

IN THE SUPREME COURT OF OHIO

IN RE: T.P.,
A MINOR CHILD

12-1752

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Case No.

On Appeal from the Butler
County Court of Appeals,
Twelfth Appellate District,
Case No. CA2012-07-143

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT T.P.

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Throughout the history of the juvenile justice system, courts have wrestled with the informal and flexible role of the juvenile court, and “the fundamental fairness demanded by due process.” *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). The juvenile court’s ability to craft a disposition that best meets the needs of the individual child promotes rehabilitation and growth. However, that must be weighed against the Fourteenth Amendment’s requirement that juvenile court proceedings meet the essentials of due process and fair treatment. *In re Gault*, 387 U.S. 1, 30, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The Third Circuit Court of Appeals balanced the informal nature of the juvenile system with the due process principles of *Gault* and determined that children must be afforded the same right of appeal as adults. *In re Brown*, 439 F.2d 47, 52-53 (3rd Cir.1971). Specifically, the court stated:

The informality and flexibility of the juvenile adjudication and the subsequent treatment make the right of appeal more, and certainly not less, vital to safeguard those subject to the juvenile process from possible degeneration warned against in *Gault*.

* * *

We find no consideration lying at the core of the concept of a separate system of justice for juveniles which is impaired by an appeal. Far from being harmless, appellate review is a beneficial safeguard for both the juvenile system and the juvenile accused.

Id.

The State of Ohio has also balanced the therapeutic nature of the juvenile court system with fairness and due process. Delinquent children, like convicted adults, have the right to appeal from a final order of a juvenile court. R.C. 2501.02; Ohio Constitution, Article IV, Section 3; *In Re Sekulich*, 65 Ohio St.2d 13, 15, 417 N.E.2d 1014 (1981). However, juvenile court proceedings are civil, not criminal; thus, the rules of civil procedure apply to juvenile

appeals. *In re Anderson*, 92 Ohio St.3d 63, 66-67, 748 N.E.2d 67 (2001). *Anderson* ensures that a child must receive the adjudication and disposition entry before the time for filing an appeal begins. *Id.* at 67. But, what happens next? A child does not know what to do with that piece of paper. A child does not know how to file an appeal. Certainly, a child does not know what papers he needs to file or where he should send the appeal. A child may not even know how to get a postage stamp to place on the envelope. Merely having a right to appeal means nothing if a child cannot exercise the right to appeal.

The Sixth Circuit Court of Appeals determined that simply providing children with access to law libraries and stacks of legal textbooks did nothing to ensure access to the courts—it was not meaningful. *John L. v. Adams*, 969 F.2d 228, 234 (6th Dist.1992). The court reasoned that “without assistance[,] the students could not make effective use of legal materials.” *Id.* Here, the right to an appeal is not meaningful if children do not have the assistance they need in order to exercise the right to appeal.

Children are handicapped by their age, immaturity, and lack of judgment. *See id.* Special protections are built into the juvenile court process to accommodate a child’s tender age; but, commonsense tells us that children rely on adults for assistance throughout the process. The filing of an appeal requires steps to be taken outside of a child’s control—did an adult explain the right to an appeal, did an adult ask whether the child wanted to exercise that right, and did an adult file the appeal? Unlike adults, children are not in a position to undertake the appellate process on their own. *See id.* The delayed appeal exists to ensure that justice is achieved, even if a deadline is missed. App.R. 5(A)(1)(b).

In this case, the Twelfth District Court of Appeals expected T.P., a fifteen-year-old boy, to read the adjudication and disposition entry, and fully understand and exercise his right to

appeal. (A-1). But, T.P. did not and could not meet those expectations. The court disregarded age as the key factor in determining why T.P. did not perfect his appeal as of right. (A-1).

The condition of being a child must not prevent a meaningful right to an appeal. Delayed appeals must be freely granted for delinquent children. Therefore, this Court should accept jurisdiction in this case to extend special protections for children to the appellate process.

