**[Cite as *In re Steven H.*, 2009-Ohio-2349.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
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| IN THE MATTER OF | : | Hon. William B. Hoffman, P.J. |
| | : | Hon. John W. Wise, J. |
| STEVEN H. | : | Hon. Patricia A. Delaney, J. |
| | : | |
| DELINQUENT CHILD | : | Case No. 08-CA-138 |
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| | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Licking County Juvenile Court<br>Case No. A2006-0808 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | May 19, 2009 |

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT
Licking County Prosecutor
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ALICE L. BOND 0025664
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

ERIN J. MCENANEY 0076853
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21 W. Church St., Ste. 201
Newark, Ohio 43055

*Delaney, J.*

{¶1} Defendant-Appellant, juvenile Steven H. appeals from his conviction of one count of rape and subsequent commitment to the Department of Youth Services. The State of Ohio is Plaintiff-Appellee.

{¶2} The underlying facts and procedural history of the case are as follows.

{¶3} On October 12, 2006, a complaint was filed, alleging that Appellant, a fifteen-year old male had committed digital/anal rape of a six-year old girl. On December 11, 2006, Appellant admitted to the charge and was adjudicated a delinquent child. On December 13, 2006, Appellant was committed to the temporary legal custody of the Licking County Department of Job and Family Services.

{¶4} On February 9, 2007, at a disposition hearing, Appellant was committed to the Ohio Department of Youth Services ("DYS") for a minimum of two years, with a maximum not to exceed his twenty-first birthday. The juvenile court suspended the commitment and placed Appellant on probation, and as a condition of probation, required Appellant to complete a program for juvenile sex offenders.

{¶5} On July 25, 2008, Appellant's juvenile probation officer filed a motion for hearing, alleging that Appellant had violated the terms of his probation. On July 28 and August 4, 2008, the juvenile probation officer filed pre-dispositional reports. The August 4 report included a "Client Discharge Summary" completed by Safely Home, Inc., the in-house juvenile sex offender treatment agency.

{¶6} On August 19, 2008, the juvenile court ordered that an updated sex offender risk assessment be completed by Family Intervention Services, Inc. ("FIS").

The probation officer filed an additional pre-dispositional report on September 28, 2008, indicating that the FIS sex offender risk assessment had been completed.

{¶7} On September 29, 2008, the matter cam for hearing on the July 25, 2008, probation violation motion in front of a juvenile court magistrate. Appellant admitted to violating the conditions of probation. Prior to disposition, the Appellant, his attorney, his aunt, and his guardian ad litem all recommended to the court that Appellant be placed with his aunt and that he begin sex offender treatment at the Thompkins Center, an outpatient facility. The probation officer, prosecutor, and Children's Services social worker disagreed with that recommendation. The magistrate orally found that, in spite of the services and opportunities offered, the juvenile had "intentionally undermined that system." Based upon that conclusion and the "danger to the community", the magistrate revoked probation and committed Appellant to DYS. The magistrate's entry was filed and journalized with the clerk on September 29, 2008. On September 30, 2008, the trial court issued an interim order, approving and adopting the magistrate's decision. No objections were filed.

{¶8} Appellant now raises a single Assignment of Error:

{¶9} "I. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DUE TO THE FAILURE OF COUNSEL TO OBJECT TO THE MAGISTRATE'S DECISION THAT A COMMITMENT TO THE OHIO DEPARTMENT OF YOUTH SERVICES WAS THE APPROPRIATE DISPOSITION FOR THE INSTANT MATTER."

I.

{¶10} In his sole assignment of error, Appellant asserts that he was denied the effective assistance of counsel because counsel failed to object to the commitment to DYS. We disagree.

{¶11} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶12} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶13} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶14} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two

components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶15} Appellant argues that trial counsel was ineffective because counsel did not object to the magistrate's decision to impose the suspended commitment to DYS after Appellant admitted to a probation violation because he did not complete the sex offender treatment program that he was ordered to complete. The sex offender treatment program was an integral part of the trial court's decision to suspend the commitment to DYS, and it gave Appellant a chance to stay out of DYS by abiding by the trial court's orders. Appellant refused to complete the programming.

{¶16} Appellant cannot point to anywhere in the record where counsel acted ineffectively. DYS is an appropriate sentence for the crime of rape. *In re Childress*, 5th Dist. No. 08-CA-57, 2008-Ohio-7001. Appellant received the benefit of a suspended sentence and Appellant chose not to comply with probation, thus bringing himself back before the court on a probation violation where the court had to reconsider imposing a DYS commitment. The court, in making its determination, found that Appellant had "intentionally undermined [the] system" and that he presented a danger to the community." Attorneys are not required to make frivolous objections, and as Appellant violated probation, admitted to the violation, and was already aware that he was on a

suspended commitment to DYS, we cannot find that counsel was ineffective in failing to object to the suspended commitment.

{¶17} Moreover, Appellant has failed to demonstrate prejudice by counsel's failure to object to the imposition of his suspended sentence. At the dispositional hearing, counsel argued for Appellant to be placed with his aunt, had the aunt come in and advocate for Appellant to be placed with her, and tried to convince the trial court that DYS was not the appropriate place to send Appellant.

{¶18} As noted by Appellee, juvenile dispositions are intended to provide care and protection of children as well as protection of the public interest, delinquent accountability, victim restoration, and offender rehabilitation. See R.C. 2152.01(A). For the purposes of achieving the goals of public protection and offender accountability, a disposition including substantial confinement may be appropriate. *In re Jorgenson*, 5th Dist. No. 07-CA-96, 2008-Ohio-2967.

{¶19} The report from Safely Home indicated that Appellant was manipulative, disruptive to staff members, prone to continuing rule violations regarding sexual matters, and that Appellant was a negative leader to other juvenile sex offenders. The updated sex offender assessment indicated that Appellant represented a recidivism risk. Moreover, the probation department indicated that Appellant demonstrated a lack of remorse for his offense. Based on these reports, the probation department, prosecutor, and Children's Services social worker all agreed that Appellant should not be returned home. The magistrate weighed all of the arguments and concluded that DYS was the appropriate resolution to the probation violation.

{¶20} Additionally, based on the above analysis, we would note that there is no reasonable probability that had Appellant's counsel filed an objection to the magistrate's decision that he would have ultimately prevailed. As such, he was not prejudiced and counsel was not ineffective.

{¶21} Based on the foregoing, we overrule Appellant's assignment of error and affirm the judgment of the Licking County Juvenile Court.

By: Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| IN THE MATTER OF: | |
| STEVEN H. | |
| DELINQUENT CHILD | JUDGMENT ENTRY |
| | Case No. 08-CA-138 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Juvenile Court is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE