[Cite as *In re J.D.*, 2018-Ohio-1823.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: J.D. DELINQUENT CHILD	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Patricia A. Delaney, J. Hon. Earle E. Wise, Jr., J. Case No. 17CA42 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Juvenile Division, Case No. 2016 DEL 00812
JUDGMENT:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
DATE OF JUDGMENT ENTRY:	May 7, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GARY BISHOP RICHLAND CO. PROSECUTOR JOSEPH C. SNYDER 38 South Park St. Mansfield, OH 44902	OHIO PUBLIC DEFENDER OFFICE TIMOTHY B. HACKETT 250 East Broad St., Ste. 1400 Columbus, OH 43215

Delaney, J.

{¶1} Appellant J.D., a juvenile, appeals from the May 16, 2017 Amended Judgment Entry and Order to Convey of the Richland County Court of Common Pleas, Juvenile Division. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶1} Appellant was 14 years old at the time he was charged in this matter and age 15 at the time of disposition. He was charged with six counts of delinquency by means of rape of a child under the age of thirteen[1] and seven counts of delinquency by means of gross sexual imposition against a child under the age of thirteen.[2] The offenses occurred between the dates of March 12, 2014 and November 13, 2016 against two victims, both family members of appellant.

{¶2} Appellant admitted to two counts of rape and two counts of G.S.I., and appellee dismissed the remaining counts. The trial court delayed disposition pending preparation of a pre-disposition report (P.D.R.).

{¶3} On April 12, 2017, appellant appeared before the trial court for disposition. Appellant was sentenced to an aggregate term of six months to age 21 in D.Y.S., with a minimum commitment of six years. The trial court ordered appellant's placement in the Paint Creek Residential Treatment program for sex offenders administered by D.Y.S.

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[1] Each count of rape is a felony of the first degree if committed by an adult pursuant to R.C. 2907.02(A)(1)(b) and (B), and R.C. 2152.02(F)(1).
[2] Each count of G.S.I. is a felony of the third degree if committed by an adult pursuant to R.C. 2907.05(A)(4) and 2152.02(F)(1).

{¶4} Appellant now appeals from the trial court's Amended Judgment Entry and Order to Convey dated May 16, 2017, and incorporating the trial court's Judgment Entry and Order to Convey of April 13, 2017.

{¶5} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶6} "I. THE JUVENILE COURT PLAINLY ERRED WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM TO PROTECT MINOR J.D.'S BEST INTERESTS, IN VIOLATION OF R.C. 2151.281(A)(2) AND JUV.R. 4(B)(2)."

{¶7} "II. THE JUVENILE COURT VIOLATED J.D.'S RIGHT TO DUE PROCESS OF LAW WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM, IN VIOLATION OF R.C. 2151.281(A)(2) AND JUV.R. 4(B)(2). FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 16, OHIO CONSTITUTION."

{¶8} "III. THE JUVENILE COURT ERRED WHEN IT FAILED TO GRANT J.D. CREDIT FOR THE 146 DAYS HE WAS CONFINED AT THE VILLAGE NETWORK IN RELATION TO THE OFFENSE FOR WHICH HE WAS COMMITTED TO DYS, IN VIOLATION OF R.C. 2152.18(B); THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; AND, ARTICLE I, SECTION 16, OHIO CONSTITUTION."

{¶9} "IV. J.D. WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE US. CONSTITUTION; AND, ARTICLE I, SECTION 10, OHIO CONSTITUTION."

ANALYSIS

I., II.

{¶10} Appellant's first and second assignments of error are related and will be considered together. Appellant argues the trial court erred in failing to sua sponte appoint a guardian ad litem (G.A.L.) to represent his best interests, therefore depriving him of due process of law. We disagree.

{¶11} R.C. 2151.281(A)(2) states, "The court shall appoint a guardian ad litem, subject to rules adopted by the supreme court, to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or unruly child when * * * [t]he court finds that there is a conflict of interest between the child and the child's parent, guardian, or legal custodian." Further, Juv.R. 4(B)(2) and (4) state: "The court shall appoint a guardian *ad litem* to protect the interests of a child * * * in a juvenile court proceeding when: * * * * [t]he interests of the child and the interests of the parent may conflict; [or] * * * * [t]he court believes that the parent of the child is not capable of representing the best interest of the child."