STATEMENT OF THE CASE AND FACTS

On June 21, 2011, a complaint was filed in the Butler County Juvenile Court alleging that then fifteen-year-old T.P. was a delinquent child for committing one count of illegal use of a minor in nudity-oriented material, a violation of R.C. 2907.323(A)(1), a third-degree felony if committed by an adult; and one count of illegal use of a minor in nudity-oriented material, a violation of R.C. 2907.323(A)(3), a fifth-degree felony if committed by an adult. On July 5, 2011, the juvenile court adjudicated T.P. delinquent of the fifth-degree felony and dismissed the third-degree felony. The juvenile court committed him to the Ohio Department of Youth Services (DYS) for a minimum period of six months, maximum to his twenty-first birthday; but, stayed the DHS commitment on the condition that T.P. successfully complete probation.

T.P. was just fifteen years old when he was adjudicated delinquent. He does not remember the juvenile court telling him about his right to appeal or telling him about the deadline to appeal. Further, T.P. does not remember his attorney telling him about the deadline for filing an appeal. He was not familiar with the Ohio Rules of Appellate Procedure. T.P. was not properly informed and did not understand his right to appeal; but, he never stated that he did not want to appeal his case.

On May 29, 2012, the juvenile court found T.P. delinquent of violating the terms of his probation and invoked the suspended DHS commitment. When T.P. arrived at DHS' intake facility, he met with an attorney from the Ohio Public Defender's Office for legal orientation. During that meeting, the attorney explained T.P.'s right to appeal and he indicated that he wanted to appeal his case. On June 26, 2012, an attorney helped T.P. file a direct appeal of his probation violation. On July 23, 2012, an attorney helped T.P. file a delayed appeal of his underlying adjudication, illegal use of a minor in nudity-oriented material. On September 5, 2012, the

Twelfth District Court of Appeals denied T.P.'s motion for leave to file a delayed appeal. (A-1).

ARGUMENT

PROPOSITION OF LAW

DELAYED APPEALS MUST BE FREELY GRANTED FOR DELINQUENT CHILDREN TO ENSURE THAT THE CONDITION OF BEING A CHILD DOES NOT PREVENT A MEANINGFUL RIGHT TO AN APPEAL.

Ohio Rule of Appellate Procedure 5(A) permits a delinquent child to file a motion for leave to appeal after the time to file an appeal as of right has expired. In the motion for leave to file a delayed appeal, the child must “set forth the reasons for the failure * * * to perfect an appeal as of right.” App.R. 5(A)(2). The rule sets forth no other standard. This Court has held that “[i]f a movant establishes sufficient reasons justifying the delay, the appellate court may, in its discretion, grant the motion, and the case proceeds as it would have if timely filed.” *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 12.

As a fifteen-year-old child, T.P. fully relied on the guiding hand of adults to help him through the juvenile court process. T.P. does not remember any adult explaining his right to appeal.

A. Appeals are an important part of the juvenile justice system; but, they are rarely filed.

The goal of the juvenile justice system is “to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.” *Gault*, 387 U.S. at 24. The juvenile justice system seeks to rehabilitate so that children can enter adulthood without the stigma of their youthful indiscretions. That concept is now more important than ever, given the increase in collateral consequences that often extend into adulthood. Megan Annitto, *Juvenile Justice on Appeal*, 66 U.Miami L.Rev. 671, 687, 701-713 (2012) (citing DNA collection, sentencing enhancements, and sex offender registration and notification as examples of collateral

consequences); *see also In re C.P.*, 131 Ohio St.3d 513, 531, 2012-Ohio-1446, 967 N.E.2d 729 (providing that “[r]egistration and notification frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma”). However, children are fairness fanatics—they “are moralistic and intolerant of anything that seems unfair.” Marty Beyer, *Juvenile Boot Camps Don’t Make Sense* (1996), available at <http://martybeyer.com/page/44/94/> (accessed Sept. 14, 2012). Children are resistant to the rehabilitative efforts of the juvenile court if they perceive the juvenile justice system to be unjust and unfair. *Gault* at 26. The appellate process provides a child with an opportunity for fairness and justice.

