



Spring 1969

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Recommended Citation

John M. Kulikowski, *Waiver—Right To Counsel—Certification of Juvenile To Criminal Proceedings Neller v. State*, 79 N.M. 528, 445 P.2d 949 (1968), 9 NAT. RES. J. 310 (1969).

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WAIVER—RIGHT TO COUNSEL—CERTIFICATION OF JUVENILE TO CRIMINAL PROCEEDINGS*

Since the United States Supreme Court handed down its decisions in the landmark cases of *Kent v. United States*¹ and *In re Gault*² the law has been in a state of turmoil regarding the rights of the accused juvenile. In these two cases, especially the latter, the Court realized that it was breaking new ground.³ It was inevitable that a flood of cases and commentary should follow on the heels of *Gault*, because the decision left a myriad of procedural questions unanswered for the juvenile. One such question left very much up in the air by *Gault* is what constitutes an effective waiver of the juvenile's right to counsel in juvenile court proceedings?

The question of effective waiver of constitutional rights by an accused has been dealt with many times by the United States Supreme Court. It has been held that the courts should indulge every reasonable presumption against waiver⁴ and that a constitutional right must be intelligently and competently waived.⁵ A waiver has been referred to as "an intentional relinquishment or abandonment of a known right or privilege."⁶ Even a plea of guilty does not necessarily waive the right to counsel.⁷ Recent clarification of waiver requirements has come from the United States Supreme Court decision in *Miranda v. Arizona*.⁸ This decision stated that "presuming waiver [of counsel] from a silent record is impermissible;" rather, an express affirmative relinquishment of the right is required.⁹

When the accused is a juvenile,¹⁰ most courts strengthen the pre-

* Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

1. 383 U.S. 541 (1966).

2. 387 U.S. 1 (1967).

3. For a discussion of this aspect of the *Gault* decision see, Katcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 Va. L. Rev. 1700 (1967).

4. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

5. *Id.*, at 468-69. Accord, Farnsworth v. United States, 232 F.2d 59 (1956); People v. Williams, 78 N.E. 2d 512 (1948).

6. *Id.*, at 464. Accord, Brookhart v. Janis, 384 U.S. 1 (1965). The Court in Johnson v. Zerbst, 304 U.S. 458 (1938) says that whether an accused has waived his right to counsel must depend in each case upon the particular facts and circumstances including the background, experience, and conduct of the accused. Consistent with these factors would be the age and maturity of a minor accused.

7. Rice v. Olson, 324 U.S. 786, 788 (1945).

8. 384 U.S. 436 (1966).

9. *Id.*, at 475. The Court also held that a full warning was required so that an unaware defendant was informed of the exact nature of his rights (at 467-68).

10. Under the Standard Juvenile Court Act, National Council on Crime and Delinquency, Standard Juvenile Court Act art. I, § 2 (e) (6th ed. 1959), and most state statutes, a juvenile is a person less than 18 years of age. See, N.M. Stat. Ann. § 13-8-20 (d) (Repl. 1968).

sumption against waiver to take into account the lack of maturity of the child.¹¹ One court, prior to *Gault*, even inferred a legislative intent to guarantee the right to counsel in juvenile courts.¹² Some judges and commentators have criticised the rule which says that it is possible for a minor to waive his rights. They have suggested that it be a matter of law rather than fact that a minor cannot competently waive his rights.¹³ *Gault's* contribution to a solution is limited. It holds that knowledge by a juvenile's mother that she can appear at the juvenile hearing with counsel is not a waiver of the right to counsel when she fails to provide or request counsel for her child.¹⁴

In the recent case of *Neller v. State*¹⁵ the type of waiver that proved fatal was a failure to assert in district court the alleged right to counsel at the juvenile court transfer proceeding.¹⁶ The case involved a sixteen year old orphan who allegedly committed the crime of armed robbery on March 28, 1964. He had been sentenced previously on the same charge, but because he had not been accorded all rights to which he had been entitled he was released on a writ of habeas corpus. After his release a new petition was filed in juvenile court charging the same offense. After a hearing at which he was not represented by counsel and no witnesses were called, the court stated:

