[Cite as *In re T.C.*, 2009-Ohio-4325.]

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

IN THE MATTER OF: [T.C., an Adjudicated] Delinquent Child.	:	Case No. 09CA10
	:	**DECISION AND JUDGMENT ENTRY**
	:	File-stamped date: 8-18-09

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for appellant.

James E. Schneider, Washington County Prosecutor, and Raymond Dugger, Washington County Assistant Prosecutor, Marietta, Ohio for appellee.

Kline, P.J.:

{¶1} T.C. appeals the juvenile court's finding of delinquency (based on two assaults) and the resulting disposition. On appeal, T.C. contends that the trial court erred when it failed to hold, sua sponte, a competency hearing. Because the record does not display sufficient indicia of incompetency to require the trial court to hold a competency hearing, we disagree. T.C. next contends that the trial court erred when it failed to dismiss the charges after considering the best interests of the child and the public. We disagree and find that the trial court did not abuse its discretion. T.C. next contends that the trial court erred when it failed to reduce the underlying charges of assault because of the lack of evidence that the victims were engaged in duties or official responsibilities at the time of the assaults. Because the state introduced sufficient evidence so that a

reasonable trier of fact could infer that the victims were engaged in their official duties at the time of the assaults, we disagree. Finally, T.C. contends that the trial court erred when it failed to enter sufficient findings of fact and conclusions of law under R.C. 2151.419. We agree, and we remand this case to the trial court so that it may issue findings of fact and conclusions of law pursuant to R.C. 2151.419.

I.

{¶2} T.C., a minor child, was enrolled in the third grade at Barlow-Vincent Elementary School. The juvenile court adjudicated T.C. a delinquent child on February 12, 2009. The lower court based its finding of delinquency on two incidents that occurred in September of 2008.

{¶3} On September 8, Stephanie Starcher, the principal of Barlow-Vincent Elementary School, was on "bus duty" and was supervising the arriving students. T.C.'s mother approached her and told her that T.C. did not want to come into the school. Starcher told her to take T.C. into the school office, and she would shortly come to the office and deal with the matter. T.C. had indicated that he had an earache, but according to Starcher, he had a habit of pretending illness to avoid school.

{¶4} T.C. and his mother were in the main office when Starcher arrived. Previously, when T.C. made it to class, he calmed down. Starcher asked T.C.'s mother to leave, and T.C. immediately became violent after his mother left. He knocked over a desk, flung binders, kicked Starcher several times, and he bit her arm when she tried to hold onto him to calm him down. The bites did not break the skin but left a mark.

{¶5} After T.C. calmed down, Starcher took him to a "time-out" room. When left alone in this room, he again became violent and destroyed an electrical panel box cutting off power to half of the building.

{¶6} On September 26, T.C.'s mom entered the same school building and asked Bridgette Stephens, the assistant principal, for assistance. T.C.'s mom told Stephens that T.C. did not want to come to school. Stephens went to the car and tried to talk T.C. into going to school. T.C. kicked her several times, Stephens grabbed his legs, and he then started to hit her in her face with his hands. Stephens then attempted to hold onto T.C. to calm him down. At this point, T.C. bit Stephens two times. Again, the bites did not break the skin, but left noticeable marks. T.C. was then taken to the "time-out" room.

{¶7} After this second incident, Stephens and Starcher notified the Washington County Sheriff's Office. The prosecuting attorney then filed a complaint of delinquency in the juvenile court. The complaint alleged T.C. was delinquent because of the two incidents above, both incidents alleged to be an Assault of a School Administrator in violation of R.C. 2903.13(A) & (C)(2)(e), if T.C. had been an adult. The lower court held an adjudicatory hearing on February 3, 2009. After finding that T.C. had committed the alleged underlying offenses, it adjudicated T.C. a delinquent child and later filed an entry consistent with this finding.

{¶8} The trial court held a dispositional hearing on February 13, 2009. At the hearing, it concluded that the best interests of T.C. would be served by placing him in the temporary custody of the Washington County Children Services Board.

