

OPINION NO. 97-040

Syllabus:

1. An indigent child is entitled pursuant to R.C. 2151.352 and Ohio R. Juv. P. 4(A) to be represented by the county public defender in all juvenile court proceedings pertaining to a complaint alleging the child to be a juvenile
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traffic offender, regardless of whether the outcome of the proceeding could result in a loss of liberty, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent child to select his own personal counsel to represent him. (1984 Op. Att'y Gen. No. 84-023, approved and followed.)

2. A county public defender is required, pursuant to R.C. 120.16, to represent before the juvenile court an indigent defendant in a paternity proceeding in which the county support enforcement agency is a party or represents the complainant, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent defendant to select his own personal counsel to represent him. (1985 Op. Att'y Gen. No. 85-090, approved and followed.)

To: Jetta Mencer, Coshocton County Prosecuting Attorney, Coshocton, Ohio
By: Betty D. Montgomery, Attorney General, September 5, 1997

You have requested an opinion concerning the representation of indigent individuals by the county public defender. In your letter you state that Coshocton County provides legal representation to indigent individuals pursuant to the county public defender system.¹ Under this system, the county public defender is vested with the responsibility of providing legal representation to indigent adults and juveniles. In light of this responsibility, the juvenile court is requiring the county public defender to represent indigent children alleged to be juvenile traffic offenders and indigent defendants in paternity actions.² Because the county public defender has

¹ Pursuant to R.C. Chapter 120, the provision of legal representation by a county to indigent individuals is accomplished through any of the following: the state public defender, R.C. 120.04-.06, a county public defender system, R.C. 120.13-.18, a joint county public defender system, R.C. 120.23-.28, or a system of appointed counsel, R.C. 120.33.

² A juvenile court has original jurisdiction to determine the paternity of any child alleged to have been born out of wedlock pursuant to R.C. 3111.01-.19. R.C. 2151.23(B)(2). In addition, a juvenile court has exclusive original jurisdiction concerning any child who on or about the date specified in the complaint is alleged to be a juvenile traffic offender. R.C. 2151.23(A)(1). R.C. 2151.021 defines a "juvenile traffic offender" as follows:

A child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or any political subdivision of this state, other than a resolution, ordinance, or regulation of a political subdivision of this state the violation of which is required to be handled by a parking violations bureau or a joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, shall be designated as a "juvenile traffic offender."

limited resources to provide the representation ordered by the court, the county public defender has asked you for legal advice on the following matters:

1. Is the county public defender required to represent an indigent child in juvenile court proceedings concerning a complaint alleging the child to be a juvenile traffic offender?
2. Is the county public defender required to represent before a juvenile court an indigent defendant in a paternity proceeding in which the county child support enforcement agency is a party or represents the complainant?

Provisions for the legal representation of children in proceedings before a juvenile court are set forth in Ohio R. Juv. P. 4(A), which provides:

Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. *This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.* (Emphasis added.)

Rule 4(A) does not create a right to court-appointed representation in juvenile court proceedings. However, the rule does indicate that an indigent child has a right to court-appointed representation in a juvenile court proceeding when the right is conferred by statute or constitution.

Pursuant to R.C. 2151.352, an indigent child is conferred the right to court-appointed representation in juvenile court proceedings. R.C. 2151.352 thus provides, in part, as follows:

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and *if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code.* If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them. (Emphasis added.)

Thus, R.C. 2151.352 mandates that an indigent child be provided legal representation in juvenile court proceedings concerning a complaint alleging the child to be a juvenile traffic offender and that such representation be provided to the child in accordance with the provisions set out in R.C. Chapter 120. *McKinney v. McClure*, 102 Ohio App. 3d 165, 656 N.E.2d 1310 (Butler County

1995); *see also In re East*, 105 Ohio App. 3d 221, 663 N.E.2d 983 (Cuyahoga County 1995), *discretionary appeal disallowed*, 74 Ohio St. 3d 1482, 657 N.E.2d 1375 (1995); *In re Kriak*, 30 Ohio App. 3d 83, 506 N.E.2d 556 (Medina County 1986).

