(A) Composition of the record on appeal.

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with *App. R. 9(B)*, such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, *App.R. 9(C)* or *9(D)* may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either *App.R. 9(C)* or *9(D)* will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

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A transcript prepared by a reporter under this rule shall be in the following form:

- (1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;
- (2) The transcript shall be firmly bound on the left side;
- (3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;
- (4) The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;
- (5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;
- (6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;
- (7) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;
- (8) No volume of a transcript shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable.

If no report of the evidence or proceedings at a hearing or trial was made, or 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. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to *App.R. 10*, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to *App.R. 10*, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Agreed statement as the record on appeal.

In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to *App.R. 10*, may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to *App.R. 10* and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by *App.R. 10*.

(E) Correction or modification of the record.

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party

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is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

HISTORY: Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92.