{¶9} T.C. appeals and raises the following four assignments of error: "I. THE TRIAL COURT ERRED IN FAILING TO INQUIRE INTO APPELLANT'S COMPETENCY TO STAND TRIAL." "II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE FELONY ASSAULT CHARGES FILED AGAINST THE NINE-YEAR-OLD APPELLANT." "III. THE TRIAL COURT ERRED IN FINDING THAT THE VICTIMS IN THIS CASE WERE ENGAGED IN THEIR OFFICIAL DUTIES AS SCHOOL ADMINISTRATORS WHEN THE INCIDENTS OCCURRED, WHERE NO EVIDENCE WAS PRESENTED AS TO WHAT THEIR DUTIES WERE." And, "IV. THE TRIAL COURT ERRED IN REMOVING APPELLANT FROM HIS HOME AND PLACING HIM IN THE TEMPORARY CUSTODY OF THE WASHINGTON COUNTY CHILDREN SERVICES BOARD, WITHOUT MAKING SPECIFIC FINDINGS REGARDING THE REASONABLE EFFORTS MADE TO PREVENT HIS REMOVAL."

II.

{¶10} T.C. contends in his first assignment of error that the trial court erred when it failed to inquire into his competency at the adjudicatory hearing. Stated differently, T.C. asserts that the court should have held a hearing to determine his competency to stand trial.

{¶11} "Due process principles forbid subjecting a legally incompetent criminal defendant to trial." *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, at ¶114, citing *State v. Berry* (1995), 72 Ohio St.3d 354, 359. "[T]he right not to be tried or convicted while incompetent is as fundamental in juvenile proceedings as it is in criminal trials of adults." *In re Bailey*, 150 Ohio App.3d 664, 2002-Ohio-6792, at ¶10. Ohio courts have applied R.C. 2945.37 to juvenile cases so long as it is applied in light of juvenile rather

than adult norms. *In re Adams*, Mahoning App. Nos. 01-CA-237, 01-CA-238, 02-CA-120, 2003-Ohio-4112, at ¶31, citing *Bailey* at 667.

{¶12} Here, T.C.'s argument raises two issues: (1) did anyone raise the issue of T.C.'s competency in the court below? And, (2) if so, was the court required to hold a hearing? To resolve this assignment of error, we must interpret R.C. 2945.37(B).

{¶13} R.C. 2945.37(B) states: "the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion."

{¶14} The use of the term "may" in the first sentence of R.C. 2945.37(B) generally indicates that the decision to raise the issue is discretionary. See, e.g., *Creed v. Sauline* (1996), 74 Ohio St.3d 402, 407-408 (the word "may" implies discretion); *Bell v. Turner* (2007), 172 Ohio App.3d 238, 245; *Bluedorn v. Hicks* (1997), 124 Ohio App.3d 621, 629. Thus, we review the issue of whether anyone, including the court, was required to raise the competency issue for an abuse of discretion. An abuse of discretion connotes that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} Once the court, prosecutor, or defense raises the issue of competency, our standard of review for determining whether the trial court had to hold a hearing on the issue of incompetency depends on whether the issue was raised before or after trial has commenced. If the issue is raised before trial has commenced, then under R.C. 2945.37(B) "the court shall hold a hearing[,]" and our review is de novo. However, if the

issue is raised after trial has commenced, then the trial court has discretion as to whether it should hold a hearing, and we review this decision for an abuse of discretion. *State v. Rahman* (1986), 23 Ohio St.3d 146, 156.

{¶16} Here, T.C. assumes that his trial counsel raised the issue when his counsel responded to the judge's question of whether the defendant was ready to proceed. His counsel's response to the question is as follows:

"He is, Your Honor.

I do want to put on the record that the parents have never brought the child to my office for an office conference. I've never spoken to the child except for briefly on the phone before the last trial, and it was probably approximately a twenty minute conversation. The father advised me that it was upsetting his child, and that I wasn't to speak to him.

I believe the child is competent to go forward though, Judge, although today he tells me he doesn't understand what's going on.

Maybe the Court will want to inquire of the child with that.

The twenty minute conversation I had with him the last time was about those issues. He seemed to understand then but he says today he doesn't." Transcript at 5-6.

