

No. 06-96197-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of L.M.,

Respondent/Appellant.

PETITION FOR REVIEW

**Appeal from the District Court of Finney County, Kansas
Honorable Philip C. Vieux, Judge
District Court Case No. 05-JV-197**

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PRAYER FOR REVIEW

L.M., respondent/appellant herein, prays that this Court review the decision of the Court of Appeals entered in this matter on December 22, 2006, and that it reverse the decision of the Court of Appeals and the district court.

DATE OF DECISION OF COURT OF APPEALS

The date of the decision of the Court of Appeals of which review is sought is December 22, 2006.

STATEMENT OF THE ISSUE OF WHICH REVIEW IS SOUGHT

1. Did the district court err in denying L.M.'s request for a jury trial in this case?

STATEMENT OF RELEVANT FACTS

The facts stated in the opinion of the Court of Appeals are correct and are sufficient for purposes of the issue for which review is sought.

ARGUMENT

After being charged with aggravated sexual battery pursuant to K.S.A. 21-3518 in a juvenile offender proceeding, L.M. requested that he be granted a trial by jury, basing

his request on K.S.A. 38-1656, the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 1, 5 and 10 of the Kansas Constitution Bill of Rights. The trial court denied this request, and the Court of Appeals affirmed that denial. This is a question of great general importance involving fundamental constitutional guarantees, and this Court should review that decision.

The Court of Appeals based its decision upon K.S.A. 38-1656, and held that it was bound by this Court's interpretation of that statute in *Findlay v. State*, 235 Kan. 462, 466, 681 P.2d 20 (1984), as making the allowance of a jury trial in a juvenile offender proceeding entirely optional with the trial court and not subject to appellate review. Although the Court of Appeals noted that L.M.'s request for a jury trial was based upon provisions of the federal and state constitutions, and it acknowledged the force of his arguments, it did not address them. However, this Court in *Findlay* also held that neither the federal nor the state constitution requires that a juvenile be granted a jury trial in proceedings under the Kansas Juvenile Offenders Code. *Id.* at Syl. ¶ 1. Presumably the Court of Appeals considered itself to be bound by that portion of the decision as well.

The decision in *Findlay* appears to have been based primarily on the decision of the United States Supreme Court in *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971), which held that juveniles being tried in the juvenile court system have no right under the Sixth and Fourteenth Amendments to a trial by jury. This decision was based in large part upon what a plurality of the Supreme Court viewed as the juvenile court's ability to function in a unique manner characterized by intimate and informal protective proceedings, and its fear that introduction of the jury trial into this

system might undermine and threaten its very existence by essentially equating the adjudicative phase of juvenile court proceedings with the adult criminal trial.

The appellant in *Findlay* argued that in fact adjudications in juvenile offender proceedings where the juvenile is charged with an offense that would constitute a felony if committed by an adult are essentially criminal trials under Kansas law and should be treated as such. This Court rejected that argument on the basis of K.S.A. 1983 Supp.38-1601, which provided at that time that all proceedings under the Kansas Juvenile Offenders Code were to be deemed to be an exercise of the state's parental power, that no order or judgment in such proceedings was to be deemed to import a criminal act on the part of any juvenile, and that the Act was to be liberally construed to best serve the juvenile's rehabilitation and the public's safety, preferably by permitting a juvenile to receive the needed care and control in his or her own home. It concluded summarily that there is no federal or state constitutional right to a jury trial in proceedings under the Kansas Juvenile Offenders Code. *State v. Findlay*, 235 Kan. at 463-64. The Court did not discuss the state constitutional claim at all, except to note that its decision was consistent with two prior decisions. *Id.* at 464.

The Court's decision in *Findlay* may have been correct when it was decided in 1984, but much has changed in the intervening 27 years, and it is time to revisit the issue. L.M. has discussed those changes in his brief to the Court of Appeal in detail, and will not repeat that discussion in full here. But it is important to note that K.S.A. 38-1601, upon which the Court rested its decision in *Findlay*, has now been substantially amended. It now provides that the primary goal of the Act (now termed the Kansas Juvenile Justice Code (KJJC)) is "to promote public safety, hold juvenile offenders accountable for such

juvenile's behavior and improve the ability of juveniles to live more productively and responsibly in the community." Public safety and juvenile accountability are now goals that are equal in importance to what might be considered rehabilitation, although the statute no longer uses that term. The provision stating that no judgment under the Code will be held to import a criminal act and that proceedings under its provisions are pursuant to the state's parental power has been removed, and the statute now specifically talks in terms of "the ultimate solutions to juvenile crime." K.S.A. 2005 Supp. 38-1601.

Other changes include amendment of some of the terminology used in the KJJC to conform to that used in the adult criminal system, the opening of most official court files and trials to the public, and the implementation of a placement matrix to govern placement in juvenile correctional facilities similar to that used in the adult criminal system. And past juvenile adjudications may now be used to enhance sentences in adult criminal cases. It is clear that the differences in the treatment of juveniles under the KJJC and of adults accused of crimes have narrowed significantly since *Findlay* was decided, and that its brief rationale no longer adequately address the issue of whether a juvenile has a constitutional right to a jury trial in proceedings under the KJJC.