Because of the unique structure of the juvenile court system, a child appears before a single juvenile court judge for all matters ranging from truancy, unruliness, delinquency, and dependency; and, the outcome of the case is based on the decision of that single judge, rather than a jury. *See Annitto*, 66 U.Miami L.Rev. at 691-692. Because of the confidential nature of juvenile court hearings, little is known about what takes place behind courtroom doors. *Id.* at 693-694; *see also* Juv.R. 27(A)(1). The appellate process plays an important role in transparency, error correction, law making, and uniformity in the juvenile justice system:

Appeals play a unique role in the delinquency context; even beyond providing for accuracy and integrity in the conclusions, they are often the only vehicle for public accountability and transparency. In addition, contrary to common misperception that juveniles receive only ‘a slap on the wrist,’ thousands of juveniles are confined each year and face consequences that will extend beyond adolescence.

Annitto, 66 U.Miami L.Rev. at 690; *see also* Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 Dick.L.Rev. 209, 212 (1993-1994).

In its latest report, the Office of Juvenile Justice and Delinquency Prevention estimated

that 1.7 million juvenile delinquency cases were processed in 2007 and more than 81,000 children were held in juvenile facilities across the country in 2008. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Delinquency Cases in Juvenile Court, 2007*, available at <https://ncjrs.gov/pdffiles1/ojjdp/230168.pdf> (accessed Sept. 13, 2012); Annitto, 66 U.Miami L.Rev. at 713. Considering the important roles that appeals play in the juvenile court system and the sheer magnitude of delinquency cases processed each year, the lack of juvenile appeals is alarming. Annitto, 66 U.Miami L.Rev. at 676; American Bar Association Juvenile Justice Center, *A Call for Justice* (2002), available at <http://www.njdc.info/pdf/cfjfull.pdf> (accessed Sept. 13, 2012), at 10.

There is very little empirical data to calculate the number of juvenile appeals taken or explain the lack of appeals in the juvenile justice arena. Annitto, 66 U.Miami L.Rev. at 676 (listing only fourteen states that could provide adequate data on juvenile appeal rates); *A Call for Justice*, at 10 (finding that “[a]n alarming aspect of juvenile defense is the infrequency with which appeals are taken”); Harris, 98 Dick.L.Rev. at 210 (finding that “appeals from juvenile delinquency dispositions are a rare event in Pennsylvania”); Benedict S. Alper, *A Study of Juvenile Appeals to the Suffolk Superior Court, Boston, 1930-1935*, 28 Am.Inst.Crim.L. & Criminology 340, 340 (1937-1938) (finding that 415 juvenile delinquency cases were appealed in a five-year period). In fact, the federal government has recently funded a study to look at states’ appellate systems in order to address the lack of data. Annitto, 66 U.Miami L.Rev. at 680-681.

In his study, Harris estimated that adults appeal their cases eleven times more than juveniles. Harris, 98 Dick.L.Rev. at 218. Harris hypothesized that adults may file more appeals because they are subject to longer periods of incarceration, have more issues to appeal, know

their rights, and are more assertive in exercising their rights. *See id.* at 213-219. And, adults have more access to resources, such as law libraries and assistance from librarians or paralegals trained in the law. *See Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1976). In Ohio, children do not have access to law libraries in juvenile correctional facilities. *See John L.*, 969 F.2d at 234 (finding that “without assistance[,] the students could not make effective use of the legal materials” in a law library).

Annitto’s study, though limited by the number of states participating, found that for every 1,000 juvenile delinquency cases, only 5.1 appeals are filed. Annitto, 66 U.Miami L.Rev. at 716. Annitto noted: “Six of the states that responded to the survey are among the top seventeen states in terms of numbers of youth who are living in confinement.” *Id.* To bolster the study, Annitto also looked into the number of juvenile appellate decisions on Westlaw. *Id.* at 719. Of importance, Annitto determined that Ohio courts only produced 513 of the juvenile appellate decisions on Westlaw for the period of 2001 through 2011. *Id.* at 720 (noting that Ohio could not provide appellate data). Ohio is one of “the top six states with the highest numbers of juveniles residing in detention facilities.” *Id.*

If children feel that their adjudications and dispositions were unfair, they will likely not fully participate in treatment and rehabilitative efforts—dooming the goal of the juvenile justice system. *Gault*, 387 U.S. at 26. The stunning lack of appeals, as evidenced by the numbers above, surely means that some children feel wronged by the juvenile court process. Ensuring that children can exercise their right to appeal alleviates unfairness, and bolsters rehabilitation and success. However, children need special protections and help throughout the appellate process.