According to the provisions of R.C. Chapter 120, a county public defender is required to "provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty." R.C. 120.16(A)(1). In addition, if the county public defender commission enters into a contract with a municipal corporation to provide legal representation to indigent adults and juveniles, the county public defender may provide legal representation to indigent adults and juveniles who are charged with the violation of an ordinance of the municipal corporation for which the penalty or any possible adjudication includes the potential loss of liberty. R.C. 120.16(A)(2). Legal representation of an indigent child by the county public defender pursuant to R.C. 120.16(A) is thus based on the child being charged with a violation of a state statute or municipal ordinance for which the penalty or any possible adjudication includes the potential loss of liberty.

A review of R.C. 2151.352 and R.C. 120.16(A) discloses that the provisions of these two statutes appear to be in conflict. R.C. 2151.352 requires an indigent child to be provided court-appointed representation in all proceedings before a juvenile court. In contrast, R.C. 120.16(A) requires the county public defender to provide an indigent child with representation in a juvenile traffic proceeding when the child faces a potential loss of liberty.

1984 Op. Att'y Gen. No. 84-023 examined the apparent conflict between the provisions of R.C. 2151.352 and R.C. 120.16(A), and concluded that, pursuant to R.C. 2151.352, an indigent child "is entitled to be represented in all juvenile proceedings by a public defender in accordance with the comprehensive system set forth in R.C. Chapter 120, regardless of whether the outcome of the proceeding could result in a loss of liberty." *Id.* (syllabus). In reaching this conclusion, the opinion reasoned as follows:

That R.C. 2151.352 operates so as to enable indigent children, their parents, custodians, or other persons in loco parentis, to be afforded the assistance of the ... county public defender ... is apparent from an analysis employing well accepted rules of statutory construction. R.C. 2151.352 and R.C. Chapter 120 must be read *in pari materia*, giving full effect to both if possible. See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956). Such reading leads to the conclusion that, although R.C. Chapter 120 generally requires the potential for the loss of liberty as an essential element prior to the provisions of legal counsel for indigents, R.C. 2151.352 specifically expands the right to counsel for indigents in juvenile court proceedings. Furthermore, as R.C. 2151.352 is relevant to the specific provision of counsel in juvenile court matters, to the extent that any conflict exists between R.C. 2151.352 and R.C. Chapter 120, the general must give way to the specific. See generally R.C. 1.51; Cincinnati v. Bossert Machine Co., 16 Ohio St. 2d 76 (1968), 243 N.E.2d 105, *cert. denied*, 394 U.S. 998 (1969). Therefore, the requirement contained in R.C. 2151.352 that an indigent person has the right to have counsel provided for him pursuant to R.C. Chapter 120 does not operate to limit the right of counsel to only those proceedings in which there exists a potential loss of liberty but operates to afford counsel for indigent persons in all juvenile proceedings in accordance with the comprehensive

system for providing legal representation contained in R.C. Chapter 120. The reference to R.C. Chapter 120 in R.C. 2151.352 is not a reference to the circumstances which give rise to the provision of counsel, but rather, is a reference to the mechanisms for providing counsel.

1984 Op. Att'y Gen. No. 84-023 at 2-73.

1984 Op. Att'y Gen. No. 84-023 thus determined that the General Assembly intended that, whenever an individual is statutorily entitled to court-appointed representation, such representation is to be provided through the system established by R.C. Chapter 120. *Accord* 1985 Op. Att'y Gen. No. 85-090 at 2-384 ("R.C. Chapter 120 was enacted to provide representation at public expense to indigent defendants constitutionally entitled to such representation"). The opinion provides a correct interpretation of the duties of the county public defender with respect to the provision of legal representation to indigent individuals, and is both well reasoned and persuasive with respect to the provision of court-appointed counsel to indigent children in juvenile court proceedings. It follows, therefore, that 1984 Op. Att'y Gen. No. 84-023 should be approved and followed. Accordingly, an indigent child is entitled pursuant to R.C. 2151.352 and Ohio R. Juv. P. 4(A) to be represented by the county public defender in all juvenile court proceedings pertaining to a complaint alleging the child to be a juvenile traffic offender, regardless of whether the outcome of the proceeding could result in a loss of liberty.

