

[Cite as *In re T.B.*, 2009-Ohio-2551.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

IN RE: T.B., :
a minor child : C.A. CASE NO. 2008CA83
: T.C. CASE NO. D-37745
: (Criminal Appeal from
Common Pleas Court,
Juvenile Division)

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O P I N I O N

Rendered on the 29th day of May, 2009.

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WOLFF, J., BY ASSIGNMENT:

{¶ 1} This is an appeal by a juvenile, T.B., from judgments of the Greene County Juvenile Court that found T.B. to be a delinquent child by reason of having committed several offenses that would be felonies if committed by an adult, and committed T.B. to the custody of the Department of Youth

Services for a minimum of one year up to a maximum of his twenty-first birthday.

{¶ 2} On July 30, 2008, a complaint was filed in Greene County Juvenile Court alleging that T.B. was a delinquent child by reason of having committed: two counts of breaking and entering in violation of R.C. 2911.13(B), felonies of the fifth degree, one count of vandalism in violation of R.C. 2909.05(A), a felony of the fifth degree, one count of theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and one count of theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree. The court appointed a guardian ad litem for T.B. Because T.B. was on community control at the time of these offenses and their commission constituted a violation of that community control, the court remanded T.B. to the Greene County Juvenile Detention Center. On August 12, 2008, T.B., his parents, his community control officer, and the guardian ad litem appointed by the court appeared in court for an adjudicatory/plea hearing. After being fully advised about the nature of the charges filed against him, his rights, and the dispositional alternatives, T.B. waived his right to counsel in open court, in writing, and entered an admission to all of the charges. The court then adjudicated T.B. a delinquent child.

{¶ 3} On September 8, 2008, the court held a dispositional hearing at which it imposed a two hundred dollar fine on counts one, two, three and four, a one hundred dollar fine on count five, court costs, and a six month commitment to the Department of Youth Services on counts one, two, three and four to be served consecutively, for a total minimum commitment of two years. The court suspended the Department of Youth Services commitments on counts three and four based upon certain conditions, leaving T.B. committed to the custody of the Department of Youth Services for a minimum of one year up to a maximum of his twenty-first birthday on counts one and two.

{¶ 4} T.B. timely appealed to this court from his delinquency adjudication and commitment to the Department of Youth Services.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT VIOLATED T. B.'S RIGHT TO COUNSEL AND TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352, AND JUVENILE RULES 3, 4, AND 29."

{¶ 6} It is well settled that juveniles who are the subject of delinquency proceedings are entitled to the

assistance of counsel at every stage of the proceedings, and to appointed counsel if indigent. *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527; *In re Anderson*, 92 Ohio St.3d 63, 66, 2001-Ohio-131; *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919; R.C. 2151.352; Juv.R. 4(A), 29(B). Like an adult, however, a juvenile may waive his or her right to counsel. *C.S.*, at ¶85; Juv.R. 3, 29(B)(3) and (4).

{¶7} There is a strong presumption against the waiver of the constitutional right to counsel by a juvenile, and the waiver must be knowing, intelligent and voluntary. *C.S.* at ¶105-106. In cases involving serious offenses, the waiver of the right to counsel must be made in open court, recorded, and in writing. *Id.* at ¶109. Furthermore, in a delinquency proceeding a juvenile may not waive his right to counsel unless he is counseled or advised by his parent, custodian or guardian on the issue of waiving his right to counsel, or he has consulted with an attorney. *C.S.* at ¶98; *In re R.B.*, 166 Ohio App.3d 626, 2006-Ohio-264; *In re E.H.*, Montgomery App. No. 22259, 2007-Ohio-6263; *In re J.F.*, 178 Ohio App.3d 702, 2008-Ohio-4325. The Supreme Court in *In re C.S.* emphasized that the juvenile court judge must be aware that not all parents are in a position to sufficiently counsel or advise their child in a delinquency proceeding, *Id.* at ¶110, and that

a judge, acting as *parens patriae*, has the inherent authority to appoint counsel for the juvenile to determine whether he should waive his rights, although the court is not required to do so. *Id.*, at ¶99.

