[Cite as *In re A.T.*, 2014-Ohio-1761.]

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

In re A.T.

Court of Appeals Nos. OT-12-023
OT-12-030

Trial Court No. 21020434

DECISION AND JUDGMENT

Decided: April 25, 2014

* * * * *

Timothy Young, State Public Defender, and Charlyn Bohland, Assistant State Public Defender, for appellant.

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and Emily M. Gerber, Assistant Prosecuting Attorney, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This case presents consolidated appeals by appellant, A.T., a minor, from judgments of the Ottawa County Juvenile Court in delinquency proceedings against him. In appeal No. OT-12-030, A.T. appeals a juvenile court judgment of adjudication and

disposition journalized on August 22, 2011. Under the judgment, A.T. was found to be a delinquent child for committing rape, a violation of R.C. 2907.02(A)(1)(B) and felony of the first degree if committed by an adult.

{¶ 2} The judgment ordered appellant committed to the legal custody of the Ohio Department of Youth Services ("DYS") for an indefinite term consisting of a minimum period of one to three years and a maximum period not to exceed the child's attainment of 21 years of age but stayed commitment to DYS on conditions enumerated in the judgment. The court ordered appellant to serve three days in the Juvenile Detention Facility and thereafter to be transported to the Juvenile Residential Center of Northwest Ohio to begin treatment. The judgment also provided that should appellant fail to comply with the conditions for the stay (as enumerated in the judgment), the court may reinstate the commitment to DYS.

{¶ 3} In appeal No. OT-12-023, A.T. appeals a juvenile court judgment journalized on July 26, 2012, and amended by a judgment filed on August 2, 2012. In the July 26, 2012 judgment, the juvenile court found that appellant failed to successfully complete all treatment at the Juvenile Residential Center of Northwest Ohio and ordered appellant committed to DYS for a minimum period of one to three years and a maximum period not to exceed the child's attainment of 21 years of age. In the August 2, 2012 judgment, the juvenile court amended the July 26 judgment to modify the minimum period of commitment to DYS. The court modified the commitment to DYS to a minimum period of two years.

{¶ 4} A.T. asserts seven assignments of error on appeal:

Assignment of Error 1. [A.T.] * * * was denied his right to due process of law when he was ordered to participate in offense based treatment while incompetent and before he was adjudicated delinquent, in violation of R.C. 2945.37, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

Assignment of Error 2. The juvenile court abused its discretion when it found * * * [A.T.] * * * competent to stand trial, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution, and R.C. 2945.37.

Assignment of Error 3. The juvenile court erred when it accepted * * * [A.T.'s] * * * admission because the admission was not knowing, voluntary, and intelligent, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Ohio Constitution, Article I, Sections 10 and 16, and Juv.R. 29(D).

Assignment of Error 4. The juvenile court abused its discretion when it issued an amended entry that increased * * * [A.T.'s] * * * commitment and did not accurately reflect what occurred during the disposition hearing.

Assignment of Error No. 5. The juvenile court erred when it committed * * * [A.T.] * * * to DYS for a probation violation when the juvenile court's continuing jurisdiction was not invoked pursuant to Juv.R. 35.

Assignment of Error No. 6. The juvenile court erred when it failed to consider community service in lieu of financial sanctions before ordering * * * [A.T.] * * * to pay court costs, in violation of R.C. 2152.20(D).

Assignment of Error No. 7. [A.T.] * * * was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. (References to the record omitted.)

{¶ 5} On September 9, 2010, the state filed a complaint alleging that A.T., age 14, was a delinquent child for engaging in sexual conduct with a victim less than 13 years of age, which if committed by an adult constitutes rape, a violation of R.C. 2907.02(A)(1)(b) and a first degree felony. The state also filed an additional complaint charging delinquency based upon alleged conduct by A.T., which if committed by an adult would constitute the offense of gross sexual imposition, a violation of R.C. 2907.05(A)(4). The trial court first appointed counsel to represent A.T. on October 13, 2010.

{¶ 6} Counsel for A.T. filed a motion on December 6, 2012, for a competency evaluation, pursuant to R.C. 2945.37(A) and Juv.R. 32(A). In the motion, counsel

requested the trial court appoint an expert to evaluate the competence of A.T. and to hold a hearing on competency after the court received a report from the expert on the issue.

{¶ 7} On December 15, 2010, the court ordered that the Court Diagnostic and Treatment Center conduct an evaluation of A.T. to determine his competency to stand trial. Charlene A. Cassel, Ph.D. of the center examined A.T. on January 13, 2011, and issued a report dated January 27, 2011. The report was filed with juvenile court on February 3, 2011.

{¶ 8} Prior to A.T.'s examination by the Court Diagnostic and Treatment Center, the trial court referred A.T. to The Giving Tree ("Giving Tree") for a diagnostic assessment. The record does not include any court order for the examination by Giving Tree. According to its report, the referral was made by the juvenile court's probation department, who requested that A.T. "be assessed for recommendations regarding sexual offense behavior." The trial court acknowledged receipt of a report on the assessment at the competency hearing conducted on February 14, 2011.

{¶ 9} Giving Tree reported that it conducted a sex-specific diagnostic assessment of A.T. on January 10 and 20, 2011. During the evaluation, A.T. was questioned directly concerning the accusations against him on which the delinquency complaint is based. The report stated that A.T. had been "accused of sexually abusing a 10 year-old female by fondling her breast and genital areas and having her perform felacio on him. He admits to the aforementioned behavior but reports that she made him do these things."

{¶ 10} The Court Diagnostic Center conducted a competency evaluation of A.T. within days of Giving Tree's conducting its assessment. Dr. Cassel stated in her report that it was her opinion within a reasonable degree of psychological certainty that A.T. suffered from various mental disorders that prevented him from "currently understanding the nature and objective of the proceedings against him and presently assisting in his defense."

{¶ 11} The trial court conducted a competency hearing on February 14, 2011. In a judgment filed on that date, the court found that A.T. was unable to understand the nature and objective of the proceedings against him and unable to assist in his defense. Under R.C. 2945.37(G), the findings constitute a determination that A.T. was at that time incompetent to stand trial. Additionally, the court concluded that "that there is a likelihood that * * * [A.T.] * * * may become capable of understanding the nature and objective of proceedings against him and assisting in his defense if provided with treatment."

{¶ 12} In the February 14, 2011 judgment, the trial court ordered A.T. to participate (1) in an evaluation by the Department of Developmental Delays, (2) in home-based counseling services focused on family safety and decreasing aggressive and impulsive behaviors, (3) in a neuropsychological evaluation to help determine the most effective medication to assist with A.T.'s behavioral issues, and (4) in a specialized group for developmentally delayed adolescents with sexual behavior problems. The court also restricted unsupervised contact by A.T. with younger children including A.T.'s younger

brother. In the judgment the court also scheduled a review of competency to proceed at a hearing on June 13, 2011.

{¶ 13} The record discloses that on June 13, 2011, it was agreed to proceed with a new competency evaluation. Gregory E. Forgac, Ph.D., a clinical psychologist at the Court Diagnostic and Treatment Center conducted a second competency evaluation on July 13, 2011. In his report, Dr. Forgac concluded that A.T. was able to understand the nature and objectives of proceedings brought against him and to assist an attorney in his defense.

{¶ 14} The trial court conducted a second competency hearing on August 8, 2011. At the hearing, counsel for the state and for A.T. stipulated to the findings of Dr. Forgac's evaluation. Based upon the stipulation and Dr. Forgac's report, the court ruled at the competency hearing that A.T. was competent to stand trial. The court filed its judgment on competency on August 10, 2011.

{¶ 15} At the hearing, after the court's ruling on competency, counsel for the parties advised the court that A.T. had entered an agreement under which A.T. would admit to the rape charge in exchange for dismissal of all remaining charges. The trial court explained to A.T. the rights that he would give up by making an admission and informed him of the potential consequences he faced by entering an admission. After the colloquy, the court accepted A.T.'s admission and adjudicated A.T. delinquent.

{¶ 16} Disposition proceeded on August 17, 2011. With A.T. in attendance, the trial court pronounced judgment that A.T. be committed to the Ohio Department of

Youth Services for a minimum of one year or until a maximum of age 21. The court stated that the commitment to DYS was suspended and that A.T. would instead receive treatment at the Juvenile Residential Center of Northwest Ohio ("JRCNWO").

{¶ 17} The court stated the suspension of the commitment to DYS and the referral to JRCNWO for treatment was conditional. One condition was that A.T. would successfully complete the treatment program at the Juvenile Residential Center. The court also ordered A.T. to serve 60 days in detention beginning on the date of the hearing, to perform 45 hours of community service and to pay costs. The trial court filed its judgment of disposition on August 22, 2011. The judgment provides for a minimum period of commitment to DYS of one to three years and a maximum period not to exceed the child's attainment of 21 years of age.

{¶ 18} After a hearing on July 25, 2012, the trial court found that A.T. had failed to successfully complete treatment at JRCNWO. In a July 26, 2012 judgment, the court committed A.T. to DYS "for an indefinite term of a minimum period of one (1) to three (3) years and a maximum period not to exceed the child's attainment of twenty-one years (21) of age." In an August 2, 2012 judgment, the court amended its judgment of July 26, 2012, to provide for a commitment to DYS "for a minimum of two (2) years and a maximum period not to exceed the juvenile's attainment of twenty-one (21) years of age."

{¶ 19} Appellant filed notices of appeal of the August 22, 2011 judgment of disposition and of the July 26, 2012 judgment (as amended by a judgment filed on August 2, 2012). We have consolidated the two appeals for proceedings in this court.

Compelled Participation in Sex Offender Assessment and Treatment

{¶ 20} Under assignment of error No. 1, appellant argues that the trial court violated his rights to due process of law and against self-incrimination in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, and R.C. 2945.37 when it ordered him to undergo a sex-specific diagnostic assessment and to participate in sex offender treatment, before he was adjudicated delinquent and while he was incompetent.

{¶ 21} During the sex-specific assessment, The Giving Tree directly questioned A.T. concerning his sexual conduct and specifically about conduct relating to the pending charges against him. During the assessment, A.T. admitted engaging in sexual conduct with the child victim, a 10-year-old girl.

{¶ 22} The Giving Tree recommended in its report that A.T. participate in a sex offender behavioral group. The court considered the recommendation at the competency hearing conducted on February 14, 2011. At the hearing the court determined that A.T. was not competent to stand trial. The court also ordered A.T. to participate in a "specialized group for developmentally delayed adolescents with sexual behavior problems." The record demonstrates that A.T. participated in such counseling at The Giving Tree prior to adjudication.

{¶ 23} Appellant did not object in the trial court to participating in either the sex-specific diagnostic assessment or sex offender counseling. Appellant did not make a Juv.R. 22(D)(3) motion to suppress statements he made in either the diagnostic assessment or in the sex offender treatment program. Accordingly our review of the trial court's judgments ordering the diagnostic assessment and sex offender treatment is limited to plain error. *See State v. Gilbert*, 7th Dist. Mahoning No. 08 MA 206, 2012-Ohio-1165, ¶ 80; *State v. Boyd*, 6th Dist. Lucas No. L-97-1366, 1998 WL 833534, *8 (Dec. 4, 1998).

{¶ 24} The Ohio Supreme Court has identified the standard for noticing plain error:

> First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶ 11, quoting *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16 and *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶ 25} Even where these three prongs are met, notice of plain error is taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest

miscarriage of justice." *Eafford* at ¶ 12, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 26} We consider appellant's challenge on due process grounds first. The requirements of due process apply to juvenile proceedings:

> [T]he United States Supreme Court has stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). At a minimum, juveniles are entitled to proceedings that "measure up to the essentials of due process and fair treatment." *Kent v. United States*, 383 U.S. 541, 562, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 14.

{¶ 27} Ohio recognizes that "juvenile proceedings are fundamentally different from adult criminal trials." *Id.* at ¶ 14, quoting *In re D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 50. With respect to juvenile proceedings, the Ohio Supreme Court has applied a "fundamental-fairness standard in addressing due process concerns holding that a balanced approach is required to preserve the special nature of the juvenile process." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 73; *In re D.H.* at ¶ 48-53.

{¶ 28} In *Renchenski v. Williams*, 622 F.3d 315 (3rd Cir.2010), the United States Court of Appeals for the Third Circuit considered a due process challenge to compelled participation, by an inmate who had not been convicted of a sex offense, in a sex offender

treatment program. The mandatory sex offender therapy included disclosure by the inmate of any history of sexual violence. *Id.* at 321-323. The Third Circuit Court of Appeals held that "only after a prisoner has been afforded due process may sex offender conditions be imposed on an inmate who has not been convicted of a sexual offense." *Id.* at 326.

{¶ 29} In reaching its judgment, the Third Circuit Court of Appeals drew support for its judgment from decisions of the U.S. Courts of Appeals for the Fifth and Eleventh Circuits in *Coleman v. Dretke*, 395 F.3d 216, 222-23 (5th Cir.2004) and *Kirby v. Siegelman*, 195 F.3d 1285, 1287 (11th Cir.1999) on the issue. *Renchenski* at 327-328.

{¶ 30} The sex-specific assessment conducted by Giving Tree of A.T. contained the same type of questioning of A.T. concerning past sexual offenses as the sex offender treatment programs considered in *Renchenski*. The assessment report was admitted into evidence at the competency hearing and includes a detailed summary of admissions by appellant of the conduct on which the delinquency complaint is based. This all occurred prior to adjudication of the delinquency charge against A.T.

