

[Cite as *In re B.M.*, 2009-Ohio-3368.]

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

IN THE MATTER OF: :

B.M. : CASE No. 08CA26

ADJUDICATED DELINQUENT CHILD. :
DECISION AND JUDGMENT ENTRY
:

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Amanda
J. Powell, Assistant Ohio Public Defender, 8 East
Long Street, 11th Floor, Columbus, Ohio, 43215

COUNSEL FOR APPELLEE: James E. Schneider, Washington County Prosecuting
Attorney, and Raymond E. Dugger, Washington
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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-30-09

ABELE, J.

{¶ 1} This is an appeal from two Washington County Common Pleas Court,
Juvenile Division, judgments that adjudicated B.M. a delinquent child and committed
her to the temporary custody of the Washington County Juvenile Center.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE WASHINGTON COUNTY JUVENILE COURT ERRED
WHEN IT ADJUDICATED [B.M.] TO BE A DELINQUENT
CHILD BECAUSE THE COMPLAINT ALLEGING HER
DELINQUENCY WAS FACIALLY INVALID; THEREFORE,
THE JUVENILE COURT DID NOT HAVE SUBJECT
MATTER JURISDICTION OVER THE CASE."

SECOND ASSIGNMENT OF ERROR:

"THE WASHINGTON COUNTY JUVENILE COURT VIOLATED [B.M.] STATUTORY AND CONSTITUTIONAL RIGHTS WHEN IT FAILED TO HOLD A COMPETENCY HEARING WHEN THE ISSUE WAS RAISED BEFORE THE TRIAL COMMENCED.

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED [B.M.] RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION AND JUV.R. 29(E)(4) WHEN IT ADJUDICATED HER DELINQUENT FOR CHRONIC TRUANCY ABSENT PROOF OF EVERY ELEMENT OF THE CHARGE AGAINST HER BY SUFFICIENT EVIDENCE."

{¶ 3} A complaint filed in the Washington County Common Pleas Court, Juvenile Division, charged that B.M. was a "chronic truant" and, thus, a delinquent child pursuant to R.C. 2152.02(D)&(F)(2). She denied the allegations and the case came on for an adjudicatory hearing. After the hearing, the trial court found B.M. to be a chronic truant.

{¶ 4} At disposition, the magistrate recommended that B.M. be committed to the temporary custody of the Washington County Juvenile Center for completion of its rehabilitation program. Appellant filed objections to the magistrate's recommendations. The trial court rejected the objections and adopted the magistrate's report. This appeal followed.

{¶ 5} Appellant asserts in her first assignment of error that the trial court lacked subject matter jurisdiction because the Washington County Attendance Officer filed the initial complaint rather than the board of education or the governing board of the educational service center as R.C. 3321.19(E) requires. We disagree.

{¶ 6} R.C. Chapter 3321 sets forth Ohio's compulsory school attendance law. State v. Whisner (1976), 47 Ohio St.2d 181, 197, 351 N.E.2d 750. Although R.C. 3321.19(E) does specify that a complaint for violation of those laws is to be filed by "the board of education of the school district or the governing board of the educational service" as appellant claims in her brief, the remainder of the subsection explains that this provision involves complaints "against the child and the parent, guardian, or other person having care of the child." *Id.* Here, the complaint was filed against B.M. Her parents were not named as defendants. Thus, R.C. 3321.19(E) has no application. Further, as the appellee correctly points out, R.C. Chapter 2152 (concerning a juvenile court's criminal jurisdiction) allows an habitual truant complaint to be filed by anyone having knowledge of the truancy. See R.C. 2152.02(A)(1); Gianelli & Yeomens, *Ohio Juvenile Law* (2002) 144, §15.2. In the instant case, the Washington County Attendance Officer filed the complaint and obviously had knowledge of B.M.'s alleged truancy.

{¶ 7} Accordingly, based upon these reasons we find no merit in appellant's first assignment of error and it is hereby overruled.

II

{¶ 8} Appellant asserts in her second assignment of error that it is a violation of her rights to adjudicate her a chronic truant, and thus a delinquent, without first

resolving a "suggestion of incompetence [and] request for competency evaluation and hearing" that she filed on May 8, 2008, the day before the hearing. The magistrate overruled that request and noted that it was untimely pursuant to Juv.R. 18(D).

