[Cite as *In re S.M.*, 2009-Ohio-3118.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

IN THE MATTER OF:	:	
	:	Case No. 09CA5
S.M.,	:	
	:	
ADJUDICATED DELINQUENT CHILD.	:	DECISION AND JUDGMENT ENTRY
	:	
	:	**Released 6/17/09**

APPEARANCES:

Samantha J. Fields, Ironton, Ohio, for Appellant.

J.B. Collier, Jr., and Kevin J. Waldo, Ironton, Ohio, for Appellee.

Per Curiam

{¶1} S.M. appeals the trial court's judgment adjudicating him a delinquent child for committing the offense of felonious assault and committing him to the Department of Youth Services (DYS). S.M. argues that he did not receive effective assistance of counsel because his attorney (1) failed to request a second competency hearing and (2) failed to present sufficient evidence in support of a DYS alternative. Because S.M. entered an admission to the delinquency complaint, he implicitly admitted his competency and sanity and may not now challenge counsel's actions related to those issues. And S.M. cannot demonstrate that even if counsel presented further evidence in support of a DYS alternative, the court would have committed him to this alternative facility. Thus, he is unable to show that he received ineffective assistance of counsel.

{¶2} S.M. also asserts that the trial court erred by failing to transfer the dispositional hearing to Butler County. Because S.M. failed to produce affirmative evidence that other proceedings involving him were pending in Butler County, the trial

court had no duty to transfer the dispositional hearing. Furthermore, the trial court did not abuse its discretion by determining that the dispositional hearing should be held in Lawrence County, where the delinquency act occurred. Consequently, we overrule S.M.'s two assignments of error and affirm the trial court's judgment.

I. FACTS

{¶3} In September of 2008, S.M. stabbed his foster mother in the chest and thigh. He subsequently was alleged to be a delinquent child for having committed the offense of felonious assault, a second-degree felony if committed by an adult. S.M. entered a plea of not guilty by reason of insanity and asked for a competency evaluation.

{¶4} Accordingly, the court ordered S.M. to undergo a mental health evaluation. Dr. Robert Kurzhals evaluated S.M. and concluded that S.M. was competent to stand trial and that he understood the wrongfulness of his actions. Dr. Kurzhals explained: "[S.M.] does not suffer from a severe mental defect, as he appears to have at least low average if not higher intellectual abilities. It is my opinion [S.M.] does suffer from a severe mental disease, as he has a history of Bipolar Disorder. However, he did not appear to be experiencing the active symptoms of this illness during the course of the evaluation, and he had reportedly been compliant with his psychotropic medication. As such, it is my opinion to a reasonable degree of psychological certainty although [S.M.] does suffer from a severe mental disease, he is currently capable of understanding the nature and objective of the proceedings pending against him and of assisting counsel in preparing a defense for himself, should he choose to do so. I therefore recommend he be found competent to stand trial."

{¶5} The doctor also opined that S.M. "was not suffering from a severe mental defect at the time of the alleged offense, as he appears to have at least low average if not average intellectual abilities. It is my opinion to a reasonable degree of psychological certainty [S.M.] was suffering from a severe mental disease at the time of the alleged offense, as he has been diagnosed with Bipolar Disorder. However, there are no indications from collateral sources he was behaving in a psychotic or delusional manner either prior to or following the alleged offense." He found "insufficient evidence to conclude he did not know the wrongfulness of his alleged offense." The doctor thus concluded that S.M. does not meet the criteria for a not guilty by reason of insanity defense.

{¶6} The trial court subsequently found S.M. competent to proceed to adjudication. The parties stipulated to the admissibility of the mental health evaluations, and S.M. admitted the allegations of the complaint. The trial court adjudicated S.M. a delinquent child for committing the offense of felonious assault. S.M. then requested the court to transfer the dispositional hearing to Butler County. The trial court denied this request.

{¶7} At the dispositional hearing, S.M. asked the court to commit him to the Ohio Hospital for Psychiatry, located in Columbus. S.M.'s Butler County caseworker testified that S.M. would benefit from this type of commitment in a locked, therapeutic facility. The court subsequently committed S.M. to DYS and ordered that he receive psychological counseling and therapy while committed.

