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Supreme Court of the United States

OCTOBER TERM, 1969

Office-Supreme Court, U.S.
FILED
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 JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 15

CLARENCE DeBACKER,

Appellant;

vs.

HOMER BRAINARD, SHERIFF OF
DODGE COUNTY, NEBRASKA,

Appellee.

Pt. 1

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Place Washington, D. C.

Date October 13, 1969

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C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	William G. Line, Esq., on behalf of Appellant	3
3	Richard L. Kuhlman, Esq., on behalf of Appellee	15
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

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 4 CLARENCE DeBACKER, :
 5 Appellant; :
 6 vs. : No. 15
 7 HOMER BRAINARD, SHERIFF OF :
 8 DODGE COUNTY, NEBRASKA, :
 9 Appellee. :
 -----x

10 Washington, D. C.
11 October 13, 1969

12 The above-entitled matter came on for argument at
13 2:05 p.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
 16 HUGO L. BLACK, Associate Justice
 17 WILLIAM O. DOUGLAS, Associate Justice
 18 JOHN M. HARLAN, Associate Justice
 19 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 20 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 WILLIAM G. LINE, Esq.
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 24 Fremont, Nebraska 68025
 Counsel for Appellant
 25 RICHARD L. KUHLMAN, Esq.
 Dodge County Attorney
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 Fremont, Nebraska 68025
 Counsel for Appellee

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APPEARANCES (Continued):

ALFRED L. SCANLAN, Esq.
Washington, D. C.
For National Council of Juvenile Court Judges
as Amicus Curiae

1 a concurrence of five judges to declare a State statute in-
2 valid.

3 The position of the appellant in this case has been
4 referred to by some of the adversaries in amicus curiaes as
5 being simplistic. Without the evil connotations of the word,
6 it is precisely that.

7 Since this Court's decisions in Duncan, in Bloom, in
8 Gault, a proceeding where a person can wind up in a penal in-
9 stitution for more than six months, surely has all the attri-
10 butes of a serious felony case.

11 Q When was he tried?

12 A He was tried in April -- actually February or
13 March 1968, before Duncan and Bloom were decided.

14 Q How do you argue on retroactivity of Duncan and
15 Bloom, or do you think they are even relevant?

16 A I don't think they are even relevant on the
17 retroactivity. I realize that they are not retroactive.

18 Q Because up until Duncan and Bloom, I suppose you
19 would say the State was not bound by the jury trial provision
20 at all?

21 A Right.

22 Q At all. And DeStefano said that Duncan and
23 Bloom would not be retroactive beyond what -- May 20, 1968 is it?

24 A May 20, 1968. This case was all argued in the
25 Nebraska Supreme Court on May 29, 1968.

1 Q But DeStefano said that in trials beginning after
2 May 20, 1968.

3 A Right. Mr. Justice White, the position --

4 Q So how do you get around that?

5 A Gault left open the question of whether a juven-
6 ile delinquency case was, in fact, a criminal case.

7 Q That is true, but even if it was the Sixth
8 Amendment, it wouldn't bind the States to give a jury trial at
9 the time of Gault.

10 A They wouldn't at the time of Gault, but --

11 Q And it wouldn't until May 20, 1968?

12 A My argument is based on this premise: that --

13 Q Or did it rely on the Sixth Amendment at all?

14 A Oh, you have to rely on the Sixth Amendment.

15 Q And on the equal protection clause.

16 A And on the equal protection clause.

17 Q If the State does, in fact, give a jury trial to
18 adults, then it must to juveniles situated as this one was.

19 A For example, an adult in Nebraska, due to the
20 Nebraska constitutional procedures and statutory decisions can
21 get two jury trials for running a stop sign, a 6-man jury in the
22 lower court and a 12-man jury on appeal to the District Court.
23 So that argument, also, we do rely on, of course.

24 It seems to me that this is a new case, basically,
25 and until this Court decides this question, this is the case

1 that should decide once and for all whether these labels that
2 everyone is so fond of mean anything any more.

3 What this case is not about, of course, is the
4 rehabilitative features of the Juvenile Court. No one has
5 pointed out, in my opinion, any reason why a jury trial or an
6 adjudication based upon a criminal standard of proof will inter-
7 fere one wit with the noble, benevolent features of the juvenile
8 court system.

