

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

IN THE INTEREST OF: D.J.M.,
A Minor

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Cause No. ED89744

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

Respondent's Brief

Responding to Brief of Appellant Juvenile

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Jurisdictional Statement

This is a juvenile case. The Juvenile Court determined that the child had committed an act which would be a violation of law if committed by an adult, and assumed jurisdiction. The case should not involve the validity of a treaty or statute of the United States, or a statute or provision of the constitution of this state, or the construction of the revenue laws of this state, or the title to any state, office or imposition of death penalty. Respondent will accept Appellants' position that it is not within the exclusive jurisdiction of the Missouri Supreme Court under Article V., Section 3 of the Missouri Constitution of 1945.

Statement of Facts

At the jurisdictional hearing, the juvenile did not have an attorney; but his parents did have an attorney and also the juvenile chose to proceed without an attorney. No objection was raised by any party, nor was a request for appointment of counsel made by the juvenile. (Tr. 7, 14-25) The Trial Court considered whether there was a conflict between the juvenile and his parents. (Supp. Tr. 6, 3-6; 56. 3-21) The parents' attorney helped the juvenile understand the issues and the juvenile's position. (Supp Tr. 6, 18-24) The juvenile understood counsel waiver. (Supp Tr. 8, 1-10) The Trial Court evaluated the need for counseling for DJM (Supp Tr. 32, 33); and whether the juvenile understood the proceedings. (Supp Tr. 33) The Trial Court allowed the juvenile to speak and indicate whether he wanted to add anything to the proceedings. (Supp. Tr. 32, 33) The parents' attorney advocated releasing DJM from custody (Supp. Tr. 46, 3-11); and acted in DJM's best interest. (Supp. Tr. 49, 17-22; Supp. Tr. 6, 18-24) In doing so, counsel for the parents was an effective advocate for the juvenile, while representing the parents. (Supp. Tr. 50, 11-16; 53, 9-16; 79, 1-23; 86, 1-21; 89, 9-23; 106, 21-25; 114, 3-20; 121, 17-24; 133, 12-21; 82, 12- page 83m 1-11) Sometimes, more attorneys in a case can cause delay by virtue of schedules. (Supp Tr. 137, 19-25; 53, 21-25; 54, 1-10) The juvenile was represented expressly by counsel for parents, at least at one time. A consensual search had been done on the juvenile's computer (Tr. 107, 22-24; Tr. 108, 1-7) The juvenile had messaged a fellow student, Carly Moore, telling her he was depressed. (Tr. 22, 8-13) The juvenile made statements that concerned Moore (Tr. 23, 7-

9), including that the juvenile was planning to bring a gun to school and kill people, and then kill himself. (Tr. 23, 18-22) The statements by the juvenile scared Moore. (Tr. 54, 4-22; Tr. 68, 3-4; Tr. 68, 19-20) Moore was 14 years old at the time. (Tr. 54, 21-22) The juvenile said he knew someone who had a gun he could get from them. (Tr. 36, 11-14, Tr. 41, 24-25) The juvenile was specific about the gun he could get, which was probably a .357 magnum. (Tr. 54, 9-14; Tr. 91, 17-22) Moore knew the juvenile could get a gun. (Tr. 55, 16-18; Tr. 92, 5-6) The juvenile had chatted with a friend about a gun. (Tr. 95, 13-14); and when depressed he had said he would bring guns to school to "...put Hannibal on the map." (Tr. 96, 25; Tr. 97, 3; Tr. 97, 25; Tr. 98, 3; Tr. 101, 8-11) It was the juvenile's friend's grandfather that had the .357 magnum. (Tr. 100, 18-20) The friend gave the juvenile a good deal of information about a .357 magnum. (Tr. 101, 2-6) There were specific people whom the juvenile said he was going to kill, including himself. (Tr. 31, 21-24; Tr. 32, 21-24; Tr. 32, 22-25; Tr. 33, 1) The juvenile was also planning to kill people of color. (Tr. 47, 11-13) Moore's concern was sufficient that she sought advice from an adult. (Tr. 24, 15-17) The adult said, any time someone threatens suicide, he should be taken seriously. (Tr. 53, 2-11) The adult took the conversation by the juvenile seriously. (Tr. 61, 2-4; Tr. 64, 10-12) Other adults took the conversation seriously too. (Tr. 90, 5-6) The juvenile said he had been hospitalized for depression. (Tr. 33, 10-17; Tr. 35, 1-6) At the time of the hearing, the juvenile had changed his appearance from one with dyed differently colored hair which was long on one side and shaved on the other. (Tr. 34; 5-19) The juvenile had been picked on at school. (Tr. 89, 1-5; Tr. 105, 3-11) The juvenile's parents presented expert testimony to aid their son.