II. ASSIGNMENTS OF ERROR

{¶8} S.M. raises two assignments of error:

First Assignment of Error:
S.M. was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

Second Assignment of Error:
The trial court erred to the detriment of appellant in failing to transfer this matter [to] Butler County contrary to R.C. 2151.271 and Juv.R. 11 clear and mandatory requirements [sic].

III. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶9} In his first assignment of error, S.M. asserts that he did not receive effective assistance of counsel. He essentially contends that trial counsel was ineffective for failing (1) to request a second competency evaluation and (2) to present sufficient testimony to support a DYS alternative. He also appears to argue that counsel rendered ineffective assistance of counsel by stipulating to the admission of the competency evaluation and by admitting the delinquency allegation.

A. AN ADMISSION CONSTITUTES A WAIVER OF CERTAIN ERRORS THAT OCCURRED DURING ADJUDICATORY PHASE

{¶10} An admission in a delinquency proceeding is similar to a Crim.R. 11 guilty plea in a criminal proceeding. *In re C.S.*, 115 Ohio St.3d 267, 285, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶112; *In re Christopher R.* (1995), 101 Ohio App.3d 245, 247, 655 N.E.2d 280. As in a criminal case when the defendant pleads guilty, a juvenile who enters a delinquency admission may not raise independent claims relating to the deprivation of constitutional rights that occurred before he entered the admission. See *State v. Spates* (1992), 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (stating that "'a guilty plea represents a break in the chain of events which has preceded it in the criminal process,'" and precludes a criminal defendant from "'rais[ing] independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the

guilty plea'"). This means that the juvenile waives the right to claim ineffective assistance of counsel on appeal, except to the extent that counsel's alleged deficient performance caused the admission to be less than knowing, intelligent, and voluntary. See *Spates* at *272; *In re J.W.*, Montgomery App. No. 19869, 2003-Ohio-5096, at ¶7; *State v. Persons*, Meigs App. No. 02CA6, 2003-Ohio-4213, at ¶11; see, also, *State v. Kelley* (1991), 57 Ohio St.3d 127, 129, 566 N.E.2d 658; *State v. Jacobson*, Adams App. No. 01CA730, 2003-Ohio-1201.

{¶11} Here, by entering an admission to the delinquency complaint, S.M. waived all alleged errors that occurred before he entered the admission, except to the extent the alleged errors caused his admission to be less than knowing, intelligent, and voluntary. S.M. does not raise any argument that counsel's alleged ineffectiveness caused his delinquency admission to be less than knowing, intelligent, and voluntary. Rather, he summarily asserts that counsel wrongly stipulated to the admission of the mental health evaluation and wrongly admitted the delinquency allegation. S.M. has no substantive argument to support these conclusory allegations. Therefore, we summarily reject them. See App.R. 16(A)(7); *State v. Henthorn*, Washington App. No. 06CA62, 2007-Ohio-2960, at ¶3.

{¶12} S.M. also waived any argument that counsel's failure to request a second competency evaluation amounted to ineffective assistance of counsel. S.M.'s precise argument regarding this issue is vague—asserting that the outcome of the proceedings would have been different—but we interpret it to mean that had counsel pursued a second competency evaluation, the results of that evaluation would have persuaded the court that he is not competent to stand trial or not guilty by reason of insanity. Like a

guilty plea in a criminal case, an admission in a juvenile case "contains within it an implied admission of sanity." *State v. Mangus*, Columbiana App. No. 07CO36, 2008-Ohio-6210, at ¶52, citing *State v. Langenkamp*, Shelby App. Nos. 17-07-08, 10-08-09, 2008-Ohio-1136, ¶28; *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, 774 N.E.2d 1228, ¶34; *State v. Fore* (1969), 18 Ohio App.2d 264, 269, 248 N.E.2d 633. Thus, by admitting delinquency, S.M. implicitly admitted his competence to stand trial and his sanity,[1] and he cannot now challenge counsel's actions in failing to seek a second evaluation.

