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JUVENILE COURT—WAIVER OF JURISDICTION—REACHING AGE SEVENTEEN DOES NOT RENDER APPEAL OF WAIVER MOOT BUT ONLY PREVENTS A REMAND IF THE CASE IS REVERSED. *Hight v. State*, 483 S.W.2d 256 (Tex. Sup. 1972).

On July 2, 1971, the State filed a petition for delinquency in the juvenile court based on certain criminal offenses which George Hight allegedly committed on June 27, 1971. Upon a hearing in the juvenile court, judgment was rendered granting the State's motion to waive jurisdiction and transfer the juvenile to district court as an adult. Hight appealed this waiver to the court of civil appeals but before the appeal was heard, he reached age seventeen. The court of civil appeals held that as of the day appellant became 17 years of age, the appeal became moot since he could no longer be tried as a juvenile; and consequently the appeal was dismissed.¹ The Supreme Court of Texas refused to issue a writ of error holding no reversible error.² Held—*Motion for rehearing overruled*. The single fact of Hight's reaching age seventeen has nothing to do with whether the case is moot; the loss of jurisdiction in the juvenile court only prevents a remand if the case is reversed.³

At common law there was no difference in the treatment accorded juveniles and adults who committed the same crime; consequently procedural rules for each were alike.⁴ Today all 50 states have enacted legislation designed to deal specifically with juveniles for the purpose of "re-education and rehabilitation rather than retribution and deterrence."⁵ The juvenile court's function is to treat children in a setting less traumatic than the criminal court, but one which is at least as well able to offer treatment to the child and protection to the community.⁶ The juvenile court's procedure is personalized and is designed to ascertain what should be done for the particular child with emphasis on the offender and not on the offense.⁷

The purpose of the Texas Juvenile Act is "not one of punishment but rather one of custodial protection of the child for his own good and

¹ *Hight v. State*, 473 S.W.2d 348 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

² *Hight v. State*, 15 Tex. Sup. Ct. J. 192 (Feb. 19, 1972).

³ The court, however, agreed with the court of civil appeals for a different reason. Hight became seventeen before the grand jury met and before he was indicted. Therefore it was apparent to the court that the waiver order was not relied upon by the grand jury and thus the case is moot.

⁴ Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

⁵ Comment, *Waiver of Jurisdictions in the Juvenile Court: Another Gault Question Still Unanswered*, 15 S.D.L. REV. 376, 377 (1970); see, e.g., ALAS. STAT. § 47.10.010 (1971); CAL. WELF. & INST'NS § 600 (Deering 1969); D.C. CODE ANN. § 11-1501 (1966); ILL. ANN. STAT. ch. 37, § 701-1 (Smith-Hurd Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 2338-1 (1971).

⁶ Rubin, *Legal Definitions of Offenses by Children and Youth*, 1960 ILL. L.F. 512.

⁷ Criswell, *The Beginnings and Developmental Steps of the Juvenile Court in America and Particularly in Florida*, in JUVENILE COURT FORUM 62 (1957).

incidentally for the protection of society."⁸ While under the jurisdiction of the juvenile court,⁹ the minor is detained separately from adults.¹⁰ An adjudication does not label the child a criminal because it is not considered a conviction.¹¹ Neither does the adjudication impose any civil disability nor operate to disqualify the child from any civil service employment.¹² In no case can the juvenile court retain a youth past his 21st birthday.¹³ The "best interest of the child is protected . . . [and] he is given every possible advantage for proper training for good citizenship"¹⁴ unless he is transferred to the district court.

In 1967 the legislature amended section 6 of the Juvenile Act.¹⁵ The amendment's purpose was to provide a procedure to waive jurisdiction and transfer children for criminal proceedings and to prevent children from being proceeded against in both the juvenile court and district court for offenses committed while of juvenile age.¹⁶ If the child is over 15 years of age and has committed a felony, the juvenile court may waive jurisdiction and the child will be transferred to the district court.¹⁷ In determining whether or not jurisdiction should be waived, the juvenile court must consider the seriousness of the alleged offense, whether the alleged offense was committed in an aggressive and premeditated manner, the sophistication and maturity of the child, the prospects of adequate protection of the public, and the likelihood of rehabilitation of the child within the juvenile system.¹⁸ If the juvenile court retains jurisdiction, the child is not subject to prosecution for any offense evidenced by anything in the proceeding.¹⁹ If the juvenile court waives jurisdiction, the child shall be dealt with as an adult according to the Code of Criminal Procedure.²⁰

*Dillard v. State*²¹ was concerned with a problem similar to that in

⁸ *In re Dendy*, 175 S.W.2d 297, 303 (Tex. Civ. App.—Amarillo 1943), *aff'd sub. nom.*, *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

⁹ It should be noted that the 62d Legislature, 4th Special Session, amended the Juvenile Act and Penal Code to eliminate the age-sex disparity in establishing the maximum age at which a minor may remain within juvenile court jurisdiction. Now a child is "any person over the age of ten years and under the age of seventeen years" rather than any female over the age of ten and under the age of eighteen, any male over the age of ten and under the age of seventeen. H.B. No. 77, *amending* TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 3, 17 (1971) & TEX. PENAL CODE art. 30, § 2 (Supp. 1972).

