[Cite as *In re K.A.*, 2013-Ohio-3847.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re K.A.

Court of Appeals No. L-12-1334

Trial Court No. 12221953

DECISION AND JUDGMENT

Decided: August 30, 2013

* * * * *

Timothy Young, State Public Defender, and Brooke M. Burns, Assistant State Public Defender, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and Thomas E. Puffenberger, Assistant Prosecuting Attorney, for appellee.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, Juvenile Division, finding that appellant, K.A., was not entitled to a reduction in

the period of his institutionalization for 121 days that he was confined at the Youth Treatment Center ("YTC"). For the reasons that follow, we reverse.

I. Factual Background

{¶ 2} On March 5, 2012, a complaint was filed in the Lucas County Court of Common Pleas, Juvenile Division, alleging that appellant, K.A., then 16 years old, was delinquent of aggravated robbery in violation of R.C. 2911.01, a felony of the first degree if committed by an adult. K.A. was tried and found delinquent of that charge on May 18, 2012. The juvenile court referred him to YTC, a community corrections facility, for an assessment pending disposition. On May 24, 2012, the court placed K.A. on probation and committed him to the Ohio Department of Youth Services ("DYS") for one year, maximum of his 21st birthday, stayed on the condition that he "cooperate, participate, and obey all program terms and conditions" at YTC.

{¶ 3} On October 25, 2012, the juvenile court adjudicated K.A. delinquent of a probation violation for violating YTC rules. It rescinded K.A.'s probation and imposed his stayed commitment to DYS. The court credited K.A. with 86 days of detention credit under R.C. 2152.18(B), but did not credit K.A. for the total number of days he was confined at YTC. This appeal arises out of the court's October 25, 2012 judgment and, more specifically, from the court's refusal to credit K.A. for the total time he spent at YTC.

{¶ 4} Before September 28, 2012, under R.C. 2152.18(B), a youth committed to DYS was entitled to a credit for days he or she was "held in detention." "Detention" is

defined in R.C. 2151.011(B)(14) as "the temporary care of children *pending court adjudication or disposition, or execution of a court order*, in a public or private facility designed to physically restrict the movement and activities of children." (Emphasis added.) This meant that in a situation like K.A.'s, where the youth is held for a reason other than to await court adjudication or disposition of his original delinquency complaint, no credit would be given for those days.

{¶ 5} However, on September 28, 2012, the Ohio General Assembly passed 2012 Am.Sub.S.B. No. 337 which, among other things, amended R.C. 2152.18(B) to remove the phrase "held in detention," and replace it with the word "confined." "Confinement" has been defined by the Ohio Supreme Court as time spent at any facility in which a person is "not free to come and go as he wishe[s]." *State v. Napier*, 93 Ohio St.3d 646, 648, 758 N.E.2d 1127 (2001). The effect of this amendment was to broaden the circumstances under which a youth will receive credit against his or her term of institutionalization. If applicable to K.A.'s case, the amendment would require that K.A. be credited with the total number of days he was confined, which would include the days he was in treatment at YTC.

{¶ 6} When K.A.'s probation was rescinded and the commitment was imposed on October 25, 2012, his attorney told the court that he believed that under S.B. 337, K.A. may be entitled to credit for the days that he was confined at YTC. The court indicated that that was something they would need to determine, however, K.A.'s attorney never

raised the issue with the court again. K.A. did not receive credit for 121 days that he spent at YTC.

{¶ 7} K.A. timely appealed the court's October 25, 2012 entry, seeking to reduce his commitment by an additional 121 days. While the appeal was pending, we granted K.A.'s request for a limited remand, allowing the juvenile court to consider K.A.'s motion to vacate or in the alternative, for relief from judgment under Civ.R. 60(B), filed in the juvenile court on February 20, 2013. *In re K.A.*, 6th Dist. Lucas No. L-12-1334 (Mar. 20, 2013). The juvenile court denied K.A.'s motion on March 26, 2013, finding that the amendments to R.C. 2152.18(B) did not indicate that they were to be retroactively applied and refusing to credit K.A. with the days he was confined at YTC.

