

[Cite as *In re A.A.W.*, 2015-Ohio-1297.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101580

**IN RE: A.A.W.
A Minor Child**

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 11115197

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: April 2, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Appellant, A.A.W., appeals a judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, granting the state's motion to invoke the adult portion of A.A.W.'s serious youth offender ("SYO") sentence pursuant to R.C. 2152.14(A). He raises four assignments of error for review:

1. The juvenile court erred when it qualified Mr. Watson as an expert witness, because the State did not lay a proper foundation for his qualifications and testimony. Evid.R. 702; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.
2. The juvenile court committed plain error when it admitted Mr. Watson's testimony and organizational charts regarding A.A.W.'s alleged role in a gang, without a proper foundation for that evidence. Evid.R. 803(6) and 901; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.
3. The juvenile court erred when it invoked the adult portion of A.A.W.'s Serious Youth Offender sentence, because the state failed to prove by clear and convincing evidence that A.A.W. was unlikely to be rehabilitated within the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 10, Ohio Constitution.
4. A.A.W. was denied the effective assistance of counsel. Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 9 and 10, Ohio Constitution.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} On August 31, 2011, pursuant to a plea agreement, A.A.W. voluntarily admitted and pleaded delinquent to three counts of aggravated robbery and one count of felonious assault. All four counts were first-degree felonies if committed by an adult and included one- and three-year firearm specifications. The charges also included SYO specifications. Pursuant to the plea agreement, the state did not seek to have A.A.W. bound over to the adult criminal justice system, and the juvenile court committed A.A.W. to the Ohio Department of Youth Services (“ODYS”) until his 21st birthday. As part of a blended sentence, the juvenile court also imposed an SYO sentence, the adult portion of the sentence, that was comprised of three concurrent, three-year adult prison terms for each count of aggravated robbery, to be served concurrently with a two-year adult prison term for felonious assault. The court ordered the concurrent prison terms to be served consecutive to the three-year prison term on the firearm specification. The juvenile court stayed the adult portion of the sentence pending successful completion of A.A.W.’s juvenile disposition.

{¶4} A.A.W. served the first three months of his commitment at Indian River Juvenile Correctional Facility, where he engaged in violent and disruptive behavior. He was also the victim of an assault in which another youth broke his jaw. After his jaw was broken, A.A.W. was transferred to Circleville Juvenile Correctional Facility (“Circleville”), where he was involved in numerous “significant incidents.” Significant incidents are documented in a “Youth Incident Summary Report.” A.A.W.’s report

describes over 80 incidents of violence, disruptive behavior, rule violations, and possession of contraband.

{¶5} As a result of these incidents, the state filed a motion to invoke the adult portion of A.A.W.'s SYO dispositional sentence. At the invocation hearing on the motion, the state played several videos taken from surveillance cameras throughout Circleville. One video depicts A.A.W. holding another youth in a chokehold while A.A.W.'s friends repeatedly punched the youth in the stomach. A.A.W. maintained the chokehold until the youth fell unconscious to the floor. Another video shows A.A.W., unprovoked, repeatedly punch another youth in the face.

{¶6} Alisha Bailey ("Bailey"), a Circleville unit manager administrator, testified that in November 2013, she told A.A.W. that ODYS was seeking to have his SYO sentence invoked. A.A.W.'s behavior subsequently improved, and he earned Phase III privileges, which are the highest level of youth privileges in the Strength Based Behavioral Systems used by ODYS. A.A.W. also performed well in school, received A's and B's on his report card, and was three credits away from graduating from high school at the time of the invocation hearing.

{¶7} However, several witnesses testified to the incidents described in A.A.W.'s Youth Summary Report and his involvement in gang activity. The court, over objection, qualified Randon Watson ("Watson"), program administrator at Circleville, as a "gang expert" and permitted him to testify about A.A.W.'s rank and role in the Heartless Felons gang. The court also admitted into evidence three "organizational charts" Watson

created that depicted the various ranks and members of the gang. Watson corroborated the opinions of other witnesses that despite over 300 hours of treatment and over 400 meetings with a clinician, A.A.W.'s attitude and demeanor remained unchanged. The state's witnesses also testified that, in their opinions, A.A.W. remained a threat to the youth and staff at ODYS facilities.

{¶8} The trial court granted the state's motion to invoke A.A.W.'s suspended SYO sentence and ordered that A.A.W. be transferred to an adult prison to serve the approximately three years remaining on his SYO sentence. A.A.W. now appeals from that judgment.

