10-30-1969

10-30-1969 Justice Harlan, Per Curiam

John Harlan
US Supreme Court Justice

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart ✓
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Harlan, J.

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SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1969.

Clarence DeBacker, Appellant, v. Homer Brainard, Sheriff of Dodge County, Nebraska. } On Appeal From the Supreme Court of Nebraska.

[October —, 1969.]

Per Curiam.

After a hearing before a juvenile court judge, appellant DeBacker was found to be a "delinquent child" [1] and ordered committed to the Boys Training School at Kearney, Nebraska.[2] DeBacker did not seek direct review of his commitment, but instead sought state habeas corpus. The Nebraska District Court dismissed appellant's petition, a divided Nebraska Supreme Court affirmed,[3] and last Term we noted probable jurisdiction over the present appeal. 393 U. S. 1076. Because we find that resolution of the constitutional issues presented

[1] "Delinquent child shall mean any child under the age of eighteen who has violated any law of the state or any city or village ordinance." Neb. Rev. Stat. § 43-201 (4). Appellant was charged with having a forged check in his possession with the intent to utter it as genuine, an act which for an adult would be forgery under Neb. Rev. Stat. § 28-601 (2).

[2] Appellant was 17 when committed, and it appears that under Nebraska law he could be kept in the training school until his 21st birthday.

[3] Four of the seven justices of the Nebraska Supreme Court thought the Nebraska statutory provisions which require that juvenile hearings be without a jury, Neb. Rev. Stat. § 43-206.03 (2), and be based on the preponderance of the evidence, Neb. Rev. Stat. § 43-206.03 (3), were unconstitutional. The Nebraska Constitution provides, however, that "No legislative act shall be held unconstitutional except by the concurrence of five judges." Neb. Const., Art. V, § 2.

by appellant would not be appropriate in the circumstances of this case, the appeal is dismissed. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

1. Appellant asks this Court to decide whether the Fourteenth and Sixth Admendments, in light of this Court's decisions in *Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194, and *In re Gault*, 387 U. S. 1, require a trial by jury in a state juvenile court proceeding based on an alleged act of the juvenile which, if committed by an adult, would, under the *Duncan* and *Bloom* cases, require a jury trial if requested. In *DeStefano* v. *Woods*, 392 U. S. 631, we held that *Duncan* and *Bloom* "should receive only prospective application" and stated that we would "not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois*." 392 U. S., at 633, 635. Because appellant's juvenile court hearing was held on March 28, 1968—prior to the date of the decisions in *Duncan* and *Bloom*—appellant would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding. It thus seems manifest that this case is not an appropriate one for considering whether the Nebraska statute which provides that juvenile hearings are "without a jury," Neb. Rev. Stat. § 43–206.03 (2), is constitutionally invalid in light of *Duncan* and *Bloom*.[4]

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[4] Although a comment made by appellant's counsel at oral argument before this Court (in response to a question) suggests reliance also on the Equal Protection Clause for the claim that a jury trial was constitutionally required (Tr. 5), an examination of the record clearly reveals that this was not any part of the basis on which probable jurisdiction was noted here. Appellant made no equal protection claim before the juvenile court, in his petition for habeas corpus to the state courts, or in his jurisdictional statement or brief in this Court. The Sixth Amendment as reflected in the Fourteenth was the exclu-

2. Appellant next asks this Court to decide whether the preponderance of the evidence standard for burden of proof in juvenile court proceedings, required by Neb. Stat. Rev. § 43–206.03 (3), satisfies the Due Process Clause of the Fourteenth Amendment. However, at the appellant's juvenile court hearing, his counsel neither objected to the preponderance of the evidence standard, nor asked the judge to make a ruling based on proof beyond a reasonable doubt. In explaining why he did not seek a direct appeal from the juvenile court's determination that appellant had committed the act upon which rested the delinquent child finding, appellant's counsel stated at oral argument before this Court:

> "It has been pointed out that I did not attack the sufficiency of the evidence. Of course, the reason for that is obvious. The evidence is more than sufficient to sustain a conviction of what he did. An appeal on the sufficiency of the evidence would have been close to frivolous." (Tr. 41–42.)

Given this commendably forthright explanation by appellant's counsel, this case is not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings.[5]

3. Appellant finally asks us to decide whether due process is denied because, as it is claimed, the Nebraska prosecutor had unreviewable discretion whether he would proceed against appellant in juvenile court rather than in ordinary criminal proceedings. The record shows

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sive basis for appellant's claim that he had a right to a jury trial. (See "Questions Presented" in Jurisdictional Statement, at 3–4, and Appellant's Brief, at 2.) Nor has any of the Nebraska courts below passed on any equal protection claim.

[5] This Court has recently noted probable jurisdiction to consider this issue in *In the Matter of Samuel Winship* (No. 85, Misc.), probable jurisdiction noted, — U. S. —.

(1) that appellant did not make this contention before the juvenile court judge; (2) that appellant raised the issue in his habeas corpus petition but that it was not passed on by the Nebraska District Court; (3) that appellant did not press the District Court's failure to consider this issue in his appeal to the Nebraska Supreme Court, and made only passing reference to the issue in his brief to that court; and (4) that the opinions of the Nebraska Supreme Court did not pass on the issue, nor even refer to the contention. Given the barrenness of the record on this issue, in the exercise of our discretion, we decline to pass on it. So far as we have been made aware, this issue does not draw into question the validity of any Nebraska statute.[6] Therefore, it could not, standing alone, be subject to review in this Court by way of an appeal. See 28 U. S. C. § 1257 (2). "[I]nsofar as notation of probable jurisdiction may be regarded as a grant of the certiorari writ" as to this issue, we dismiss such writ as improvidently granted. *Mishkin* v. *New York*, 383 U. S. 502, 513.

For the foregoing reasons this appeal is

Dismissed.

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[6] In his petition for state habeas corpus, appellant did not allege as to this issue that any Nebraska statutory provision was invalid. Instead he claimed: "Petitioner is deprived of his liberty under the Fourteenth Amendment of the Constitution of the United States when his right to a jury trial and protective procedures of the criminal code are left to depend on the uncontrolled discretion of the prosecutor as to whether petitioner should be proceeded against in juvenile court or should be informed against in District Court under the provisions of the code of criminal procedure." If it can be fairly said that the prosecutor's discretion under Nebraska law is "uncontrolled," or not subject to review, this is not because of any explicit statutory provision making it such, cf. Neb. Rev. Stat. § 43-205.04, but instead is based on language in Nebraska case law. See *State* v. *McCoy*, 145 Neb. 750, 18 N. W. 2d 101 (1945); *Fugate* v. *Ronin*, 167 Neb. 70, 75, 91 N. W. 2d 240, 243–244 (1958).