

[Cite as *In re E.B.*, 2005-Ohio-401.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85035

IN THE MATTER OF E.B.,	:	JOURNAL ENTRY
A MINOR	:	
	:	and
Defendant-Appellant	:	
	:	OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

February 3, 2005

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Juvenile Court Division
Case No. DL-03109006

JUDGMENT:

REVERSED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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(E.B.)

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Appellant, E.B., a minor, appeals the trial court's judgment reversing the magistrate's decision, which found E.B. incompetent to stand trial. Finding merit to the appeal, we reverse.

{¶ 2} In 2003, E.B. was charged with statutory rape, pursuant to R.C. 2927.02(A)(1)(b). At the time of the alleged offense, he and the victim were eight years old. In April 2004, a magistrate conducted a hearing to determine whether E.B. was competent to stand trial and to consider E.B.'s motion to dismiss. The magistrate directed the State to proceed first with its expert witness. Next, E.B. called his own expert to testify that he was incompetent to stand trial.

{¶ 3} On April 12, the magistrate found E.B. incompetent to stand trial and granted E.B.'s motion to dismiss. The trial judge

approved the magistrate's decision on April 19, and the court's entry was journalized on April 21, dismissing the charge of delinquency with prejudice. The State filed timely objections to the magistrate's decision and moved to vacate the April 21 journal entry. In June, the trial court sustained the objections and rejected the magistrate's decision.

{¶ 4} E.B. appeals, raising five assignments of error, which will be addressed together where appropriate.¹

Due Process

{¶ 5} In his first assignment of error, E.B. argues that the trial court violated the due process rights of the alleged co-delinquent A.B. by failing to send a certified copy of its journal entry to A.B.'s counsel or parents. E.B. asks this court to consider that matter in conjunction with the instant case because the issues are identical.

{¶ 6} However, A.B.'s case was not appealed to this court nor consolidated with the instant appeal pursuant to App.R. 3(B). Therefore, we lack jurisdiction to consider any argument raised on A.B.'s behalf.

{¶ 7} Accordingly, the first assignment of error is overruled.

Objections to Magistrate's Decision

{¶ 8} E.B. argues in his second assignment of error that the trial court could not rule on the findings in the magistrate's

¹We find that this matter is a final appealable order pursuant to R.C. 2505.02 by virtue of the dismissal of the case in the April 21 entry.

report because the State failed to order the transcript to support its objections. In his fourth assignment of error, E.B. argues that, even if the magistrate erred in directing the State to present its expert witness first at the competency hearing, it was harmless error.

{¶ 9} A trial court's decision to adopt, reject, or modify a magistrate's decision will be reversed on appeal only for an abuse of discretion. *Ciavarella v. Ciavarella*, Columbiana App. No. 2002-CO-11, 2004-Ohio-568, citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419, 680 N.E.2d 1305. See, also, *Tiffe v. Groenenstein*, Cuyahoga App. No. 80668, 2003-Ohio-1335. An abuse of discretion is more than an error of law, it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 10} In support of his argument, E.B. cites Juv.R. 40(E)(3)(c), which provides that "[A]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of the evidence if a transcript is not available." E.B. claims that because a transcript was available, its filing was required instead of an affidavit.

{¶ 11} Juv.R. 40(E)(3)(c) allows for the filing of an affidavit in lieu of a transcript. This rule has been construed to mean that a party may support its objections with an affidavit in lieu of a transcript only when the party demonstrates that a transcript is

not available, and if the affidavit describes all the relevant evidence presented at the hearing, not just the evidence that the objecting party feels is significant. *Galewood v. Terry Lumber & Supply Co.* (Mar. 6, 2002), Summit App. No. 20770, citing *Csongei v. Csongei* (July 30, 1997), Summit App. No. 18143. See, also, *E. Ohio Gas Co. v. Kenmore Constr. Co.* (Mar. 28, 2001), Summit App. Nos. 19567 and 19790.²

{¶ 12} In the instant case, the State failed to assert, much less demonstrate, that a transcript of the competency hearing was not available. In fact, the submission of the transcript for our appellate review strongly suggests that a transcript was not “unavailable” when the State filed its written objections. See, *Frank Lerner & Assoc. v. Vassey* (1991), 74 Ohio App.3d 537, 548, 599 N.E.2d 734. Under such circumstances, the use of an affidavit does not satisfy the requirements of Juv.R. 40. Even assuming that the transcript was unavailable, the State’s affidavit falls short of the requirement that it include all relevant evidence presented to the magistrate. The State’s affidavit addressed only the issue of the magistrate’s improperly placing the burden of proof on the State. No relevant evidence was described in the affidavit.