{¶ 31} We recognize the need to preserve the special nature of the juvenile process. In our view, however, fundamental fairness requires that due process be provided to a juvenile before the child may be compelled to participate in a sex offender assessment or treatment program that requires disclosure by the child of prior sexual conduct that is the basis of the pending delinquency charge against him or her. That was not done here.

{¶ 32} Appellant also contends that his statements made during the sex-specific diagnostic assessment were compelled, in violation of his Fifth Amendment privilege against self-incrimination. "It is well established that a defendant who is subjected to custodial interrogation must be advised of his or her *Miranda* rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible." *State v. Treesh*, 90 Ohio St.3d 460, 470, 739 N.E.2d 749 (2001). The United States Supreme Court has applied this standard to compelled statements made in a court ordered psychiatric examination. *Estelle v. Smith*, 451 U.S. 454, 469, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *State v. Johnson*, 163 Ohio App.3d 132, 2005-Ohio-4243, 836 N.E.2d 1243, ¶ 62 (10th Dist.).

{¶ 33} Appellant did not file a motion to suppress statements he made during the sex-specific assessment or during sex offender counseling. The record is silent on whether *Miranda* warnings were sought from appellant or provided before questioning and whether, due to A.T.'s incompetency, the issue was addressed to his attorney. Even if we were to assume, due to A.T.'s incompetency, that the questioning at Giving Tree constituted sufficient government compulsion to violate A.T.'s Fifth Amendment rights against self-incrimination, we conclude the third element of plain error has not been met.

{¶ 34} Appellant's due process and Fifth Amendment privilege against self-incrimination claims both fail to meet the third element of the standard for plain error, that the trial court error affected the outcome of trial court proceedings. The record demonstrates that appellant admitted to the same conduct to police during earlier

questioning in the presence of his parents as admitted to Giving Tree. The record does not demonstrate that the trial court considered the statements to Giving Tree either in adjudication or disposition.

{¶ 35} On this record, we conclude that evidence is insufficient to demonstrate that compelling A.T. to participate in the diagnostic assessment and sex offender treatment affected the outcome of delinquency proceedings. Accordingly, we find assignment of error No. 1 not well-taken.

Competency

{¶ 36} Under assignment of error No. 2, appellant contends that the trial court abused its discretion when it found that A.T. was competent to stand trial. Appellant argues that the record does not support a finding of competency.

{¶ 37} Dr. Cassel examined A.T. in January 2011. In her report, Dr. Cassel concluded that at the time of examination A.T. was not competent to stand trial, but that he may become competent in the future. It was Dr. Cassel's opinion that it was likely A.T. would become competent to stand trial if he were provided a course of treatment.

{¶ 38} Appellant contends that nothing changed between Dr. Cassel's examination of A.T. in January 2011 and Dr. Forgac's examination in July 2011. Appellant argues that the only treatment A.T. was provided during the period was sex offender treatment. Appellant contends that such treatment is not designed to assist in restoring competency. Appellant disputes Dr. Forgac's opinion that at the time of examination in July 2011, that

A.T. "was able to understand the nature and objectives of the proceedings which have been brought against him and was able to assist an attorney in his own defense."

{¶ 39} A trial court's finding that a defendant is competent to stand trial will not be reversed on appeal where it is supported by competent, credible evidence in the record. *State v. Williams*, 23 Ohio St.3d 16, 19, 490 N.E.2d 906 (1986); *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 33.

{¶ 40} We have reviewed the record and conclude that Dr. Forgac's report provided competent, credible evidence in the record supporting the trial court's determination that A.T. was competent to stand trial. We defer to the trial court as to the weight to be given Dr. Forgac's opinion on the issue.

{¶ 41} We find assignment of error No. 2 not well-taken.

Admission

{¶ 42} After the court announced its determination that A.T. was competent to stand trial, at the same hearing A.T. advised the court that he had reached an agreement with the state under which he would admit to delinquency on the basis of rape in exchange for dismissal of all remaining charges. Under assignment of error No. 3, appellant contends that the trial court erred when it accepted A.T.'s admission. Appellant contends that the admission was not knowingly, voluntarily and intelligently made and that the court violated Juv.R. 29(D), the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution in accepting the admission.

{¶ 43} "An admission in a juvenile proceeding, pursuant to Juv.R. 29, is analogous to a guilty plea made by an adult pursuant to Crim.R. 11 in that both require that a trial court personally address the defendant on the record with respect to the issues set forth in the rules." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 112, quoting *In re Smith*, 3d Dist. Union No. 14-05-33, 2006-Ohio-2788, ¶ 13.