[I]n view of the age of the juvenile, the nature of the offense, that it is [in the] best interest of the Public that this matter be transferred to the Criminal Docket for further proceedings.¹⁷

This was followed by an order to transfer and the appointment

11. In *Williams v. Huff*, 142 F.2d 91 (D.C. Cir. 1944), the court remanded twice to the district court for it to determine whether there was an effective waiver "[I]n the light of [defendant's] age, education, and information and all other pertinent facts." Also see, *People v. Witsenski*, 207 N.E. 2d 358 (1965) and *Moore v. Michigan*, 355 U.S. 155 (1957).

12. *Shioutakon v. District of Columbia*, 236 F.2d 666 (1956).

13. For a thorough review of this approach see Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?* 19 Hastings L. J. 223 (1967).

14. 387 U.S. at 41-42. In *Gault*, the defendant's mother appeared with him at the juvenile hearing but no counsel was present. Merely because Mrs. Gault knew that she could have appeared with counsel did not constitute a waiver of the right to counsel. The Court stated that Mrs. Gault and Gerald had a right to be expressly advised that they might retain counsel and that if they were unable to afford to employ counsel it would be provided, unless they close to waive that right.

15. 445 P.2d at 953.

16. It is beyond the scope of this Comment to deal with all the issues raised, so discussion will be limited primarily to the court's rationale regarding waiver. The other issues are whether an accused must have counsel and be advised of his rights during juvenile court proceedings. Further, the petitioner asked for relief based on arguments of double jeopardy and that the trial court did not advise him of the consequences of his plea of guilty at arraignment.

17. 445 P.2d at 950.

of counsel. At petitioner's arraignment his appointed counsel waived a preliminary hearing and petitioner pleaded guilty. The petitioner was sentenced and began serving his term in the state penitentiary. On September 27, 1966, Neller sought post conviction relief¹⁸ by filing a motion to vacate judgment in the District Court of Curry County, which had imposed the sentence. The motion alleged that petitioner had been denied his constitutional rights to counsel, freedom from self incrimination and to cross examine witnesses. Following a denial of the motion this appeal was brought to the New Mexico Supreme Court. The court held that the trial court did not err in denying relief. In a vigorous dissent Judge Wood concluded that the question of waiver was not reached because the district court lacked jurisdiction over the petitioner.¹⁹

After referring to *Kent* and *Gault*, the court decided against the petitioner's central contention that there was a denial of his constitutional rights. The court held that *Gault* did not alter the decision in *Kent* so as to make the requirement of a hearing with counsel at the juvenile court transfer proceeding one of constitutional dimensions.²⁰ In the light of the statute²¹ governing the juvenile transfer proceeding to district court the majority then side-stepped an important yet unresolved issue of New Mexico law by stating:

We are not prepared, nor do we need, to decide if the holding in *Kent* suggests that counsel must be provided in juvenile court when an investigation is made under this section of our statute.

The court then concluded that even if counsel was required at the juvenile court investigation, the failure to so provide did not make

18. See N.M. Stat. Ann. § 21-1-1 (93) (Supp. 1967). New Mexico's rule 93 is taken from the federal rule. See 28 U.S.C. § 2255 (1965).

19. Judge Wood's reasoning will be explored later in this Comment.

20. 445 P.2d at 951.

21. N.M. Stat. Ann. § 13-8-27 (Repl. 1968), which states:

No person under the age of eighteen [18] years shall be charged with the commission of any offense, including a felony, in any court other than the juvenile court and any person knowingly charging a child under eighteen [18] years of age with an offense in any court other than the juvenile court may be punished for contempt of the juvenile court by the judge thereof. Provided, however, that if any child fourteen [14] years of age or older is charged in juvenile court with an offense which would be a felony if committed by an adult, and if the court after full investigation deems it contrary to the best interests of such child or of the public to retain jurisdiction, the court may in its discretion certify such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult; but no child under fourteen [14] years of age shall be so certified.

void all subsequent proceedings in district court including the judgment and sentence. *Salazar v. Rodriguez*²² was relied on in making this conclusion. The Tenth Circuit Court of Appeals in *Salazar* handed down its decision before *Gault* was decided and stated that whether a juvenile is entitled to a remand from district court to juvenile court because of error in the juvenile court²³ was a procedural question ordinarily to be determined by the New Mexico court. So the question remains: Are cases like *Neller* and *Salazar* to be resolved by New Mexico procedure as determined by the New Mexico court or by principles of federal constitutional law? The court avoided this question by resting its decision on the petitioner's waiver.

