1973 WL 26966 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 9, 1973

***1** Ralph G. Moffat, Jr., Esquire
Public Defender
Lexington County Defender Agency, Inc.
Post Office Box 747
Lexington, South Carolina 29072

Dear Mr. Moffat:
You have requested the opinion of this Office as to whether a public defender is required to represent a juvenile accused when the juvenile has parents who are financially responsible and capable of hiring a private attorney.

The landmark case which held that juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the essentials of due process andfair treatment is In Re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). There, speaking of the right to counsel, the Court held:
'We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.' [Emphasis added]. 387 U.S. 41.

The problem, of course, is that the Supreme Court used the language 'the child and his parents', 'them', and 'they'. 387 U.S. at 41. A reasonable inference from this language is that both the juvenile and his parents must be determined to be indigent before the juvenile would be entitled to the appointment of counsel. It was not necessary, however, for the Court to reach this question in the case. (It is not mentioned whether Gault's parents were determined to be indigent; in fact, both parents were apparently employed, 387 U. S. at 5).

Other courts, however, have reached this and similar questions. In People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E. 2d 517 (1971), a prosecution of two college students, ages 19 and 20, for the theft of property of less than $150 in value, it was held reversible error for the trial court to refuse to appoint counsel for the defendants on the premise that the parents of the defendants might have had funds with which to hire an attorney, where the defendants themselves were without funds, and the parents of one defendant had indicated that they would not provide an attorney for him, and the widowed mother of the other defendant had relied upon the impression, which her son had, that the court would appoint counsel for him, and the court made no effort to continue the matter so that both parents and the defendants could confer and clearly understand the status of the defendants in the case.

In Hendryx v. State, 130 Ind. 265, 29 N.E. 1131 (1892), it was held error for the trial court to refuse to assign counsel for the defendant as a poor person on a premise similar to that of the above case. The conclusion here was based upon the fact that the parents in fact refused to supply their son an attorney, and there was no process by which they could be coerced to do so (the son had reached his majority and was married).

***2** Other cases in which various courts have recognized that the earnings or property of various persons other than the accused, but in some way related to him, would not be considered in determining his indigency (the test being the personal means of

the accused) but in some way related to him, would not be considered in determining his indigency (the test being the personal means of the accused) are collected in an Annotation, 51 A.L.R. 3d 1108, § 4 (1973).

The South Carolina Supreme Court in a criminal case has stated the test to be:
'The factual question is not whether the accused ought to be able to employ counsel but whether he is, in fact, able to do so.' State v. Cowart, 251 S.C. 360, 162 S.E. 2d 535, 537 (1968). [The case involved two young men, ages 17 and 20—their parents are not mentioned in the case. The denial of counsel was on grounds other than that their parents should have supplied private defense counsel.]

Though dicta in the case, one federal court has stated:
'. . . Even in the absence of such an evident alert, a court has the inherent duty of satisfying itself by ascertaining from any person, adult or infant, whether or not he has funds with which to hire counsel and to make a good faith determination of indigency, and in those cases where indigency is found to exist, and after full advice, if the accused does not waive an offer of court-appointed counsel, the Court has the further duty of appointing counsel to represent him before proceeding with trial.' Phillips v. Cole, 298 F. Supp. 1049, 1052 (1968).

A court would be proceeding with great risk in commencing the trial of a juvenile accused when there was no defense counsel due to the fact that the juvenile's parents refused to employ counsel although they had been deemed capable of doing so, and there has been no waiver.

The question arises whether parents can be required, by court order or otherwise, to employ counsel to assist in the defense of their children. Attorney's fees have been included in the necessaries which a father is under obligation to furnish his children. 59 Am. Jr. 2d Parent and Child § 55, citing Noyes v. Jack, 443 S. W. 2d 89, Griston v. Stousland, 186 Misc. 201, 60 N.Y.S. 2d 118.

Our Legislature has provided for the defense of indigents. §§ 17-281, et seq., S.C. Code Ann. (1962), as amended. Pursuant to § 17-290, the Supreme Court of South Carolina has promulgated Rules entitled the 'Defense of Indigents Act'. S.C. Code Ann., Vol. 15, page 60 of the 1971 Cum. Supp. (Rule 1 amended September 20, 1972). Rule 2 thereof provides:
'. . . (3) If the accused represents that he is financially unable to employ counsel, [the Clerk of Court or other officer shall] take his application for the appointment of counsel or for the services of the Public Defender where the latter is available in the County.

If application for counsel is made by the accused, the Clerk of Court of other officer shall immediately notify the office of Public Defender . . . and the Public Defender shall immediately thereafter enter upon representation of the accused . . ..'

***3** After he has undertaken to represent the juvenile, if the Public Defender discovers that the juvenile's parents are financially able to employ a private attorney, he can move the court to review his appointment under Rule 3, which provides:
'The initial designation of the Public Defender . . . to represent the accused shall be subject to review by the Court if it subsequently appears that the accused is in fact financially able to employ counsel, has obtained counsel, or for other good cause shown.'

Additionally, each case must be considered on an individual basis as to appointment of counsel. There may be cases where the juvenile is clearly emancipated and it would appear that only the financial status of the juvenile and not his parents would govern his right to counsel.
Very truly yours,

Raymond G. Halford

Assistant Attorney General

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