

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-918 (C.P.C. No. 09CR-03-1359)
	:	
Charles Erwin,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Adam R. Todd, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Charles Erwin ("appellant"), was previously convicted of aggravated murder with specification, murder with specification, aggravated robbery with specification, tampering with evidence, theft, and having a weapon while under disability. This court affirmed those convictions on direct appeal. *State v. Erwin*, 10th Dist. No. 09AP-918, 2010-Ohio-3022. On February 8, 2011, this court granted appellant's application for reopening that decision for the limited purpose of allowing review of the bindover decision by which appellant was transferred from the juvenile court to the court of common pleas. *State v. Erwin*, 10th Dist. No. 09AP-918, ¶13 (Feb. 8, 2011) (memorandum decision). The matter is now before us on reopening.

{¶2} On February 29, 2008, appellant and four other young men stole a Jeep Cherokee. Later that evening, they were traveling on Stockbridge Road when the driver

swerved the Jeep toward two men, Thomas Smith ("Thomas") and James Smith ("James"), who were walking on the opposite side of the street. Thomas and James jumped out of the way and swore at the driver. Thomas and James crossed to the other side of the street and the Jeep continued on Stockbridge Road. The Jeep then turned around and drove back toward Thomas and James. One of the young men in the Jeep had a .22 caliber handgun and fired it out the window as the vehicle approached Thomas and James.

{¶3} Appellant and the other young men exited the Jeep and confronted Thomas and James. Appellant took the handgun from one of the other young men, pointed it at James and demanded money. James refused and appellant shot him in the chest. Appellant and the other young men then fled in the Jeep. James died as a result of the gunshot wound.

{¶4} At the time of the incident, appellant was 15 years old. He was arrested and charged with aggravated murder, aggravated robbery, and receiving stolen property in the Juvenile Branch of the Franklin County Court of Common Pleas, Division of Domestic Relations ("juvenile court"). The state filed a motion for the juvenile court to relinquish jurisdiction and transfer appellant to the general division of the court of common pleas for prosecution. The juvenile court conducted a probable cause hearing on August 28 and September 2, 2008. The state presented testimony from Thomas and from one of the young men who had been in the Jeep, Michael New. The state also presented testimony from a forensic pathologist in the coroner's office. Appellant called as witnesses the lead police investigator, Detective Raymond Clouse ("Detective Clouse"), and another of the young men who had been in the stolen Jeep, Justin Lee Wickham. At the close of that hearing, the juvenile court found that there was probable cause that appellant committed the charged offenses.

{¶5} On March 5, 2009, the juvenile court conducted a hearing to determine whether appellant was amenable to rehabilitation in the juvenile system or should be bound over to the court of common pleas. At the bindover hearing, the juvenile court admitted as evidence a bindover evaluation report and a psychological report prepared by Steve Sparks, Ph.D. ("Dr. Sparks"). The court also heard testimony from Daniel Davis, Ph.D. ("Dr. Davis"), a psychologist retained by appellant, and admitted a copy of Dr.

Davis's psychological report. At the close of the bindover hearing, the juvenile court found that appellant was not amenable to rehabilitation in the juvenile system and ordered him transferred to the general division of the court of common pleas.

{¶6} Appellant appeals the juvenile court's judgment, assigning two errors for this court's review:

Defendant-Appellant's First Assignment of Error: The juvenile court's bindover decision was contrary to law as the court failed to consider specific factors set forth in the Ohio Revised Code and based its decision only upon the seriousness of the charge.

Defendant-Appellant's Second Assignment of Error: Mr. Erwin was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution during the bindover proceedings.