¹⁰ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 17 (1971).

¹¹ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13(d) (1971).

¹² *Id.*

¹³ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13(c)(2) (1971).

¹⁴ *In re Dendy*, 175 S.W.2d 297, 304 (Tex. Civ. App.—Amarillo 1943), *aff'd sub. nom.*, *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

¹⁵ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1971).

¹⁶ Tex. Laws 1967, ch. 475, § 4, at 1082.

¹⁷ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(b) (1971).

¹⁸ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(h) (1971).

¹⁹ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(i) (1971); TEX. PENAL CODE ANN. art. 30, § 3 (Supp. 1972).

²⁰ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(j) (1971).

²¹ 439 S.W.2d 460 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

Hight. Before Dillard was adjudicated a delinquent, the State filed a motion for waiver and certification of him to a district court for criminal proceedings. Dillard was indicted before he reached age seventeen but criminal prosecution was withheld pending appeal from the order of waiver of jurisdiction. Dillard became seventeen before his appeal was heard and the State contended that any errors of the court had become moot. The court of civil appeals recognized that there are possibly circumstances when an appeal taken from a waiver of jurisdiction might result in a fraud upon a person under 17 years of age by reason of the necessary delay occasioned by appeal but said this was not such a case and held that the case was moot.²² One member of the court noted that there was fundamental error occasioned in the juvenile court in its effort to comply with the Juvenile Act. Nevertheless, he agreed that the case was moot since Texas courts have uniformly held that the age of a juvenile at the time of the trial is controlling rather than his age at the time of the offense.²³

In *Carrillo v. State*²⁴ the Supreme Court of Texas allowed Carrillo to appeal a judgment of delinquency even though he had passed the age of seventeen. The court held that a minor should have the right to clear himself by appeal and the fact that the boy turned seventeen while the case is being appealed should not make the case moot.²⁵

In the instant case the Texas Supreme Court followed the reasoning in *Carrillo*²⁶ and held that the single fact that Hight had reached age seventeen had nothing to do with whether or not the case was moot. Since Hight had turned seventeen, the juvenile court could no longer have jurisdiction over him but this fact only prevents a remand if the case is reversed. The court, however, did agree with the court of civil appeals' decision of mootness for a different reason. Because the grand jury did not meet until one month after Hight had become seventeen, it was apparent to the court that the waiver order was not relied upon by the grand jury. The supreme court overruled the motion for a rehearing on the basis that it could render no judgment which would have any legal consequences since Hight had already been indicted.²⁷

Waiver of jurisdiction is the most severe sanction that may be imposed by the juvenile court. The transfer of custody is an arrest and after transfer the child is dealt with as an adult.²⁸ Individuality and confidentiality are replaced by publicity which may itself constitute a

²² *Id.*

²³ *Id.* at 463 (concurring opinion).

²⁴ 480 S.W.2d 612 (Tex. Sup. 1972).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Hight v. State*, 483 S.W.2d 256 (Tex. Sup. 1972).

²⁸ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6(j) (1971).

form of punishment.²⁹ The child acquires a public arrest record which is a stigma even if he is acquitted.³⁰ If the child is convicted, he may be detained well past his 21st birthday in an adult prison where he may be subjected to physical and sexual abuse by older inmates.³¹ Penal confinement for several years often only hardens the criminal tendencies of the young person. Such treatment is counterproductive to the best interests of society and the juvenile and should be used only as a last resort.

The Supreme Court has emphasized the necessity that the basic requirements of due process and fairness be satisfied in waiver proceedings. Considering the possible consequences of the waiver of jurisdiction, it becomes obvious that such a proceeding is "critically important."³² Once the juvenile court has waived jurisdiction, all the safeguards accorded a minor are gone and his only recourse is appeal.