B. Children are different.

The common experience of childhood informs us that children are different. *See J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394, 2403, 180 L.Ed.2d 310 (2011). The juvenile justice system has highlighted those differences since the first juvenile court was established in Chicago, Illinois in 1899. Alper, 28 Am.Inst.Crim.L. & Criminology at 340. Courts have long recognized that children, who are by their very nature naïve, unsophisticated, less educated, more dependent upon authority, and in need of special care and help when dealing with the juvenile justice system. *See Haley v. Ohio*, 332 U.S. 596, 601, 68 S.Ct. 302, 92 L.Ed. 224 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). And, just a few months ago, the Supreme Court reaffirmed the differences between children and adults. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *see also Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *J.D.B.* Ohio has followed suit and explicitly carved out special protections for children. For example:

Adults	Children
<i>R.C. 2929.11(A)</i> The purpose of a felony sentence is to protect the public and to punish the offender.	<i>R.C. 2152.01(A)</i> The purpose of a juvenile disposition is to protect and rehabilitate the child.
An adult is convicted of and sentenced for committing a crime.	A child is adjudicated delinquent and given a disposition.
<i>Crim.R. 44</i> A trial court must advise a defendant of the right to counsel, and a defendant may knowingly, intelligently, and voluntarily waive that right.	<i>Juv.R. 3</i> A juvenile court must advise a child of the right to counsel; but, a child must confer with counsel or a guardian before waiving that right.
	<i>Juv.R. 4(B)</i> A juvenile court must appoint a guardian ad litem to represent the child's best interests when there is a conflict between the child and a guardian.
<i>Crim.R. 7(B)</i> Indictments contain the name of the defendant.	<i>Juv.R. 5(A)</i> Published juvenile court opinions refer to a child by initials rather than full name.
<i>Sixth Amendment to the U.S. Constitution</i> Adult trials are open to the public.	<i>Juv.R. 27(A)(1)</i> The public may be excluded from juvenile court hearings.
<i>Crim.R. 11(C)(2)</i> A trial court must ensure that an adult's guilty plea is knowingly, intelligently, and voluntarily made.	<i>Juv.R. 29(D)</i> A juvenile court must ensure that a child's admission is knowingly, intelligently, voluntarily given. The juvenile court must ensure that the child subjectively understood the implications of the admission.
	<i>R.C. 2152.41(A)</i> Children must not be housed with adults in detention facilities.
<i>R.C. 2953.36</i> Sealing and expungement opportunities apply to a smaller class of adult cases.	<i>R.C. 2151.355</i> Sealing and expungement opportunities are more readily available for children.
	<i>R.C. 2151.357(H)</i> Juvenile court judgments must not impose any of the civil disabilities normally imposed by conviction of a crime.

The law recognizes that children are less culpable than adults, children are not able to comprehend long-term consequences, children are able to reform and conform their behavior, and children need the guiding hand of adults to help them through the court process. *See, e.g.,*

Roper at 571 (noting that juveniles are less culpable than adults); R.C. 2151.355; R.C. 2151.357(H); *Haley* at 601 (finding that a fifteen-year-old child's confession was not freely given because of "[t]he age of petitioner" and "the fact that he had no friend or counsel to advise him").

Research questions whether children "possess the cognitive ability, maturity, and judgment necessary to exercise legal rights." Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn.L.Rev. 26, 27-28 (2006). In fact, research suggests that children have difficulty even understanding the concept of a "right." *Id.*, citing Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 202 (1981). Because of the lack of cognitive ability, maturity, and judgment, children do not always understand the long-term consequences of court actions. Harris, 98 Dick.L.Rev. at 223.

The ability to comprehend legal jargon and rights has been considered in the area of Miranda and custodial interrogation. Feld, 91 Minn.L.Rev. at 41 (noting that "[t]he foremost research, by Thomas Grisso, reports that most juveniles simply do not understand a Miranda warning well enough to invoke or waive their rights in a 'knowing and intelligent' manner"); *J.D.B.* at 2402-2403 (holding that "a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave'"). In *J.D.B.*, the Supreme Court emphasized the importance of a child's age in the custodial interrogation analysis. *Id.* at 2398. In that case, a thirteen-year-old boy was interrogated by a police officer in his school, behind a closed door, without being informed of his Miranda rights. *Id.* at 2399-2400. The Supreme Court held:

A child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions

apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and time again, this Court has drawn these commonsense conclusions for itself. We have observed that children ‘generally are less mature and responsible than adults,’ that they ‘often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them;’ that they ‘are more vulnerable or susceptible to outside pressures’ than adults, and so on.

