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ATTORNEY GENERAL OPINION NO. 89- 137

Nola Foulston  
Sedgwick County District Attorney  
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535 N. Main  
Wichita, Kansas 67203

Re: Minors--Kansas Juvenile Offenders Code--New Trial

Synopsis: District courts appear to have the authority to entertain a motion for new trial in a juvenile proceeding if the motion is timely filed and if double jeopardy problems would not arise. A juvenile does not, however, have a statutory or constitutional right to a new trial. Cited herein: K.S.A. 38-801 et seq., repealed L. 1982, ch. 182; 38-1601; 38-1632; 38-1653; 38-1665; 38-1681; 38-1683; 60-259; 60-2103; K.S.A. 44-556, as amended by L. 1979, ch. 158, § 1.

\* \* \*

Dear Ms. Foulston:

You request our opinion regarding the following:

"Does a juvenile offender have a statutory right to a new trial following adjudication and/or disposition? If so, does that right exist by a provision in the juvenile offender's code or provisions in the code of civil procedure generally? If not, is a juvenile offender entitled to a new trial by virtue of any other

considerations; i.e. constitutional rights, inherent power of the court to review its own rulings, etc?"

Although the court may rehear a preadjudicatory detention matter upon request of the alleged juvenile offender's parent who was not given notice of the hearing, K.S.A. 38-1632(e), and may modify certain orders of disposition, K.S.A. 38-1665, the Kansas juvenile offenders code contains no specific provision authorizing a new trial on the adjudication. (K.S.A. 38-1683, however, does provide for a trail de novo in the district court on appeal from an order entered by a district magistrate judge.) The question therefore becomes whether K.S.A. 60-259 of the code of civil procedure applies in juvenile proceedings.

This exact question has as yet not been resolved by the Kansas appellate courts. In re Trotter, 3 Kan.App.2d 566 (1979) involved a question on the court's jurisdiction to grant a new trial on the basis that the trial court had failed to record proceedings in a trial de novo of a matter under the old juvenile code (K.S.A. 38-801 et seq., repealed, L. 1982, ch. 182). The issue whether K.S.A. 60-259 (the provision for new trial) was legally available to the requesting party was not discussed, but rather whether the grounds for new trail listed in K.S.A. 60-259(a) included a court's failure to record its proceedings. The court held that it did. 3 Kan.App.2d at 567.

In In re Waterman, 212 Kan. 826 (1973), the Kansas Supreme Court held that "[t]he juvenile court act is a comprehensive inclusive act covering the entire field of juvenile delinquency, miscreancy, dependency and neglect, and it provides its own specific procedures. It is full and complete within itself." 212 Kan. at 830. The court therefore concluded that since the old juvenile code did not provide for an appeal by the state, appeal by the state was not available in a juvenile proceeding. Id. More recently, however, the Supreme Court has held that a district court could proceed under K.S.A. 60-235, authorizing medical and psychiatric evaluations, in a juvenile proceeding even though the old juvenile code did not specifically provide for such evaluations:

"The parents argue on appeal that K.S.A. 60-235(a) was not applicable to the proceedings. They base this contention on the fact the proceedings herein were under

Chapter 38 (Juvenile Code) and argue that an order pursuant to K.S.A. 60-235(a) was improper. This case arose prior to court unification and the statute in effect at the time relative to the scope of Chapter 60 (Code of Civil Procedure) was set forth in K.S.A. 60-201 (Corrick) as follows:

"This article governs the procedure in the district courts of Kansas and original proceedings in the supreme court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in section 60-265.

"K.S.A. 38-813, in the form in effect at the time, provided:

"All witnesses shall be sworn on oath or affirmation, and the rules of the code of civil procedure relating to witnesses, including the right of cross-examination, shall apply to proceedings in the juvenile court. Only witnesses who have been subpoenaed shall be allowed witness fees and mileage. No witness shall be entitled to be paid such fee or mileage before his actual appearance in court."

"This court has used K.S.A. 38-813 as a basis to apply the hearsay rules (K.S.A. 60-460) to juvenile court proceedings. In re Harris, 218 Kan. 625, 544 P.2d 1403 (1976); In re Johnson, 214 Kan. 780, 522 P.2d 330 (1974).