There are two instances, however, when a county public defender may not be required to provide legal representation to a child alleged to be a juvenile traffic offender. First, a juvenile court may appoint counsel other than the county public defender or may permit an indigent child to select his own personal counsel to represent him. R.C. 120.16(E).³ Second, an indigent child may waive his right to counsel.⁴ In either instance, a county public defender would not be required to provide legal representation to an indigent child in a juvenile court proceeding. In light of the above, it is our conclusion that an indigent child is entitled pursuant to R.C. 2151.352

³ R.C. 120.16(E) provides that nothing in R.C. 120.16 "shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select the indigent person's own personal counsel to represent the indigent person."

⁴ With respect to the waiver of counsel by a child in a juvenile court proceeding, the court in *In re East*, 105 Ohio App. 3d 221, 223, 663 N.E.2d 983, 984 (Cuyahoga County 1995), *discretionary appeal disallowed*, 74 Ohio St. 3d 1482, 657 N.E.2d 1375 (1995) stated:

We have found no controlling Ohio case law regarding what constitutes a valid waiver of a juvenile's constitutional right to counsel. However, as the United States Supreme Court held in *In re Gault* (1967), 387 U.S. 1, 36, 87 S.Ct. 1428, 1448, 18 L.Ed.2d 527, 551, there is no material difference with respect to the constitutional right to counsel between adult and juvenile proceedings. Therefore, case law regarding an adult's waiver of counsel provides guidance. These cases indicate that an effective waiver of the right to counsel by an adult must be voluntary, knowing and intelligent. The court must fully and clearly explain to defendant his right to counsel and the defendant must then affirmatively waive that right on the record. (Citations omitted.)

and Ohio R. Juv. P. 4(A) to be represented by the county public defender in all juvenile court proceedings pertaining to a complaint alleging the child to be a juvenile traffic offender, regardless of whether the outcome of the proceeding could result in a loss of liberty, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent child to select his own personal counsel to represent him.

Your second question asks whether the county public defender is required to represent before a juvenile court an indigent defendant in a paternity proceeding in which the county child support enforcement agency (CSEA) is a party or represents the complainant. The Ohio Supreme Court has held that "the denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions." *State ex rel. Cody v. Toner*, 8 Ohio St. 3d 22, 24, 456 N.E.2d 813, 815 (1983), *cert. denied*, 466 U.S. 938 (1984).⁵ It follows, therefore, that an indigent defendant in a paternity proceeding in which the CSEA is a party, or represents the complainant, has a constitutional right to court-appointed counsel. *See* Ohio R. Juv. P. 4(A). Thus, a juvenile court is required to appoint counsel to represent an indigent defendant in such proceedings. *See Rees v. Heimberger*, 60 Ohio App. 3d 45, 47, 573 N.E.2d 189, 192 (Cuyahoga County 1989) ("when the state acts on a paternity complaint, a court should at the outset of the case determine whether the defendant is indigent and whether counsel should be appointed in his behalf"), *jurisdictional motion overruled*, 47 Ohio St. 3d 702, 547 N.E.2d 986 (1989), *cert denied*, 494 U.S. 1088 (1990).

As indicated above, R.C. 120.16 sets forth provisions pertaining to the authority of a juvenile court to appoint the county public defender to represent indigent defendants. Pursuant to this statute, the county public defender is required to provide legal representation to an indigent defendant in any proceeding in which the defendant is charged with the violation of a state statute or municipal ordinance, when the municipal corporation contracts with the county public defender, for which the penalty or any possible adjudication includes the potential loss of liberty.

1985 Op. Att'y Gen. No. 85-090 addressed the question of whether the State Public Defender must partially reimburse counties for the cost of providing legal representation to indigent paternity defendants who are entitled to such representation under *State ex rel. Cody v. Toner*. In so doing the opinion examined the language and history of R.C. Chapter 120, and concluded that R.C. Chapter 120 must be construed broadly in order to provide court-appointed legal representation to indigent defendants in paternity proceedings in which the defendant faces the state as an adversary. *See generally* Legislative Service Commission Analysis of Am. Sub. H.B. 164, 111th Gen. A. (1975) (eff. Jan. 13, 1976).⁶ As stated in 1985 Op. Att'y Gen. No. 85-090 at 2-380:

⁵ Prior to *State ex rel. Cody v. Toner*, 8 Ohio St. 3d 22, 456 N.E.2d 813 (1983), *cert. denied*, 466 U.S. 938 (1984), one Ohio appellate court held that an indigent defendant in a paternity proceeding brought pursuant to R.C. Chapter 3111 does not have a constitutional right to court-appointed counsel. *Sheppard v. Mack*, 68 Ohio App. 2d 95, 427 N.E.2d 522 (Cuyahoga County 1980).