{¶12} In the instant case, we note appellant's legal guardian was present throughout the proceedings in the record before us, and appellant was represented by appointed counsel at those hearings. Appellant did not request appointment of a G.A.L., nor did anyone make such a request on his behalf. No objection raised to the trial court's failure to appoint a G.A.L. We are mindful that a juvenile is not required to ask for the appointment of a G.A.L. when the juvenile appears at a proceeding unaccompanied by a parent. *State v. Morgan*, --Ohio St.3d--, 2017-Ohio-7565, --N.E.3d--, ¶ 30,

reconsideration denied, 151 Ohio St.3d 1458, 2017-Ohio-8842, 87 N.E.3d 224. In this case, however, appellant had both his legal guardian and appointed counsel present.

{¶13} The "relevant question on appeal is whether the record reveals an actual or potential conflict of interest which required the appointment of a guardian ad litem." *In re J.C.*, 5th Dist. Knox No. 14CA23, 2015-Ohio-4664, ¶ 27. We have previously acknowledged potential conflicts in cases in which the parent is both the parent of the offender and the victim. See, *In re: Sargent,* 5th Dist. Licking No. 00CA91 and 00CA92, unreported, 2001 WL 1011229 (Aug. 31, 2001); *In re J.C.*, 5th Dist. Knox No. 14CA23, 2015-Ohio-4664. In both of those cases, however, there were facts in the record before the trial court which evidenced potential conflicts of interest. In the instant case, appellant asks us to presume a potential conflict in the absence of facts in the record. The victims of appellant's sex offenses were other family members, but that fact alone does not give rise to a conflict of interest requiring the appointment of a G.A.L.

{¶14} Appellant was represented by counsel at all stages of the proceedings and his legal guardian was present. Appellant admitted four offenses and the remaining counts were dismissed. Appellant argues his legal guardian, his grandmother, is also related to the victims and sought to relinquish custody of appellant. Appellant fails to point to evidence of prejudice, however, speculating that he was prejudiced by the absence of a G.A.L. "appris[ing] the court of the available treatment options…," inferring that he may have been sentenced to a treatment program instead of D.Y.S. As the Ohio Supreme Court has recognized, "speculation cannot prove prejudice." *Morgan*, supra, 2017-Ohio-7565 at ¶ 53, citing S*t. Paul Mercury Ins. Co. v. Natl. Sur. Corp.,* N.D.W.Va. No. 1:14–cv–45, 2015 WL 222477, *6 (Jan. 14, 2015).

{¶15} Appellant's failure to establish prejudice is fatal to his argument. The criminal plain-error standard applies when errors that are not preserved arise in juvenile-delinquency proceedings. *Morgan*, supra, 2017-Ohio-7565 at ¶ 48. Even if arguably an error occurred when the juvenile court failed to appoint a G.A.L., showing that an error occurred is not enough. Id. Appellant also has the burden of proving that the error affected the outcome of the proceeding. Id.

{¶16} We conclude appellant has not met his burden of proof that he was prejudiced by the juvenile court's failure to appoint a G.A.L. on the facts of this case. *Morgan*, supra, 2017-Ohio-7565 at ¶ 54; *In re I.N.*, 5th Dist. Stark No. 2011CA00011, 2011-Ohio-4572 at ¶ 20; see also, *In re T.B*., 5th Dist. Tuscarawas No. 2015AP050022, 2016-Ohio-575, ¶ 45, appeal not allowed, 146 Ohio St.3d 1416, 2016-Ohio-3390, 51 N.E.3d 660 [record fails to show appellant was not zealously represented by counsel, that conflicts arose in representation, or any actual conflict between appellant and guardian].

{¶17} Appellant's first and second assignments of error are overruled.

III.

{¶18} In his third assignment of error, appellant argues he should have received jail-time credit for the time spent at the Village Network prior to disposition. We agree to the extent that we are unable to determine from the record whether appellant's time at the Village Network qualifies as "confinement" for purposes of R.C. 2152.18(B) and therefore remand this matter for further consideration by the trial court.

{¶19} R.C. 2152.18(B) states:

> When a juvenile court commits a delinquent child to the custody of the department of youth services * * *, the court shall state

> in the order of commitment the total number of days that the child has been confined in connection with the delinquent child complaint upon which the order of commitment is based. The court shall not include days that the child has been under electronic monitoring or house arrest or days that the child has been confined in a halfway house. The department shall reduce the minimum period of institutionalization that was ordered by both the total number of days that the child has been so confined as stated by the court in the order of commitment and the total number of any additional days that the child has been confined subsequent to the order of commitment but prior to the transfer of physical custody of the child to the department.

