

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

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| In the Matter of: | : | Case No. 09CA44 |
| J.C., | : | <u>DECISION AND JUDGMENT</u> |
| Adjudicated Delinquent Child. | : | <u>ENTRY</u> |
| | | Released 4/21/10 |

APPEARANCES:

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

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

Harsha, J.

{¶1} J.C. appeals from his adjudication as a delinquent child and the disposition imposed by the trial court upon his admission to a complaint alleging possession of marijuana. J.C. contends that the trial court erred in denying his motion to withdraw his admission. Specifically, J.C. contends that his right to counsel was violated at the adjudicatory hearing because the trial court did not obtain a valid waiver of counsel. And without a valid waiver, the admission was involuntary. Thus, the court should have granted his motion to withdraw it.

{¶2} We conclude that J.C. validly waived his right to counsel before admitting to the charge of delinquency. The record contains sufficient evidence indicating that J.C. was advised or counseled by his mother before waiving his right to an attorney. Therefore we conclude that the trial court properly denied J.C.'s motion to withdraw his admission.

I. Summary of Facts

{¶3} While J.C. was on probation for truancy, he failed a drug screening test. Thus, he faced a new complaint, which alleged he was a delinquent child for possessing marijuana, in violation of R.C. 2925.11(A). At his initial hearing, which his mother and father attended, the trial court explained the purpose of an admission hearing and offered a detailed explanation of the potential penalties for admitting to the charge of delinquency. In the following colloquy, the trial court informed J.C. of his right to an attorney:

{¶4} THE COURT: Now, you and your parents are all parties to this action. As such, you and your parents do have the right to be represented by lawyers. You have the right to hire lawyers of your own choosing, however, if you wanted a lawyer but you couldn't afford one, and you qualified under state guidelines, I could appoint a lawyer to represent the child as well as the parents. Now, [J.C.], do you want a lawyer to represent you in this case?

{¶5} THE JUVENILE: No, sir.

{¶6} THE COURT: Does the mother want a lawyer?

{¶7} THE JUVENILE'S MOTHER: No, sir.

{¶8} THE COURT: Does the father want a lawyer?

{¶9} THE JUVENILE'S FATHER: No, sir.

{¶10} THE COURT: And have the parents had an opportunity to discuss this complaint with your child prior to today's hearing?

{¶11} THE JUVENILE'S MOTHER: Yes, I have.

{¶12} THE COURT: And you too, sir?

{¶13} THE JUVENILE'S FATHER: Not really.

{¶14} THE COURT: But the custodial parent has? The mother has?

{¶15} THE JUVENILE'S MOTHER: Uh-hum.

{¶16} THE COURT: And do you agree with his decision then to waive his right to counsel today?

{¶17} THE JUVENILE'S MOTHER: Yes.

{¶18} THE COURT: Okay. The probation officer is going to hand the family the waiver of counsel form. Please review it. If you agree that you don't want a lawyer, go ahead and sign it.

{¶19} (PAUSE)

{¶20} THE COURT: I'll note that the family has signed the waiver of counsel form. Now, the right to have a lawyer is a continuing right. So if we would go to another hearing and you change your mind about wanting a lawyer, let the Court know. We'll make sure you have the opportunity to speak with one.

{¶21} Then the court read the complaint and J.C. indicated his desire to admit to the offense. The court accepted the admission and continued the case for disposition. After a disposition hearing, J.C. was placed in the Washington County Juvenile Center. J.C. subsequently filed a motion to withdraw his admission but the court denied it. This appeal followed.

II. Assignment of Error

{¶22} I. THE TRIAL COURT ERRED IN DENYING JUVENILE APPELLANT'S MOTION TO WITHDRAW HIS ADMISSION, WHERE THAT ADMISSION RESULTED FROM AN INVALID, UNCOUNSELED, WAIVER OF HIS RIGHT TO COUNSEL.

III. Disposition

{¶23} J.C. argues that the trial court violated his rights by failing to obtain a valid waiver of counsel before accepting his admission. He argues that there is no evidence that he was counseled and advised by his parents on his right to counsel. Thus he contends the court should have allowed him to withdraw his admission. The State argues that there was evidence that J.C. talked with his mother about the complaint prior to entering the admission, and the mother said that she approved the decision to waive counsel.