(Internal citations omitted). *Id.* at 2403.

The same barriers to understanding Miranda rights—age, cognitive ability, maturity, and judgment—are the same barriers for understanding the appellate process. Children have limited knowledge about the right to appeal. Annitto, 66 U.Miami L.Rev. at 688. A key factor is that the vocabulary essential to the court process is not easy to understand or define. *Id.* Further, presence of counsel does not alleviate the problem, as appeals are infrequently filed even when defense counsel is present. *Id.* at 694; *A Call for Justice*, at 10.

T.P.’s case encompasses these concerns. T.P. was just fifteen years old when he appeared in the juvenile court. Though he was present with defense counsel, he did not understand the appellate process or know that he had a deadline in which to exercise his right to appeal. Further, he never had access to post-disposition counsel until he entered DYS. As soon as he arrived at DYS and was explained his appellate rights, he indicated that he wanted to exercise the right to appeal.

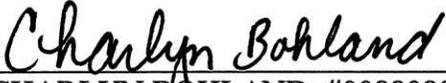
His immaturity, lack of judgment, and tender age prevented him from fully understanding his right to appeal at the time his direct appeal was due. As highlighted above, the appellate process is key to an educated, uniform, and transparent juvenile justice system. And, perceived unfairness and injustice prevents a child from fully investing in treatment and rehabilitation. Without this delayed appeal, T.P. is foreclosed from challenging his juvenile court adjudication and disposition, and he is foreclosed from his opportunity for fairness and justice.

CONCLUSION

The underlying goal of transforming a wayward child into a successful adult highlights the importance of appellate review. This Court should accept T.P.'s appeal because it involves a felony-level offense, is of public or great general interest, and involves a substantial constitutional question. For the reasons argued above, T.P. respectfully requests that this Court accept jurisdiction of this appeal and hold that delayed appeals must be freely granted for delinquent children to ensure that the condition of being a child does not prevent a meaningful right to an appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant T.P.**, was served by ordinary U.S. Mail, postage-prepaid, this 16th day of October, 2012 to the office of Michael Gmoser, Butler County Prosecutor, 315 High Street – 11th Floor, Hamilton, Ohio 45011.



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IN THE SUPREME COURT OF OHIO

IN RE: T.P.,
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APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT T.P.

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IN THE COURT OF APPEALS FOR BUTLER COUNTY, OHIO

IN THE MATTER OF: T.B.P.

CASE NO. CA2012-07-143
REGULAR CALENDAR

ENTRY DENYING MOTION
TO FILE DELAYED APPEAL

FILED BUTLER CO.
COURT OF APPEALS

SEP 05 2012

MARY L. SWAIN
CLERK OF COURTS

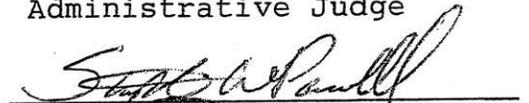
The above cause is before the court pursuant to a motion for leave to file a delayed appeal filed by counsel for appellant, T.B.P., on July 23, 2012.

Upon due consideration of the foregoing, the motion is hereby DENIED. This cause is hereby DISMISSED, with prejudice, costs to appellant.

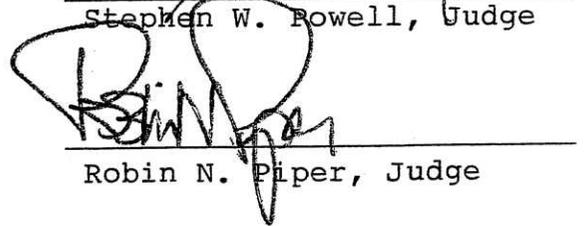
IT IS SO ORDERED.



Robert A. Hendrickson,
Administrative Judge



Stephen W. Rowell, Judge



Robin N. Piper, Judge