II. Law and Analysis

A. Expert Testimony

{¶9} In the first assignment of error, A.A.W. argues the trial court erred when it qualified Watson as a gang expert and allowed him to testify about A.A.W.'s role in the Heartless Felons. A.A.W. contends Watson's expert testimony was admitted into evidence in violation of Evid.R. 702.

{¶10} Evid.R. 702 governs the admission of expert testimony and states, in relevant part, that a witness may testify as an expert if "[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons," or "is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(A) and (B).

{¶11} However, the Ohio Rules of Evidence are not applicable to invocation proceedings. Evid.R. 101(A) provides, in part, that the evidence rules do not apply to miscellaneous criminal proceedings such as “[p]roceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest; criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.”

{¶12} In *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 16, 20, the Ohio Supreme Court stated that an invocation proceeding is not the same as a delinquency proceeding. Rather, an invocation proceeding is analogous to a “proceeding incident to a criminal court’s imposition of a suspended sentence.” *Id.* at ¶ 16. At an invocation hearing, the juvenile court may not increase the juvenile offender’s sentence; it merely decides whether to invoke the adult portion of the juvenile’s sentence that was suspended. *Id.* at ¶ 8; *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 30. Although Evid.R. 101(A) does not specifically include the term “invocation hearings” on its list of exemptions, because they are akin to sentencing proceedings, probation violation hearings, and “proceedings with respect to release,” Evid.R. 101(A) exempts them from strict application of the Ohio Evidence Rules.

{¶13} Additionally, R.C. 2151.35(B)(2), which governs juvenile court hearing procedures, specifically states that “[t]he court may admit any evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence.” *See also Juv.R. 35(B)(2); In re T.J.*, 8th Dist. Cuyahoga Nos. 99877 and 99878,

2013-Ohio-5434. Thus, the only restriction on the admission of evidence during an invocation proceeding is that the evidence must be “material and relevant.” *Id.*

{¶14} The juvenile court’s admission of Watson’s expert testimony was reasonable and not an abuse of discretion. The trial court allowed defense counsel to question Watson regarding his qualifications before Watson provided any expert opinions. Since the Ohio Rules of Evidence are inapplicable to invocation hearings, this voir dire was not required. Further, Watson testified that he is a licensed social worker, has a Masters degree in criminal justice, and has received specific training on gangs. With respect to certifications, Watson testified:

Department of corrections certified me advanced STG [Serious Threat Group] coordinator, also. Homeland Security, FEMA has the gang awareness and gang specialist that I took two days. And OPOTA [Ohio Peace Officer Training Academy] also has a gang training that I have completed, successfully passed.

{¶15} Watson further stated that he was the first gang intervention specialist for the ODYS. As a gang specialist, he performed gang assessments, STG assessments, and STG profiles. He also interviewed juvenile gang members, and documented their tattoos, pictures, and gang graffiti. Watson testified that while he was the STG coordinator at Circleville, he collected evidence and documented gang activity inside the facility. He worked personally with A.A.W. on programs to rehabilitate his gang mentality and thus had personal knowledge of A.A.W.’s participation in the gang. The court qualified him as an expert based on his training, professional experience as a STG coordinator, and his personal experience with A.A.W. Under these circumstances, the

trial court acted well within its discretion when it allowed Watson to testify as a gang expert.

{¶16} The first assignment of error is overruled.

B. Documentary Evidence

{¶17} In the second assignment of error, A.A.W. argues the trial court committed plain error when it admitted Watson's organizational charts regarding A.A.W.'s role in the gang, without a proper foundation, in violation of Evid.R. 803(6) and 901.

{¶18} Defense counsel did not object to the admission of Watson's charts or to his testimony regarding A.A.W.'s gang participation. Under Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." However, plain error only occurs when, but for the error, the outcome of the proceeding clearly would have been different. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978); *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001). Notice of plain error should be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at 97.

{¶19} As previously stated, the Ohio Rules of Evidence are inapplicable to invocation proceedings pursuant to Evid.R. 101(A), R.C. 2151.35(B)(2), and Juv.R. 35(B)(2). Therefore, any failure to comply with Evid.R. 803(6) or 901 is irrelevant. Indeed, R.C. 2151.35(B)(2) and Juv.R. 35(B)(2) specifically provide that hearsay evidence is admissible if it is "material and relevant."

{¶20} Moreover, even if the charts were admitted in error, the error did not change the outcome of the proceedings. Bailey, the unit manager at Circleville, and James Art, a program deputy from Circleville, testified about A.A.W.'s gang involvement, his defiant attitude, and incidents of violence. Therefore, the charts were not necessary to establish A.A.W.'s participation in the Heartless Felons.

{¶21} The second assignment of error is overruled.