Appellant argues that this constitutes error. We disagree.

{¶ 9} We believe that the magistrate correctly ruled that this request should have occurred no later than seven days prior to the hearing. See Juv.R. 18(D). Also, this issue was not raised in an objection to the magistrate's report and was therefore waived. See Juv.R. 40(D)(3)(b)(iv). Finally, we see nothing in the record to suggest that B.M. suddenly lost competency. A request of that nature on the day of her adjudicatory hearing should be viewed skeptically.

{¶ 10} Accordingly, based upon the foregoing reasons appellant's second assignment of error is hereby overruled.

III

{¶ 11} Appellant asserts in her final assignment of error that insufficient evidence was adduced at the hearing to adjudicate her delinquent. We agree with appellant.

{¶ 12} A "chronic truant" is a child "absent without legitimate excuse . . . seven or more consecutive school days, ten or more school days in one school month, or fifteen or more school days in a school year." (Emphasis added.) R.C. 2152.02(D). As we point out *infra*, applying this standard to the case sub judice is problematic. Our review reveals that the actual number of days B.M. was absent is not entirely clear. Appellee's own witnesses disagree and we compute the figures differently than the numbers defense counsel proposes.

{¶ 13} Assistant Principle Warren Carter testified that B.M. was absent one half

(½) day September 4th, and all day on October 12th, 16th, 17th, 18th, 19th, 23rd, 24th, November 6th, 13th, 14th, 15th, 16th, 27th, 30th, December 3rd and 4th. By our calculation, this appears to total sixteen and one half (16½) days in the first half of the 2007 school year. School Attendance Officer Lynn Doebrich testified that B.M. was charged with one half (½) day absences for September 4th and October 12th, full day absence on October 16th, 17th, 18th, 19th, half (½) day absences on October 24th and November 5th, full day absences on November 6th, 13th, 14th, 15th, 16th, half (½) day absences on November 27th and 30th, and full day absences on December 3rd and 4th. This appears to total fourteen (14) days. Whatever the discrepancies, it is apparent that B.M. was not absent for seven consecutive days during the first half of the 2007 school year. Testimony from both Carter and Doebrich also confirm that B.M. was not absent more than ten days in September, October, November or December of 2007. Consequently, B.M. could only be deemed a "chronic truant" if she was absent for fifteen or more school days in a school year. As noted earlier, Doebrich's testimony reveals that B.M. was absent for fourteen (14) days by the end of the first half of the school year. This is short of the minimum.

{¶ 14} We again note that Warren testified that B.M. was absent sixteen and one half (16½) days (one and a half days over the statutory limit). However, it further appears that a number of doctor's excuses for those absences were introduced into evidence.¹ School officials and the trial court both refused to recognize those excuses

¹ The unrefuted evidence reveals that B.M. has a number of medical problems, including back trouble. During the fall of 2007, B.M. endured both ruptured ovarian cysts as well as an automobile accident.

for the entire day, but the magistrate did opine during the adjudicatory hearing that he would count them for half ($\frac{1}{2}$) days. The school's authority to count those excuses for half days is unclear. The school's policy counts a medical excuse for the time of the appointment and a "reasonable" time before and after. Here, some of the excuses do not provide the times of appointment. Fortunately, however, we need not wade too deeply into that thicket because those excuses, even if treated as only half-day excuses, total six and one half ($6\frac{1}{2}$) days, thus resulting in a figure that falls below the statutory limit.

{¶ 15} In summary, we agree with appellant that insufficient evidence supports her adjudication as a "chronic truant." When reviewing sufficiency of the evidence, appellate courts look to the adequacy of evidence and whether that evidence, if believed, supports a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. In the case sub judice, the evidence adduced below did not establish that B.M. was absent, without excuse, for the requisite number of days to satisfy the chronic truant threshold. See to R.C. 2152.02(D).

{¶ 16} Accordingly, based upon the foregoing reasons, we hereby sustain appellant's third assignment of error and reverse the trial court's judgment. B.M. is hereby discharged.

JUDGMENT REVERSED.
JUDGMENT ENTRY

It is ordered that the judgment be reversed and that appellant recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

Peter B. Abele, Judge

BY:_____

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.