{¶8} In *In re C.S.*, the Ohio Supreme Court instructed courts to use a totality of the circumstances analysis to decide whether a juvenile has validly waived counsel. *Id.* at ¶108. This test incorporates "a number of factors and circumstances, including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings." *Id.*, citing *In re Dalton S.* (2007), 273 Neb. 504, 515, 730 N.W. 2d 816. According to the Ohio Supreme Court, "a key factor in the totality of the circumstances is the degree to which the juvenile's parent is capable of assisting and willing to assist the juvenile in the waiver analysis." 115 Ohio St.3d 267, 2007-Ohio-4919, at ¶110.

{¶9} T.B. argues that his waiver of his right to counsel was not valid because he never consulted with an attorney and

neither his parents nor his guardian ad litem ever counseled or advised him on the issue of waiving his right to counsel.

{¶ 10} Our examination of the August 12, 2008 hearing discloses that after the magistrate recited the charges, she asked T.B.'s parents if they had received a copy of the charges. The parents replied: "No, we have not, ma'am." The magistrate then advised T.B. of his right to counsel and the right to have counsel appointed for him if he could not afford to hire an attorney. When the magistrate asked T.B. if he wished to have an attorney, T.B. responded: "No ma'am." After explaining to T.B. what an attorney might be able to do for him in these proceedings, his various trial rights and the dispositional alternatives available to the court, the magistrate asked T.B.: "Understanding everything I've said, do you wish to have an attorney?" T.B. answered: "No ma'am." The magistrate then asked T.B.'s guardian ad litem if he agreed with T.B.'s desire not to have an attorney. The guardian ad litem responded: "Yes, your honor."

{¶ 11} The following colloquy between the magistrate and T.B.'s parents then took place:

{¶ 12} "THE COURT: Parents, you understood the rights and disposition alternatives I've explained?

{¶ 13} "MRS. [B.]: Yes.

{¶ 14} "MR. [B.]: Yes, sir.

{¶ 15} "THE COURT: And you wish for him not to have an attorney?

{¶ 16} "MR. [B.]: Yes, ma'am. The police read him his Miranda Rights in front of us.

{¶ 17} "THE COURT: Okay. Hold on. Because I'm the only one sitting here who wants him to have an attorney.

{¶ 18} MR. [B.]: Ma'am, we just don't - it's useless. It really is. He's guilty. He was found in the place. He admitted to it.

{¶ 19} "THE COURT: The problem that I have is the taking of this young man's liberty until he's 21. And I think right, wrong, good, bad, ugly or indifferent, he should be advised by counsel.

{¶ 20} "MRS. [B.]: We can't afford it.

{¶ 21} "MR. [B.]: With all the restitution and everything else we've had to pay, we just - we can't hardly pay our bills anymore.

{¶ 22} "THE COURT: Have you checked with the public defender's office?

{¶ 23} "MRS. [B.]: We don't qualify.

{¶ 24} "MR. [B.]: You did that before. You appointed a Court attorney and we had to scrape to get the money to pay

him. I couldn't buy groceries for two weeks because of the bicycle incident July 2nd.

{¶ 25} "THE COURT: You don't want an attorney, sir?

{¶ 26} "A. No, ma'am.

{¶ 27} "THE COURT: His Guardian doesn't want him to have an attorney and his parents don't want him to have an attorney.

{¶ 28} Then I need you to sign and date the form the bailiff is handing you waiving his right to counsel.

{¶ 29} "The Court will let the record reflect that both the juvenile and his parents have executed a waiver of counsel and the Court will permit it to be so.

{¶ 30} "This does not permanently waive your right to an attorney, sir. At any time in this hearing or any hearing hereafter you may ask for an attorney. Do you understand that?

{¶ 31} "A. Yes, ma'am." (August 12, 2008, H.Tr. At 8-10).

{¶ 32} Following this waiver of T.B.'s right to counsel, the magistrate accepted T.B.'s admissions to all the charges and adjudicated him a delinquent child.