{¶20} Judges must grant confinement credit under R.C. 2152.18(B) if the confinement stems from an original complaint and is sufficiently linked to the adjudication of the charges upon which the juvenile court orders commitment. *In re D.S.*, 148 Ohio St.3d 390, 2016-Ohio-7369, 71 N.E.3d 223, ¶ 22.

{¶21} The issue posed by the instant case is whether appellant's pre-disposition time spent at the Village Network qualifies as "confinement" for the purpose of R.C. 2152.18(B). R.C. Chapter 2152 does not define "confinement," although R.C. 2152.18(B) provides examples of what is not confinement: electronic monitoring, house arrest, or time spent in a halfway house. *In re J.C.E.*, 11th Dist. Geauga No. 2016-G-0062, 2016-Ohio-7843, ¶ 18.

{¶22} In *State v. Napier*, 93 Ohio St.3d 646, 2001-Ohio-1890, 758 N.E.2d 1127, the Ohio Supreme Court considered the meaning of "confinement" for the adult jail-time

credit statute, R.C. 2967.191. The Court held that time spent in a community-based corrections facility (CBCF) is "confinement" for which an adult defendant is entitled to jail-time credit because a CBCF is "a secure facility that contains lockups and other measures sufficient to ensure the safety of the surrounding community," from which offenders are not permitted to leave without permission. Id., citing *State v. Snowder*, 87 Ohio St.3d 335, 337, 720 N.E.2d 909 (1999).

{¶23} Other Districts which have considered the issue of jail-time credit for juveniles have followed *Napier* in considering whether a juvenile has been "confined" within the meaning of R.C. 2152.18(B). See, *In re D.P.,* 1st Dist. Hamilton No. C–140158, 2014-Ohio-5414, 2014 WL 6960250 [juvenile court "must review the nature of the facility, to see if it is a secure facility with measures sufficient to ensure the safety of the surrounding community" and "must also review the nature of the restrictions on the juvenile at the facility to determine if the juvenile was 'free to come and go as he wished' or if he was 'subject to the control of the staff regarding personal liberties' * * *"]; *In re T.W.*, 1st Dist. Hamilton No. C-150327, 2016-Ohio-3131, 66 N.E.3d 93, appeal not allowed*,* 147 Ohio St.3d 1413, 2016-Ohio-7455, 62 N.E.3d 185; *In re K.A.,* 6th Dist. Lucas No. L–12–1334, 2013–Ohio–3847.

{¶24} In the instant case, the record does not contain enough information to permit us to weigh the Village Network against *Napier's* guidelines. Appellant points to the record of a hearing on December 8, 2016, at which the magistrate inquired of a social worker about conditions at the Village Network and the worker described the facility in some detail. The questions posed by the magistrate, though, are premised upon concern *for the safety of other child residents of the facility*, not about the security of the facility

itself or whether appellant was "confined" therein. Because appellant was charged with raping and molesting younger children, the magistrate wanted to know whether he would have access to younger, physically smaller children in the facility and what measures were in place to ensure supervision and safety.

{¶25} We thus disagree with appellant's conclusory statements that the trial court evaluated whether the Village Network is "confinement" because that specific issue was not before the court.[3] Appellee points out that the Eleventh District has described the Village Network as a "nonsecure" treatment facility, but we find this dicta inconclusive in determining whether time spent in the facility is "confinement." See, *In re Thrower*, 11th Dist. Geauga No. 2008-G-2813, 2009-Ohio-1314, ¶ 38, reversed on other grounds *sub nom. In re Cases Held for the Decision in In Re D.J.S.*, 130 Ohio St.3d 253, 2011-Ohio-5349, 957 N.E.2d 288.

{¶26} Upon our review of the record, we are unable to determine whether appellant's time at the Village Network constitutes confinement for purposes of R.C. 2152.18(B). See, *In re J.C.E.*, supra, 2016-Ohio-7843, at ¶ 42. The Eleventh District in *J.C.E.* modeled the following remand instructions on that of the First District in *In re D.P.,* 1st Dist. Hamilton No. C-140158, 2014–Ohio–5414, and we do the same. 11th Dist. Geauga No. 2016-G-0062, 2016-Ohio-7843, ¶ 43.

