

**IN THE COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

D.M. and J.M.,	}	
Appellants.	}	
v.	}	Cause No. ED89744
	}	
Philip W. Livesay, Juvenile Officer	}	
Tenth Judicial Circuit	}	
Marion County, Hannibal, Missouri	}	
Petitioner/Respondent.	}	

APPEAL FROM
THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
DISTRICT 2 JUVENILE DIVISION
TENTH JUDICIAL CIRCUIT
Honorable David C. Mobley
Case No. 06MR-JU00069

DJM's Reply Brief Pro Se

Table of Contents

Table of Contents	1
Table of Authorities	2
Argument	3
Conclusion	7
Certification of Word Count	8
Certification of Scanned Disk	8
Affidavit of Service	9

Table of Authorities

In the Interest of DL, 999 SW2d 291 (Mo.App. E.D. 1999) 4,5,6

Argument

The Juvenile Office's Brief concerning right to counsel does not correctly state the facts concerning waiver of right to counsel and totally ignores the Trial Court's failure to follow the procedures concerning waiver of right to counsel mandated by this Court. The Trial Court clearly recognized that there was a potential conflict between the juvenile and his parents. (Supp. Tr. 6). The Trial Court was repeatedly reminded that the child was not represented. (Supp. Tr. 6, 56). The Trial Court never addressed the question of counsel with the child and wholly failed to address the waiver of right to counsel. This is a manifest error and miscarriage of justice which requires that the judgment of the Trial Court be reversed.

The Juvenile Office's arguments about the facts are not supported by the record in this case. The Juvenile Office argues that the child chose to proceed without an attorney. (Resp. Brief, responding to Brief of Appellant Juvenile, 4). In fact, there is nothing in the record to indicate that the child made any choice whatsoever. The Juvenile Office argued that the Trial Court "considered whether there was a conflict between the juvenile and his parents." *Id.* In fact, the only reference to this

is the following,

“Court: Prior to going on the record we discussed that Mr. Wood is specifically only representing the parents; that there could be a conflicting interest involved, and that just needed to be made clear, which the Court is aware of.” (Supp. Tr. 6)

In this portion of the transcript, the Trial Court merely recognized the existence of a potential conflict. There is nothing to reflect any consideration by the Trial Court of the nature or extent of this conflict. The Juvenile Office argues that the child understood counsel waiver. (Resp. Brief, responding to Brief of Appellant Juvenile, 4). The citation is to Supplemental Transcript 8 lines 1 through 10. This was testimony of a deputy juvenile officer concerning the Miranda and Roan warnings given the child prior to a statement. It does not in any way address the right to counsel in the Juvenile Court. The factual assertions by the Juvenile Office concerning waiver of the right to counsel are without evidentiary basis.

The Trial Court wholly failed to follow the procedures for waiver of right to counsel required by statute, rule and appellate decision in this Court. This Court has spelled out in explicit detail the procedure for waiver

of right to counsel in a juvenile case. *In the Interest of DL*, 999 SW2d 291 (Mo.App. E.D. 1999). In this case, there was no explanation in the Trial Court advising the child of his right to counsel or warning him of the perils of self-representation. There was no written waiver. In fact, there was no waiver at all. The Eastern District Court of Appeals has stated, **“We hold the constitutional requirements for waiver of counsel by juveniles in proceedings should be no less than those requirements for waiver of counsel by adults in criminal actions.”** *Id.* at 295. The Trial Court never addressed waiver of the right to counsel. The absence of counsel is a fundamental error resulting in a manifest miscarriage of justice.

The Court should not speculate about whether there would have been a different result if the child had been represented by separate counsel. It would require speculation to address the question of whether counsel would have advised the child to testify and whether or not the child would have testified. It would require speculation and guess work to evaluate the impact of testimony by the child. This is a decision which should have been made by the child with advice of counsel who was representing him.

This Court should not speculate about the effect that counsel

for the child may have had upon these proceedings based upon a record that was developed without counsel.

In this case, there was much less attention to waiver of right to counsel than that disclosed in the record in the case of *In the Interest of DL*. In the case of *In the Interest of DL*, there were two written waivers of right to counsel. The court inquired of the parties concerning the waiver of right to counsel. Despite this, the court held the waivers were insufficient because the record did not disclose that the waiver was knowing and intelligent. In the case at bar, there was no written or verbal discussion of the child's right to counsel at any time during the proceedings. Trial on a delinquency charge without counsel is a manifest injustice and requires reversal.

Conclusion

The judgment of the Trial Court should be reversed because the Trial Court proceeded in a delinquency case in which the child was neither represented by counsel or waived the right to counsel. The right to counsel is a fundamental right guaranteed in the United States and Missouri Constitutions. It is a right guaranteed by statute, rule and case law in the State of Missouri. Adjudication of delinquency without counsel or waiver of the right to counsel is void and should be reversed.

Respectfully submitted,

D.J.M., Appellant, Pro Se

Certification of Scanned Disk

Comes now DJM and certifies that the disk containing DJM's Reply Brief has been scanned for viruses and it is virus-free.

Certification of Word Count of DJM's Reply Brief

Comes now DJM and certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for DJM's Reply Brief is 1114 words, as calculated by the word count of the word-processing system used to prepare this Brief.

D.J.M., Appellant, Pro Se