9 For example, I can imagine a juvenile court judge who
10 has a delinquent before him being able to be much more pater-
11 patriae if he hasn't convicted him. Surely he can say, "You
12 have been convicted by a jury of your peers. Now let's see
13 what we can do about you, son," and the juvenile is apt to feel
14 less resentment at the juvenile court process if he has been
15 convicted by his fellow citizens with a standard of proof beyond
16 a reasonable doubt.

17 Q What would you say if it was turned around the
18 other way, that the judge might think he ought to be convicted,
19 but the jury would say, "Well, this boy is a youngster. We are
20 not going to convict him"?

21 A That, I think, Mr. Justice Harlan, is the magic
22 of the whole system.

23 Q Is what?

24 A Is the magic of the whole system. I think that
25 is the reason he ought to have it. Very occasionally judges

1 think people should be convicted and juries think they should
2 not, and that is the way it works out.

3 Q Why have juvenile courts at all? Why not turn
4 them over to the adult authorities?

5 A It seems to me that if a juvenile court system
6 means anything at all, the theory, as I understand it, is that
7 you are not supposed to punish him; you are supposed to rehabili-
8 tate him. Of course, modern penology, I think, is supposed to
9 be arriving at that theory, too, not the thumb screw and the
10 rack, and so forth. We are interested in rehabilitation.

11 It seems to me that the juvenile court can still func-
12 tion; that merely because you give a boy a constitutional right
13 to be tried by a jury, you don't then necessarily have to take
14 away from him whatever benefits yet remain.

15 Q Wasn't one of the purposes of the whole juvenile
16 concept to spare the child, the juvenile, from the traumatic
17 experience that accompanies the whole criminal process, from
18 indictment to the prison; that is, spare him from, among other
19 things, the panoply of a jury trial? Wasn't that in the minds
20 of the conceivers? I am not talking about whether you agree
21 with it. Wasn't that the conception?

22 A No question about it.

23 Q Would you agree that the jury trial can be a
24 traumatic experience for both an adult and a child?

25 A It can be, but I submit not near as traumatic as

1 winding up in a penal institution on the say-so of one man when
2 you have asked for a jury trial, and on the basis of a preponder-
3 ance of evidence. I think that is so much more traumatic.

4 Q In your brief you almost seem to be asking for
5 what Mr. Justice Harlan has just suggested. You say since his
6 case is a criminal case in any realistic sense of the term. If
7 you add all these incidents of the other world, that is, of the
8 adult world, aren't you liable to wind up having all juveniles
9 tried -- I am not talking about you, personally, Mr. Line.

10 If this process continues, aren't we, indeed, well on
11 the way toward abolishing the whole juvenile court concept and
12 system?

13 A That is the other side of the coin. The argument
14 to that effect is made earnestly, but I don't believe realistically
15 Mr. Chief Justice. Ninety percent or more of criminal cases
16 throughout this country are disposed of on pleas of guilty.
17 Juvenile cases, the argument is made in the amicus curiae brief,
18 one reason that this Court shouldn't grant a jury trial is be-
19 cause it has been considered so invaluable it has never been
20 demanded.

21 I think reference is made to Denver where there were
22 only a very few requests made over a period of years.

23 On the other side of the coin, they say, on the other
24 hand, if you do make it available nationwide, then it will be
25 in such demand that the system will break down. We won't be

1 able to administrate. We won't be able to do this and we won't
2 be able to do that.

3 Q I suppose we can take judicial notice, although
4 it is also in the record here, apparently, of the situation in
5 the District of Columbia, for example. You are aware of how
6 far backed up they are because they have jury trials.

7 A That is true. Again, surely the availability of
8 a jury trial cannot depend upon the administrative convenience
9 of a court.

10 Q What happens to the juvenile concept if we grant
11 bail to the juvenile when he is 13 or 14 years old and it takes
12 five or six years to get him to trial? Is there any point in
13 trying him then?

14 A Mr. Chief Justice, you have run a ringer in on
15 me on bail because that is not an issue that I have addressed
16 myself to and that is not presented by this case.

17 Q It is part of the whole problem, though, isn't it?

18 A It is part of the whole problem, but then, right
19 there, I think you get into a whole new issue. It is probably
20 that people are acutely aware of it now because I read in the
21 paper after I got here about the juvenile crime involving drop-
22 ping a rock off an overpass where he had been out on bail. So
23 that becomes fresh in a person's mind.