{¶7} In appellant's first assignment of error, he claims that the juvenile court's decision to bind him over to the adult system was improper because the court failed to consider the factors set forth in the transfer statute. The transfer of cases from juvenile court is governed by R.C. 2152.12. As we have previously noted, appellant was not subject to mandatory bindover to the common pleas court under the provisions of R.C. 2152.12(A). *State v. Erwin*, 10th Dist. No. 09AP-918, ¶12 (Feb. 8, 2011) (memorandum decision). Therefore, the juvenile court transferred appellant pursuant to the discretionary bindover provisions under R.C. 2152.12(B). We review a juvenile court's transfer of a case to the common pleas court under an abuse-of-discretion standard. *State v. Steele*, 10th Dist. No. 00AP-499, 2001 WL 721806 (June 28, 2001). *See also In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶39; *State v. Warner*, 8th Dist. No. 95750, 2011-Ohio-4096, ¶28. An abuse of discretion occurs when a decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶8} R.C. 2152.12(B) provides that a juvenile may be transferred if the court finds, among other factors, that the child is not amenable to rehabilitation in the juvenile system. In making this determination, the court is required to consider whether the factors indicating that the case should be transferred outweigh the factors indicating that the case should not be transferred. R.C. 2152.12(B)(3).

{¶9} R.C. 2152.12(D) sets forth the following factors that a court must consider in favor of transferring a juvenile to the general division of the common pleas court:

In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child's relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

{¶10} R.C. 2152.12(E) sets forth the factors against transferring a juvenile to the adult system:

In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division:

- (1) The victim induced or facilitated the act charged.
- (2) The child acted under provocation in allegedly committing the act charged.
- (3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.
- (4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.
- (5) The child previously has not been adjudicated a delinquent child.
- (6) The child is not emotionally, physically, or psychologically mature enough for the transfer.
- (7) The child has a mental illness or is a mentally retarded person.
- (8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

{¶11} Contrary to appellant's claim, the hearing transcript indicates that the juvenile court expressly considered and weighed both the factors in favor of transferring appellant to the adult system and those against transfer. With respect to the statutory factors in favor of a transfer, the court noted that James suffered physical harm resulting in his death. R.C. 2152.12(D)(1). The court also noted that appellant was alleged to have used a firearm to kill James. R.C. 2152.12(D)(5). Based on the findings of Dr. Sparks, the court concluded that appellant was emotionally mature enough for a transfer. R.C.

2152.12(D)(8). Further, the court considered the seriousness of the crime charged against appellant, a charge of murder. Although the seriousness of the crime is not a factor specified under R.C. 2152.12(D), the juvenile court is permitted to consider it in making a discretionary bindover decision. *State v. Watson*, 47 Ohio St.3d 93 (1989), syllabus. We also note that the statutory factors under R.C. 2152.12(D)(1) and (5) address the seriousness of the crime. Thus, there were multiple factors in favor of transferring appellant to the adult system.

{¶12} By contrast, the court found that few of the factors weighing against a transfer were present. At the hearing, the court stated "two of the eight [factors weighing against a transfer] maybe were relevant." (Mar. 5, 2009 Tr. 89.) However, in reviewing the court's analysis, it appears that the juvenile court found only one of the factors against a transfer to be present. James did not induce the attack and did not engage in any provocation that would justify appellant in shooting him. R.C. 2152.12(E)(1) and (2). Moreover, appellant was the principal actor in the crime and caused physical harm through his actions. R.C. 2152.12(E)(3) and (4). Appellant had previously been charged with felonious assault for having shot another child in the head with a BB gun and had been placed on probation for that offense. R.C. 2152.12(E)(5). As noted, the court concluded that appellant was sufficiently mature for a transfer to the adult system. R.C. 2152.12(E)(6). Appellant was not found to be mentally ill, and, although both Dr. Sparks and Dr. Davis found that appellant was on the "borderline" between low average mental function and mental retardation, there was no conclusive finding that appellant was mentally retarded.¹ R.C. 2152.12(E)(7).