(Tr. 117, 22; Tr. 119, 16; Tr. 126, 12-21) The expert testified that the juvenile could react impulsively, would have difficulty controlling his behavior, (Tr. 123, 22-25) and could get overly stimulated and do things that are outrageous. (Tr. 124, 10-12) The expert confirmed the juvenile's suicidal thought tendencies; (Tr. 133, 5-25) and that the juvenile would understand that saying he wanted to take a gun to school and shoot everyone and himself, would be a "startling statement". (Tr. 139, 13-19)

Points Relied On

I

The Trial Court did not err in entering a judgment finding jurisdiction based upon the alleged offense of Peace Disturbance and the juvenile was well represented by both his parents and able counsel; objections to alleged lack of counsel were not raised until appeal; no prejudice was shown; and there was neither manifest injustice nor a miscarriage of justice.

In the Interest of JIW, 695 SW2d 513 (Mo App 1985)

State v. Chambers, 891 SW2d 93 (Mo 1994)

State v. Galazin, 58 SW3d 500 (Mo 2001)

State v. Tokar, 918 SW2d 753 (Mo 1996)

Article V, Section 3 of the Missouri Constitution of 1945

Section 210.160

Section 211.032(2)

Section 211.211

Section 211.462

Rule 84.13(c) Mo. Rules of Civil Procedure

Rule 116.01(c) Mo. Rules of Civil Procedure

Argument

The Trial Court did not err in entering a judgment finding jurisdiction based upon the alleged offense of Peace Disturbance and the juvenile was well represented by both his parents and able counsel; objections to alleged lack of counsel were not raised until appeal; no prejudice was shown; and there was neither manifest injustice nor a miscarriage of justice.

Constitutional questions must be raised at the first opportunity. *State v. Chambers*, 891 SW2d 93 (Mo 1994). The lack of counsel was not raised herein, until the appeal. Two reasons to raise an issue such as lack of counsel, at the first opportunity, are to enable the trial court to address that type of complaint at an early stage (preserving judicial economy and substantive rights), and to obtain a full exploration of that type of complaint. *Winston v. Reorganized School District R2, Lawrence County, Miller*, 636 SW2d 324 (Mo. 1982) For example, if the “no counsel” argument had been raised early, Respondent could have made a letter and/or depositions, showing representation of the juvenile, part of the trial record, thereby indicating a position contrary to Appellant’s current posture.

Standard Of Review

The issue of no counsel was not adequately raised until appeal. Such an issue should probably have been raised in the first instance. *State v. Chambers*, 891 SW2d 93 (Mo 1994). Therefore the review herein should only be for manifest, or miscarriage of, justice. Rule 84.13(c). The Court should review for prejudice, not mere error; and

reverse only if the alleged error deprived the juvenile of a fair hearing. *State v. Tokar*, 918 SW2d 753 (Mo 1996).

As indicated throughout the record and Respondent's brief responding to the juvenile's parents, there was a basis for the Trial Court's Judgment. No manifest injustice or miscarriage of justice appears. Rule 84.13(c). DJM was more than ably represented by current counsel for his parents. Also, DJM was advised and knew he had a right to counsel (Supp. L.F. 2, 4).

In re Gault, 387 U.S. 1 (1967), cited by DJM, involved a case wherein no attorney represented the interests of the juvenile (and the juvenile, age 15, was committed until age 21). *Gault* required due process for a juvenile. Rule 116.01(c) and Section 211.211 RSMo., require due process; but are clear that a Trial Court has discretion to determine the necessity to appoint separate counsel for a juvenile who may otherwise be adequately represented. Both the Rule and the statute require separate counsel "when necessary to assure a full and fair hearing". A Trial Court needs that type of discretion in order to do justice. Also, if every juvenile were appointed counsel, no matter how unnecessary, judicial time frames may not be met; attorneys in out state Missouri may not be found in time for proper docket movement; and a prosecutor may not have funding for enough assistants to promote proper docket movement.

