

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	No. 09AP-242 (C.P.C. No. 08JU-4989)
J.J.A., a minor,	:	
(Appellant).	:	No. 09AP-243 (C.P.C. No. 09JU-1574)
	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 25, 2010

Timothy Young, Ohio Public Defender, and *Brooke M. Burns*,
for appellant.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee State of Ohio.

APPEALS from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

McGRATH, J.

{¶1} Appellant, J.J.A., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, revoking his probation and committing him to the custody of the Department of Youth Services ("DYS").

{¶2} On April 8, 2008, a complaint was filed alleging appellant was a delinquent minor for having committed acts, if committed by an adult, would constitute the offense of rape in violation of R.C. 2907.02. At a hearing on August 1, 2008, appellant entered an admission to the amended charge of gross sexual imposition, in violation of R.C. 2907.05, and the magistrate found appellant to be a delinquent minor. After a dispositional hearing

held on August 14, 2008, the court placed appellant on official probation until August 14, 2009, or successful completion of prescribed terms and conditions of probation.

{¶3} On October 31, 2008, a motion to exercise continuing jurisdiction was filed alleging appellant violated the terms of his probation by enrolling in school six weeks after instructed, then failing to attend school at all after four days. Appellant appeared with counsel and his mother at the hearing on December 23, 2008, and admitted he violated the conditions of his probation. At the dispositional hearing held on February 6, 2009, the state noted appellant had also been charged with failing to provide a change of address, in violation of R.C. 2950.051, arising out of appellant's failure to provide law enforcement officers with notice 20 days prior to moving out of his brother's home. Appellant entered an admission to the new charge. Through its magistrate, the court revoked appellant's probation and committed him to the custody of DYS for a minimum period of six months and a maximum period not to exceed appellant's 21st birthday in each case and ordered the sentences to run concurrently. No objections were filed, and the trial court adopted the magistrate's decision and entered judgment accordingly.

{¶4} Appellant appealed to this court and brings the following three assignments of error for our review:

ASSIGNMENT OF ERROR I

The juvenile court committed plain error and violated J.J.A.'s right to due process when it accepted his admission to a probation violation without complying with the requirements of Juv.R. 29(B) and (D). *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354; Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 16 of the Ohio Constitution. As such, [J.J.A.'s] admission was not knowingly, intelligently, or voluntarily made.

ASSIGNMENT OF ERROR II

The trial court committed plain error and violated J.J.A.'s right to due process when it revoked his probation without following the requirements of Juv.R. 35(B). Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR III

J.J.A. was denied the effective assistance of counsel when trial counsel failed to object to the revocation of his probation though the juvenile court revoked his probation without complying with Juv.R. 29(B) and (D) and 35(B). Sixth and Fourteenth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution.

{¶5} Though appellant filed an appeal of both cases, appellant's arguments center around the admission taken on December 23, 2008, and appellant makes no argument with respect to the admission taken on February 9, 2009. Consequently, our discussion focuses likewise. Because they are interrelated, we will address appellant's first two assignments of error together. In these assigned errors, appellant contends the trial court failed to comply with Juv.R. 29(B)(1), (2), (D)(1), and 35(B), when it accepted his admission to violating the terms of his probation because it failed to ascertain whether the notice requirements had been satisfied or whether appellant knew or understood the substance of the complaint against him.

{¶6} Initially, we note appellant failed to object to the magistrate's decision and, as a result, has waived all but plain error in the proceedings before the magistrate. *In the Matter of B.J.C.*, 10th Dist. No. 07AP-961, 2008-Ohio-2794, ¶5, quoting Juv.R. 40(D)(3)(b)(iv). In order to find plain error, an appellate court must determine that the outcome of the trial clearly would have been different but for the trial court's improper

actions. *In re T.S.*, 10th Dist. No. 06AP-1163, 2007-Ohio-5085, ¶12, citing *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100. However, even if an appellate court finds plain error, it is not required to correct it. *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Indeed, plain error should be noticed and corrected " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶7} Recently, the Supreme Court of Ohio held that both Juv.R. 29 and Juv.R. 35(B) are applicable to probation revocation hearings. *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354. As is relevant here, Juv.R. 29 states:

(B) Advisement and findings at the commencement of the hearing.

At the beginning of the hearing, the court shall do all of the following:

- (1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;
- (2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under Juv. R. 30 where the complaint alleges that a child fourteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;
- (3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;
- (4) Appoint counsel for any unrepresented party under Juv. R. 4(A) who does not waive the right to counsel;

* * *

(D) Initial procedure upon entry of an admission.