{¶17} Here, the trial court did not act upon the statement of T.C.'s attorney because "[n]o motion of incompetency has been filed[.]" Transcript at 6. The above record also indicates that T.C.'s attorney did not orally raise the issue either. T.C.'s attorney explained on the record why she was not going to raise it. The record only shows that

T.C.'s attorney invited the court to raise it. Accordingly, we find that the issue of competency was not "raised" in the court below within the meaning of R.C. 2945.37(B).

{¶18} However, T.C. claims that the trial court erred when it failed to accept his counsel's invitation to raise the issue and hold a hearing. If the court had raised the issue, then it had to hold a competency hearing because T.C.'s trial had not yet commenced.

{¶19} "The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains 'sufficient indicia of incompetence,' such that an inquiry into the defendant's competency is necessary to ensure the defendant's right to a fair trial." *State v. Berry* (1995), 72 Ohio St.3d 354, 359, quoting *Drope v. Missouri* (1975), 420 U.S. 162. "In determining whether sua sponte granting of a hearing is merited, the following factors should be considered: (1) doubts expressed by counsel as to the defendant's competence, (2) evidence of irrational behavior, (3) the defendant's demeanor at trial, and (4) prior medical opinion relating to competence to stand trial." *State v. Hartman*, 174 Ohio App.3d 244, 2007-Ohio-6555, at ¶16, citing *State v. Rubenstein* (1987), 40 Ohio App.3d 57, 60-61.

{¶20} Here, we find that the court did not abuse its discretion when it failed to immediately accept T.C.'s counsel's invitation to raise the issue. The only suggestion of incompetency on the record is this statement of defense counsel on the day of trial, but T.C.'s defense counsel never actually moved for, or objected to the lack of, a competency hearing. Counsel affirmatively represented that T.C. was competent to stand trial. The Supreme Court of Ohio has held that an unsupported suggestion of defense counsel alone is insufficient indicia of incompetency to require a hearing. *State*

v. Chapin (1981), 67 Ohio St.2d 437, paragraph one of the syllabus. Here, T.C.'s counsel did represent that her client said that he did not understand the proceedings, but she also affirmatively represented that she believed T.C. was competent to proceed.

{¶21} In addition, the record does not show any evidence of irrational behavior or demeanor at trial that would suggest T.C. was incompetent. No medical evidence was admitted. Hence, the trial court did not abuse its discretion when it did not raise the issue or hold a hearing during trial.

{¶22} Therefore, we find that the record does not demonstrate sufficient indicia of incompetence to require the lower court to sua sponte raise or hold a competency hearing either before or during trial.

{¶23} Accordingly, we overrule T.C.'s first assignment of error.

III.

{¶24} T.C. contends in his second assignment of error that the trial court should have dismissed the felony assault charges as this prosecution did not serve the "best interest of the child and the public." T.C.'s brief at 7, citing *In re M.D.* (1988), 38 Ohio St.3d 149.

{¶25} We review such determinations for an abuse of discretion. See *In re Smith* (1992), 80 Ohio App.3d 502, 504. As we stated earlier, an abuse of discretion connotes that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore* at 219.

{¶26} *In re M.D.* involved a twelve year old who was adjudicated as a delinquent child on the basis of complicity to rape in violation of R.C. 2907.02 and 2923.03(A)(4). *In re M.D.* at 150. The Supreme Court of Ohio first concluded the conviction for rape was erroneous and "no rape was committed[.]" Id. at 152. "Adjudicating a child as

'delinquent' under circumstances where, as here, the child has neither committed a crime nor violated a lawful order of the juvenile court is obviously contrary to R.C. Chapter 2151." Id. at 152.

{¶27} In the same case, the Supreme Court of Ohio later held that even if the conduct at issue technically constituted rape, nonetheless prosecution "under these circumstances violates the underlying public policy of this state[.]" Id. at 152-53. In so ruling, the Supreme Court noted that the prosecution violated the local court's intake rules, and also noted that the prosecution of this offense caused more trauma to the child and her family than the actual offence. Id. at 153-54. Finally, the Court noted "[a]ppellant has been saddled with the 'taint of criminality' by this adjudication for a felony sex offense under circumstances where 'sex' played but a minute role." Id. at 154. And the trial court should have dismissed the complaint pursuant to the public policy of avoiding unnecessary prosecutions of juveniles under Chapter 2151 of the Revised Code and Juv.R. 9(B). Id. at 153.