"The Juvenile Code is to be liberally construed for the protection of dependent and neglected children. This concept is well stated in Lennen v. State, 193 Kan. 685, 689-90, 396 P.2d 290 (1964), as follows:

"[W]e must ever bear in mind the purpose which underlies the Juvenile Code and the beneficent objectives which the code seeks to attain. These objectives are well

expressed in 38-801, supra, which provides:

"This act shall be liberally construed, to the end that each child coming within its provisions shall receive such care custody, guidance, control and discipline, preferably in his own home, as will best serve the child's welfare and the best interests of the state. In no case shall any order, judgment or decree of the juvenile court, in any proceedings under the provisions of this act, be deemed or held to import a criminal act on the part of any child; but all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state. This section shall not apply to proceedings under section 30 [38-830] of this act."

"The statute is but a legislative expression of the concern which the people of this state have always had for the welfare of children. This court early gave voice to the public feeling in this regard. Speaking for the court in the case of In re Bullen, 28 Kan. 781, Justice Brewer posed the paramount question:

". . . What will be best for the welfare of the child? . . ." (p. 786.)

'Like a vivid, vital strand, this concept of what is best for the child runs through the tapestry woven from our many decisions dealing with child custody, care and placement.'

"We do not hesitate to hold that when the mental condition of the parent is a basic issue of dependent and neglected child proceedings, the district court may proceed under K.S.A. 60-235. Under the circumstances herein the district court did not err in ordering the psychiatric

evaluation of the father." In re Kerns, 225 Kan. 746, 750, 751 (1979).

These cases were all decided under the prior juvenile code rather than the current juvenile offender or child in need of care codes, but they provide guidance as to how the court might rule on the question before us.

Further guidance may be drawn from the court's decision in Dieter v. Lawrence Paper Co., 237 Kan. 139 (1985). In a prior case, Hensley v. Carl Graham Glass, 226 Kan. 256 (1979), the court interpreted a provision of the workers' compensation act, K.S.A. 1978 Supp. 44-556(c), as amended by L. 1979, ch. 158, § 1, to conform the time for appeal in workers' compensation cases to that in other civil actions under K.S.A. 60-258 and K.S.A. 60-2103. In Dieter, the court took this holding one step further finding that the time to appeal in workers' compensation cases under the 1979 amendment to K.S.A. 44-556 is tolled by post-judgment motions as provided in K.S.A. 60-2103. The statute in question provided as follows:

"(c) Any party to the proceedings may appeal from any findings or order of the district court to the appellate courts on questions of law. The compensation payable under the decision of the district court shall not be stayed pending such appeal. Such appeal shall be taken and perfected by the filing of a written notice of appeal with the clerk of the district court within thirty (30) days after the filing of the entry of judgment as provided in K.S.A. 60-258 and amendments thereto. Any appeal heretofore taken and pending on the effective date of this act which was filed within twenty (20) days from the date of journal entry of judgment shall be deemed timely and the appellate court in which the appeal is pending shall have jurisdiction to determine such appeal. Appeals pursuant to this subsection shall be prosecuted in like manner as other appeals in civil cases, and shall take precedence over other cases except cases of a like character." L. 1979, ch. 158, § 1 (emphasis added).

The court reasoned:

"The Kansas appellate courts have not heretofore addressed the specific question whether the filing of a postjudgment motion tolls the time for filing an appeal since 44-556(c) was amended in 1979. Prior to the 1979 amendment, a number of Kansas cases held that, since there was no provision in the Workmen's Compensation Act for filing motions for a new trial or other postjudgment motions, the statutory time for appeal was not extended by filing a post-trial motion. Dunn v. Kuhlman Diecasting Co., 203 Kan. 670; Gray v. Herclues Powder Co., 160 Kan. 767, 165 P.2d 447 (1946); Ferguson v. Palmolive-Peet Co., 129 Kan. 516. The opinion in Henlsey v. Carl Graham Glass, 226 Kan. 256, did not specifically cover the question whether a postjudgment motion tolls the time for filing a notice of appeal to an appellate court in a workers' compensation case.

" We have concluded that the 1979 amendment to 44-556(c) had the effect of making the procedural provisions of the Kansas Code of Civil Procedure pertaining to entry of judgment, postjudgment motions, and appeals applicable to workers' compensation appeals pending in the district court to the same extent as they are applied in other types of civil cases. In reaching this conclusion, we note that K.S.A. 60-201 addresses the scope of the Kansas Code of Civil Procedure and provides as follows:

"60-201. Scope. This article governs the procedure in the district courts of Kansas, other than actions commenced pursuant to chapter 61 of the Kansas Statutes Annotated, and any amendments thereto, and governs the procedure in all original proceedings in the supreme court in all suits of a civil nature whether

cognizable as cases at law or in equity, except as provided in K.S.A. 60-265.'

