[Cite as *In re David G.*, 2009-Ohio-4002.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	William B. Hoffman, P.J.
DAVID G.	:	Julie A. Edwards, J.
(Minor Child)	:	Patricia A. Delaney, J.
	:	
	:	Case No. 2008 CA 00243 and
	:	2008 CA 00244
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Stark County Court Of Common Pleas, Juvenile Division, Case No. 2008JCR00242 and 2008JCR02468
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 3, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio BY:RENEE M. WATSON Assitant Prosecuting Attorney Appellate Section 110 Centrla Plaza, South Canton, Ohio 44702-0049	ANGELA MILLER Office of the Ohio Public Defender 8 East Long Street, 11th Floor Columbus, Ohio 43215

Edwards, J.

{¶1} Appellant, David G., appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, finding him delinquent by reason of escape upon a plea of true and committing him to the Department of Youth Services (hereinafter "DYS") for a minimum period of six months and no more than his attainment of the age of 21 (Case No. 2008CA00243). Appellant also appeals the judgment of the court imposing a previously suspended sentence for one count of receiving stolen property and committing him to DYS for a minimum period of six months and no more than his attainment of the age of 21 (Case No. 2008CA00244). The appeals have been consolidated by this Court. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On January 24, 2008, a complaint was filed in the Juvenile Court alleging that appellant was delinquent by reason of having committed the offense of receiving stolen property. He entered a plea of true, and on February 13, 2008, the court sentenced him to a DYS commitment of a minimum of six months. The court stayed the commitment and placed him at the Community Corrections Facility (hereinafter "CCF"). The entry suspending the commitment stated in pertinent part, "Said juvenile shall not leave CCF without the express permission of the court or shall be subject to charges of escape from detention filed pursuant to ORC 2921.34(A)." Judgment entry, 2/13/08.

{¶3} On August 21, 2008, a complaint was filed alleging that appellant was delinquent by reason of escape in violation of R.C. 2921.34(A)(1) and R.C. 2921.34(C)(2)(b). The complaint alleged that, while an inmate at the multi-county juvenile detention center, appellant ran off after eating at the Golden Corral restaurant

where he and others were on a supervised outing. A warrant was issued, and appellant was apprehended in Parkersburg, West Virginia. Appellant was also charged with violating a prior court order.

{¶4} Appellant appeared at a pre-trial hearing before a magistrate on September 3, 2008. He entered a plea of true to the charge of escape, and the charge of violation of a prior court order was dismissed. On September 8, 2008, the court committed appellant to DYS for a minimum period of six months for escape. The court also imposed the suspended commitment for the prior finding of delinquency by reason of receiving stolen property. The court imposed fines and court costs. Appellant assigns three errors on appeal to this Court:

{¶5} "I. DAVID G.'S ADMISSION TO ESCAPE WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION, AND JUVENILE RULE 29.

{¶6} "II. DAVID G. WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶7} "III. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER COMMUNITY SERVICE IN LIEU OF FINANCIAL SANCTIONS FOR DAVID G., AN INDIGENT JUVENILE. THIS IS A VIOLATION OF R.C. 2152.20."

I

{¶8} In his first assignment of error, appellant argues that his plea of true to escape was not knowing, voluntary and intelligent because the trial court did not inform him of the nature of the allegations against him as required by Juv. R. 29(D)(1), and the trial court did not determine whether he understood the constitutional rights he was waiving by entering a plea of true, specifically the right to have the state prove the charges against him beyond a reasonable doubt.

{¶9} In response, appellee argues that appellant did not object to the manner in which the hearing was conducted and did not file objections to the magistrate's decision, and therefore has waived all but plain error. Appellee also argues that appellant did not preserve the error for review because he failed to move to withdraw his plea. Appellee argues that appellant has not shown that but for the errors in the plea colloquy, he would not have entered an admission to the charge, and therefore has not demonstrated plain error. Appellee argues that appellant signed a waiver of his rights and was represented by counsel, creating a presumption that defense counsel informed him of the nature of the charges.

{¶10} Juv. R. 29(D) governs admissions in the juvenile court:

{¶11} "The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

{¶12} "(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

{¶13} "(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing."

{¶14} In a juvenile delinquency case, the preferred practice is strict compliance with Juvenile Rule 29(D*). In re C.S.*, 115 Ohio St.3d 267, 874 N.E.2d 1177, 2007-Ohio-4919, ¶113. However, if the trial court substantially complies with Juv. R. 29(D) in accepting an admission from a juvenile, the plea is deemed voluntary absent a showing of prejudice or a showing that the totality of the circumstances does not support a finding of a valid waiver. Id. Substantial compliance for purposes of juvenile delinquency proceedings means that under the totality of the circumstances, the juvenile subjectively understood the implications of his plea. Id.

{¶15} In the instant case, the following colloquy occurred between the court and appellant:

{¶16} "THE COURT: Thank you. And David, your attorney indicates you're going to be pleading true today to the remaining charge of Escape. I've been presented with your Rule 29, that you have signed. I'm need [sic] to go over those rights briefly. You are here for a Pre-trial, you have a right to have this set for a trial. You have a right to subpoena any witnesses to testify on your behave (sic). You have the right to cross examine witnesses the State would present. You also, have the right to remain silent. Do you understand those rights?

{¶17} "JUVENILE: Yes, ma'am.

{¶18} "THE COURT: You understand that by pleading true today, you're waving (sic) those rights and there will be no trial?

{¶19} "JUVENILE: Yes, ma'am.

{¶20} "THE COURT: And if you plead true today, possibly disposition could be incarceration at the Ohio Department of Youth Services for a minimum period of six (6) months but you could be help [sic] up to the age of twenty-one (21). Do you understand that?

{¶21} "JUVENILE: (Inaudible).

{¶22} "THE COURT: Alright. Then given that, how do you plead to one count of Escape, a felony three (F3)?

{¶23} "JUVENILE: True.

{¶24} "THE COURT: Did anyone force you to plead true today?

{¶25} "JUVENILE: No, ma'am.

{¶26} "THE COURT: Did anyone promise you anything?

{¶27} "JUVENILE: No, ma'am.

{¶28} "THE COURT: Alright. I'll accept your true plea. You're found to be a juvenile delinquent." Tr. 3-5.

{¶29} We first address the state's argument that appellant has waived all but plain error by failing to object on the record to the plea colloquy and failing to file an objection to the magistrate's decision pursuant to Juv. R. 40(E)(3)(d).

{¶30} This Court has previously held that based on the U.S. Supreme Court's interpretation of Fed. Rules Cr. Proc. Rule 11, the federal rule governing pleas by adults in the federal courts, a juvenile who fails to object to the plea process has the burden to demonstrate plain error. *In re Marquise Smith*, Richland App. No. 2004-CA-64, 2005-Ohio-1434, ¶11, citing *United States v. Vonn* (2002), 535 U.S. 55, 122 S. Ct. 1043,

1046, 152 L.Ed.2d 90. To demonstrate plain error, we have held that the juvenile must show a reasonable probability that but for the error, he would not have entered the plea. Id. at ¶10, citing *U.S. v. Dominguez-Benitez* (2004), 542 U.S. 75, 124 S. Ct. 2333, 2340, 159 L.Ed.2d 157. We reiterated this standard of review in *In re: Corey Spears*, Licking App. No. 2005-CA-93, 2006-Ohio-1920, ¶35-36.

{¶31} However, when the Ohio Supreme Court reversed this Court's decision in *Spears,* in which we found that the juvenile had validly waived counsel, the Ohio Supreme Court did not use a plain error standard of review. *In re C.S*., supra. The Supreme Court did not expressly state that this Court erred in requiring the juvenile to demonstrate plain error based on his failure to object on Juv. R. 29(D) grounds in the trial court, but the Ohio Supreme Court defined the standard of review as whether, under the totality of the circumstances, the juvenile subjectively understood the implications of his plea. *In re C.S*., ¶113.

{¶32} We are troubled by the concept of requiring a juvenile to object to the plea proceedings to preserve the error for appeal. The purpose of Juv. R. 29(D) is to satisfy the court that the admission of a juvenile is made voluntarily with an understanding of the nature of the allegations and the consequences of the admission, and with an understanding of the rights being waived by entering the admission. Id. at ¶111. Underlying the Rule is a presumption that the juvenile entering the plea may not understand the implications of the plea he is entering. If the juvenile does not understand these rights, he does not know to object to the fact that the court did not inform him of the rights he is waiving, the nature of the allegations he is facing and the implications of the plea.

{¶33} The Ohio Supreme Court has considered an analogous issue in *State v. Campbell*, 90 Ohio St.3d 320, 738 N.E.2d 1178, 2000-Ohio-183. In *Campbell,* the trial court failed to advise the defendant of his right to allocution pursuant to Crim. R. 32(A)(1). The state contended that the defendant's failure to object at the sentencing hearing waived the issue, and error would, therefore, be cognizable only if it amounted to plain error. The Ohio Supreme Court held that, in this context, the doctrine of waiver was inapplicable because the rule did not merely give the defendant a right to allocution, it imposed an affirmative requirement on the trial court to ask the defendant if he or she wished to exercise that right. Id. at 324. The use of the word "shall" in a rule or statute connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary. Id. at 325, citing *State v. Golphin*, 81 Ohio St.3d 543, 545-546, 692 N.E.2d 608, 611, 1998-Ohio-336.

{¶34} Juv. R. 29(D) provides that the juvenile court "shall not accept an admission" without determining that the juvenile understands the implications of the plea. Like the language in Crim R. 32(A)(1), the use of the word "shall" connotes the imposition of a mandatory obligation on the court which cannot be waived by a failure to object. We, therefore, conclude that appellant has not waived all but plain error by his failure to object, and the appropriate standard of review to apply is that set forth in *In re C.S.*: whether the trial court substantially complied with Juv. R. 29(D), meaning that under the totality of the circumstances, the appellant subjectively understood the implications of his plea. *In re C.S.* at ¶113.

{¶35} Juv. R. 40(D)(3)(b)(iv) provides that, except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any finding or

conclusion of a magistrate unless the party has filed an objection to that finding or conclusion. In this case, appellant did not object to the magistrate's finding that he was delinquent based upon his admission. However, in *In Re: C.S.,* supra, the juvenile and his mother were informed of their right to object to the magistrate's decision and acknowledged receipt of the magistrate's decision. 115 Ohio St.3d at ¶62. They waived objections and consented to the magistrate's decision. Id. While the Ohio Supreme Court did not discuss the issue of the juvenile's failure to object, as discussed earlier the court did not require the juvenile to demonstrate plain error. For the reason stated in our discussion concerning appellant's failure to enter an objection on the record at the plea hearing, we find appellant has not waived his right to raise all but plain error for failing to file objections to the magistrate's decision.

{¶36} Further, we reject the state's argument that appellant was required to move to withdraw his plea to preserve the error for review. The state relies on *In re Bice*, Clermont App. No. CA2001-01-008, 2001-Ohio-8660, where the Twelfth District found the appellant failed to preserve a Juv. R. 29(D) claim for appeal because he did not attempt to withdraw his admission before the trial court, citing the Eighth District case of *In re Nicholson* (1999), 132 Ohio App.3d 303, 724 N.E.2d 1217. However, the Twelfth District later distinguished *Bice* in *In Re: Ashley Ratliff*, Clermont App. No. CA2001-03-033, 2002-Ohio-2070, on the basis that, because the trial court never addressed appellant [Ratliff] and asked her if she admitted the offense, there was not a valid plea. Therefore, there was no waiver for failure to seek a withdrawal of an admission that was never made. Id. at 7. The court never addressed the juvenile to determine whether she understood the nature of the allegations and the consequences

of entering an admission and the court never directly asked her if she admitted to the offense. Id. The court failed to comply with the requirements of Juv. R. 29(D), requiring reversal of the adjudication of delinquency. Id. at 7-8.