{¶ 44} Juv. R. 29(D) provides:

> **(D) Initial procedure upon entry of an admission**
>
> 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:
>
> (1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;
>
> (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.
>
> The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.

{¶ 45} The Ohio Supreme Court has ruled that strict compliance with the rule is preferred but "[i]f 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." *In re C.S.* at ¶ 113.

{¶ 46} Before accepting A.T.'s admission to conduct constituting rape, if committed by an adult, the trial court spoke to A.T. directly and conducted a Juv.R. 29 colloquy. The court discussed the proposed admission.

> The Court: All right. Now you were in the courtroom today and you heard the attorneys talk about the fact that you may be willing today to admit to the offense of rape, if committed by an adult, with the understanding that the other cases, the gross sexual imposition, the probation violation, the resisting arrest, the domestic threatening, the disorderly conduct with persistence, the unruly, and the menacing, those cases would be dismissed.

{¶ 47} The court spoke with A.T. and stated that he and the court needed to go through those rights that A.T. would give up were he to make the admission. The court informed A.T. that he would be giving up the right to a trial and the right to require the prosecutor to meet the burden of proving that he had committed the offenses.

{¶ 48} The court explained that if the case proceeded to trial the prosecutor would call witnesses to testify against him and that A.T., through his attorney, would have the right to question the witnesses. The court explained that A.T. would give up the right to question witnesses if he made the admission as well as give up the right to present his

own evidence, including his own right to testify in his own defense. The court explained that appellant had the right not to testify, to remain silent at trial, and that if he chose to remain silent that it would still be the prosecutor's burden to prove that he (A.T.) committed the offenses. The court explained that by making the admission that appellant would be giving up the right to call persons to testify on his own behalf and in defense of the charges against him. The court further explained that by entering the admission of rape he would give up the right to require the prosecutor to prove all the charges against him beyond a reasonable doubt.

{¶ 49} The court also discussed with A.T. the consequences of making the admission. The court advised A.T. that it could commit him to the Ohio Department of Youth Services, "something like prison for kids." The court advised A.T. that he could be committed to DYS for a minimum of one to three years to a maximum of his 21st birthday. The judge explained that he could order such a commitment and also suspend it, "meaning not send you there, but tell you [that] you have to do certain things so you don't have to go there."

{¶ 50} The court continued:

> I could require that you be placed in a different type of facility where you would receive treatment, sex offender treatment, maybe mental health counseling, some of those other things that you may need in an out-of-home placement. * * *.

I could order that you be placed in the Juvenile Detention Facility for up to ninety days. I could order a period of detention, but suspend some or all of the days.

I could order that you participate in any further assessments, evaluations, counseling, treatment or court programs deemed appropriate to you, or we think would be good for you.

I could continue you on probation, put you on intensive probation, in-home detention, electronic monitoring. I could order that you perform community service, pay fines and Court costs. Those are the possible consequences you face. Do you understand that?

Appellant: Yes.

{¶ 51} The court also went through the elements of the rape charge and questioned appellant on whether his admission was to each of the elements. The court also asked whether any promises had been made for him to admit to the offense.

{¶ 52} The court inquired as to whether appellant had an opportunity to speak to his attorney concerning the admission and whether he had any questions for his attorney. The court asked whether appellant was under the influence of any drugs or alcohol or prescription medicines.

{¶ 53} The court advised appellant that it could require him to register as a sex offender.

{¶ 54} Appellant does not challenge the nature of the Juv.R. 29 colloquy except to assert that appellant's right to remain silent was violated by the court's compelling A.T. to participate in the sex-specific diagnostic assessment and sex offender therapy before his adjudication as a delinquent and while he was incompetent to stand trial. Appellant argues that although the court advised A.T. of his right to remain silent in his colloquy, the statement was meaningless because he had been stripped of the right.

{¶ 55} These contentions were addressed and rejected in our consideration of assignment of error No. 1.

{¶ 56} We conclude that the trial court substantially complied with the requirements of Juv.R. 29(D) and conducted a thorough colloquy with A.T. Under the totality of the circumstances, we conclude that A.T. subjectively understood the implications of his admission and that A.T.'s admission was knowingly, voluntarily and intelligently made pursuant to Juv.R. 29.

{¶ 57} We find assignment of error No. 3 not well-taken.

{¶ 58} In assignment of error No. 4, appellant argues that the trial court erred by announcing one sentence at the August 17, 2011 dispositional hearing but setting forth a different sentence in the judgment entry of disposition that was filed on August 22, 2011. At the August 17, 2011 dispositional hearing, the trial court pronounced judgment that A.T. "be committed to the Ohio Department of Youth Services for a minimum of one year or until a maximum of age 21." In the August 22, 2011 judgment, the trial court

ordered A.T. committed to DYS for an indefinite period consisting of a "minimum of one (1) to three (3) years" and the same maximum period (until age 21).

{¶ 59} Appellant argues that the August 22, 2011 judgment was entered in error and that it should be corrected nunc pro tunc to set forth a minimum DYS commitment of one year, as pronounced at the dispositional hearing on August 17, 2011.

{¶ 60} After determining A.T. had not complied with the conditions for suspension of sentence, the trial court reinstated the suspended commitment to DYS in a judgment filed on July 26, 2012 and amended on August 2, 2012. The July 26, 2012 judgment committed A.T. to DYS for a minimum period "of one to three years." In the August 2, 2012 judgment, the trial court amended the judgment to provide for minimum commitment to DYS "of two years."

{¶ 61} Accordingly, appellant contends that the August 22, 2011, July 26, 2012, and August 2, 2012 judgments were each issued in error because they did not set forth the one year minimum period of commitment to DYS that the trial court pronounced in open court at the original dispositional hearing of July 17, 2011. Appellant seeks a nunc pro tunc order correcting the judgments of August 22, 2011 and August 2, 2012 to reflect a minimum period of commitment to DYS of one year.

{¶ 62} The state argues that appellant made no objection in the trial court to the commitment order to DYS and that the claimed error is subject to review for plain error only. The state argues that it was not plain error for the court to impose a two year

minimum term of the commitment to DYS because under R.C. 2152.16(A)(1) the court had discretion to impose any minimum term up to three years.

{¶ 63} A trial court retains the authority to modify sentence at any time before a valid judgment of conviction is journalized. *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 11-12. It is error, however, if the judgment of conviction filed imposes a sentence that is different than the sentenced announced in open court at the sentencing hearing. *State v. Williams*, 2013-Ohio-726, 987 N.E.2d 322, ¶ 49 (6th Dist.); *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 79. As we explained in *Robinson*, such a variance violates defendant's right to be present at sentencing and requires a remand for resentencing:

> Crim.R. 43(A) provides that "the defendant must be physically present at every stage of the criminal proceeding and trial, including * * * the imposition of sentence." Because a defendant is required to be present when sentence is imposed, it constitutes reversible error for the trial court to impose a different sentence in its judgment entry than was announced at the sentencing hearing in defendant's presence. Thus, "'if there exists a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry, a remand for resentencing is required.'" *State v. Hardison*, 6th Dist. No. L-10-1282, 2011-Ohio-4859, ¶ 9, quoting *State v. Pfeifer*, 6th Dist. No. OT-10-013, 2011-Ohio-289, ¶ 8.

See also State v. Quinones, 8th Dist. No. 89221, 2007-Ohio-6077, ¶ 5.

Robinson at ¶ 79.

{¶ 64} This analysis has been applied to juvenile court judgments in delinquency proceedings. *In re R.W.*, 8th Dist. Cuyahoga No. 80631, 2003-Ohio-401, ¶ 25-27; *In re DaCosta*, 9th Dist. Lorain No. 01CA007877, 2002 WL 347319, *2 (The trial court filed a judgment increasing the minimum term of commitment to DYS).

{¶ 65} In *State v. Simms*, 10th Dist. Franklin No. 13AP-299, 2013-Ohio-5142, ¶ 8, the Tenth District Court of Appeals found that such a variance between the sentence announced in open court and the sentencing judgment constitutes plain error. The court reasoned:

> [T]he trial court's action was taken outside the presence of the defendant in violation of Crim.R. 43(A), the Fifth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Section 16, and therefore constitutes plain error. To hold otherwise would be tantamount to making sentencing under Crim.R. 43(A) of no effect even if the sentence pronounced in the offender's presence differed from that in the court's judgment entry. *Id*.

{¶ 66} We find assignment of error No. 4 well-taken in part and not well-taken in part.

{¶ 67} We find the analysis of the Tenth District Court of Appeals persuasive and conclude that the trial court's error constitutes plain error and requires remand for

resentencing in A.T.'s presence as provided in Crim.R. 43. The sentence on resentencing may not necessarily be the sentence originally stated by the court in open court at the original dispositional hearing. *In re R.W.* at ¶ 25; *State v. Jones*, 8th Dist. Cuyahoga No. 94408, 2011-Ohio-453, ¶ 15. To avoid collateral consequences of the error, resentencing is required both with respect to the August 22, 2011 and August 2, 2012 judgments.