"Furthermore, the Kansas Code of Civil Procedure is to be liberally construed. K.S.A. 60-102. In liberally construing the Code of Civil Procedure, it should be held to apply to workers' compensation reviews in the district court in order to give a district court authority to correct its own errors prior to appellate review. In Hensley, 226 Kan. 256, it is stated that the purpose of the 1979 amendment to 44-556(c) was to conform the time for appeal in workers' compensation cases to those in other civil actions under K.S.A. 60-258 and K.S.A. 60-2103.

. . . .

"K.S.A. 60-2103 states that when an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be thirty days from the entry of the judgment as provided in K.S.A. 60-258, except that the running of the time for appeal is terminated by a timely posthearing motion and that the full time for appeal commences to run and is to be computed upon the entry of an order granting or denying a motion for judgment under K.S.A. 60-250(b) or granting or denying a motion under K.S.A. 60-252(b) to amend or make additional findings of fact, or granting or denying a motion under K.S.A. 60-259 to alter or amend the judgment, or denying a motion for a new trial under K.S.A. 60-259." Dieter, 237 Kan. at 143, 144 (emphasis added).

Like the workers' compensation statute considered in Dieter, the juvenile offenders code contains a provision which adopts the appellate procedure of the Kansas code of civil procedure. K.S.A. 38-1683. (The code also incorporates the rules of evidence of the code of civil procedure. K.S.A. 38-1653.) K.S.A. 60-2103 specifically references K.S.A.

60-259 in tolling the time in which an appeal must be taken. [Note: parties in a juvenile offender proceeding must take care to file an appeal within the limits of K.S.A. 38-1681(b). See State v. Hemminger, 207 Kan. 172, 176 (1971) (even where particular provision of civil procedure code is made applicable to criminal cases, "in a criminal proceeding a provision of the code of civil procedure may not prevail in the face of a contrary or inconsistent provision of the criminal code nor may it replace a specific provision in the criminal code.")] Thus, arguably, the juvenile offenders code has adopted K.S.A. 60-259 by reference, thus allowing the district court in such proceedings to entertain motions for new trial. We believe this is consistent with the court's previous holdings which favor giving the trial court an opportunity to correct its own errors. See Merando v. A.T. & S.F. Rly. Co., 232 Kan. 404, 413 (1983); Loose v. Burbacher, 219 Kan. 727, 729 (1976); Dieter, supra at 143. It is also consistent with the fundamental policy of the juvenile offenders code to "best serve the juvenile's rehabilitation and the protection of society." K.S.A. 38-1601. See also State, ex rel., v. Owens, 197 Kan. 212, 223 (1966); State v. Muhammad, 237 Kan. 850, 854 (1985); In re C.A.D., 11 Kan.App.2d 13, 19 (1985). It is therefore our opinion that the court in a juvenile proceeding is authorized to entertain a motion for new hearing pursuant to K.S.A. 60-259.

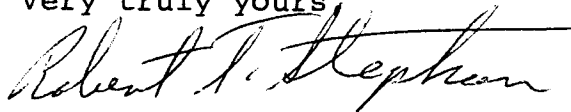
However, K.S.A. 38-1683 merely adopts the procedures on appeal used for other civil actions, it does not specifically adopt any substantive rights found therein. Thus, we do not believe courts in juvenile proceedings are bound by the provisions of K.S.A. 60-259(a) Sixth. Further, we caution the courts in granting a new hearing on motion of the prosecution after jeopardy is attached in that this may violate K.S.A. 38-1682 and case law which holds the double jeopardy clause applicable to juvenile proceedings. See Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). See K.S.A. 22-3501. We also caution parties requesting new hearings that, should a court disagree with our opinion that motions for new trial may be entertained in juvenile proceedings, filing of a motion for a new trial will not toll the time for appeal. See Dieter, supra at 143, and cases cited therein. If the time for appeal is not tolled and the appeal is not taken within ten days of the entry of the order of disposition, the appellate court will not have jurisdiction to hear the appeal. Finally, we believe the best way to proceed is to file the K.S.A. 60-259 motion after adjudication but before disposition, if possible, and request



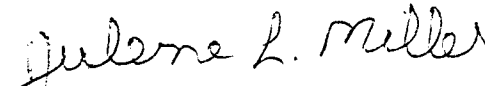
the court to stay its dispositional order until it rules on the motion since the time to appeal does not begin to run until entry of the order of disposition. K.S.A. 38-1681(b).

In conclusion, district courts appear to have the authority to entertain a motion for new trial in a juvenile proceeding if the motion is timely filed and if double jeopardy problems would not arise. A juvenile does not, however, have a statutory or constitutional right to a new trial.

Very truly yours,



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