{¶ 13} E.B. also argues that the affidavit filed by the State is factually incorrect. We agree. The State’s affidavit avers that the State objected to the magistrate’s placing the burden of proof

²We recognize that these cases interpret Civ. R. 53(E), which governs magistrates’ decisions in civil cases; however, Juv.R. 40(E) contains essentially the same language.

on the State to prove E.B.'s competency. However, our review of the transcript reveals no objection when the magistrate directed the State to proceed first.

{¶ 14} Moreover, even assuming the magistrate erred by seemingly placing the burden of proof on the State merely because the State "went first" in presenting expert testimony, it was harmless error.

The magistrate heard testimony from experts for both the State and E.B. and then issued a recommendation. The magistrate's decision, on its face, does not indicate that the State bore the burden of proving E.B. competent. Instead, the decision and the record reflect that the magistrate considered the testimony from both experts and then issued his recommendation.

{¶ 15} We further find that the trial court never reinstated the case in its June entry after it entered a dismissal with prejudice in the April 21 entry. The June entry does not reference the dismissal of the case, only the competency issue. The court's entry states, in relevant part:

"This matter came on for consideration this 16 day of June, 2004 * * * upon the Objection to the Magistrate's Decision of April 12, 2004 finding the child competent to stand trial.

Upon due consideration of the decision and the objections thereto, the Court sustains the objections thereto and disapproves the Magistrate's Decision.

IT IS THEREFORE ORDERED that this matter is to be scheduled for further hearing before this Court."

{¶ 16} Once a magistrate's decision has been filed, the trial court can either 1) adopt the magistrate's decision and enter

judgment without waiting fourteen days for objections to be filed, 2) wait until the time for objections expires, and then "adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter itself", or 3) enter an interim order for a temporary time, if immediate relief is justified. If the court enters judgment on the magistrate's decision without waiting for objections, the filing of timely written objections automatically stays execution of the judgment until the court disposes of the objections and vacates, modifies, or adheres to the judgment previously entered. See, Juv.R. 40(E)(4)(b) and (c).

{¶ 17} Here, the trial court entered judgment without waiting fourteen days for objections to be filed. However, once the State filed its objections, the judgment was stayed until the trial court disposed of the objections and vacated the previous judgment. Therefore, both the finding of incompetency and the dismissal of the matter were stayed until the trial court ruled on the State's objections.

{¶ 18} The trial court, in ruling on the objections, noted that the objections stemmed from a finding that E.B. was incompetent to stand trial. However, the court never mentioned the dismissal of the delinquency charge, even though the State moved to vacate the dismissal. Thus, the dismissal is still in effect from the April 21 entry.

{¶ 19} Moreover, the only evidence before the trial court in support of the State's objections was a flawed affidavit, which was insufficient under Juv.R. 40(E)(3)(c).

{¶ 20} Therefore, because we find the affidavit in support of the State's objections is fatally flawed, we find that the trial court abused its discretion in rejecting the magistrate's decision which found E.B. incompetent to stand trial. We also conclude that it was harmless error to direct the State to proceed first in the competency hearing. Furthermore, because the trial court never vacated its dismissal nor reinstated the delinquency charge, the dismissal remains in effect pursuant to the April 21 entry.³

{¶ 21} Accordingly, the second and fourth assignments of error are sustained.⁴

Judgment reversed.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee the costs herein.

³E.B.'s counsel agreed at oral argument that E.B. remains subject to the Court's Intake Unit for diversion pursuant to the April 21 journal entry.

⁴Having sustained E.B.'s second and fourth assignments of error, we need not address the remaining assignments of error which involve whether a competency finding in and of itself is a final appealable order and whether double jeopardy attached.

It is ordered that a special mandate be sent to the Juvenile Court Division of the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, A.J. and

JAMES J. SWEENEY, J. CONCUR

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).