{¶ 68} If the imposition of a minimum term of commitment to DYS for a term greater than one year was a result of clerical mistake, the trial court may correct the error by nunc pro tunc judgments to reflect the one year commitment to DYS that was pronounced in open court at the original dispositional hearing. *Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, at ¶ 84.

Post-Dispositional Hearing on Compliance to Conditions of Suspended Sentence

{¶ 69} The trial court conducted a hearing on July 25, 2012, concerning whether A.T. had complied with a condition of his suspended sentence that he "successfully complete all treatment at the Juvenile Residential Center of Northwest Ohio." Under assignment of error No. 5, appellant contends that the continuing jurisdiction of the juvenile court was not properly invoked pursuant to Juv.R. 35(A) to consider the issue. Appellant argues that Juv.R. 35(A) provides "[t]he continuing jurisdiction of the juvenile court shall be invoked by motion filed in the original proceeding." No motion was filed by the state to revoke the suspension and impose A.T.'s sentence of commitment to DYS.

{¶ 70} A.T. was present at the July 25, 2012 hearing and represented by the same attorney who had represented him at the hearing on his admission and at the hearing on the original disposition. No objection was made by any party with respect to the adequacy of notice of the hearing or authority of the court to proceed with consideration of compliance with conditions of the suspended sentence at that time. The order setting the hearing stated "Reason: Failed to successfully complete treatment program @ JRCNWO."

{¶ 71} The director of the Juvenile Residential Center of Northwest Ohio testified at the hearing concerning A.T.'s participation in treatment programs at the center. The director testified of treatment programs provided A.T. at the center and that A.T. was disruptive, consistently noncompliant, and was not successful in treatment. The director testified that in her opinion A.T. could no longer be successful at JRCNWO. She recommended that A.T. be unsuccessfully discharged from the JRCNWO program.

{¶ 72} Prior to the hearing, the director and A.T.'s counselor at the JRCNWO jointly prepared a discharge summary recommending termination of A.T.'s treatment at the center. The discharge summary was filed with the court on July 20, 2012.

{¶ 73} A.T.'s probation officer also testified at the hearing and agreed with the director's evaluation of A.T.'s participation in the JRCNWO treatment programs and discharge recommendation.

{¶ 74} Counsel for appellant did not present evidence at the hearing to contest the testimony by the JRCNWO director or the probation officer. Counsel did not seek a continuance to permit presentation of evidence on A.T.'s behalf.

{¶ 75} At the hearing, the court found that A.T. failed to successfully complete his treatment at the JRCNWO, concluded that the failure constituted noncompliance with the conditions of A.T.'s suspended sentence, and imposed the suspended commitment to DYS. A judgment setting forth the findings and ordering commitment to DYS was filed on July 26, 2012.

{¶ 76} Appellant does not dispute that juvenile courts retain continuing jurisdiction to issue appropriate dispositional orders upon failure of a juvenile to meet conditions for a suspended sentence of commitment to DYS. The court's continuing jurisdiction terminates when the juvenile completes probation. *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 27. Accordingly, no jurisdictional issue is presented under assignment of error No. 5.

{¶ 77} Appellant did not raise the claimed procedural error in the trial court. Our review of the juvenile court's decision is limited to plain error.

{¶ 78} Appellant has not cited the court to any authority holding that a juvenile court cannot, sua sponte, raise the issue whether a juvenile has violated a condition of the suspension of his sentence by failing to successfully complete a treatment program. Furthermore, appellant has not demonstrated surprise or prejudice. He presents no basis

to conclude that the outcome would have been different but for the claimed procedural error.

{¶ 79} We find assignment of error No. 5 not well-taken.

{¶ 80} Under assignment of error No. 6, appellant argues that the trial court erred by failing to consider community service in lieu of financial sanctions before ordering appellant to pay court costs. R.C. 2152.20(D) provides: "[i]f a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of section 2152.19 of the Revised Code in lieu of imposing a financial sanction under this section."

{¶ 81} The trial court ordered appellant to pay costs in the August 22, 2011 and July 26, 2012 dispositional judgments. The record also demonstrates that appellant is indigent. However, the record does not demonstrate that the trial court failed to consider ordering community service in lieu of payment of court costs. In fact, the record suggests the court did consider community service at disposition. In the August 22, 2011 dispositional judgment, the trial court ordered appellant to perform 45 hours of community service.

{¶ 82} We find assignment of error No. 6 not well-taken.

{¶ 83} In assignment of error No. 7, appellant argues ineffective assistance of counsel. Appellant argues that counsel was deficient in six respects:

1. Counsel failed to object to the probation department's mandate that A.T. participate in the sex specific diagnostic assessment.

2. Counsel failed to object to the trial court's order that A.T. participate in sex offender treatment before adjudication of delinquency and while incompetent.

3. Counsel stipulated to the second competency evaluation (by Dr. Forgac).

4. Counsel failed to object to trial court's ordering A.T. to pay court costs.

5. Counsel failed to correct the juvenile court's entries invoking the suspended DYS commitment, on the basis of the variance with the minimum period of DYS announced at the dispositional hearing.

6. Counsel failed to object to the failure of the state to invoke the continuing jurisdiction of the trial court to impose A.T.'s suspended commitment to DYS.

{¶ 84} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A defendant must establish both prongs of the standard to demonstrate ineffective assistance of counsel. *Strickland* at 687. A properly licensed attorney in Ohio is presumed to be competent. *State v. Jackson*, 64 Ohio St.2d 107, 111, 413 N.E.2d 819 (1980).

{¶ 85} Items numbered one and two concern the failure of trial counsel to object to the trial court's compelling A.T. to participate in the sex-specific diagnostic assessment and, afterwards, in sex offender treatment, before A.T. was adjudicated delinquent and while A.T. was incompetent to stand trial. A.T.'s statements during the diagnostic assessment were not kept confidential, but were disclosed in Giving Tree's report.

{¶ 86} The state argues that A.T. was not prejudiced by counsel's failure to object. The state contends the evidence in the record demonstrates that the statements to The Giving Tree were not used against A.T.

{¶ 87} In our review of the record, we find evidence lacking that statements made to Giving Tree were used against A.T. either in adjudication of delinquency or in disposition. As previously discussed, A.T. had made the same admission earlier to police in the presence of his parents. We conclude appellant has failed to meet his burden to establish prejudice by counsel's failure to object to the court ordered sex-specific assessment and sex offender treatment.

{¶ 88} In our consideration of assignment of error No. 2, we concluded that the trial court did not err in determining A.T. competent, based on Dr. Forgac's evaluation.

Accordingly, we conclude that trial counsel was not deficient in stipulating to Dr. Forgac's competency evaluation.

{¶ 89} We concluded under assignment of error No. 6 that the trial court did not err in ordering A.T. to pay court costs. Accordingly, we conclude that counsel was not deficient in failing to object to the court's imposition of the obligation to pay court costs.

{¶ 90} Under item number 5, appellant argues that trial counsel was deficient in failing to object to the variance between the sentence announced at the dispositional hearing and the original sentence imposed on July 25, 2012, and subsequent judgment invoking the stayed commitment to DYS (as amended) on August 2, 2011. As we reverse the trial court judgment on both dispositional orders and remand for resentencing due to the variance, we find the issue moot.

{¶ 91} Appellant's final claim of ineffective assistance of trial counsel is directed to the trial court's proceeding to consider revocation of the stay of sentence and imposition of the commitment of A.T. to DYS, without a motion to do so. Appellant argues that trial counsel was deficient in failing to object to the procedure used to invoke continuing jurisdiction on procedural grounds to consider A.T.'s failure to comply with conditions of his suspended sentence.

{¶ 92} The state argues that the evidence was overwhelming that A.T. did not adhere to the conditions of his suspended commitment to DYS and that A.T. was not prejudiced by counsel's failure to object. A.T. had failed to cooperate in treatment and was being discharged unsuccessfully from treatment at the Juvenile Residential Center of

Northwest Ohio. The state contends that even if different procedure were followed, through use of a motion to revoke probation by the state, the outcome would have been the same.

{¶ 93} We agree. We find no prejudice to A.T. by trial counsel's failure to object to the procedure to invoke the court's continuing jurisdiction to consider A.T.'s failure to meet the conditions of the suspension of his commitment to DYS.

{¶ 94} We find assignment of error No. 7 not well-taken.

{¶ 95} Accordingly, we affirm the trial court judgments in part and reverse them in part.

{¶ 96} We reverse the trial court's dispositional judgments of August 22, 2011 and August 2, 2012 with respect to the period set in the judgments for the minimum period of commitment of A.T. to DYS. We remand this case for resentencing on the issue.

{¶ 97} In all other respects we affirm the trial court judgments. Pursuant to App.R. 24, we order the state to pay the costs of this appeal.

Judgments affirmed in part
and reversed in part.

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

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

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JUDGE