{¶28} The language T.C. relies upon is of uncertain authority. "*In re M.D.* * * * is an opinion authored by Justice Holmes and not a *per curiam* opinion, only the syllabus states the controlling point of law decided in the case." *In re Smith* at 505. The only proposition of law announced in the syllabus is that "[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D.* syllabus.

{¶29} Here, T.C. advances no argument that the underlying conduct was innocent. Instead, he offers two circumstances that mitigate his conduct. T.C. does not therefore

rely on the part of *In re M.D.* that holds a finding of delinquency where the underlying crime did not occur violates Chapter 2151 of the Revised Code.

{¶30} First, he contends that his conduct was a result of his bipolar disorder. "On a good day, when [T.C.] is focused and interested, he has no problem learning, and being an A/B student. Unfortunately, the school seems to believe that because [T.C.] can keep it together on good days, that he is misbehaving on purpose, on the bad days." T.C.'s Brief at 7, internal citations omitted. A bipolar disorder is generally not a defense to a criminal act. See *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 242-44 (defendant who suffered from bipolar disorder among other ailments "did not suffer from any mental diseases that would qualify for the insanity defense under Ohio law").

{¶31} Second, T.C. argues he "did not cause any serious physical harm[,]" and "[e]veryone's best interests would be better served by helping [T.C.] learn to deal with his medical problems." T.C.'s Brief at 7. Again this is merely mitigation rather than exculpation. The primary goal of the juvenile code is rehabilitation, but T.C. offers no argument for why a finding of delinquency is not the most effective means of rehabilitating him. The issue is not whether the lower court should have fashioned a sentence that encourages rehabilitation, but rather what is the best means of encouraging rehabilitation.

{¶32} T.C. presents what may be costs related to the trial court's decision finding him delinquent and removing him from the home. However, in making such a decision a trial court is vested with discretion for a reason. Rarely will any decision be without costs or dangers. The question is whether there is sufficient evidence on the record to support the trial court's decision in this case. Testimony at the adjudicatory hearing

indicated that T.C. assaulted both the principal and vice principal, notwithstanding T.C.'s objections to the felony specification, he offers no argument that his conduct was innocent. Testimony at the disposition hearing indicated that T.C.'s mother suffers from paranoid schizophrenia as well as a gambling addiction; that T.C. and his siblings at times went to school hungry because there was no food at the home; that one of T.C.'s siblings was facing criminal charges; that another one of T.C.'s siblings was on probation; and that T.C.'s mother had sold his medication in order to purchase lottery tickets. Transcript at 65-69. T.C.'s parents did testify that they had improved, and the trial court did allow that they may have fixed some of these issues. Transcript at 85. But on balance, we cannot say that the trial court's decisions to allow the prosecution to proceed or to remove T.C. from his home were unreasonable.

{¶33} T.C. presents no persuasive argument for why the trial court acted in an arbitrary or unreasonable manner. Absent such an argument, the trial court's decision to allow this prosecution to proceed is not an abuse of discretion.

{¶34} Accordingly, we overrule T.C.'s second assignment of error.

IV.

{¶35} In T.C.'s third assignment of error, T.C. contends that the state failed to present any to the court on whether the victims of the assaults were "engaged in duties or official responsibilities associated with the victim's employment or position as a school teacher or administrator." T.C.'s Brief at 8. The state argues a trier of fact in this case could reasonably infer both victims were engaged in their duties or official responsibilities.

{¶36} We review claims involving the sufficiency of the evidence within the juvenile context with the same standard of review applicable to criminal convictions. See *In re Watson* (1989), 47 Ohio St.3d 86, 91-92 (applying cases based on adult criminal convictions to a juvenile delinquency case). When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶37} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, this test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. Accordingly, the weight given to the evidence and the credibility of witnesses are issues for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶38} Here, aside from their description of the events on September 8th, and September 26th, the only evidence related to this element is the title of each victim's position, principal and assistant principal.