⁶ This legislation enacted R.C. Chapter 120. *See* 1975-1976 Ohio Laws, Part I, 1868 (Am. Sub. H.B. 164, eff. Jan. 13, 1976).

It is therefore apparent that the legislature intended to enact a broadly inclusive scheme for the representation of indigent defendants at the county level, with reimbursement from the state. The legislative scheme was intended to remedy the fact that previous Ohio statutory law was not as broad as the constitutional requirements, as enunciated by the United States and Ohio Supreme Courts, and to provide, in accordance with these constitutional requirements, counsel at public expense for indigent defendants whose liberty was threatened in any proceeding.⁷ Thus, in those instances where the courts have found a constitutional right to representation at public expense, the legislature intends that such representation be provided through the statutory scheme of public defense established under R.C. Chapter 120 and, that reimbursement by the state for such defense be provided pursuant to R.C. 120.18, R.C. 120.28, and R.C. 120.33. (Footnote added.)

After determining that R.C. Chapter 120 sets forth a scheme for representation of indigent defendants when such representation is constitutionally required, 1985 Op. Att'y Gen. No. 85-090 proceeded to examine whether indigent defendants in paternity proceedings in which the state is an adversary have a constitutional right to court-appointed counsel under R.C. Chapter 120. The opinion stated that the threat to a putative father's personal liberty in the event that the father failed to comply with a support order issued in a parentage action initiated pursuant to R.C. Chapter 3111 renders a proceeding conducted pursuant to R.C. Chapter 3111 a proceeding which may result in a potential loss of liberty. The potential loss of liberty faced by a putative father in a parentage proceeding arises from the fact that a putative father may be charged with the violation of one or more state statutes as a result of the parentage proceeding. *Id.* at 2-384. Although a parentage proceeding initiated pursuant to R.C. Chapter 3111 is not itself a proceeding in which a defendant is charged with an act that is a violation of a state statute, the threat to a putative father's personal liberty in the event that the father failed to comply with a support order issued in a parentage action initiated pursuant to R.C. Chapter 3111 is sufficient to invoke the due

⁷ 1985 Op. Att'y Gen. No. 85-090 noted that the amendment of R.C. Chapter 120 by 1983-1984 Ohio Laws, Part I, 949 (Am. Sub. S.B. 271, eff. Sep. 26, 1984) was not intended to deny legal representation to anyone entitled to such representation under R.C. Chapter 120 as enacted by the General Assembly in 1975-1976 Ohio Laws, Part I, 1868 (Am. Sub. H.B. 164, eff. Jan. 13, 1976). In this regard, the opinion stated:

[W]hile R.C. 120.16, R.C. 120.26, and R.C. 120.33 no longer expressly provide representation for all persons "in any proceeding the outcome of which could result in the loss of liberty," it is apparent that the changes effected by Am. Sub. S.B. 271 in this regard were intended merely to "streamline" the previous statutory language, and were not meant to deprive anyone entitled to representation under previous law of that representation. The intent of R.C. Chapter 120 continues to be that of providing a scheme for representation of indigent defendants when representation at public expense is constitutionally required. It appears then that, the provisions of R.C. Chapter 120 should be construed in order to fulfill the legislature's intent that the constitutional rights of indigent defendants be protected. (Citation omitted.)