In further spelling out its determination, the court in *Neller* concluded that representation by counsel at the juvenile court investigation can be waived if done "knowingly" and "intelligently." To reach this result the court compares "the juvenile court proceeding . . . to the preliminary hearing accorded to all adults, as well as juveniles after transfer."²⁴ Since the failure by an adult to be represented by counsel at the preliminary hearing is waived when no objection is made at arraignment,²⁵ the right to counsel at the juvenile investigation is simply waived by the failure to object at district court arraignment. Thus the court reasons by analogy that *Neller* waived his right to counsel at the juvenile court investigation. This analogy assumes that the preliminary hearing and the juvenile court investigation are functionally the same. A look therefore at these two proceedings seems in order.

The purpose of the preliminary hearing is to inquire into the commission of the crime and the accused's connection with it so that if there is probable cause the state may bring the accused to trial.²⁶ Although the juvenile court investigation performs a similar function, it has other objectives. It is much more concerned with the individual character of the accused because of his age and incompetency. The proceedings in juvenile court have the purpose of determining

22. 371 F.2d 726 (10th Cir. 1967).

23. The defects in juvenile court when it waived jurisdiction to the district court were that the defendants were not represented by counsel and that allegedly the juvenile court never relinquished jurisdiction hence jurisdiction of the state district court never attached. See 371 F.2d at 728.

24. 445 P.2d at 953.

25. The court relies on *Sanders v. Cox*, 395 P.2d 353 (1964), *cert. denied*, 379 U.S. 978 (1965), and *Latham v. Crouse*, 320 F.2d 120 (10th Cir. 1963), *cert. denied*, 375 U.S. 959 (1963).

26. See N.M. Const. art. 2, § 14.

what is best for the child.²⁷ As Justice Fortas stated in *Kent v. United States*,²⁸ the objectives of the juvenile courts "are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." In the light of these functional differences, the analogy between the preliminary hearing and the juvenile court investigation is somewhat weakened.

The court's analogy would also seem weakened when the jurisdictional relationship between the juvenile and district courts is compared with the jurisdictional relationship between the magistrate and district courts. The jurisdiction of juvenile courts in New Mexico is specifically stated to be "exclusive" and "original."²⁹ By contrast, provisions of New Mexico law dealing with the preliminary hearing in magistrate court do not contain any terminology giving that court exclusive and original jurisdiction *vis a vis* the district courts.³⁰ The magistrate court acts as a preparatory forum for the district court while the juvenile court is a forum in its own right.

The majority in *Neller* seems to view the analogy of the preliminary hearing and the juvenile court investigation through a peephole. The analogy is made to explain the waiver and then is explored no further. If this analogy is to be consistent the court should look at other provisions of the New Mexico statutes dealing with preliminary examination. For example, section 41-3-1 directs the magistrate to immediately inform the accused of the charge against him, "and of his right to the aid of counsel in every stage of the proceedings."³¹ Article three, chapter 41 also allows the defendant an opportunity to send for counsel and provides for adjournment until counsel arrives.³² It would seem that if a juvenile can waive defects based on the court's analogy he should also have the benefit of the safeguards provided by article three, chapter 41.

Rule 92³³ of the District Court Rules of New Mexico has a

27. See, e.g., N.M. Stat. Ann. § 13-8-64 (Repl. 1968); National Counsel on Crime and Delinquency Standard Juvenile Court Act, art. I, § 1 (6th ed. 1959); and 31 Am. Jur. *Juvenile Courts* § 52 (1958) and cases cited therein.

28. 383 U.S. 541, 554.