{¶39} The September 8th incident occurred within the school building at the "main office." Transcript at 14. The principal asked the mother to leave, and after she did so T.C. became violent. The principal then used force to defend herself and protect the property within the room. A trier of fact could reasonably conclude the principal acted within the scope of her employment when she suppressed a disturbance of a student within the "main office" of her school.

{¶40} The September 26th incident occurred outside of the school building, although it appears it did occur either on the school grounds or just outside of the school grounds. The mother entered the school and said T.C. was refusing to come to school on that day. The assistant principal went to the car, and when she started to talk with T.C., he threw a cup filled with liquid at her. She then tried to talk T.C. to come into school, and at this point T.C. began to kick her. The assistant principal eventually restrained T.C. and brought him into the school to place him in the "time-out" room. T.C. contends "[n]o one testified that they were required or encouraged to physically drag children out of cars, and into the school building." T.C.'s Brief at 8. However, according to the testimony of the assistant principal, she merely went to the car to persuade T.C. to attend school. Only after he became violent did she use force. So the only question is whether a reasonable trier of fact could conclude that it is within the duties and obligations of an assistant principal of a school, under a system of compulsory attendance, to attempt to persuade a student, present on or by school grounds, to attend school.

{¶41} A trier of fact is entitled to make reasonable inferences from the record. Here, a trier of fact could reasonably infer from her title of assistant principal that she had an

obligation to ask students, present on or by school grounds, to attend classes as scheduled.

{¶42} Therefore, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of delinquency proven beyond a reasonable doubt.

{¶43} Accordingly, we overrule T.C.'s third assignment of error.

V.

{¶44} Finally, T.C. contends in his fourth assignment of error that under the circumstances of his case the lower court was obliged to issue findings of fact and conclusions of law that establish the Washington County Children Services Board had made reasonable efforts to prevent T.C.'s removal from the home. The trial court did issue and file a journal entry. This journal entry was a form, and the lower court had checked a box that indicated reasonable efforts had been made to prevent the removal of the child.

{¶45} R.C. 2151.419(A)(1) provides that if a "court removes a child from the child's home * * * the court shall determine whether the public children services agency * * * has made reasonable efforts to prevent the removal of the child from the child's home[.]" R.C. 2151.419(B)(1) in turn states: "A court that is required to make [this determination] shall issue written findings of fact setting forth the reasons supporting its determination. If the court makes a written determination * * * it shall briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home."

{¶46} T.C. relies on a 12th district court of appeals case, *In re S.W.*, Butler App. Nos. CA2006-09-211, CA2006-10-263, 2008-Ohio-1194. In that case, the court of appeals found that "the court simply checked a box that reasonable efforts were made without providing any further support for its determination. Accordingly, we are unable to determine what facts the court found to support this determination." Id. at ¶15. In other words, merely checking a box that indicates a legal conclusion fails to satisfy the requirement that a court issue findings of fact.

{¶47} We find *In re S.W.* persuasive because R.C. 2151.419(B)(1) specifically requires the court to "briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home[.]" In checking a box, the trial court in this case provided no such description.

{¶48} The state argues that *In re S.W.* is a dependency action and not a delinquency matter, and therefore its precedent is unpersuasive. However, the relevant statute requires the same finding of reasonable efforts for both delinquency and dependency findings. See R.C. 2151.419(A)(1) (this provision covers all hearings held pursuant to R.C. 2151.28, which in turn covers both delinquency hearings and dependency hearings). The state also relies on a statement the trial court issued from the bench at the dispositional hearing. However, "a court of record speaks only through its journal." *Rowe v. Stillpass*, Lawrence App. No. 06CA1, 2006-Ohio-3789, at ¶13, citing *In re Adoption of Gibson* (1986), 23 Ohio St.3d 170, 173, fn. 3. Finally, the state appears to advance it argument by basing it on matters not in the record. But, facts not admitted before the trial court cannot be used to support the failure of a trial court to issue

findings of fact and conclusions of law. See *State v. Williams* (1995), 73 Ohio St.3d 153, 160 ("a reviewing court may not supplement the record before it with new matter that was not part of the trial court's proceedings and then decide the appeal on the basis of the new matter.").

