[Cite as *In re S.M.*, 2008-Ohio-6852.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91408

IN RE: S.M.

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. 008121761

BEFORE: Kilbane, P.J., Dyke, J., and Boyle, J.

RELEASED: December 24, 2008

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy Young
Chief Public Defender
Angela Miller

Assistant Public Defender
Office of Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

William Mason
Cuyahoga County Prosecutor
William Beck
Erin Donovan
Assistant County Prosecutors
The Justice Center
1200 Ontario Street
Cleveland, OH 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Defendant-appellant, S.M.,[1] appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, accepting his admission to felonious assault and also the juvenile court's delinquency adjudication. After reviewing the parties' arguments and pertinent case law, we reverse.

{¶ 2} On February 29, 2008, complaints were filed with the juvenile court alleging that S.M. was delinquent as it pertains to the following offenses, if otherwise committed by an adult: one count of felonious assault and one count of abduction.

{¶ 3} On March 20, 2008, the matter proceeded to hearing and the State nolled the count for abduction. Thereafter, the juvenile court conducted a colloquy with S.M., informing him of the rights he would be waiving by admitting to the charge of felonious assault. S.M. thereafter admitted to felonious assault, and the juvenile court accepted his admission.

{¶ 4} On March 27, 2008, the matter proceeded to a dispositional hearing in which the juvenile court adjudicated S.M. delinquent on the count of felonious assault and committed S.M. to the Ohio Department of Youth Services for a minimum period of one year and a maximum period not to exceed his twenty-first birthday.

{¶ 5} S.M. appeals, asserting two assignments of error for our review.

---

[1] The juveniles are referred to herein by their initials or title in accordance with this court's established policy regarding non-disclosure of identities in all juvenile cases.

ASSIGNMENT OF ERROR NUMBER ONE

> "[S.M.'s] admission to the charge of Felonious Assault was not knowing, intelligent, and voluntary, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 16 of the Ohio Constitution and Juv.R. 29. (Hrg. 3/20/08, Tp. 4)."

{¶ 6} S.M. argues that this admission was not entered knowingly, intelligently, and voluntarily because the juvenile court failed to advise him of the nature of the allegations pursuant to Juv.R. 29(D)(1) and failed to advise him of the substance of the complaint pursuant to Juv.R. 29(D)(2).

{¶ 7} It must be noted, however, that S.M. never objected to the plea colloquy with the juvenile court. Thus, S.M. waived this argument on appeal save for plain error. Plain error is set forth in Crim.R. 52(B): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶ 8} The Supreme Court of Ohio held: "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91. The Supreme Court of Ohio further held: "The plain error test requires that, but for the existence of the error, the result of the trial would have been otherwise." *State v. Wiles* (1991), 59 Ohio St.3d 71.

{¶ 9} Juv.R. 29(D) addresses juvenile admissions and reads in part:

"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."

{¶ 10} Thus, the trial court "s*hall* not accept an admission without addressing the party personally and determining *** [t]he party is making the admission voluntarily with understanding of the nature of the allegations ***." Juv.R. 29(D)(1). (Emphasis added.)

{¶ 11} The Supreme Court of Ohio held:

> "In a juvenile delinquency case, the preferred practice is strict compliance with Juv.R. 29(D). If 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.*, 115 Ohio St.3d 267, 2007-Ohio-4919, at paragraph six of the syllabus.

{¶ 12} As such, the Fourth Appellate District of Ohio held:

> "Prior to accepting an admission, the juvenile court must personally address the actual party before the court and determine that party *** understands the nature of the allegations and the consequences of entering the admission. Furthermore, the test for the accused delinquent's understanding of the charges is subjective, rather than objective, in that it is not sufficient that a hypothetical reasonable party would understand. The person actually before the court must do so." *In re: K.B.* (1996), 115 Ohio App.3d 567.

{¶ 13} We have also held that "[i]n light of the criminal aspects of delinquency proceedings, including a juvenile's loss of liberty, due process and fair treatment are required in a juvenile adjudicatory hearing." *In re C.F.*, Cuyahoga App. No. 84434, 2005-Ohio-2190; citing *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183. As such, the same due process rights afforded to adult defendants also applies to juveniles in a delinquency adjudication. See *In re Gault* (1967), 387 U.S. 1.

{¶ 14} The colloquy in the instant case is similar to that in *In the matter of: Amanda Pritchard*, 5th Dist. No. 2001 AP 080078, 2002-Ohio-1664. In the *Pritchard* matter, although the trial court did review the rights that *Pritchard* was waiving, it did not review the nature of the charge with her. A review of the hearing in this case reveals the same; namely, that although the trial court reviewed the rights with S.M. that he would be waiving, the trial court did not review the elements of felonious assault with him or inquire whether he understood the nature of the charge. As such, the totality of the circumstances does not support a finding of a valid waiver pursuant to *In re C.S.*

{¶ 15} Thus, we find plain error as it pertains to the juvenile court's application of Juv.R. 29(D)(1), and we need not address S.M.'s contentions as to the juvenile court's application of Juv.R. 29(D)(2). See App.R. 12.

{¶ 16} S.M.'s first assignment of error is sustained.

ASSIGNMENT OF ERROR NUMBER TWO

"[S.M.] was denied the effective assistance of counsel when counsel failed to make a motion to withdraw [S.M.'s] admission of "True" prior to sentencing, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution."

{¶ 17} In light of our ruling on S.M.'s first assignment of error, the second assignment of error is moot.

Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the juvenile division of the common pleas court 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.

_____

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS
ANN DYKE, J., DISSENTING (SEE SEPARATE DISSENTING OPINION.)

