

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: M.H.

A MINOR CHILD

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JUDGES:

Hon. William B. Hoffman, P.J.

Hon. W. Scott Gwin, J.

Hon. Sheila G. Farmer, J.

Case No. 14-CA-10

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas of Licking County, Juvenile
Division, Case No. A2013-0083

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

December 18, 2014

APPEARANCES:

For Appellant

CHARLYN BOHLAND
Assistant Public Defender
250 East Broad Street
Suite 1400
Columbus, OH 43215

For Appellee

Kenneth W. Oswalt
Licking County Prosecutor

By: JUSTIN T. RADIC
20 South Second Street
Fourth Floor
Newark, OH 43055

Hoffman, P.J.

{¶1} On February 20, 2013, a complaint was filed alleging Appellant, M.H., a thirteen year old, to be delinquent for committing two counts of assault in violation of R.C. 2903.13, felonies of the fifth degree if committed by an adult.

{¶2} On March 5, 2013, Appellant filed a motion to evaluate competency to stand trial. A hearing before a magistrate was held on May 6, 2013. By judgment entry filed May 8, 2013, the trial court approved and adopted the magistrate's May 6, 2013 decision, finding Appellant was incompetent to stand trial but restorable, and ordering him to participate in residential competency attainment services. Appellant was sent to Boy's Village Network.

{¶3} Follow-up hearings on Appellant's competency, both oral and non-oral, were held on August 19, and September 30, 2013, with services to restore his competency to continue. Another hearing was held on November 19, 2013, wherein Appellant was found to be competent. By judgment entry filed November 20, 2013, the trial court approved and adopted the magistrate's November 19, 2013 decision, finding Appellant to be competent to stand trial.

{¶4} An adjudicatory hearing before a magistrate was held on December 10, 2013. By judgment entry filed December 11, 2013, the trial court approved and adopted the magistrate's December 10, 2013 decision, adjudicating Appellant delinquent for committing two counts of assault.

{¶5} A dispositional hearing before a magistrate was held on January 10, 2014. By judgment entry filed January 15, 2014, the trial court approved and adopted the magistrate's January 14, 2014 amended decision, committing Appellant to the Ohio

Department of Youth Services for a minimum period of six months, maximum to his twenty-first birthday.

{¶6} Appellant filed objections to the disposition on January 29, 2014. By judgment entry filed February 4, 2014, the trial court denied the objections.

{¶7} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶8} "M.H. WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW WHEN HE WAS HELD IN RESIDENTIAL TREATMENT FOR COMPETENCY ATTAINMENT PAST THE MAXIMUM STATUTORY LIMIT, IN VIOLATION R.C. 21452.59; THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION; AND; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

II

{¶9} "M.H. WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW WHEN THE COMPETENCY ASSESSMENT REPORT DID NOT CONFORM TO THE STATUTORY REQUIREMENTS, IN VIOLATION OF R.C. 2152.56(A); THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION; AND, ARTICLE I, SECTION 16, OHIO CONSTITUTION."

III

{¶10} "THE JUVENILE COURT ERRED WHEN IT ALLOWED M.H. PROCEED TO TRIAL WHEN HE WAS INCOMPETENT, IN VIOLATION OF R.C. 2152.51; THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; AND, ARTICLE I, SECTION 16, OHIO CONSTITUTION."

IV

{¶11} "M.H. WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; AND, ARTICLE I, SECTION 10, OHIO CONSTITUTION."

I

{¶12} Appellant claims the trial court erred in holding him in residential treatment for competency attainment past the maximum statutory time limit in violation of R.C. 2152.59. While we agree, we find such did not rise to the level of plain error.

{¶13} Appellant was charged with two counts of assault in violation of R.C. 2903.13, felonies of the fifth degree if committed by an adult. On March 5, 2013, Appellant filed a motion to evaluate competency to stand trial. During a hearing before a magistrate on May 6, 2013, the magistrate stated the following (May 6, 2013 T. at 8):

THE COURT: All right. Then based on the stipulation of the parties, I do accept the finding of Dr. Miller, that [M.H.] is not competent at this point; but that there is at least a possibility, if he's placed in inpatient residential treatment, that we can have his competency restored within six month. So what I'm going to be doing is continuing the case pursuant to statute.

And we now need to move on to what's going to be the situation with [M.H.] between now and the time that hopefully we have his competency restored. I guess - - Well, I'll go ahead and indicate my understanding of the agreement.