{¶13} It appears that the court concluded that the only factor weighing against transfer was the fact that there may have been sufficient time to rehabilitate appellant within the juvenile system. R.C. 2152.12(E)(8). At the time of the bindover decision, appellant was approaching his 17th birthday. Appellant would only be subject to the jurisdiction of the juvenile court until he turned 21 years old. *See* R.C. 2152.02(C)(6) ("The juvenile court has jurisdiction over a person who is adjudicated a delinquent child

¹ The terms "retarded" or "retardation" are used in R.C. 2152.12(E)(7) and the psychological reports in this case. Therefore, to mirror the statutory language and evidence presented below, we have used the terms in this decision.

or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, except as otherwise provided in this division, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a 'child' until the person attains twenty-one years of age."). Both Dr. Sparks and Dr. Davis concluded that long-term placement in an intensive rehabilitation program would be necessary to rehabilitate appellant. Dr. Sparks did not provide a specific time period of treatment that would be needed to rehabilitate appellant. Dr. Davis testified that treatment within the juvenile system and release under parole guidance shortly before his 21st birthday could provide the maximum opportunity for appellant to demonstrate that he had been rehabilitated. Thus, the court could have reasonably concluded that four years in the juvenile system would be sufficient for appellant to be rehabilitated.

{¶14} The statute requires the court to consider whether the factors in favor of a transfer outweigh the factors against a transfer and states that the record must indicate the specific factors the court found to be applicable and that it weighed. However, there is no requirement that the court enter written findings regarding these factors. *See State v. Douglas*, 20 Ohio St.3d 34, 36 (1985) (holding that no written findings were required under prior version of transfer statute and juvenile rule regarding transfer); *State v. Moorer*, 11th Dist. No. 2001-G-2353, 2003-Ohio-5698. In this case, the juvenile court stated that, based on its evaluation of the statutory factors, it found that "the factors for transfer to the adult system are much greater than those weighing against transfer." (Mar. 5, 2009 Tr. 91.) Although the court stated that it was "making the choice to bind [appellant] over based on the seriousness of this crime," it is clear that this was not the sole basis for the discretionary bindover. (Tr. 91.) The court also stated that appellant was being bound over "because I find him not amendable to care or rehabilitation in the Juvenile System and the safety of the community may require that [appellant] be subject to adult sanctions and that may be beyond his 21st birthday." (Tr. 92.) After reviewing the transcript and the evidence presented to the juvenile court, we conclude that the juvenile court did not abuse its discretion in binding appellant over to the adult system.

{¶15} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶16} In his second assignment of error, appellant asserts that he received ineffective assistance of counsel during the bindover proceedings. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶12, citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970). Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989). "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at paragraph three of the syllabus.

{¶17} In determining whether counsel was deficient, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶13, citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). "Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel." *State v. Hester*, 10th Dist. No. 02AP-401, 2002-Ohio-6966, ¶10 (internal citations omitted).

{¶18} Appellant first argues that he received ineffective assistance of counsel because his attorney failed to request a complete mental examination or a competency evaluation. R.C. 2152.12(C) provides that, before considering a discretionary transfer, "the juvenile court shall order an investigation, including a mental examination of the child by a public or private agency or a person qualified to make the examination." In this case, the juvenile court ordered a psychological evaluation, which was performed by Dr. Sparks. Appellant's counsel also arranged for a second psychological evaluation, conducted by Dr. Davis. In addition to meeting with appellant and conducting an independent evaluation of his psychological status, Dr. Davis reviewed Dr. Sparks's report. Dr. Davis concluded that appellant's reading level was insufficient to allow him to conduct certain diagnostic tests. However, he testified that he was able to use other diagnostic measures to evaluate appellant's mental status. On cross-examination, Dr.

Davis admitted that he had not performed a formal competency evaluation on appellant. Appellant argues that his trial counsel was ineffective for failing to request a full psychological examination or a competency evaluation.

{¶19} We note that, despite the limitations caused by appellant's reading proficiency, both Dr. Sparks and Dr. Davis were able to conclude that appellant fell on the "borderline" between low average mental function and mental retardation. However, even assuming for the purpose of analysis that appellant's counsel was deficient in failing to request a complete psychological examination, appellant has failed to establish that this deficiency resulted in prejudice. It is unclear whether a more thorough psychological evaluation would have produced a different result; appellant might still have been deemed to fall in the range between low average function and mental retardation. Moreover, even if appellant had been found to suffer from a mental disability, that finding would only be one factor weighing against a transfer. The other factors weighing in favor of a transfer and the serious nature of the crime charged would remain unchanged. Appellant has failed to establish a reasonable probability that, if his counsel had sought a more complete psychological examination or competency evaluation, the result of the bindover hearing would have been different.

{¶20} Appellant also argues that his counsel was ineffective for failing to subpoena or otherwise ensure the appearance of a certain witness at the probable cause hearing. "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001). Moreover, this court has previously noted that the presentation of a defense in a probable cause hearing differs from the presentation of a defense at trial. *State v. Suggs*, 10th Dist. No. 89AP-957, 1990 WL 61121, *6 (May 10, 1990). "Therefore, in most instances, defense counsel makes no effort to present evidence of its own, but confines his efforts to cross-examination of the prosecution's witnesses to determine the strength of the prosecution's case." *Id.* at *7.

{¶21} In this case, appellant alleges that his trial counsel failed to ensure that a subpoena was properly served on a witness who was a confidential police informant in unrelated matters, who "at one point, possessed the gun used in the alleged shooting." (Appellant's brief at 11.) According to testimony provided by the lead investigator,

Detective Clouse, the informant received the gun used in the shooting from one of the young men involved in the incident and placed it in a driveway. The informant's son allegedly then picked up the gun and took it to a friend's house. The police searched that house but did not recover a weapon. The informant did not appear at the probable cause hearing, and appellant's counsel did not request a continuance to attempt to secure her attendance.

{¶22} It appears that appellant's counsel attempted to subpoena the confidential informant but failed to ensure that the subpoena was personally served on her. Assuming for the sake of analysis that counsel was deficient in failing to ensure that this informant appeared at the probable cause hearing, appellant has failed to demonstrate that he was prejudiced by this deficiency. A party seeking to establish ineffective assistance of counsel based on failure to call a witness must establish that the witness's testimony "would have significantly assisted the defense and affected the outcome of the case." *State v. Dennis*, 10th Dist. No. 04AP-595, 2005-Ohio-1530, ¶22. Based on the testimony of Detective Clouse, it appears that the confidential informant was not present at the time of the shooting. Therefore, she would not be able contradict the eyewitness testimony from Michael New that appellant shot James. Testimony from the confidential informant regarding what happened to the gun *after* the shooting would not affect the outcome of a hearing convened to determine whether there was probable cause that appellant committed the shooting. Therefore, appellant has failed to establish that his counsel provided ineffective assistance in failing to ensure that a subpoena was served on the confidential informant.

{¶23} Appellant also claims that his counsel provided ineffective assistance by failing to ensure that the state provided full copies of all lab reports, failing to object to the lack of complete lab reports, or by failing to request a continuance of the hearing to obtain full copies of the lab reports. During the testimony of Detective Clouse, it became clear that appellant's counsel may not have been provided complete copies of all lab reports associated with the investigation. At the close of the first day of the probable cause hearing, appellant's counsel requested full copies of all lab reports. However, it appears that, when the probable cause hearing was reconvened, there may have been at least one lab report that was not provided to appellant's counsel. The hearing transcript indicates

that there was a lab report regarding fingerprints taken from the stolen Jeep that was not provided to appellant's counsel. Once again, assuming for the sake of analysis that appellant's counsel was deficient in not objecting to this evidence or delaying the hearing until he obtained copies of any additional reports, appellant has failed to demonstrate prejudice. Detective Clouse testified that the missing lab report indicated that Wickham's fingerprints were found on the rearview mirror of the stolen Jeep. Whether or not appellant had copies of this report, the evidence would not contradict the eyewitness testimony provided at the probable cause hearing and would not affect the outcome of the probable cause hearing.

{¶24} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶25} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.