There are Missouri statutes where appointment of counsel is required in the juvenile code. Section 211.032(2) RSMo states that the court *shall* appoint an attorney to represent the minor child in cases where the parent, legal guardian, or other person having legal custody of a minor petitions the court to extend the jurisdiction of the Juvenile Court. Section 211.462 RSMo states that a guardian ad litem *shall* be appointed in all actions to terminate parental rights. Section 210.160 RSMo states that a guardian ad litem *shall* be appointed in every case involving an abused or neglected child. It is apparent that removal of the discretion of the Trial Court to appoint counsel to represent the child, can be appropriate.

No mandatory statement requiring the appointment of counsel for the juvenile is included within Section 211.211 RSMo. At no time during the proceedings in the interest of DJM was a request made for appointment of counsel by the juvenile, his parents, or their counsel. The juvenile had been advised of his right to counsel, (Supp. L.F. 2, 4) and made no request. There is no requirement under Section 211.211 that counsel be appointed when it is not requested.

In this case, there were several separate hearings before the Trial Court, (see transcript and supplemental transcripts; Tr. 1; Supp. Tr. 1) and the adjudicatory hearing took several hours with multiple witnesses providing direct and cross-examined testimony. Extensive testimony was received from both the juvenile officer, and the

juvenile's parents through their counsel. A full and fair hearing was held on the merits of the petition.

Appellant bears burden of showing plain error. *State v. Galazin*, 58 SW3d 500 (Mo 2001); an error is only injustice if it's prejudicial, *State v. Fuente*, 871 SW2d 438 (Mo 1994); the error and injustice must be apparent. *Id* at 443. In the case before this Court, there has been no showing that the result would have been different, if DJM had separate nominate counsel.

In this case, the parents' attorney obviously well represented the juvenile; no complaint to the contrary was ever made until this appeal; and no prejudice was shown in the Juvenile Division. Cf., *In the Interest of JIW*, 695 SW2d 513 (Mo App 1985). In the case cited by Appellant, *In the Interest of D.L.*, 999 SW2d 291 (E.D. 1999), there was no attorney, at all, representing the interest of the juvenile in any way. In accord with that case, the instant Trial Court can be found to have investigated the circumstances and determined that the juvenile was adequately protected. Contrary to the Appellate Court's determination regarding the parents in *D.L.*, the attorney for DJM's parents knew procedure, evidence, and was a highly competent cross examiner. Some evidence that current counsel for the parents still adequately represents DJM can be seen if this Court could judicially notice the Cole County, Missouri case of DJM, et. al. v. Hannibal Public School District #60, 07AC-CC00250.

Claiming that no attorney formally and expressly entered the case for DJM is not, in this case, synonymous with DJM's rights and interests not being adequately protected. As there was no miscarriage of justice or manifest injustice; no raising of the lack of counsel at the earliest opportunity; no prejudice demonstrated; and there was more than adequate protection of DJM's rights and interests, the Juvenile Division Judgment should be affirmed.

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Certification of Scanned Disk

Comes now, Thomas P. Redington and certifies that the disk containing Respondent's brief has been scanned for viruses and it is virus free.

Certification of Word Count of Respondent's Brief

Comes now Thomas P. Redington and certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for the Respondent's Brief is 3887 words, as calculated by the word count of the word-processing system used to prepare the Brief, and the number of lines of monospaced type is 14.

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	}	Cause No. ED89744
	}	
	}	

Affidavit of Service

Thomas P. Redington, being first duly sworn, deposes and states upon his oath that true and accurate copies of the annexed Respondent's Brief were served upon the juvenile at #9 Marcia Lane, Hannibal, Missouri 63401 (573) 406-0671; and counsel for the parents Branson L. Wood, 1001 Center Street, Hannibal, Missouri 63401 (573) 221-4255, by depositing two (2) copies of the same in the United States Mail, properly addressed to his business office and postage fully paid, also the disks were so served.

Affiant further states that the annexed documents were so served on the _____ day of _____, 200_____.

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STATE OF MISSOURI }
 } ss
COUNTY OF MARION }

Subscribed and sworn before me this _____ day of _____, 200_____.

Notary Public

Appendix

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