29. See N.M. Stat. Ann. § 21-1-1 (93) (Supp. 1967).

30. See also articles 2 and 12 of chapter 36 N.M. Stat. Ann. for more on the jurisdiction of the justices of the peace (magistrate) courts.

31. The accused is also informed of his rights to waive an examination before any further proceedings occur. A statute like § 41-3-1 applied to juvenile investigation proceedings would then force any waiver of rights to occur in juvenile court rather than in district court as was the case in *Neller*.

32. See N.M. Stat. Ann. § 41-3-2 (Repl. 1964).

33. N.M. Stat. Ann. § 21-1-1 (92) (Supp. 1967).

similar provision for informing a defendant of his right to counsel. The rule further states:

Nothing herein shall be considered as preventing the intelligent waiver by any defendant of the right to representation by counsel at the preliminary hearing, but such waiver must be in writing and certified to by the committing magistrate.

This progressive requirement of written waiver has been recommended in United States Supreme Court decisions.³⁴ If this safeguard is deemed necessary for adults in New Mexico it would seem that it should apply to juveniles, especially since the court in *Neller* analogizes the preliminary hearing and the juvenile court investigation.

In a well reasoned dissent, which seems to embrace the spirit of the *Kent* and *Gault* decisions, Judge Wood reaches a different result than does the majority. After distinguishing two cases³⁵ which the majority relies on he deals with the question of *Neller's* waiver of the right to counsel. Judge Wood concludes that the trial court did not have the authority to accept the plea of guilty which resulted in the waiver.³⁶ This is so because *Neller* was not transferred to the district court in the manner provided by the New Mexico statute governing such transfers.³⁷ In Judge Wood's view this statute must be read in the context of the requirements of due process. The transfer proceeding is "critically important" according to *Kent*³⁸ and must measure up to the due process standard requiring the right to be represented by counsel and to have counsel appointed if the accused cannot provide his own.

Requiring New Mexico's statutory provision on transfer from juvenile to district court to be read in the context of due process as exemplified by *Kent* and *Gault* seems to be a reasonable and sound approach. This view has the support of respected judges and commentators.³⁹

34. See *Johnson v. Zerbst*, *supra* at 465; where waiver should appear in the record.

35. *Cradle v. Peyton*, 208 Va. 243, 156 S.E. 2d 874 (1967), which held that where the right to counsel at the juvenile court transfer proceeding exists, it is a development of statutory law; and *State v. Acuna*, 78 N.M. 119, 428 P.2d 658 (1967) which said that the same right did not exist because the transfer proceeding was not a criminal proceeding.

36. *Neller v. State*, 445 P.2d 949, 957.

37. See N.M. Stat. Ann. § 13-8-27 (Repl. 1968), the section is quoted in note 21 *supra*.

38. See note 1 *supra* at 556.

39. See, e.g., note 3 *supra*; *Steinhauer v. State*, 206 So.2d 25, 27 (Fla. App. 1968); and Chief Justice Traynor's opinion in *In re Harris*, 64 Cal. Rptr. 319, 321, 434 P.2d 615, 617 (1967).

In a more general sense, the court stated it was possible for Neller to waive his right to counsel if done knowingly and intelligently.⁴⁰ However, the court, in the remainder of the opinion, never focuses on these terms to see if the petitioner's waiver adequately measures up. Two grounds are seen as the basis for the waiver: the plea of guilty and the failure in district court to object to the defect in juvenile court.⁴¹ These two grounds are listed independently in the opinion and although the court does not so state, apparently either by itself is sufficient for an effective waiver.

A plea of guilty at arraignment when represented by counsel is usually held to waive defects at the preliminary hearing.⁴² Neller was represented at arraignment when he pleaded guilty, and his counsel waived a preliminary hearing in district court. In applying the above rule the court says in effect that the guilty plea waives rights at two stages; the preliminary hearing in district court, and the juvenile court investigation. It is clear that Neller, through his counsel, intended to waive the preliminary hearing in district court but is it clear that he also intended to waive any rights that he may have had in juvenile court? It is at this other stage (juvenile court) that the "intelligently and knowingly" test is a much closer question of fact.

