

65/203.1

COURTS: Circuit and Probate.
CHILDREN: Jurisdiction over.
CRIMINAL LAW.

Waiver by juvenile division of probate court to circuit court waives felony only, not lesser included offense; juvenile may not, after waiver, be charged with nor plead guilty to lesser included offense before circuit court; upon trial for felony, juvenile is entitled to have jury charged regarding lesser included offenses; if found guilty of lesser included offense, juvenile is sentenced therefor by circuit judge rather than by juvenile division of probate court.

No. 4502

December 3, 1965.

Mr. John T. Hammond
Prosecuting Attorney for Berrien County
816 Ship Street
St. Joseph, Michigan 49085

This answers your inquiry concerning interpretation of Section 4 of the Juvenile Code, being C.L. 1948 § 712A.4; M.S.A. 1962 Rev. Vol. § 27.3178(598.4), which provides as follows:

"In any case where a child over the age of 15 years is accused of any act the nature of which constitutes a felony, the judge of probate of the county wherein the offense is alleged to have been committed may, after investigation and examination, including notice to parents if address is known, and upon motion of the prosecuting attorney, waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offense."

You note that this statute permits waiver for trial in circuit court when and only when the juvenile is accused of an act constituting a felony. House Bill No. 2735 of the 1965 legislative session, which is in the House Judiciary Committee, would have amended this section to permit the waiver of jurisdiction over a child of the age of 15 years or more but less than 17 years of age accused of any act constituting a felony or misdemeanor punishable by imprisonment or confinement for more than 90 days and would have permitted such child to be prosecuted after waiver as though he were an adult.

You indicate that there is one school of thought holding that a juvenile may not be convicted in circuit court of any offense which is not a felony, and that therefore no included offenses may be considered if those included offense are misdemeanors. Thus, for example, a defendant accused of unlawfully driving away a motor vehicle (M.S.A. § 28.645) may not plead guilty to a second count charging unlawful use of a motor vehicle (M.S.A. § 26.646) because the latter offense is a high misdemeanor. The same thing applies in this view in the case of manslaughter which is a felony and negligent homicide which is a high misdemeanor.

There is a different thought holding that once the probate court has entered its order waiving jurisdiction, the regular criminal processes of the law apply and the felony charged may be reduced at or before preliminary examination, arraignment, or trial. This view holds that all included offenses may be considered by the jury and the jury may convict of an included offense. Thus, for example, a juvenile accused of assault with a deadly weapon would be, under this view, convicted of assault by the jury and the judge will be empowered to impose sentence therefor.

You indicate that the statute as now framed must be interpreted as providing for the trial of juveniles over the age of 15 years only when they are accused of acts the nature of which consists of a felony and that, therefore, it is not proper or permissible to charge or try a juvenile with a misdemeanor when said misdemeanor was allegedly committed prior to the 17th birthday of the juvenile, notwithstanding the provisions of Section 4 of the Juvenile Code or any proceedings undertaken under the authority of said Section.

The language of the statute is plain. As you point out, it specifically restricts the power of the probate court to waive jurisdiction to cases where the child over 15 is accused of a felony. The waiver, therefore, cannot be construed as waiving the authority of the probate court to deal with acts constituting a misdemeanor. Article VI, Section 15 of the Michigan Constitution of 1963 provides in pertinent part that the probate court shall have "original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law." Section 2 of the Juvenile Code provides that the juvenile division of the probate court shall have exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning any child under 17 years found within the county who has violated any municipal ordinance or law of the state or of the United States [Act 182, P.A. 1965; M.S.A. Cur. Mat. § 27.3178(598.2)]. The provision of Section 2 above referred to includes jurisdiction over misdemeanors. In the example you put, the juvenile court has exerted jurisdiction first so that we do not have the question of potential concurrent jurisdiction such as was raised in the *Schell* case. (*Schell v. Schell*, 257 Mich. 85.) Since the juvenile division of the probate court has original jurisdiction of the activity defined as a misdemeanor, and since the probate court has power to waive only those acts constituting a felony, it must follow that the jurisdiction of the probate court to deal with the misdemeanor remains in the probate court, which has no authority to waive it.

Therefore, in the example you put, it is my conclusion that a defendant accused of unlawfully driving away a motor vehicle may not be charged with, nor may he plead guilty to, a second count charging unlawful use of a motor vehicle, the latter offense being a high misdemeanor. After waiver by the juvenile division of the probate court, the defendant may be charged with or plead guilty to the felony only, since only the felony is before the circuit court, which has no jurisdiction over offenses other than the felony.

Let us suppose, however, that the defendant charged with unlawfully driving away comes to trial for this felony as charged. There remains the question whether, during trial, this defendant is entitled to have the jury instructed and charged concerning the lesser included offenses. Section 32

of the Michigan Code of Criminal Procedure, being C.L. 1948 § 768.32; M.S.A. 1954 Rev. Vol. § 28.1055, provides that upon an indictment for any offense consisting of different degrees, the jury may find the accused not guilty of the offense in the degree charged in the indictment, but may find the accused person guilty of any degree of such offense inferior to that charged in the indictment or of an attempt to commit such offense. Our Supreme Court has held that the trial judge is required to instruct the jury in relation to lesser degrees of an offense where there is evidence which would tend to support conviction of a lesser degree. See *People v. Guillet*, 342 Mich. 1, and *People v. Milhem*, 350 Mich. 497. It seems clear that a juvenile waived by the probate court must have access to the same procedural provisions as any other defendant; otherwise he does not receive due process. Therefore, the juvenile defendant on trial for a felony after waiver is entitled to have the jury charged concerning the lesser included offenses. Further, he is entitled to be sentenced by the circuit court for the lesser included offense if the judge or jury finds him guilty of the same. There are no Michigan cases on the point, but it appears essential to conclude that the circuit judge may complete the process of trial of the waived felony by imposing sentence in accordance with the finding of the jury at that trial. See, for example, *Howland v. State*, 268 S.W. 115 (Tenn., 1925) holding that jurisdiction of the criminal court was not lost on conviction of offense of lesser degree, since judgment must be on verdict of jury, and, jeopardy once having attached, jurisdiction may not be relinquished and the cause recommitted to the juvenile court. The same conclusion is impelled by the fact that section 1 of Chapter XIA of the Probate Code, Juveniles and Juvenile Division, provides that "Proceedings under this chapter shall not be deemed to be criminal proceedings." (C.L. 1948 § 712A.1; M.S.A. 1962 Rev. Vol. § 27.3178 (598.1)). It therefore follows that sentence for a criminal offense of whatever nature may not be imposed by the probate court. See *Metcalf v. Commonwealth*, 156 N.E. 2d. 649 Mass. (1959), holding that juvenile court may sentence for delinquency, not for crime.

I therefore advise you (1) that waiver by the juvenile division of the probate court under section 4 of the Juvenile Code waives only the felony; (2) that after waiver, the juvenile may not be charged with a lesser included offense nor may he plead guilty to the same before the circuit court; (3) that upon a trial for the felony, the juvenile is entitled to have the jury charged regarding lesser included offenses and to jury finding concerning an includable offense if warranted by the evidence, and (4) that if found guilty of a lesser included offense, the juvenile is to be sentenced therefor by the circuit judge rather than transferred back to the juvenile court for sentence.

FRANK J. KELLEY,
Attorney General.