ANN DYKE, J., DISSENTING:

{¶ 18} I respectfully dissent. As an initial matter, I note that appellant failed to enter any Juv.R. 29 objections on the record. Accordingly, he has the burden to demonstrate plain error which affected his substantial rights. *In re Smith*, Richland App. No. 2004-CA-64, 2005-Ohio-1434, relying on *United States v. Vonn* (2002), 535 U.S. 55, 58, 122 S.Ct. 1043, 152 L.Ed.2d 90. This court may look to the entire record when determining whether appellant's substantial rights have been affected. Id., relying on *Vonn*, supra at 59. To demonstrate plain error under Juv.R. 29, a defendant must establish "a reasonable probability that, but for the error, he would not have entered the [admission.]" Id., quoting *United States v. Dominguez-Benitez* (2004), 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157.

{¶ 19} Pursuant to Juv.R. 29(D)(1), the juvenile court must personally address the defendant to determine whether he "is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission." The court must substantially comply with the requirements of Juv.R. 29(D)(1), which means that, under the totality of the circumstances, the defendant subjectively understands the implications of his plea. *In re Palmer* (Nov. 21, 1996), Franklin App. No. 96APF03-281, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474.

{¶ 20} When determining whether an admission is being made with an

understanding of the charges, a court is not always required to inform the juvenile of the elements of the offense or specifically inquire whether he understands the charge, so long as the totality of the circumstances supports the trial court's conclusion that the juvenile understands the charges brought against him. *In re Garrard* (Nov. 20, 1997), Franklin App. No. 97APF03-449, citing *State v. Rainey* (1982), 3 Ohio App.3d 441, 442, 446 N.E.2d 188. In *Rainey*, the court explained that "* * * under some circumstances, the trial court may be justified in concluding that a defendant has drawn an understanding from sources other than the lips of the trial court." Id. "A familiarity with the facts alleged relating to each count of the crimes charged is enough to provide the defendant with knowledge of the nature of the crime." *In re Largo*, Muskingham App. No. CT2003-055, 2004-Ohio-4938.

{¶ 21} Moreover, the court may presume that a defendant represented by counsel was informed of the nature of the charges. Id. "[E]ven without such express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Id., quoting *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 396 N.E.2d 757, quoting *Henderson v. Morgan* (1976), 426 U.S. 637, 647, 96 S.Ct. 2253, 49 L.Ed.2d 108.

{¶ 22} Additionally, one can presume that the defendant was informed of the nature of the crime when he was served with the complaint or indictment which set forth the charged offenses. *In re Largo*, supra.

{¶ 23} The following colloquy occurred in this matter during the change of plea

hearing on March 20, 2008:

{¶ 24} "THE COURT: Do you understand that if you admit to the charge of felonious assault, a felony of the second degree, I will accept your admission. I will find that you are delinquent. Do you understand that?

{¶ 25} "THE DEFENDANT: Yes.

{¶ 26} "THE COURT: Understand then my usual procedure is to have the probation department give us a report and recommendation so we can make a decision of what to do with you. Among my options are everything from having you pay fines, court costs, restitution. That is, to pay back any damages you caused. I could have you do community service work, put you on probation.

{¶ 27} "I could lock you up in the detention center for up to 90 days, I could send you to the youth development center. It's a program run by the County for juveniles. I could send you to the Ohio Department of Youth Services, the prison system in Ohio for juveniles. If I send you there your minimum term would be one year. If you decided to act a fool while there they could keep you longer. They could actually keep you until you reach the age of 21.

{¶ 28} "Finally, if this is your first felony adjudication you would be required to submit a DNA sample. They take a swab from the inside of your mouth. They keep it on file with the State. Do you understand all of that that we just went over?

{¶ 29} "THE DEFENDANT: Yes.

{¶ 30} "THE COURT: Okay. With all that in mind is it your free choice today to admit to this charge of felonious assault?

{¶ 31} "* * *

{¶ 32} "THE COURT: All right. Ms. Donovan, would you give me a brief summary of the evidence we would have heard at trial?

{¶ 33} "MS. DONOVAN: Thank you, your Honor. Had this matter proceeded to trial the evidence would have shown that [S.M.] along with another individual came across [the victim], who I believe was his girlfriend at the time, he was mad at her for some reason and proceeded to choke her, punch her, beat her up pretty badly. Punched her in the stomach and face to the point where a teacher found her in a fetal position on the ground.

{¶ 34} "THE COURT: All right. I will accept your admission. I will find you delinquent on that charge and grant the State's motion to nolle Count 2. * * *."

{¶ 35} While the court in this case did not review the elements of felonious assault with appellant or specifically inquire whether he understood the charge, I would find from the totality of circumstances that appellant understood the nature of the allegations. First, the record establishes that appellant was served with the complaint and was represented by counsel throughout the proceedings in this case. Additionally, the court personally addressed appellant at the change of plea hearing and engaged in a lengthy discussion with him in which the court informed him of the charges against him, the rights he would be waiving by entering an admission, and the range of penalties for the offense. The court inquired into appellant's understanding of the information and in each instance appellant responded that he understood. He did not express any confusion as to the proceedings, as to the

nature of the allegations, or ask the court any questions. Additionally, the conduct that constituted the offense of felonious assault was dispelled by the prosecutor at the direction of the court and in the presence of appellant. Accordingly, under the circumstances, I would find that the trial court substantially complied with the provisions of Juv.R. 29(D)(1). Based on the foregoing, I would find that the trial court substantially complied with Juv.R. 29 and appellant has failed to demonstrate plain error affecting his substantial rights. I would additionally conclude that the requirements of Juv.R. 29(D)(2) were also met herein.