{¶37} If the record demonstrates the alleged error in the Juv. R. 29(D) colloquy resulting in an invalid plea, we see no reason to require the juvenile to first seek to withdraw the admission in the trial court before raising the issue on direct appeal. While a juvenile could move to withdraw a plea for failing to substantially comply with Juv. R. 29(D), the juvenile does not lose his right to appeal this issue by failing to move to withdraw his admission.

{¶38} We further reject the state's claims that we can infer appellant understood the charges against him and the rights he was waiving because he was represented by counsel and signed a written waiver form. Representations by the defendant's attorney that the juvenile understood the rights waived and the consequences of the plea are not enough to demonstrate a voluntary and knowing waiver. *In re Flynn* (1995), 101 Ohio App.3d 778, 783, 656 N.E.2d 737. A written waiver form is not a substitute for the court's duty to personally address the juvenile. *In re Royal* (1999), 132 Ohio App.3d 496, 504, 725 N.E.2d 685.

{¶39} Appellant argues that the court failed to determine that he understood the nature of the charge against him.

{¶40} Juv. R. 29(D)(1) specifically requires the court to determine that the party making the admission understands the nature of the allegations and the consequences of the admission. This Court has previously held that a court fails to substantially comply with the rule when the court fails to review the charge with the appellant. *In the*

Matter Of: Amanda Pritchard, Tuscarawas App. No. 2001AP080078, 2002-Ohio-1664. In *In re Beechler* (1996), 115 Ohio App.3d 567, 572, 685 N.E.2d 1257, the Fourth District Court of Appeals found that the trial court did not substantially comply with Juv. R. 29(D) when the court failed to make any inquiry whatsoever into whether the juvenile understood the charges against him or the possible penalties resulting from the admission. The Seventh District has determined that when the trial court explains the possible sentence arising out of an admission but does not read the complaint into the record nor ask the juvenile if he understands the nature of the charge against him, the court fails to substantially comply with Juv. R. 29(D)(1). *In re: Darrell Clark*, (May 12, 1999), Mahoning App. No. 96 CA 163, unreported. See also *In Re: S.M.*, Cuyahoga App. No. 91408, 2008-Ohio-6852, ¶14 (trial court did not review the elements of felonious assault with juvenile or inquire whether he understood the nature of the charge, therefore the totality of the circumstances did not support a finding of a valid waiver).

{¶41} In the instant case, the magistrate did not ask appellant whether he understood the charge against him, nor did the magistrate read the complaint into the record at the plea hearing. The magistrate did not review the elements of the charge with the juvenile. The state argues that the appellant was before the court for a review hearing in May 2008, and, at that time, part of his non-compliance with the court's prior orders appears to have been appellant's plan to escape from the CCF. The state argues that when appellant fled the CCF in September of 2008, it may be inferred from the record that he was aware that this behavior constituted escape. However, Juv. R. 29(D)(1) places on the court the responsibility to ensure that the juvenile understands

the nature of the charges against him at the time he enters the plea. At the time of the May hearing, appellant had not yet been charged with escape. We cannot infer that appellant understood the nature of the allegations against him at the time he entered the plea from information presented at a hearing prior to the conduct giving rise to the complaint. The trial court failed to substantially comply with Juv. R. 29(D)(1) by failing to inform appellant of the nature of the charge against him and failing to ask appellant if he understood the charge against him.

{¶42} Because we find that the trial court did not substantially comply with Juv. R. 29(D)(1), and the plea was therefore not knowingly and voluntarily made, we need not reach appellant's claim that the trial court did not advise him of the right to have the state prove the charges against him beyond a reasonable doubt.

{¶43} The first assignment of error is sustained.

II, III

{¶44} Appellant's second and third assignments of error are rendered moot by our disposition of assignment of error number one.

{¶45} The judgment of the Stark County Court of Common Pleas, Juvenile Division, is reversed. This case is remanded to that court for further proceedings according to law, consistent with this opinion.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0430

[Cite as *In re David G.*, 2009-Ohio-4002.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF: DAVID G. (Minor Child)	:	JUDGMENT ENTRY
	:	CASE NO. 2008 CA 00243 and 2008 CA 00244

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Juvenile Division, is reversed and remanded to the trial court for further proceedings. Costs assessed to appellee.

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JUDGES