{¶ 33} The State argues that the totality of the circumstances in this case demonstrate that T.B. validly waived his right to counsel, pointing out the relevant factors

and circumstances mentioned in *In re C.S.* that were present at the time T.B. waived his right to counsel and entered his admissions to all of the charges, as well as the court's compliance with the requirements in Juv.R. 29(B) and (D). That argument, however, fails to address T.B.'s specific contention that he could not waive his right to counsel because he was not counseled or advised by either his parents or his guardian ad litem on the issue of waiving his right to counsel. *In re C.S.*; *In re J.F.* Although T.B.'s parents and his guardian ad litem were present at the August 12, 2008 hearing and they agreed with T.B.'s desire to waive his right to counsel, there is no evidence in this record that either T.B.'s parents or the guardian ad litem counseled T.B. or rendered any meaningful advice to him regarding his decision to waive his right to counsel. The record strongly suggests that T.B.'s parents may not have been in a position to counsel or render meaningful advice to T.B. because their interests ran counter to his. They did not want T.B. to have counsel because they could not afford it, and, in any event, they believed T.B. was guilty. Neither that fact, nor the fact that T.B.'s family may have been familiar with the process in which T.B. was engaged because of T.B.'s extensive past experience with the juvenile court, is sufficient to

demonstrate that either T.B.'s parents or the guardian ad litem counseled T.B. or rendered any meaningful advice to him on the issue of waiving his right to counsel. *In re C.S.*

{¶ 34} In *In re R.B.*, 166 Ohio App.3d 626, 2006-Ohio-264, this court observed:

{¶ 35} "{¶ 29} We also find instructive a decision of the Greene County Juvenile Court. In *In the Matter of J.C.T.* (Aug. 3, 2005), No. 37420, Judge Robert Hutcheson ruled as follows:

{¶ 36} "{¶ 30} 'A minor child has a right to an attorney in a Juvenile Court proceeding, regardless of the parents' financial ability and/or willingness to hire counsel for their child. The law requires appointment of counsel if the child does not independently have the means to hire counsel.'"

{¶ 37} Because the totality of the facts and circumstances in this case fail to demonstrate that T.B. consulted with an attorney or was counseled and advised by his parent, custodian or guardian on the issue of waiving his right to counsel, he could not waive his right to counsel and his waiver is invalid. *In re C.S.*; *In re E.H.*; *In re J.F.* By proceeding to accept T.B.'s admissions to these charges and adjudicating him a delinquent child in the absence of counsel, the juvenile court violated T.B.'s constitutional right to counsel and due

process. *Id.*

{¶ 38} T.B. additionally argues in this assignment of error that the juvenile court's disposition must be reversed and remanded for a new hearing because the court failed to either advise T.B. of his right to counsel at the disposition hearing or secure a waiver of the right to counsel from T.B. The State has conceded this error in its brief. We agree. *In re B.M.S.*, 165 Ohio App.3d 609, 2006-Ohio-981.

{¶ 39} T.B.'s first assignment of error is sustained.

{¶ 40} T.B.'s second and third assignments of error are as follows:

SECOND ASSIGNMENT OF ERROR

{¶ 41} "T. B.'S ADMISSIONS TO HIS DELINQUENCY CHARGES WERE NOT KNOWING, INTELLIGENT, AND VOLUNTARY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, AND JUVENILE RULE 29."

THIRD ASSIGNMENT OF ERROR

{¶ 42} "THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER COMMUNITY SERVICE IN LIEU OF FINANCIAL SANCTIONS IN VIOLATION OF R.C. 2152.20."

{¶ 43} In these assignments of error T.B. argues that the court did not substantially comply with the requirements in

Juv.R. 29(D) in accepting his admissions to the charges, and that the court erred in its disposition by imposing fines without considering T.B.'s indigence or community service as an alternative to financial sanctions. In view of our disposition of T.B.'s first assignment of error, which will require new adjudicatory and disposition proceedings, we regard T.B.'s second and third assignments of error as moot, and we find it unnecessary to resolve them. App.R. 12(A)(1)(c).

{¶ 44} T.B.'s second and third assignments of error are overruled as moot. Having sustained T.B.'s first assignment of error, the judgment of the trial court accepting T.B.'s admissions and adjudicating him delinquent, and the judgment committing T.B. to the Department of Youth Services and imposing fines and court costs are reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

DONOVAN, P.J. And BROGAN, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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