{¶49} Accordingly, we sustain T.C.'s fourth assignment of error and remand this cause for the trial court to issue findings of fact and conclusions of law that comply with the requirements of R.C. 2151.419.

VI.

{¶50} For the foregoing reasons, we affirm, in part, and reverse, in part, the judgment of the lower court. We remand this matter to the Washington County Court of Common Pleas, Juvenile Division, for the court to issue findings of fact and conclusions of law consistent with this opinion.

JUDGMENT AFFIRMED, IN PART, REVERSED, IN PART, AND CAUSE REMANDED.

McFarland, J., dissenting:

{¶51} I respectfully dissent and agree with the analysis of *In re Williams*, (1997), 116 Ohio App.3d 237, 242, 686 N.E.2d 507, which stated "the standard enunciated in R.C. 2945.37(A) governs competency evaluations of juveniles, so long as it is applied in light of juveniles rather than adult norms." The U.S. Supreme Court has also said "The constitutional test under the Fourteenth Amendment for competency to stand trial is 'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.' " Id. at 241-242, quoting *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788. Further, I believe *Juv. R. 1(B)(1)* and *Juv. R. 32(A)(4)* taken together encourages close scrutiny, especially when dealing with a ten year old as in this case.

{¶52} While the majority opinion does not mention the Ohio Rules of Juvenile Procedure, I find them to be highly relevant and very instructive in this case. Specifically, *Juv. R. 1(B)(1)* provides in pertinent part: "These rules shall be ***liberally interpreted and construed*** so as to effectuate the following purposes:

(1) to effect the just determination of every juvenile court proceeding ***by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights***[.]" (Emphasis added.)

{¶53} And, *Juv. R. 32(A)(4)* states: "The Court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint under any of the following circumstances: * * * (4) Where a party's legal responsibility for the party's

acts or ***the party's competence to participate in the proceedings is an issue***[.]" (Emphasis added.)

{¶54} Here, and unlike the majority, I find the issue of competency was orally raised by counsel. If counsel was thoroughly convinced her client had no issues understanding what was happening, why did she make the statement below? I believe the issue was raised when the child's counsel stated:

> **" *I do want to put on the record* that the parents *have never* brought the child to my office for an office conference*. I've never spoken to the child except for briefly on the phone* before the last trial, and it was probably approximately a twenty minute conversation. *The father advised me that it was upsetting his child, and that I wasn't to speak to him*. I believe the child is competent to go forward though, Judge, *although today he tells me he doesn't understand what's going on. Maybe the court will want to inquire of the child with that*. The *twenty minute conversation* I had with him the last time was about those issues. *He seemed to understand then but he says today he doesn't*."** (Emphasis added.)

{¶55} When you combine this statement from counsel and the fact she only had a twenty minute conversation to make this conclusion, it raises serious concerns as to whether this child had the sufficient present ability to consult with his lawyer and understand what was happening to him. Further, under juvenile norms and not those relating to adults, the issues of the child's inability to meet with his lawyer prior to the adjudication and the child's competency deserved some attention by the court.

{¶56} The U.S. Supreme Court has stated it is settled law "that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri* (1975), 420 U.S. 162, 171, 95 S.Ct.

896.

{¶57} In this case, the child's counsel admitted she only had limited contact with the child via the telephone and the child stated through counsel "he doesn't understand what's going on." We must remember this case involves a child who was in the third grade at the time of the offense. Based on these facts and my reading of *Drope*, *supra,* this child should not have been subjected to a trial until he had adequate time to consult with his attorney and fully understood the nature and object of the proceedings against him. After considering the facts, and the law in conjunction with the express provisions of the Juvenile Rules, my conclusion is that some inquiry was necessary into the child's competency. Without any inquiry by the court, it was unreasonable in my view to proceed to an adjudication.

{¶58} Accordingly, I respectfully dissent and would reverse on this assignment of error thereby rendering the other assignments moot.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, REVERSED, IN PART, and that the CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellant and Appellee shall equally split the costs herein.

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 Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

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

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents with Dissenting Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding 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.