The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

{¶8} Juv.R. 35(B) provides:

The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to Juv. R. 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv. R. 34(C), been notified.

{¶9} As the Supreme Court of Ohio stated in *In re C.S.*, 115 Ohio St.3d 267, "most courts of appeal have held that only substantial compliance with Juv.R. 29 is needed." We agree. *Id.* at ¶112 (internal citations omitted.) While the focus of *In re C.S.* was on a juvenile's waiver of the right to counsel at a probation revocation hearing, the Supreme Court held that "if the trial court substantially complies with Juv.R. 29(D) in accepting an admission by a juvenile, the plea will be deemed voluntary absent a showing of prejudice by the juvenile or a showing that the totality of the circumstances does not support a finding of a valid waiver. For purposes of juvenile delinquency proceedings, substantial compliance means that in the totality of the circumstances, the

juvenile subjectively understood the implications of his plea." *Id.* at ¶1113. The standard of substantial compliance set forth in *In re C.S.* remains in tact as this standard was reiterated by the Supreme Court of Ohio in *In re L.A.B.* with respect to one's waiver of counsel. *Id.* at ¶157. Thus, substantial compliance with Juv.R. 29 and 35, based on the totality of the circumstances, is necessary to ascertain whether the juvenile understood the implications of his plea rendering the same voluntary. As stated previously, however, we review this matter under a plain error standard, and, as such, we must determine whether appellant has established the outcome of the proceedings would have been different, i.e., he would not have entered the admission, had the proceedings been run differently. Unlike *In re C.S.* and *In re L.A.B.*, we are not concerned with a waiver of the right to counsel, for indeed appellant had counsel at all times during the proceedings, but, rather, we are concerned with the voluntariness of the admission.

{¶10} Here, appellant was just over one month shy of his 18th birthday at the time of the probation revocation hearing held on December 23, 2008. Appellant had been represented by counsel at all stages of the proceedings, and at the preliminary hearing on the probation violation held on December 15, 2008, the magistrate stated, "all right. [Appellant], your attorney has waived reading of the probation violation and the traffic offense and entered a denial for you." (Dec. 15, 2008 Tr. 3-4.) At the beginning of the hearing held on December 23, 2008, in which appellant entered his admission to the probation violation, the magistrate noted that the purpose of the hearing was a violation of probation, and appellant's counsel stated, "there will be admissions to the motions Your Honor." (Dec. 23, 2008 Tr. 2.) After dismissing the traffic case, the magistrate proceeded to address appellant. The magistrate informed appellant of the rights he was waiving by

admitting guilt to violating his probation and the potential penalties involved. The magistrate also verified appellant understood that he was admitting guilt to violating his probation and that he was doing so voluntarily. Thereafter, appellant's probation officer described the charges, and appellant's counsel spoke on appellant's behalf. Additionally, the magistrate's decision, as incorporated into the trial court's judgment entry, reflects the magistrate advised appellant of all rights and possible consequences as defined under Juv.R. 29. Moreover, appellant's mother was present at the hearing, signed a waiver of service of summons and notice of hearing, and gave no indication that she was not in agreement with appellant proceeding as he did.

{¶11} Upon review, we find nothing to indicate appellant did not understand the charges alleged against him or that he would not have admitted to the charges had the proceedings been different. As such, we cannot find appellant has established plain error and overrule appellant's first and second assignments of error.

{¶12} In his third assignment of error, appellant contends he was denied effective assistance of counsel because his counsel failed to object to the trial court's revocation of his probation without complying with Juv.R. 29(B) and (D) and 35(B). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must then establish "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶13} According to *Strickland*:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064.

{¶14} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id., 466 U.S. at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is

not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶15} Assuming without deciding that appellant's counsel was deficient in his performance in failing to object at the probation revocation hearing, appellant is unable to show such error was prejudicial. This is so because even if counsel had objected and the proceedings were conducted differently, there is not a reasonable probability of a different outcome. As explained in our disposition of appellant's first two assigned errors, appellant was just short of 18 years old at the time of the hearing, was represented by counsel, as he had been throughout the proceedings, and had his mother at the hearing, who had waived service of summons and was in apparent agreement with appellant's decision to admit guilt. The record is devoid of any indication that appellant did not understand the charges against him or that he would not have admitted to the charges had the proceedings been different. Just as appellant cannot demonstrate plain error, appellant has failed to demonstrate he was prejudiced by his counsel's conduct and that he received ineffective assistance of counsel. Consequently, we overrule appellant's third assignment of error.

{¶16} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and KLATT, J., concur.