{¶13} More importantly, several courts have concluded that counsel's failure to seek a second competency evaluation does not amount to ineffective assistance of counsel. See *State v. Hill*, Lucas App. No. L-05-1080, 2006-Ohio-859 (concluding counsel was not ineffective for failing to request second competency evaluation), reversed on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 110 Ohio St.3d 156, 2006-Ohio-4086, 852 N.E.2d 156; *State v. Womack*, Lucas App. No. L-04-1092, 2005-Ohio-2689 (stating that when the record fails to show that a second examination would reveal a different conclusion, a defendant is hard-pressed to establish ineffective assistance of counsel for failing to request a second exam); see, also, *In re Anderson*, Tuscarawas App. No. 2001AP030021, 2002-Ohio-776; *In re Gooch*, Montgomery App. No. 19339, 2002-Ohio-6859, at ¶29-31; *State v. Grubbs* (1998), 129 Ohio App.3d 730, 719 N.E.2d 28.

{¶14} S.M.'s remaining argument—that counsel failed to present additional

[1] Although S.M. is not a criminal defendant, "the right not to be tried or convicted while incompetent" is as fundamental in juvenile proceedings as it is in an adult criminal trial. See *In re Bailey*, 150 Ohio App.3d 664, 667, 2002-Ohio-6792, 782 N.E.2d 1177.

evidence to support a DYS alternative—does not relate to an event that occurred before he entered his admission. Instead, this argument relates to events that occurred after his admission. Therefore, his delinquency admission did not waive this alleged claim of ineffective assistance of counsel.

B. S.M. HAS NOT SHOWN THAT COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

{¶15} The Sixth Amendment to the United States Constitution and Section 10, Article I, of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. An accused juvenile has a constitutional right to counsel, and the same rights to effective assistance of counsel as an adult criminal defendant. *In re Lower*, Highland App. No. 06CA31, 2007-Ohio-1735, at ¶37, citing *In re Gault* (1967), 387 U.S. 1, 41, 87 S.Ct. 1428, 18 L.Ed.2d 527. Thus, we apply the same Sixth Amendment effective assistance of counsel principles that apply in criminal proceedings. See *In re B.C.S.*, Washington App. No. 07CA60, 2008-Ohio-5771.

{¶16} To prevail on a claim of ineffective assistance of counsel, S.M. must show (1) his counsel's performance was deficient in that it fell below an objective standard of reasonable representation, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. See, e.g., *State v. Smith*, 89 Ohio St.3d 323, 327, 2000-Ohio-166, 731 N.E.2d 645, citing *Strickland* at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To establish prejudice, S.M.

must show that there is a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. See, e.g., *State v. White*, 82 Ohio St.3d 16, 23, 1998-Ohio-363, 693 N.E.2d 772; *Bradley*, paragraph three of the syllabus. Failure to establish either element is fatal to the claim. *Strickland*; *Bradley*.

{¶17} Even if we assumed that counsel's failure to submit additional evidence in support of a dispositional alternative constituted deficient performance, S.M.'s assertion that the trial court would have ordered him committed to the Ohio Hospital for Psychiatry is pure speculation. The record shows that S.M.'s delinquency adjudication resulted from a violent, second-degree felony if committed by an adult. He stabbed his victim with a knife. The trial court obviously determined that his actions justified a commitment to DYS. While further evidence regarding the dispositional alternative may have been helpful, no reasonable probability exists that the trial court's commitment decision would have been different.

{¶18} Accordingly, we overrule S.M.'s first assignment of error.

IV. TRANSFER OF DISPOSITIONAL HEARING

{¶19} In his second assignment of error, S.M. argues that the trial court erred by failing to transfer the dispositional hearing to Butler County. He contends that a case was pending in Butler County and, thus, the court was required, under R.C. 2151.271 and Juv.R. 11(B), to transfer the dispositional hearing to Butler County.