It's my understanding, Mr. Miller, that Children Services is willing to accept competency or, accept custody of [M.H.] for the time being to help facilitate his placement at Boy's Village, that you believe Boy's Village would be an appropriate placement for [M.H.] to be placed to work on regaining his competency and - - as well as working on his mental health in general. You believe that placement with Children Services would help facilitate - - make sure all the bureaucratic issues are taken care of, but also to help make sure that the program is properly funded.

{¶14} By decision filed same date, the magistrate placed Appellant in the temporary custody of the Licking County Department of Job and Family Services for placement at Boy's Village Network to restore him to competency and to address his competency generally.¹ The trial court approved and adopted this decision on May 8, 2013.

{¶15} R.C. 2152.59 governs proceedings after determination of competency or incompetency. Subsection (D)(2)(b) states:

(D) The competency attainment services provided to a child shall be based on a competency attainment plan described in division (E)(2) of this section and approved by the court. Services are subject to the following conditions and time periods measured from the date the court approves the plan:

¹We note appellate counsel failed to prepare a legible magistrate's decision per Loc.R. 9(A)(1)(a) of the Fifth Appellate Judicial District.

(2) No child shall be required to participate in competency attainment services for longer than is required for the child to attain competency. The following maximum periods of participation apply:

(b) If a child is ordered to receive competency attainment services that are provided in a residential setting that is operated solely or in part for the purpose of providing competency attainment services, the child shall not participate in those services for a period exceeding forty-five calendar days if the child is charged with an act that would be a misdemeanor if committed by an adult, three months if the child is charged with an act that would be a felony of the third, fourth, or fifth degree if committed by an adult, six months if the child is charged with an act that would be a felony of the first or second degree if committed by an adult, or one year if the child is charged with an act that would be aggravated murder or murder if committed by an adult.

{¶16} The state argues subsection (D)(2)(c) applies:

(c) If a child is ordered into a residential, detention, or other secured setting for reasons other than to participate in competency attainment services and is also ordered to participate in competency attainment services concurrently, the child shall participate in the competency attainment services for not longer than the relevant period set forth in division (D)(2)(a) of this section.

{¶17} Subsection (D)(2)(a) states:

(a) If a child is ordered to participate in competency attainment services that are provided outside of a residential setting, the child shall not participate in those services for a period exceeding three months if the child is charged with an act that would be a misdemeanor if committed by an adult, six months if the child is charged with an act that would be a felony of the third, fourth, or fifth degree if committed by an adult, or one year if the child is charged with an act that would be a felony of the first or second degree, aggravated murder, or murder if committed by an adult.

{¶18} In support of its argument, the state claims the treatment plan was for competency restoration as well as working on appellant's mental health in general. From our review of the competency hearing transcript (May 6, 2013), the sole issue stipulated to by both the state and Appellant, was the evaluation performed by clinical psychologist, Cecil Miller, Ph.D., and the need for competency restoration. Even the follow-up three month hearing review held on August 19, 2013, spoke only to competency restoration. August 19, 2013 T. at 4. The same with a four month non-oral hearing review on September 30, 2013. See, Magistrate's Order filed October 1, 2013. Dr. Miller's competency report filed April 19, 2013 was limited in scope to the competency restoration issue and was not a mental health treatment plan.

{¶19} The state argues six months was the maximum time limit while Appellant argues three months was the maximum time limit. We note the fact that from the May

6, 2013 competency hearing to the November 19, 2013 final determination on competency, more than six months had lapsed. We find the three month time limit applies.

{¶20} We note Appellant did not file objections to the competency procedures pursuant to Juv.R. 40(D)(3); therefore, this court will rely on the plain error standard of review per Juv.R. 40(D)(3)(b)(iv). In order to prevail under a plain error analysis, Appellant bears the burden of demonstrating that the outcome clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶21} We do not find plain error for two reasons. First, not only did Appellant not object to the placement exceeding three months, he stipulated to Dr. Miller's report and recommendation. To such extent, we find Appellant invited the error. Second, upon the restoration of competency, the state would have been able to refile the charges to which Appellant ultimately admitted.

{¶22} We find no plain error established under these circumstances. Appellant's first assignment of error is overruled.

II.

{¶23} In the second assignment of error, Appellant asserts the trial court erred in accepting a competency report including details of the offense, in violation of R.C. 2152.56(A).