A. Standard of Review

{¶24} J.C. moved to withdraw his plea after he was committed to the Ohio Department of Youth Services. In the case of an adult charged with a crime, Crim.R. 32.1 controls the appropriate procedure and disposition. However, there is no analogous provision in the juvenile rules. Where those rules do not specifically provide for a procedure, courts may use “any lawful manner” that is not inconsistent with the juvenile rules. Juv.R. 45(B). Thus, we treat the motion as if it were made under Crim.R. 32.1. See *State v. Lockett*, Summit App. No. 17523, 1996 WL 99772, at *1.

{¶25} Prior to disposition such a motion should be freely granted. See *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. One who seeks to withdraw an admission after the disposition has the burden of establishing the existence of a manifest injustice. See Crim.R. 32.1 and *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, at paragraph one of the syllabus. Ultimately, the decision to grant or deny a motion to withdraw an admission lies within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. 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. *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-Ohio-52, 620 N.E.2d 72; *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161,169, 559 N.E.2d 1301. Above all, a reviewing court should be guided by a presumption that the findings of a trial court are correct, because the “trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

B. J.C.’s Waiver of Counsel

{¶26} J.C. is essentially arguing that the trial court, by failing to obtain a valid waiver of counsel, accepted an involuntary admission contrary to Juv. R. 29(D). That rule sets forth the initial procedure the trial court must follow to accept an admission in an adjudicatory hearing. In *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, the Supreme Court of Ohio explained that “the preferred practice is strict compliance with Juv.R. 29(D) *** however, *** if the trial court substantially complies with Juv.R. 29(D) in accepting an admission by a juvenile, the plea will be deemed voluntary absent a showing of prejudice by the juvenile or a showing that the totality of the circumstances does not support a finding of a valid waiver.” *Id.* at ¶113.

{¶27} Juveniles have the same functional rights in delinquency hearings as adult defendants do in criminal hearings, including the right to counsel. See, generally, *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428; see, also, Juv.R. 4(A); Juv.R. 29(B); R.C.

2151.352. Generally, the right to counsel may be waived as long as the waiver is voluntary, knowing, and intelligent. See *In re East* (1995), 105 Ohio App.3d 221, 223, 663 N.E.2d 983 (superseded by rule on other grounds). However, the Supreme Court of Ohio has explained: “[i]n a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.” *In re C.S.*, at paragraph two of the syllabus.

{¶28} A court must use a totality-of-the-circumstances test to decide whether a juvenile validly waived his right to counsel. *Id.* at ¶108. “The judge must consider 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.

{¶29} Furthermore, a court should be guided by Juv.R. 29 when considering a waiver of counsel and accepting an admission. *Id.* at ¶111. Specifically, Juv.R. 29(B)(3) requires the trial court, at the beginning of an adjudicatory hearing, to “[i]nform unrepresented parties of their right to counsel and *determine if those parties are waiving their right to counsel[.]*” (Emphasis added.) Juv.R. 29(B)(5) further obligates the court to “[i]nform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings * * *.”

{¶30} In the wake of *In re C.S.*, several cases have interpreted its requirement that a juvenile be “counseled” by parents prior to waiving an attorney. In *In re Brandon M.*, Clark App. No. 2009CA48, 2009-Ohio-6579, the court concluded that the juvenile’s parents had not counseled him about waiving his rights. *Id.* at ¶39. The juvenile told the court he had not discussed the charge with his parents. *Id.* at ¶¶18-19. And both parents also declined an opportunity provided by the court to confer with their son about the charge. *Id.* at ¶¶22-23.

{¶31} Similarly, in *In re J.F.*, 178 Ohio App.3d 702, 2008-Ohio-4325, 900 N.E.2d 204, the court held that the juvenile had not been counseled where the juvenile’s mother was present at the hearing but did not say that she had discussed the complaint with her son and simply requested continued treatment for him and that he not be detained long before being transported to the department of youth services. *Id.* at ¶93.