{¶ 8} K.A. assigns two errors for our review:

> ASSIGNMENT OF ERROR NO. I: The juvenile court committed plain error when it failed to grant [K.A.] detention credit for the total amount of time he was confined at Youth Treatment Center relative to his offense. R.C. 2152.18(B); Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (A-1).
>
> ASSIGNMENT OF ERROR NO. II: [K.A.] was denied the effective assistance of counsel when his attorney failed to object to the juvenile court's failure to grant [K.A.] detention credit for the total amount of time he was confined at Youth Treatment Center relative to the offense.

Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (A-1).

{¶ 9} For the following reasons, we find K.A.'s first assignment of error well-taken. Because of our disposition of his first assignment of error, we need not reach his second assignment of error.

II. Standard of Review

{¶ 10} Generally, an appellate court will not reverse the decision of a juvenile court on appeal unless the juvenile court exceeds the statutory sentencing guidelines or abuses its discretion. *In re William H.*, 105 Ohio App. 3d 761, 767-68, 664 N.E.2d 1361, 1365 (6th Dist.1995). *See also In re Richardson*, 7th Dist. Mahoning No. 01 CA 78, 2002-Ohio-3461, ¶ 13. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} Where no objection is made in the juvenile court to the length of a juvenile's commitment, an appellate court will review the juvenile court's disposition only for plain error. *In re L.B.B.*, 12th Dist. Butler No. CA2012-01-011, 2012-Ohio-4641, ¶ 8, *motion to certify allowed*, 134 Ohio St. 3d 1446, 2013-Ohio-347, 982 N.E.2d 726. "Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

"'Plain error does not exist unless it can be said that but for the error, the outcome * * * would clearly have been otherwise.'" *Id.*, quoting *State v. Biros*, 78 Ohio St.3d 426, 436, 678 N.E.2d 891 (1997).

III. Analysis

{¶ 12} R.C. 2152.18(B), as amended by S.B. 337, now provides:

> When a juvenile court commits a delinquent child to the custody of the department of youth services pursuant to this chapter, the court shall state in the order of commitment the total number of days that the child has been *confined* in connection with the delinquent child complaint upon which the order of commitment is based. The court shall not include days that the child has been under electronic monitoring or house arrest or days that the child has been *confined* in a halfway house. The department shall reduce the minimum period of institutionalization that was ordered by both the total number of days that the child has been so *confined* as stated by the court in the order of commitment and the total number of any additional days that the child has been *confined* subsequent to the order of commitment but prior to the transfer of physical custody of the child to the department. (Emphasis added.)

{¶ 13} The state agrees that following S.B. 337, a youth is entitled to receive credit for all time during which he was confined and not just the days he was detained pending court adjudication or disposition, or awaiting execution of a final court order.

The parties' disagreement centers around whether K.A. is entitled to the benefit of this amendment.

{¶ 14} Under R.C. 1.58 (B), "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, *if not already imposed*, shall be imposed according to the statute as amended." (Emphasis added.) The question, therefore, is when K.A.'s punishment was "imposed": Was it on May 24, 2012, when the court committed K.A. to DYS for one-year, staying that commitment on the condition that he cooperate, participate, and obey all YTC terms and conditions, or was it October 25, 2012, after K.A. was found to have violated the terms of his probation, when the court rescinded the stay and invoked K.A.'s one-year commitment to DYS?

{¶ 15} Relying on *State v. Grenoble*, 12th Dist. Preble No. CA2012-01-001, 2012-Ohio-5961, the state argues that R.C. 1.58(B) does not apply when a stay is lifted because the court is simply executing a sentence that had already been imposed. In *Grenoble*, the defendant had been granted a stay of execution of sentence pending the appeal of his conviction. While the appeal was pending, 2011 Am.H.B. No. 86 went into effect, altering Ohio's sentencing statutes. After his conviction was upheld, the state asked that the stay of defendant's sentence be lifted. Defendant moved to modify his sentence, arguing that he should receive the benefit of H.B. 86, which would have reduced his sentence. The Twelfth District Court of Appeals denied defendant's motion, holding that even though defendant's sentence was stayed pending appeal, it was nonetheless final

when it was originally imposed. Because his sentence predated the effective date of H.B. 86, the amendments did not alter the defendant's sentence.

{¶ 16} The state's position in the present case is that K.A.'s commitment was imposed on May 24, 2012, before S.B. 337 was passed, the former version of the statute is applicable, and K.A. is entitled to a credit for only the days he was "detained."