However, this case does not require the Court to decide that issue in general. Rather, it presents the much narrower issue of whether a juvenile charged with an offense which, if convicted, would cause him to be categorized as a "sex offender" as defined by K.S.A. 22-4902(b) and subjected to the registration and publication provisions of K.S.A. 22-4904, 22-4906 22-4907 and 22-4909, has the right to demand a trial by jury. These statutes are part of the Kansas Offender Registration Act, which was enacted in 1993, well after the decision in *Findlay*.

In this case L.M. was charged with and found guilty of the crime of aggravated sexual battery under K.S.A. 2005 Supp. 21-3518. A person adjudicated as a juvenile offender for this offense is a “sex offender” as defined by K.S.A. 2005 Supp. 22-4902(b), (c)(10). Upon adjudication of this offense, L.M. was required to register as a sex offender until the expiration of five years from the date of adjudication or release from confinement, whichever date occurs later. K.S.A. 2005 Supp. 22-4906(g). All of the information required to be furnished upon registration is open to inspection by any member of the public at the sheriff’s office, the KBI headquarters, or any internet site sponsored by the sheriff or KBI. K.S.A. 2005 Supp. 22-4909(a). The trial court had no discretion in imposing this requirement upon L.M.

In *State v. Myers*, 260 Kan. 669, 695-97, 923 P.2d 1024 (1996), this Court explicitly held that the public disclosure provision of the Kansas Offender Registration Act constitutes punishment for purposes of determining whether it violates the Ex Post Facto Clause of the United States Constitution because it provides for unlimited public access to all of the information in the sex offender registry, leaving open the probability that a registered sex offender will be subjected to public stigma and ostracism. Although this case involved an adult, it is clear that this provision is equally, if not more, punitive to juveniles, and it is inconsistent with the notion that the goal of the juvenile court system is rehabilitation and not punishment. In fact, the registration and public notice requirements are imposed precisely because the legislature has determined that a repeated offense is likely, i.e., that rehabilitation is unlikely to be successful. When the fact of this mandatory punishment is added to the other changes in the juvenile justice system previously described, it seems clear that, at least in this category of cases, the differences

between the juvenile justice system and the adult criminal system are no longer sufficient to justify denying juveniles the right to a trial by jury.

In his brief L.M. argues that close scrutiny of the opinions in *McKeiver* suggests that the Supreme Court would not have reached the same result under the facts of this case, and that a ruling that he is entitled under the federal constitution to a trial by jury in this case would not be inconsistent with *McKeiver*. However, this Court can also reach the same result under the state constitution. As noted above, the Court in *Findlay* offered no analysis or reasoning in support of its conclusion that there is no right under the Kansas constitution to a jury trial in juvenile offender proceedings, except to note that this conclusion was consistent with its earlier decisions in *Hall v. Brown*, 129 Kan. 859, 861-62, 284 Pac. 396 (1930), and *In re Turner*, 94 Kan. 115, 121-22, 145 Pac. 871 (1915). Both of these decisions held that juvenile delinquency and neglect proceedings are parental and not criminal, undertaken in the child's best interests and not for the purpose of punishing the juvenile. In addition, the Court in *Hall* noted that such proceedings are statutory proceedings not found at common law, and that a jury trial is not a matter of right in purely statutory proceedings. However, this distinction must be based on more than mere labels, and will no longer hold up if, as in this case, the differences between juvenile offender proceedings and a criminal trial are no longer sufficient to warrant the denial to juveniles of the constitutional rights that attach to criminal proceedings.

In *State v. Morris*, 255 Kan. 964, 980-81, 880 P.2d 1244 (1994), a case dealing with the right to counsel, this Court noted that it is free to construe provisions of the state constitution independent of federal interpretation of corresponding federal constitutional

provisions and to extend state constitutional protections beyond federal guarantees, but that it has never done so. However, it would do no violence to this policy simply to interpret the state constitution's guarantee of the right to a jury trial in all prosecutions to apply in a factual context for which federal interpretations of the Sixth Amendment guarantee are lacking, and this Court should do so.

In sum, this is a question of great general importance, dealing with basic constitutional guarantees that are essential to the integrity and fairness of the criminal justice system. The Court of Appeals, although indicating a favorable disposition toward L.M.'s arguments, felt itself precluded from addressing the issue by this Court's prior decision in *Findlay*. That decision no longer adequately addresses the question in light of the changes in the juvenile justice system and the imposition of punitive public registration requirements upon juvenile sex offenders and should be reappraised by this Court. For these reasons, L.M. requests that this Court grant his petition for review in this case.

Respectfully submitted,

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APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that I deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing Petition for Review, addressed to:

Lara Blake Bors
John P. Wheeler, Jr.
409 North Ninth Street
Garden City, Kansas 67846

Paul Morrison
Kansas Attorney General
120 S.W. 10th Street, 2nd Floor
Topeka, Kansas 66612-1597

on this _____ day of January, 2007.

Paul Shipp
Attorney for Respondent/Appellant