24 But again, bail is something that shouldn't, perhaps,
25 be just automatic. Certainly society can protect itself from

1 people who are psychiatrically disturbed if they think there is
2 going to be a high risk of danger to society. The system should
3 be able to take care of that. The fact that there are problems
4 in that perhaps if this Court decides a juvenile is entitled to
5 a jury trial, the fact that perhaps it might be used as a later
6 decision that bail rights should be enlarged, I respectfully
7 suggest one step at a time.

8 Here I think the realities of the situation are --
9 Duncan said the purpose of a jury trial is to provide protection
10 against an arbitrary prosecutor or a biased judge. Most attorneys
11 I think, are going to waive jury trial for a juvenile. You are
12 not going to, as his counsel, put him through this traumatic
13 experience unless you think that it is in his best interest.

14 I wanted to put DeBacker through the traumatic exper-
15 ience because I was satisfied, it was my judgment, that he would
16 be acquitted.

17 Q First of all, I suppose a jury trial would neces-
18 sarily involve a public trial, wouldn't it?

19 A Yes, Your Honor.

20 Q Which, of course, would run contrary to the idea,
21 as the Chief Justice has said, which was in the minds of those
22 who conceived the juvenile court system. One of their ideas
23 was that the proceedings be private. Isn't that correct?

24 A That is correct.

25 Q But beyond that, you keep talking about guilty

1 of this offense, and guilt or innocence. The charge was that
2 this young man, this juvenile, was a delinquent child and I sup-
3 pose evidence of whether or not he was a delinquent child would
4 go far beyond the evidence on the question of whether or not
5 he committed a specific offense. It would also involve all
6 sorts of things about his previous record and about his conduct
7 generally and his environment and his reputation and all those
8 things that are generally entirely inadmissible in a criminal
9 trial when the only question is whether or not the defendant
10 committed a particular offense defined in the indictment. Isn't
11 that true?

12 A That was gone into in the dispositional stage,
13 Mr. Justice Stewart. It was not referred to before the juvenile
14 court judge made his adjudication. Our statute statutorily
15 declares a person delinquent if he violates a statute of the
16 State or a municipal ordinance.

17 DeBacker was declared a delinquent because he violated
18 the forged check statute. Then after that the judge did go into
19 his background, prior offenses, prior troubles with the law, in
20 deciding, apparently, to commit him summarily to the Boys Train-
21 ing School. But it was not an issue and the proceeding was not
22 founded on the basis that he was delinquent generally. It was
23 that he is delinquent because of the forged check.

24 Q Under the law of Nebraska, is that the only
25 basis on which a person can be found to be a delinquent?

1 A No. There is a special supervision portion of
2 the statute. He has to be in violation of any law of the State
3 or any city or village ordinance. If he is hopeless, homeless
4 or destitute, under Section 43-201, he is a dependent child.

5 Q Delinquency involves an act that would be vio-
6 lative of a criminal statute if performed by an adult.

7 A Yes.

8 Q Necessarily so? Is that true in Nebraska?

9 A Yes. Subdivision 4, "Delinquent child shall mean
10 any child under the age of 18 years who has violated any law of
11 the State or any city or village ordinance."

12 Q I see.

13 A Section 5 is, "A child in need of special super-
14 vision shall mean a child who is under the age of 18 years and
15 is wayward, habitually truant, deports himself so as to en-
16 danger his morals or the morals of others."

17 Q Under Nebraska law, can a child in need of
18 special supervision, as the statute defines it, be put into
19 custody in an industrial school or a special school?

20 A I believe that he could.

21 Q But not as a delinquent.

22 A But not as a delinquent.

23 Q Your submission, as I understand it, is that any
24 proceeding that can or does result in involuntary custody for a
25 substantial period of time, with respect to any such proceeding

1 the Constitution requires the right to a jury trial.

2 A That is correct, Mr. Justice Stewart.

3 Q So if you are correct in your tentative answer
4 as to the Nebraska law with respect to a child in need of
5 special supervision, a jury trial, it would follow, would also
6 be required for such a proceeding. Is that correct?

7 A I think there is a difference. A child in need
8 of special supervision seems to me to be a child who is in a
9 status. A delinquent child is a child who, by his voluntary,
10 volitional conduct, has violated the law of the State. I think
11 that it would not necessarily apply to a child in need of
12 special supervision.