The juvenile court, like any other court, is subject to corrections for failure to observe procedural commands of the statute under which it functions.³³ If a 16-year-old boy is transferred to the district court, he may appeal the waiver.³⁴ If the waiver order was proper, the district court will proceed with the prosecution; but if the waiver was improper, the child will be returned to the juvenile court. However, any person who becomes seventeen while appealing a waiver order is in effect denied the right of appeal. According to *Hight*, if a person turns seventeen while the waiver order is being challenged, the appeal is not moot, but the result is the same as if no appeal were allowed. Because of his age, he can not be remanded to the juvenile court if the waiver is reversed, and since he was never adjudged by the juvenile court to have committed any offense, charges can be filed against him in district court. If the grand jury indicts the person who turned seventeen while appealing the waiver order, the appeal is moot because "[n]o judgment . . . [the court] could render concerning the waiver order would in any way affect anyone's rights."³⁵ Whether or not the waiver was improper is immaterial since a 17-year-old person can be indicted by the grand jury without waiver by the juvenile court. If the waiver were improper and the child *should* have remained in the juvenile court, the 17 year old is nevertheless amenable to criminal prosecution and in effect punished for the juvenile court's mistake.

²⁹ President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime*, ch. 1, at 38 (1967).

³⁰ Schornhorst, *Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 586 (1968).

³¹ *Id.* at 587.

³² *Kent v. United States*, 383 U.S. 541, 556, 86 S. Ct. 1045, 1055, 16 L. Ed. 2d 84, 94 (1966).

³³ *Kent v. United States*, 343 F.2d 247 (D.C. Cir. 1965), *rev'd on other grounds*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

³⁴ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 21 (1971).

³⁵ *Hight v. State*, 483 S.W.2d 256, 257 (Tex. Sup. 1972).

Hight is significant in that it recognizes the right to appeal a waiver of jurisdiction and transfer even though the child can not be remanded to the juvenile court. It does not, however, go far enough. It is apparent that there are still certain circumstances in which it is possible for a juvenile to be tried as an adult for crimes committed while he was of juvenile age without the state having complied with the provision requiring a proper waiver of jurisdiction. The district court not only acquires jurisdiction over the child if the waiver proceeding is properly done, but even if there is fundamental error in it. Although the supreme court decided that the single fact of reaching age seventeen did not make the case moot, the same result was reached as in the contrary holding of *Dillard*.³⁶

Determining juvenile court jurisdiction by the child's age at the time of the trial is too nebulous and susceptible to injustice. If the child's appeal of waiver of jurisdiction is effectively denied because of the incidental arrival of his 17th birthday, then he is deprived the assurance of a proper waiver hearing granted by the 1967 amendment to the Juvenile Act.³⁷ The use of age at the time of the offense as the criterion, however, would solve the problems of minors such as *Hight* who pass the maximum age while appealing juvenile court decisions. This criterion is employed by other jurisdictions³⁸ and is based on the theory that juvenile delinquency arises from acts or conduct taking place at an age when the child is meant to be protected from the rigors of criminal law and that such a delinquent act does not ripen into a crime merely because of a lapse of time.³⁹ This is a logical approach since the test of the child's responsibility rests in his discretion and power to discriminate right from wrong and to comprehend the consequences of his acts.⁴⁰ If on appeal the waiver is found appropriate the district court may proceed with prosecution. If the waiver is found inappropriate, the child can be remanded to the juvenile court.

Since the Juvenile Act does not indicate whether age at the time the alleged act is committed or age at the time of the trial is controlling, appropriate legislation should be enacted to finally establish that the child's age is to be determined at the time of the offense.

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³⁶ *Dillard v. State*, 439 S.W.2d 460 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

³⁷ TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1971).

³⁸ *E.g.*, *United States v. Jones*, 141 F. Supp. 641 (E.D. Va. 1956); *United States v. Fotto*, 103 F. Supp. 430 (S.D.N.Y. 1952); *State v. Dubray*, 250 P. 316 (Kan. 1926); *State v. Malone*, 100 So. 788 (La. 1924); *Austin v. State*, 280 A.2d 17 (Md. Ct. Spec. App. 1971); *Metcalf v. Commonwealth*, 156 N.E.2d 649 (Mass. 1959); *Johnson v. State*, 114 A.2d 1 (N.J. 1955); *State v. Jones*, 418 S.W.2d 769 (Tenn. 1966); *Slatton v. Boles*, 130 S.E.2d 192 (W. Va. 1963).

³⁹ *Mattingly v. Commonwealth*, 188 S.W. 370 (Ky. Ct. App. 1916); *State v. Malone*, 100 So. 788 (La. 1924); *In re Smigelski*, 154 A.2d 1 (N.J. 1959).

⁴⁰ 43 C.J.S. *Infants* § 95 (1945).