1985 Op. Att'y Gen. No. 85-090 at 2-381; *see* Legislative Service Commission Analysis of Am. Sub. S.B. 271, 115th Gen. A. (1984) (eff. Sept. 26, 1984).

process protection provided by appointed counsel. *State ex rel. Cody v. Toner*. In this regard, the opinion reasoned as follows:

I recognize that a proceeding conducted pursuant to R.C. Chapter 3111 is not itself a proceeding in which a defendant is charged with an act that is a violation of state statute. I believe, however, that, in light of *State ex rel. Cody v. Toner*, together with the evident intent of the General Assembly in enacting R.C. Chapter 120, R.C. 120.16, R.C. 120.26, and R.C. 120.33 must be given a construction which requires the county, through its public defender or appointed counsel system, to provide representation under the circumstances described herein. R.C. Chapter 120 was enacted to provide representation at public expense to indigent defendants constitutionally entitled to such representation. The Ohio Supreme Court has deemed indigent paternity defendants constitutionally entitled to representation at public expense under those facts present in that case. Thus, R.C. Chapter 120 must be construed so as to provide counsel to those defendants found entitled to representation in *Cody*.

A construction of R.C. Chapter 120 which excluded parentage proceedings from the reimbursement provisions of R.C. Chapter 120 would lead to an unreasonable situation in which the statutory scheme designed to provide counsel for indigent defendants at public expense, as constitutionally required, would not encompass representation at proceedings in which the Ohio Supreme Court has expressly found such constitutional right to representation. Such a construction would result in the situation where paternity defendants would not be entitled to representation under R.C. Chapter 120, even though other defendants deemed constitutionally entitled to representation would be entitled to counsel under R.C. Chapter 120. Such a construction runs afoul of the rule of statutory construction that it is presumed that the legislature, in enacting a statute, intends a just and reasonable result. Thus, I must construe R.C. Chapter 120 to avoid such unreasonable results. (Citations omitted.)

1985 Op. Att'y Gen. No. 85-090 at 2-384 and 2-385. Thus, 1985 Op. Att'y Gen. No. 85-090 determined that the provisions of R.C. Chapter 120 may be used to supply a scheme for providing representation at public expense where such representation is constitutionally required, even though R.C. Chapter 120 may not be applicable to a proceeding by its own terms.

After reviewing the history and current provisions of R.C. Chapter 120, I concur in the analysis contained in 1985 Op. Att'y Gen. No. 85-090.⁸ It appears reasonable to conclude that the General Assembly intended that whenever an indigent defendant is constitutionally entitled to legal representation at public expense that it be provided through the system established by R.C. Chapter 120. *See also* 1984 Op. Att'y Gen. No. 84-023. Therefore, since an indigent defendant in a paternity proceeding in which the CSEA is a party or represents the complainant has a constitutional right to court-appointed counsel, *see State ex rel. Cody v. Toner*; 1985 Op. Att'y Gen. No. 85-090, a county public defender is required, pursuant to R.C. 120.16, to represent

⁸ Since the issuance of 1985 Op. Att'y Gen. No. 85-090, there have been several amendments to the provisions within R.C. Chapter 120. None of the amendments, however, indicates a legislative intent to deny court-appointed counsel to indigent defendants in paternity proceedings in which the state is an adversary.

such a defendant before a juvenile court.

However, as stated above, a county public defender is not required to provide legal representation to an indigent person when the indigent defendant has waived his right to counsel or the juvenile court pursuant to R.C. 120.16(E) has appointed counsel other than the county public defender or allowed an indigent defendant to select his own personal counsel to represent him. Accordingly, a county public defender is required, pursuant to R.C. 120.16, to represent before the juvenile court an indigent defendant in a paternity proceeding in which the county support enforcement agency is a party or represents the complainant, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent defendant to select his own personal counsel to represent him.

Based on the foregoing, it is my opinion and you are advised as follows:

1. An indigent child is entitled pursuant to R.C. 2151.352 and Ohio R. Juv. P. 4(A) to be represented by the county public defender in all juvenile court proceedings pertaining to a complaint alleging the child to be a juvenile traffic offender, regardless of whether the outcome of the proceeding could result in a loss of liberty, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent child to select his own personal counsel to represent him. (1984 Op. Att'y Gen. No. 84-023, approved and followed.)
2. A county public defender is required, pursuant to R.C. 120.16, to represent before the juvenile court an indigent defendant in a paternity proceeding in which the county support enforcement agency is a party or represents the complainant, except when the right to counsel is waived or the juvenile court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows an indigent defendant to select his own personal counsel to represent him. (1985 Op. Att'y Gen. No. 85-090, approved and followed.)