13 For example, if a child is found on a doorstep and
14 becomes a ward of the juvenile court, that child doesn't need
15 a jury trial to determine whether or not somebody will look
16 after him.

17 Q You have answered tentatively, and I am not hold-
18 ing you to this at all, but your impression is that in Nebraska
19 a child is determined to be one who is in need of special super-
20 vision, he can be sent to an industrial school and there confined
21 against his will for a substantial period of time. Let's assume
22 that is true.

23 I suppose it would follow from your argument that the
24 Constitution requires a jury trial before he can be found to be
25 a child in need of special supervision.

1 A I think so. I have some difficulty with this
2 concept of how you determine in advance how serious a case is
3 going to be, as to whether the jury trial is going to be avail-
4 able. But I think if it is contemplated in the process with
5 this child that he is going to be confined for more than six
6 months, then he ought to have a jury trial.

7 Q In this gray zone, who would make that decision,
8 Mr. Line? The court? The prosecutor?

9 A Who would make the decision, you say, in the gray
10 area?

11 Q About the jury trial; grant it as a matter of
12 right.

13 A Well, first of all, it would, I think, require a
14 demand of the juvenile's counsel. Second, I suppose then it
15 requires the judge to search his mind and determine what he is
16 going to do with the child. There, frankly, I have difficulty.

17 The Frank case that referred to probation being im-
18 possible for over six months without a jury trial and then if
19 probation is violated only a sentence of six months could be
20 imposed. I don't know how a judge can determine what he is
21 going to do with the person before him until he knows what the
22 facts of the case are.

23 Q Isn't that one of the considerations that led
24 the founders of the system of juvenile courts to eliminate the
25 jury and let, presumably, an expert in juvenile matters deal

1 with it?

2 A I think that is perhaps one of the considerations,
3 but certainly a juvenile court judge is no particular expert in
4 deciding whether or not DeBacker forged the check or broke into
5 a filling station. That, I think, is still within the traditional
6 competence of the jury.

7 MR. CHIEF JUSTICE BURGER: Mr. Kuhlman?

8 ARGUMENT OF RICHARD L. KUHLMAN, ESQ.

9 ON BEHALF OF APPELLEE

10 MR. KUHLMAN: If the Court please, first of all I
11 would like to point out that the reference to the young lad
12 DeBacker being in the State Reformatory, that he is there under
13 a transfer statute which is not involved with deciding whether
14 or not there should be a jury in juvenile cases. This is a
15 transfer statute where the young man is transferred after a
16 hearing at Kearney, and I maintain that the method to attack
17 this is to bring a habeas corpus at the penal complex to decide
18 whether this transfer statute is unconstitutional.

19 This is a separate matter that should be determined.
20 The only thing here is whether or not the trial of the young
21 man in County Court or in the juvenile court need be with a
22 jury. The fact that he was eventually transferred to the men's
23 reformatory doesn't have anything to do with this jury question.

24 Q Has a separate lawsuit or a separate proceeding
25 been initiated attacking that transfer, did you say?

1 A No, there has not. I maintain that this is the
2 way to attack it.

3 Q You say the way to do it is in a separate pro-
4 ceeding.

5 A Rather than to say that the statute which says
6 the juvenile is not entitled to a jury should be attacked. The
7 attack should be against the statute that allows the transfer,
8 rather than the statute on the jury.

9 Q And this petitioner was, in fact, transferred to
10 an adult penal institution.

11 A Yes, he was.

12 Q The Nebraska Juvenile Code is oriented along
13 judicial lines, rather than along social welfare lines. We have
14 included in the Nebraska statute the notice, which has always
15 been there, for years, even prior to Gault; of the right to
16 counsel; of the right to confrontation; the right against self-
17 incrimination; the right to cross-examination; the right to a
18 transcript of the proceedings; the right to appellate review.

19 All of these things have always been a part of
20 Nebraska's juvenile court law. This is a matter of the deter-
21 mination of due process, the fact that the youngsters have
22 always had this, that this is oriented along judicial lines
23 rather than along social welfare lines

24 MR. CHIEF JUSTICE BURGER: Shouldn't this red light
25 be on, Mr. Clerk?

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I see. It is due to an electronic inadvertence.

We will hear you tomorrow morning, Mr. Kuhlman.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter was recessed, to reconvene at 10 a.m., Tuesday, October 14, 1969.)