{¶ 17} K.A. argues that R.C. 2152.18(B) is not triggered until the child is physically transferred to DYS, therefore, credit must be provided in accordance with the terms of the statute as they appear on the date that the youth is physically transferred to DYS. As support, K.A. cites *In re Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, and the provision of the statute that indicates that credit against DYS commitment continues to accumulate between the time the court issues the order of commitment and the time the child is actually placed in DYS's custody.

{¶ 18} We agree with K.A. that the amended statute should have been applied. Various courts, including this court, have considered this issue in a similar context. For instance, in *State v. Marshall*, 6th Dist. Erie No. E-12-022, 2013-Ohio-1481, defendant was indicted on a second-degree burglary charge in 2008, entered a guilty plea to a lesser charge, and was sentenced to a four-year community control sanction. The trial court explained to defendant that if he violated the terms of community control, a prison term of four years would be imposed. In 2012, defendant admitted violating the terms of community control and the trial court imposed the four-year prison term as promised. Defendant argued that he could be sentenced to only three years because in 2011, H.B. 86

reduced the maximum penalty for the offense to three years. We agreed with defendant and with several other appellate districts that have held that a prison sentence is not imposed until community control is revoked. *See also State v. Nistlebeck*, 10th Dist. Franklin No. 11AP-874, 2012-Ohio-1765; *State v. Fisher*, 5th Dist. Stark No. 2012CA00031, 2013-Ohio-2081; *State v. Gibson*, 2d Dist. Champaign No. 2012-CA-38, 2013-Ohio-2930. *But see State v. Radcliff*, 5th Dist. Delaware No. 02-CAA01004, 2002-Ohio-1837 (holding that two-year term of imprisonment following revocation of probation was not a new sentence, but a reimposition of original sentence).

{¶ 19} We believe the same reasoning in *Marshall* should be applied here. Although the court informed K.A. that he would be committed to DYS for one year if he did not cooperate, participate, and obey YTC's terms and conditions, he was not so committed until he was found to have violated those rules and the stay was rescinded. In effect, the juvenile court delayed imposition of K.A.'s commitment to DYS.

{¶ 20} *In re Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, provides support for our conclusion. Like the present case, the Ohio Supreme Court in *In re Thomas* considered whether, under the pre-S.B. 337 statute, two youths (Burford and Thomas) were entitled to credit for days spent at a treatment or rehabilitation facility. There, the juvenile court committed Buford to DYS for a minimum period of six months and a maximum period lasting until she turned 21. The court suspended the commitment and placed her on probation. She violated probation and was placed at YTC. After violating YTC rules, she was found to be delinquent of violating probation. As described

by the court, "the juvenile court *then imposed* her previously suspended commitment to DYS for her violation of the court's prior order in regard to probation." (Emphasis added.) *Id.* at ¶ 3. The language selected by the court indicates that the commitment was "imposed" after the probation violation was established. Because R.C. 1.58(B) provides that the amended statute with the lesser penalty will apply if a penalty was "not already imposed," K.A. was entitled to credit against his period of institutionalization as set forth in the post-S.B. 337 version of R.C. 2152.18(B).

{¶ 21} This case is different than *Grenoble,* 12th Dist. Preble No. CA2012-01-001, 2012-Ohio-5961, where defendant's sentence was stayed while the appellate court considered the validity of the underlying conviction. There the sentence was imposed before the statute was amended, but defendant's incarceration was postponed until the appellate court completed its review of his appeal. Moreover, in *Grenoble,* defendant was granted credit for time served and was not required to serve a sentence in excess of that originally imposed. Were we to uphold the denial of credit to K.A. for his days spent at YTC, we would essentially be extending his commitment from 12 months to 16 months.

{¶ 22} We, therefore, find K.A.'s first assignment of error well-taken. The version of the statute applicable at the time the court rescinded the stay of his DYS commitment should have been applied, and the juvenile court's decision to apply the pre-amendment version was plain error. Because of our disposition of K.A.'s first assignment of error, it is unnecessary for us to reach his second assignment of error.

IV. Conclusion

{¶ 23} We find K.A.'s first assignment of error well-taken. Under R.C. 2152.18(B), as amended before the stay of his commitment was rescinded, K.A. was entitled to credit of an additional 121 days for the time he was confined at YTC. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is reversed and the matter is remanded to the juvenile court to amend its October 24, 2012 judgment entry to include credit to K.A. for all days he was confined at YTC in connection with case No. 12221953. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE