

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

In the matter of: S.R.

Court of Appeals No. OT-09-024

Trial Court No. DL20920228

DECISION AND JUDGMENT

Decided: June 30, 2010

* * * * *

Sarah A. Nation, for appellant.

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of judgments of the Juvenile Division of the Ottawa County Court of Common Pleas adjudicating S.R. to be a delinquent child and ordering him to be placed in a juvenile detention center for 30 days, with 20 days of the sentence suspended upon conditions. Delinquency proceedings were initiated with the filing of a

complaint on April 20, 2009, alleging that S.R. was a delinquent child for knowingly causing or attempting to cause physical harm to another in an incident that occurred on April 17, 2009. The alleged conduct, if committed by an adult, constitutes the offense of assault, a violation of R.C. 2903.13(A) and a first degree misdemeanor. At the time of the alleged offense and trial, S.R. was 16 years of age.

{¶ 2} Trial counsel entered an appearance on behalf of S.R. in the delinquency proceedings on April 23, 2009. On May 12, 2009, the trial court set a June 24, 2009 trial date during a pretrial conference. Written notices of the assignment of the case for trial on June 24, 2009, were sent by ordinary mail to both of S.R.'s parents and to S.R. (at his mother's address).

{¶ 3} On June 24, 2009, S.R. appeared for trial with both of his parents and with trial counsel. Trial counsel made an oral motion at the beginning of proceedings for a continuance of the trial date. He stated grounds demonstrating that he was unprepared for trial. He had been unable to reach S.R. or to speak with him about the case before the day of trial. Counsel also had not spoken to the defense witness. Counsel explained:

{¶ 4} "Mr. Weis: The second thing, Your Honor, is I would ask for a continuance.

{¶ 5} "We have discussed in chambers that I have not heard from * * * [S.R.] * * *, his mother or his father until today. I found out that there was a witness that is here today but I was unable to talk to.

{¶ 6} "I received no phone calls. I was not able to talk to * * * [S.R.] * * * about the case. I understand there has been a change in custody. He has gone from his mother to his father, and in that period of time (inaudible) no contact with me, and that is why we request the continuance.

{¶ 7} "The Court: Okay. Have you attempted to contact * * * [S.R.] * * * or his family?

{¶ 8} "Mr. Weis: I had written a letter a week ago and I tried several phone numbers.

{¶ 9} "The Court: I am going to deny your motion to continue. We have got all of our witnesses here. It has been on our docket for some time, and so we are going to proceed."

{¶ 10} Trial proceeded. On June 29, 2009, the trial court issued judgment finding that the state had proved beyond a reasonable doubt that S.R. violated R.C. 2903.13(A) and found S.R. to be a delinquent child. The trial court issued judgment on August 6, 2009, as to disposition.

{¶ 11} S.R. appeals the trial court's judgments. He assigns two errors on appeal:

{¶ 12} "Assignments of Error

{¶ 13} "I. The trial court erred in denying appellant's motion to continue.

{¶ 14} "II. Defense counsel's performance of his duties was deficient in that he made errors so serious that he failed to function as the counsel guaranteed by the Sixth Amendment and appellant was prejudiced by said errors."

Denial of Continuance

{¶ 15} Juv.R. 23 provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties." Appellant contends that the denial of his motion for a continuance of trial effectively denied him the right to counsel at trial and denied him a fair trial.

{¶ 16} In the decision of *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, the Ohio Supreme Court conducted a historical review of juvenile court procedures and the requirements of due process. In the decision the court outlined the nature of the due process right to an attorney in juvenile court proceedings:

{¶ 17} "In declaring that the juvenile facing commitment to an institution has a right to counsel "at every step in the proceedings against him," *In re Gault*, 387 U.S. at 36, 87 S.Ct. 1428, 18 L.Ed.2d 527, quoting *Powell v. Alabama* (1932), 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158, the Supreme Court reinforced its belief that the appointment of counsel for a juvenile is not a mere formality or 'a grudging gesture to a ritualistic requirement'; it is a venerable right at the core of the administration of justice and due process. *Kent [v. United States]*, 383 U.S. at 561, 86 S.Ct. 1045, 16 L.Ed.2d 84." *In re C.S.* at ¶ 78.

{¶ 18} The court also stated the importance of the right to counsel in more concrete terms:

{¶ 19} "The fact that the right to counsel in a juvenile case arises from due process does not diminish its importance. A juvenile typically lacks sufficient maturity and good

judgment to make good decisions consistently and sufficiently foresee the consequences of his actions. See, e.g., *Roper v. Simmons* (2005), 543 U.S. 551, 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1; *Planned Parenthood of Cent. Missouri v. Danforth* (1976), 428 U.S. 52, 102, 96 S.Ct. 2831, 49 L.Ed.2d 788 (Stevens, J., concurring in part and dissenting in part). Thus, '[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it.' (Footnote omitted.) *Gault*, 387 U.S. at 36, 87 S.Ct. 1428, 18 L.Ed.2d 527." *In re C.S.* at ¶ 82.

{¶ 20} Appellate courts review a denial of a continuance on an abuse of discretion standard. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. In making that determination, the Ohio Supreme Court in *Unger* recognized: "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589.

{¶ 21} The court adopted a balancing test to evaluate a trial court's grant or denial of a continuance: "Weighed against any potential prejudice to a defendant are concerns such as a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Id.* The court also instructed:

{¶ 22} "In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *Id.*, 67 Ohio St.2d at 67-68. (Citations omitted.)

{¶ 23} The reasons given by the trial court in overruling the motion for a continuance included the fact that "we have all our witnesses here" and that the case "has been on our docket for some time." The state offered testimony from two witnesses at trial. There were two defense witnesses: S.R. and a friend.

{¶ 24} Appellant had not previously requested a continuance. The length of the requested continuance was not discussed. Trial proceeded 45 days after the complaint in delinquency was filed and 48 days after the incident. Trial proceedings took half of a day.

{¶ 25} The state concedes the request for a continuance was "made for a legitimate purpose." S.R.'s counsel stated that he had not been able to speak to S.R. about the case before the day of trial. This was despite repeated efforts to reach appellant and his parents before trial, both by telephone and letter. Counsel also had not spoken to a witness who appeared to testify on behalf of the defense at trial.

{¶ 26} The state argues that the defendant contributed to the need for a continuance. It argues that although counsel made several attempts to reach S.R. and his parents, that appellant and his parents failed to respond to those requests. Appellant admits in his brief that "[p]resumably his parents should have assisted him in contacting his attorney to prepare for his case."

{¶ 27} The state argues that under *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, it is not an abuse of discretion to deny a continuance due to the unpreparedness of counsel for trial where unpreparedness was avoidable. In *Hartt v. Munobe*, the Ohio Supreme Court concluded that there had been a "distinct lack of diligence on the part of the defendants throughout the litigation." *Id.*, 67 Ohio St.3d at 9. The defendants also appeared for trial with an attorney who was "unfamiliar with the litigation" after the case had been pending for two and one-half years before trial. *Id.* The case was a civil case involving a corporate defendant, not a delinquency proceeding against a minor.

{¶ 28} The Supreme Court of Ohio has recognized that in considering the right to counsel in juvenile proceedings it is to be anticipated that a minor "typically lacks sufficient maturity and good judgment to make good decisions consistently and sufficiently foresee the consequences of his actions." *In re C.S.* at ¶ 82. Considering *Unger* and *Hartt v. Munobe* together in a juvenile court context, we view the appropriate analysis is to consider the failure of S.R., a minor, to remain in contact with his attorney before trial as inconclusive alone and that the failure should be treated as one of the

various factors considered in conducting a balancing analysis under *Unger* in determining whether it was an abuse of discretion to deny a continuance.

{¶ 29} S.R. was age 16 at the time of the incident and trial. The record reflects that he had experience with legal proceedings as he was on probation when the incident upon which charges were based occurred.

{¶ 30} "An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *Unger* at 67. "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 31} Given that the need for the continuance was caused at least in part by appellant's failure to maintain contact with his attorney before trial and unresponsiveness to counsel's attempts to contact him prior to trial, appellant's age and prior experience in court proceedings, the failure to raise the need for a continuance until the day of trial, and the resulting inconvenience presented by the request upon the court, witnesses, and prosecution, we find no abuse of discretion in the trial court's overruling the motion for a continuance. Assignment of Error No. 1 is found not well-taken.

Ineffective Assistance of Counsel

{¶ 32} Under Assignment of Error No. 2, appellant argues that he was denied effective assistance of counsel as guaranteed under the Sixth Amendment. In juvenile court proceedings, the constitutional right to counsel has been identified as arising from

an entitlement to due process of law under the Fourteenth Amendment and not the Sixth Amendment. *In re C.S.* at ¶ 79, citing *In re Gault* (1967), 387 U.S. 1, 41. We consider appellant's second assignment of error as presenting a claim of ineffective assistance of counsel in violation of appellant's right to counsel on that basis.

{¶ 33} The same analysis used to establish ineffective assistance of counsel under *Strickland v. Washington* (1984), 466 U.S. 668, employed in adult criminal proceedings, also applies to the issue in juvenile delinquency proceedings. *In the Matter of S.M.*, 4th Dist. No. 09CA5, 2009-Ohio-3118, ¶ 15; *In re J.J.*, 9th Dist. No. 21386, 2004-Ohio-1429, ¶ 13; see *In re Darvius C.*, 6th Dist. No. E-00-064. To prove ineffective assistance of counsel under *Strickland*, a defendant must prove two elements: "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 * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* at 687. Where the defendant makes an insufficient showing as to either component of the inquiry, the claim of ineffective assistance of counsel fails, and it is unnecessary for the court to consider the other component. *Strickland* at 697.

{¶ 34} Ineffective assistance of counsel requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687-688. When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland* at 689.

{¶ 35} Appellant argues that the record discloses that trial counsel was deficient. He argues that trial counsel did not attempt to make contact with appellant or his parents until the week before trial and that counsel had not spoken to appellant, his parents, or to witnesses until the day of trial. The state argues in response that the record is insufficient to establish when counsel first attempted contact. It also argues that the record does not establish the cause of the inability of counsel to speak with appellant, his parents, or witnesses before trial.

{¶ 36} The record reflects that counsel made repeated unsuccessful efforts to reach appellant and his parents by telephone at different telephone numbers, but does not indicate when counsel initiated or made those attempts. The record is clear that the attempt to reach appellant by letter was not undertaken until the week before trial. Comments by counsel appear to indicate that appellant and his parents were unresponsive to counsel's attempts to make contact. Appellant and his parents clearly made no independent effort to contact counsel to cooperate in the defense.

{¶ 37} While counsel did not attempt contact by letter until a week before trial, he did attempt telephone contact through a series of telephone numbers. This was not a

complex case to prepare for trial. The case involved a handful of witnesses to one specific incident of short duration.

{¶ 38} We conclude that the record is insufficient to establish when counsel first initiated efforts to contact appellant or his parents concerning the case or in an effort to prepare for trial. The record also is insufficient to determine the relative responsibility between client and counsel for lack of contact before trial, particularly due to the lack of response by either S.R. or his parents to telephone calls made by counsel.

{¶ 39} Where an ineffective assistance of counsel claim requires consideration of materials outside the record of proceedings in the trial court, the claim is not of the type that can be considered on direct appeal. *State v. Carter* (2000), 89 Ohio St.3d 593, 606; *State v. Davis*, 6th Dist. No. L-05-1056, 2006-Ohio-2350, ¶ 21. In our view, this is such a case. Given the presumption that counsel's representation of appellant met professional standards, we conclude that the record is insufficient to establish whether counsel's representation fell below an objective standard of reasonableness by failing to undertake reasonable contact with appellant, his parents, and witnesses in order to properly prepare for trial.

{¶ 40} We find appellant's Assignment of Error No. 2 is not well-taken.

{¶ 41} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgments of the Ottawa County Court of Common

Pleas, Juvenile Division, are affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.
CONCUR.

JUDGE

Keila D. Cosme, J.,
DISSENTS.

COSME, J.

{¶42} I respectfully dissent. The lack of communication between S.R., his parents, and trial counsel should not have been held against S.R. and should not have outweighed the other factors considered by the juvenile court in determining whether a continuance was appropriate. I would hold that the denial of a continuance in this case violated S.R.'s right to due process of law.

{¶43} Although a juvenile, S.R. had an obligation to communicate with his attorney. See *In re Johnson* (Oct. 25, 1983), 2d Dist. No. 7998; *In re Jeromie D.* (Nov. 30, 2000), 6th Dist. No. L-00-1030. See, also, R.C. 2945.37.

{¶44} Yet, S.R.'s parents had an obligation to facilitate communication between S.R. and his attorney, because, as the Supreme Court of Ohio has noted, "[a] juvenile typically lacks sufficient maturity and good judgment to make good decisions consistently and sufficiently foresee the consequences of his actions." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶ 82. Parents are obligated to provide their child with care, education and support. See *Perry v. Perry* (Mar. 16, 1936), 2d Dist. No. 2606. Such care and support logically extends to ensuring that the child charged with a crime meets with his attorney and attends all court hearings in much the same way parents are responsible for their child's health. See *State v. Lott* (1999), 135 Ohio App. 3d 198, 202, discretionary appeals not allowed, (2000), 88 Ohio St.3d 1437 ("Under Ohio law, parents have a legal duty to act to protect their children from harm.")

{¶45} Similarly, S.R.'s attorney, Mr. Weis, had an obligation to make every reasonable effort to communicate with his client and keep him abreast of the pending legal matters. *Cuyahoga Cty. Bar Assn. v. Curry* (1997), 79 Ohio St.3d 181, 184.

{¶46} Juv.R. 23 states that "continuances shall be granted only when imperative to secure fair treatment for the parties." A review of the record suggests that a continuance, even a brief one, would have been appropriate to ensure fair treatment for

the parties - particularly S.R., who had not had an opportunity to meet with counsel - through no documented fault of his own.

{¶47} We have held that "[t]he power of a trial court in a juvenile proceeding to grant or deny a continuance under Juv.R. 23 is broad and is reviewed under an abuse of discretion standard." *In re Jordan B.*, 6th Dist. No. L-06-1161, 2007-Ohio-2537, ¶ 16. An abuse of discretion connotes more than an error of judgment or law; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶48} The juvenile court had to balance the competing factors set forth in *State v. Unger* (1981), 67 Ohio St.2d 65, 67. In doing so, the juvenile court clearly considered the conduct of S.R., his parents, and trial counsel to be dilatory. We have held that any continuance "must be based upon some unavoidable, rather than voluntary, circumstance." *In re P.C.*, 6th Dist. No. L-08-1388, 2009-Ohio-2599, citing *Hartt v. Munove* (1993), 67 Ohio St.3d 3. In this case, S.R., his parents, and trial counsel were aware, as early as May 12, 2009, that this matter would be proceeding to trial on June 24, 2009.

{¶49} In *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus, the Supreme Court of Ohio held, "[t]he grant or denial of a continuance is a matter that is entrusted to the broad, sound discretion of the trial judge." A reviewing court will not reverse the denial of a continuance unless there has been an abuse of discretion. *Id.* at 67.

{¶50} The salient question before us is whether the denial of the continuance violated S.R.'s right to due process of law. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger*, 67 Ohio St.2d at 67, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589. In *Sarafite*, the United States Supreme Court recognized that, although "not every denial of a request for more time * * * violates due process[,] * * * a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend * * * an empty formality." *Sarafite*, 376 U.S. at 589.

{¶51} According to the Ohio Supreme Court, a reviewing court should utilize a balancing test, weighing any potential prejudice to the moving party against such concerns as the "court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." *Unger*, 67 Ohio St.2d at 67.

{¶52} Application of the factors listed in *Unger* is revealing and suggests that a continuance was warranted. Those factors include the length of the requested delay; prior continuances requested and received; the inconvenience to parties, witnesses, counsel, and the court; the presence or absence of legitimate reasons for the requested delay; and the moving party's participation or contribution to the circumstances giving rise to the request for a continuance. *Unger*, 67 Ohio St.2d at 67-68.

{¶53} S.R.'s trial counsel, Mr. Weis, asked for a continuance because he had not yet met with S.R. and S.R. had brought with him that morning a witness whom Mr. Weis did not know about. Mr. Weis explained to the juvenile court that he had sent S.R. a letter a week before trial and attempted to call several numbers he had for S.R. and S.R.'s parents. Apparently, at that time, S.R. went from the custody of his mother to the custody of his father. Nevertheless, the change in custody does not explain the difficulty in contacting S.R.'s parents. Nor is there any explanation why S.R.'s parents did not contact Mr. Weis. However, I do not believe that S.R. can, or should be, held solely accountable for the failure to communicate with trial counsel. Nor should this singular factor outweigh any other factors justifying a continuance. Mr. Weis did not indicate whether he was seeking a half-day continuance, a week continuance or longer. No prior continuances had been requested.

{¶54} The failure to prepare for trial is not grounds for a continuance. "The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger*, 67 Ohio St.2d at 67 (internal citation omitted). *State v. Richardson*, 2d Dist. No. 2007 CA 74, 2009-Ohio-1418. Here, the juvenile court apparently felt that S.R., his parents, and Mr. Weis' failure to meet prior to trial was "dilatory," *Unger*, 67 Ohio St.2d at 68, in large part because they were unable to show, on the record, "some unavoidable, rather than voluntary, circumstance." *In re P.C.*, 6th Dist. No. L-08-1388, 2009-Ohio-2599, citing *Hartt v. Munove* (1993), 67 Ohio St.3d 3. I do not believe, without more, that S.R.'s

conduct could be considered dilatory. Surely he should not be deprived of his due process rights because his parents and trial counsel could not communicate.

{¶55} Regarding the question of inconvenience to the parties and witnesses, Mr. Weis did not argue if those individuals would have been inconvenienced by a continuance of the hearing. Nor did the state suggest that there would be any inconvenience to its witnesses. The oral motion for a continuance was made on the day set for trial, and all parties were in attendance. There would necessarily have been some amount of inconvenience if they had to return on another day, or later that day. However, the number of witnesses was few.

{¶56} If the continuance had been sought for a "contrived" reason or for mere delay, this factor might well weigh against the granting of a continuance, but the request was apparently based on Mr. Weis' difficulty in communicating with S.R. and S.R.'s parents - for reasons not clearly detailed in the record - other than his attempt to contact them one week prior to trial.

{¶57} Finally, we must balance the potential prejudice to the moving party with the juvenile court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. There was no discussion, on the record, of whether a continuance of a half a day or more was needed and whether the juvenile court could accommodate that request.

{¶58} The lack of communication between S.R., his parents, and Mr. Weis should not have been weighed so heavily against granting a continuance. The denial of the continuance violated S.R.'s right to due process of law. Therefore, I respectfully dissent.