{¶20} R.C. 2151.271 provides:

> Except in a case in which the child is alleged to be a serious youthful offender under section 2152.13 of the Revised Code, if the child resides in a county of the state and the proceeding is commenced in a juvenile court of another county, that court, on its own motion or a motion of a party, may transfer the proceeding to the county of the child's residence upon the filing of the complaint or after the adjudicatory, or

> disposition hearing, for such further proceeding as required. The court of the child's residence shall then proceed as if the original complaint had been filed in that court. Transfer may also be made if the residence of the child changes. *The proceeding shall be so transferred if other proceedings involving the child are pending in the juvenile court of the county of the child's residence*."

(Emphasis added.)

{¶21} Juv.R. 11 states:

> (A) Residence in another county; transfer optional
> If the child resides in a county of this state and the proceeding is commenced in a court of another county, that court, on its own motion or a motion of a party, may transfer the proceeding to the county of the child's residence upon the filing of the complaint or after the adjudicatory or dispositional hearing for such further proceeding as required. The court of the child's residence shall then proceed as if the original complaint had been filed in that court. Transfer may also be made if the residence of the child changes.
> (B) Proceedings in another county; transfer required
> The proceedings, other than a removal action, shall be so transferred if other proceedings involving the child are pending in the juvenile court of the county of the child's residence.

{¶22} Juv.R. 11(B) and the last sentence of R.C. 2151.271 make a change of venue mandatory if other proceedings are pending in the juvenile court of the county where the child resides. Although no Ohio cases explicitly set forth the standard of review that governs a transfer of venue under R.C. 2151.271 and Juv.R. 11(B), we believe that the proper standard of review is a mixed question of law and fact. Under this standard, we defer to the trial court's factual findings if competent, credible evidence supports them. Then, accepting the court's facts as true, we independently determine whether the trial court properly applied the law to the facts. See, generally, *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶50-51 (concluding that mixed standard of review applies to juvenile court's probable cause determination in a mandatory bindover proceeding).

{¶23} Accordingly, we defer to the trial court's factual determination regarding whether another proceeding is pending as long as competent, credible evidence supports it. Then, we independently apply R.C. 2151.271 and Juv.R. 11(B) to the established facts.

{¶24} Here, the trial court did not err as a matter of law by failing to transfer the dispositional hearing to Butler County pursuant to R.C. 2151.271 and Juv.R. 11(B). The record contains no evidence that any juvenile proceedings involving S.M. are pending in Butler County. S.M.'s assertion that he is in the temporary legal custody of Butler County does not sufficiently show that proceedings are pending. "Pending is defined as 'Begun, but not yet completed; during; before the conclusion of; prior to the completion of; * * * Thus an action or suit is "pending" from its inception until the rendition of final judgment.'" *In re Don B.*, Huron App. No. H-02-033, 2003-Ohio-1400, at fn.1, quoting Black's Law Dictionary (5 Ed.1979) 1021. Whatever proceedings led to S.M.'s placement in Butler County Children Service's temporary custody could be concluded at this point. Based upon the lack of evidence, we can only speculate as to the status of the proceeding. Thus, we defer to the trial court's factual finding. In the absence of affirmative evidence demonstrating that proceedings are pending in Butler County, we are unwilling to rely upon S.M.'s unsupported assertion to rule that the trial court was under a mandatory duty to transfer the dispositional hearing.

{¶25} Nor did the trial court abuse its discretion by refusing to transfer the case under Juv.R. 11(A). Under Juv.R. 11(A) and R.C. 2151.271, a trial court retains discretion to transfer venue when other proceedings involving the child are not pending in another county. See *In re Meyer* (1994), 98 Ohio App.3d 189, 192-193, 648 N.E.2d

52. Thus, we review this type of decision for an abuse of discretion. See id. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. See, e.g., *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 2008-Ohio-6200, 898 N.E.2d 952, at ¶27. When applying the abuse of discretion standard, we are not free to merely substitute our judgment for that of the trial court. See, e.g., *In re Jane Doe I* (1990), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181. Because the delinquency occurred in Lawrence County, the trial court reasonably could have determined that the dispositional hearing should be heard in the same county.

{¶26} Accordingly, we overrule S.M.'s second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court, Probate-Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only as to Assignment of Error I;
Dissents as to Assignment of Error II.

For the Court

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.