{¶32} And in *In re T.B.*, Greene App. No. 2008CA83, 2009-Ohio-2551, the court held that no valid waiver occurred where the juvenile and his parents agreed that they did not want an attorney but neither parent stated that they had discussed the charge with the juvenile. *Id.* at ¶¶33, 37. Furthermore, the court indicated that the parents were incapable of rendering meaningful advice on the issue of counsel. *Id.* at ¶33. The parents stated that they could not afford to hire an attorney for the juvenile and they felt that the juvenile was guilty. *Id.* at ¶¶18-26. See, also, *In re Bucholtz*, 179 Ohio App.3d 249, 2008-Ohio-5826, 901 N.E.2d 305 (juvenile did not waive right to an attorney when he appeared at parole revocation hearing without a parent or guardian and no indication in record that he had been counseled prior to court appearance); *In re E.H.*, Montgomery App. No. 22259, 2007-Ohio-6263 (no valid waiver where juvenile’s mother

was present at hearing but no evidence that she had counseled defendant and mother merely replied “yes” when asked if she believed if juvenile understood his constitutional rights).

{¶33} But in *In re Haggard*, the court held that a waiver was validly obtained where the juvenile indicated he did not desire an attorney and then he and his mother both read and signed a written waiver form. Auglaize App. Nos. 2-08-20, 2-08-21, 2-08-22, 2-08-23, 2009-Ohio-3821, at ¶34. The court held that there was sufficient evidence that the juvenile was “counseled” because his mother was present at the time the waiver was signed and she cosigned it, “thus providing a clear indication that she agreed that waiving counsel was the correct decision * * *.” *Id.* at ¶35.

{¶34} Under the totality-of-the-circumstances in this case, there is sufficient evidence in the record to indicate that J.C. validly waived his right to counsel. J.C. was seventeen years old at the time of the hearing. There was no evidence indicating he was incapable of understanding the charge against him or his rights. He attended the hearing with both of his parents. There is no evidence in the record that either of J.C.’s parents had any interests adverse to his own.

{¶35} The trial court explained to J.C. and his parents the possible ramifications of admitting to the charge of delinquency. The trial court also explained J.C.’s right to have a trial on his charge of delinquency. The court then informed J.C. and his parents of their right to counsel and asked them if they wanted an attorney. They indicated that they did not want attorneys.

{¶36} The court then asked whether anyone had discussed the complaint with J.C. prior to the hearing. J.C.’s mother indicated that she had. She also told the judge

that she agreed with J.C.'s decision to waive counsel. The trial court then directed J.C., his mother, and his father to review and sign a written waiver of counsel form. The court then informed all three, "If you agree that you don't want a lawyer, go ahead and sign it." They did so after the record indicated a "pause" to sign the form.

{¶37} In the cases finding the juvenile had not validly waived counsel, there was little or no evidence on the trial record demonstrating that the parent had counseled the juvenile prior to the hearing. In the present case, during the court's inquiry in the waiver of counsel colloquy, J.C.'s mother told the court that she discussed the complaint with her son prior to the hearing. She then confirmed that she agreed with his decision to waive counsel. Furthermore, as in *Haggard*, J.C., his mother, and his father all signed a written waiver of counsel form together in open court after reviewing it together. Thus, the court substantially complied with Juv.R. 29(A)(3).¹

IV. Conclusion

{¶38} We hold that under the totality-of-the-circumstances J.C. validly waived his right to counsel. Furthermore, the trial court substantially complied with Juv.R. 29(D) in accepting this waiver and voluntary admission. Thus, the trial court's decision to deny the motion to withdraw his admission was not an abuse of discretion.

JUDGMENT AFFIRMED.

¹ Although we conclude the court substantially complied with Juv.R. 29(A)(3), clearly the better approach is to specifically ask the parent if the parent has discussed the waiver of counsel with the child. If the answer is "yes," that is sufficient. If the response is "no," the court would simply instruct the parent to do so "now." This procedure will satisfy the strict compliance standard set forth in *In re C.S.*, supra.

Kline, J., Dissenting:

{¶39} I respectfully dissent. I would sustain J.C.'s sole assignment of error and remand this cause to the trial court for further proceedings.

{¶40} In my view, the following language is clear: "If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, at ¶98. Because this language is so emphatic, I would not infer that J.C.'s mother provided the type of counseling required by *In re C.S.* Instead, I would require an affirmative showing that J.C.'s mother actually discussed the right to counsel with J.C.

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 Washington County Court of Common Pleas, 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.: Concurs in Judgment and Opinion.

Kline, J.: Dissents with Attached Dissenting Opinion.

For the Court

BY: _____
William H. Harsha, 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.