{¶24} R.C. 2152.56(A) reads,

(A) Upon completing an evaluation ordered pursuant to section 2152.53 of the Revised Code, an evaluator shall submit to the court a written competency assessment report. The report shall include the evaluator's opinion as to whether the child, due to mental illness, intellectual disability, or developmental disability, or otherwise due to a lack of mental capacity, is currently incapable of understanding the nature and objective of the proceedings against the child or of assisting in the child's defense. The report shall not include any opinion as to the child's sanity at the time of the alleged offense, details of the alleged offense as reported by the child, or an opinion as to whether the child actually committed the offense or could have been culpable for committing the offense.

R.C. § 2152.56

{¶25} Appellant did not object to the introduction of the report. Therefore, Appellant has waived all but plain error. The record reflects both parties stipulated to both the April 19, 2013 and November 7, 2013 competency evaluations. Any details of the offense contained in the report would be cumulative to the evidence presented at the adjudicatory hearing herein. Therefore, we do not find plain error.

III.

{¶26} In the third assignment of error, Appellant argues the trial court erred in allowing the matter to proceed to trial when Appellant's behavior at trial indicates he was incompetent at the proceedings. Appellant asserts the trial court had a continuing duty

to ensure Appellant was competent during the proceedings. *Drope v. Missouri* 420 U.S. 162, 181, 95 S.Ct. 896 (1975). Appellant asserts his behavior at the December 10, 2013 proceedings should have alerted the court he was not competent. Specifically, Appellant struggled with the decision as to whether to admit the charges or to proceed with the trial. M.H.'s mother and counsel questioned his competency, and M.H. was unable to answer basic questions before the court. The trial court inquired of his competence and proceeded with trial.

{¶27} Appellant did not object to the proceedings going forward, and had already stipulated to the competency report finding him competent to stand trial. The trial court found Appellant emotional, but when calm, aware of the proceedings and capable of assisting in his own defense. Tr. at 15. The trial court was within the best position to assess the behavior and responses of Appellant. We do not find the trial court erred by proceeding with the case.

{¶28} The third assignment of error is overruled.

IV.

{¶29} Appellant's fourth assignment of error asserts he was denied the effective assistance of trial counsel.

{¶30} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538

N.E.2d 373 (1989). In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶31} Appellant has not demonstrated the outcome of the trial would have been different but for the alleged errors of trial counsel. R.C. 2152.59(H)(3) would allow the State to refile the complaint herein once Appellant regained competency. Accordingly, the result of the proceedings would have been the same. Appellant cannot now claim his due process rights have been violated.

{¶32} The fourth assignment of error is overruled.

{¶33} The judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, P.J.

Gwin, J. concurs

Farmer, J. dissents

Gwin, J., concurs separately

{¶34} I concur with the author's conclusions in this case. However, I disagree with his finding that "the three month time limit applies." ¶19.

{¶35} In the case at bar, appellant was in custody for an alleged assault. He was detained in a residential, detention, or other secured setting by the magistrate's order on February 27, 2013. In fact, appellant was placed in the temporary custody of the Department of Human Services. This was before the competency evaluation was ordered by the court on March 6, 2013.

{¶36} R.C. 2152.59(D)(2) provides,

(c) If a child is ordered into a *residential, detention, or other secured setting for reasons other than to participate in competency attainment services* and is also ordered to participate in competency attainment services concurrently, the child shall participate in the competency attainment services for not longer than the relevant period set forth in division (D)(2)(a) of this section.

(Emphasis added). Because appellant was held on the assault charge, I would find that appellant was being held in a *residential, detention, or other secured setting* for reasons other than to participate in competency attainment services and, therefore, he could properly be ordered to participate in competency attainment services for six months, rather than three months. I would further find that appellant's dismissal from Boy's Village on June 23, 2013 until his acceptance into Osterlean residential treatment center

on July 3, 2013 acted as a tolling event for purposes of computing time under R.C. 2152.59.

Farmer, J., dissents

{¶37} I respectfully dissent from the majority's opinion that holding appellant past the maximum statutory limit for competency attainment in violation of R.C. 2152.59 did not rise to the level of plain error.

{¶38} I find the statutory time limits of R.C. 2152.59(D)(2)(b) to be jurisdictional. The outcome would have been different as the charges would have been dismissed after the three month period. While the state would have been able to refile the charges, it is not our position to second-guess what the state would have chosen to do.

{¶39} I would remand the case for dismissal of the two assault counts.

[Cite as *In re M.H.*, 2014-Ohio-5652.]