{¶27} We therefore remand the instant case for the trial court to take evidence and make findings concerning the nature of the Village Network's security procedures

[3] Appellant did not move for jail-time credit and the trial court did not consider the question of crediting time spent at the Village Network. Nevertheless, the mandatory language of R.C. 2152.18(B) indicates the trial court must credit appellant with the time if appropriate, and we therefore consider whether the trial court erred in failing to do so.

and the staff's control regarding appellant's personal liberties. *J.C.E.*, 2016-Ohio-7843 at ¶ 46. The trial court shall also determine whether appellant was "confined" pursuant to R.C. 2152.18(B), as that term is interpreted by the Ohio Supreme Court in *Napier, supra,* and, if so, the number of days appellant was confined. Id.

{¶28} In determining whether appellant was "confined" at the Village Network for purposes of determining credit for time served, the trial court shall consider whether the Village Network is a secure facility that contains lockups and other measures to ensure the safety of the surrounding community; whether juveniles are secured there in such a way as to prevent them from entering the community without the approval of the Village Network's managers; and whether the juveniles housed at the Village Network are under secure care and supervision. Id. at ¶ 47. The court shall also consider the nature of the restrictions on appellant to determine if he was free to come and go as he wished or if he was subject to the control of the staff regarding his personal liberties as contemplated by *Napier.* Id.

{¶29} Appellant's third assignment of error is therefore sustained to the extent that the matter is remanded to the trial court for determination of whether appellant should receive credit for days spent at the Village Network and if so, how many.

IV.

{¶30} In his fourth assignment of error, appellant argues he received ineffective assistance of trial counsel because the trial court failed to appoint a G.A.L. and defense trial counsel failed to move for jail-time credit for the time spent at the Village Network. We disagree.

{¶31} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "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.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶32} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690. Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶33} Appellant first argues he received ineffective assistance of trial counsel because of the trial court's failure to appoint a G.A.L. In light of our disposition of his first and second assignments of error, in which we determined appellant was not prejudiced by the absence of a G.A.L., we find counsel was not ineffective on that basis.

{¶34} Appellant further argues trial counsel should have advocated for jail-time credit for his time spent at the Village Network. In *Strickland,* the United States Supreme Court stated that "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." *Id.* at 689. Based on the record before us, we cannot determine whether appellant is entitled to jail-time credit and, therefore, appellant cannot show that he was prejudiced or that defense counsel's conduct did not fall within the wide range of reasonable professional assistance. *State v. Horsley*, 10th Dist. Franklin No. 05AP-1152, 2006-Ohio-6217, ¶ 58; see also, *State v. Williams*, 10th Dist. No. 16AP-540, 2017-Ohio-5598, 93 N.E.3d 449.

{¶35} Furthermore, appellant suffered no prejudice, because "any error in the calculation of jail-time credit will be remedied on remand." *State v. Sampson*, 8th Dist. Cuyahoga No. 103311, 2016-Ohio-4560, ¶ 25, motion for delayed appeal granted, 146 Ohio St.3d 1513, 2016-Ohio-7199, 60 N.E.3d 5, and appeal not allowed, 149 Ohio St.3d 1406, 2017-Ohio-2822, 74 N.E.3d 464, citing *State v. Ponyard,* 8th Dist. Cuyahoga No. 101266, 2015–Ohio–311, ¶ 11; see also, *State v. Cockrell*, 1st Dist. No. C-150497, 2016-Ohio-5797, 70 N.E.3d 1168, ¶ 27, *appeal not allowed,* 149 Ohio St.3d 1418, 2017-Ohio-4038, 75 N.E.3d 236 [remand for calculation of proper jail-time credit renders ineffective-assistance argument moot].

{¶36} Appellant's fourth assignment of error is overruled.

CONCLUSION

{¶37} Appellant's first, second, and fourth assignments of error are overruled. Appellant's third assignment of error is sustained to the extent described supra and this matter is remanded to the trial court to determine whether appellant should receive credit for the pre-disposition time spent at the Village Network.

{¶38} The judgment of the Richland County Court of Common Pleas, Juvenile Division is therefore affirmed in part, reversed in part, and the matter is remanded to the trial court with instructions.

By: Delaney, J.,

Gwin, P.J. and

Wise, Earle, J., concur.