The court's second ground for waiver, a failure to assert at arraignment rights believed to have been denied, might be questioned on the theory from *Miranda* that "a silent record is impermissible" to effect a waiver.⁴³ Neller made no objection to the lack of counsel at his transfer proceeding in juvenile court when arraigned but is it to be presumed that he knew that this right existed? *Miranda* seems to say no⁴⁴ although there the waiver was of the right to be informed that counsel could be present at interrogation, whereas Neller had counsel when his right was waived. The court in *Neller*, without saying so, apparently would distinguish the two cases to find a waiver of the right to counsel at the transfer proceeding.

The preceding discussion raises the question of what effect the presence of counsel has when a right of an accused is allegedly waived. Is every procedural right waived when the accused has the

40. See note 37 *supra* at 953.

41. *Id.*

42. See majority's discussion at page 953 and cited New Mexico authority.

43. See notes 8 & 9 *supra*. However, this standard from *Miranda* as applied in that case pertained to an adult who did not have the benefit of counsel at the time of alleged waiver.

44. 384 U.S. at 471-72.

benefit of counsel at the time of waiver? In *Fay v. Noia*⁴⁵ the United States Supreme Court dealt to some extent with this question and concluded that a choice made solely by counsel does not automatically bar relief. The dissent in *Noia* grants that there are cases that turn on whether the defendant himself expressly waives a constitutional right and then states:

Foremost among these are the cases involving right to counsel, for the court has made it clear that this right cannot be foregone without deliberate choice by the defendant.⁴⁶

In *Henry v. Mississippi*⁴⁷ the United States Supreme Court dealt with the question of counsel's ability to waive a defendant's right by not asserting the right during the trial. According to the Court, if counsel fails to assert a right as part of trial strategy and that tactic fails, the waiver is binding on the defendant. However, strategy adopted without consulting the accused will not prevent the accused from making a claim of ineffective waiver.⁴⁸ Implicit in *Henry* is that a court should not hold an accused accountable for his lawyer's negligence or incompetence. If the reasonable presumption is made that in waiving the preliminary hearing in district court and pleading guilty, Neller's counsel failed to realize that he was also waiving potential defects in juvenile court, then Neller's waiver would fall short of the "intelligent and knowing" standard.

It is important to keep in mind that the majority assumes throughout the opinion that the right to counsel at the transfer proceeding is required for the sake of dealing with the waiver issue. After taking note of this assumption the brief in support of a motion for rehearing urged that "it is a logical fallacy to presume that counsel can advise a client and secure a waiver of procedural defects which this court has previously refused to recognize as such."⁴⁹

The right to counsel at the transfer proceeding was not a known right when Neller was arraigned and pleaded guilty. It could not have been a known right since in the *Neller* opinion itself the court decides that the requirement of counsel at the transfer proceeding is not of constitutional dimensions,⁵⁰ but rather is determined by New Mexico law.⁵¹

45. 372 U.S. 391, 439 (1963).

46. *Id.*, at 471.

47. 379 U.S. 443 (1965).

48. *Id.*, at 451-52.

49. Petitioner's Brief in Support of Motion for Rehearing at 7, *Neller v. State*, 445 P.2d 949 (1968).

50. *Neller v. State*, 445 P.2d 949, 951 (1968).

51. *Id.*, at 953.

Although the requirement of counsel is not of constitutional dimensions the court says later in the opinion :

If at the time of arraignment, complaint had been made that counsel had not been provided in juvenile court, we consider it would possibly have been error for the district court to refuse to remand to the juvenile court for a proper hearing.⁵²

The court seems then to be setting the stage for a case which would face the issue of counsel at the transfer proceeding head-on. This would occur when, in a situation like *Neller's*, objection is made at district court arraignment to an alleged defect in juvenile court.

Neller thus does not represent the final word on the right to counsel at the transfer proceeding. The finding of waiver by the court is decisive and avoids the larger issue. A waiver of rights, however, is not a favored device of the courts. It would seem that it should be even less favored in juvenile courts since these courts were not created to deprive a juvenile of his rights but to ameliorate the harshness of the criminal law.

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52. *Id.*