C. Serious Youthful Offender Sentence

{¶22} In the third assignment of error, A.A.W. argues the trial court erred when it invoked the adult portion of his SYO sentence. A.A.W. contends the state failed to prove, by clear and convincing evidence, that he was unlikely to be rehabilitated within the remaining period of juvenile jurisdiction.

{¶23} In *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, the Ohio Supreme Court distinguished the treatment of serious youthful offenders in Ohio juvenile courts from that of adults in the criminal justice system. The court recognized that SYO cases do not involve a bindover to an adult court and that the juvenile remains under the continuing jurisdiction of the juvenile court judge. *Id.* at ¶ 18. Any adult sentence imposed by the juvenile judge at sentencing acts as a “potential sentence.” *Id.* at ¶ 30. The juvenile must engage in separate conduct detrimental to his own rehabilitation in the juvenile system before he may be committed to an adult facility. *Id.* at ¶ 38.

{¶24} Theoretically, the threat of an adult sentence encourages the juvenile to cooperate in his own rehabilitation. *Id.* at ¶ 18. Indeed, the overriding purposes for

dispositions under R.C. Chapter 2152 are “to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, and hold the offender accountable for the offender’s actions, restore the victim, and rehabilitate the offender.” R.C. 2152.01(A).

{¶25} Under R.C. 2152.14(E), the juvenile court may invoke the adult portion of an SYO dispositional sentence if the juvenile court finds, by clear and convincing evidence, that (1) the person is serving the juvenile portion of a serious youthful offender dispositional sentence, (2) the person is at least 14 years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person, and (3) the person engaged in conduct or acts charged under R.C. 2152.14(A)(B), and (C), and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. The “conduct or act charged under R.C. 2152.14(A),(B), and (C)” includes acts in violation of the rules of the institution that could be charged as any felony or first-degree misdemeanor offense of violence if committed by an adult, or conduct that creates a substantial risk to the safety and security of the institution, the community, or the victim. R.C. 2152.14(E).

{¶26} It is undisputed that A.A.W. was over 14 years of age and was serving the juvenile portion of his SYO dispositional sentence at the time of the invocation hearing. It was also undisputed that A.A.W. engaged in conduct that could be charged as a felony or misdemeanor of violence, if committed by an adult. A.A.W. argues the trial court

should have found that he was likely to be successfully rehabilitated because he did not commit any infractions after he received notification of the invocation.

{¶27} Although A.A.W.'s behavior improved once he learned that ODYS requested invocation, the evidence showed it was unlikely A.A.W. could be rehabilitated in the juvenile system. The ODYS Youth Incident Summary Report, which was made part of the record, shows that A.A.W. engaged in over 80 acts of violence. In one incident, A.A.W. held another youth in a chokehold until the youth lost consciousness and dropped to the floor. In another incident, A.A.W. assaulted a youth specialist, who was trying to get him into seclusion. EMS transported the youth specialist to the hospital as a result of A.A.W.'s actions. (5/6/14 tr. at 44.)

{¶28} Brad Burke, a social worker at Circleville, testified that A.A.W. participated in individual counseling, cognitive behavioral therapy groups that encourage behavioral changes, and manic groups that teach anger management. Yet despite 319 hours of treatment and 368 group sessions, Burke did not observe any improvement in A.A.W.'s attitude or behavior. (5/6/14 tr. at 132.) Burke explained: "He understands the material, but his behavior has not changed." (5/6/14 tr. at 132.) Burke also stated that even when A.A.W.'s actions became physically less aggressive, his demeanor and attitude did not change. (5/6/14 tr. at 134.) Based on Burke's observations and A.A.W.'s performance on a professional assessment, Burke concluded that A.A.W. posed a high risk of recidivism. (5/6/14 tr. at 134.)

{¶29} Similarly, Watson testified that although A.A.W. completed the four stages of the New Phoenix Mentality Program, a program for the rehabilitation of gang mentality, he remained a leader in the Heartless Felons. Watson explained:

I would say Youth [A.A.W.] was very candid with me in our conversations. And we had several individual sessions where we talked about his gang activity. Youth [A.A.W.] is a loyal member of his gang and he is involved because he likes the comradery.

* * *

[W]hen we had our central office review committee to bring this in front of your Court today * * * [h]e mentioned that he would continue to associate with Heartless Felons. He's a Heartless Felons. And that's how he feels. That's who he is. That's part of him.

(5/6/14 tr. at 202-203.) Watson testified that if A.A.W. returned to Circleville, he would continue his gang involvement in the Heartless Felons. (5/6/14 tr. at 204.)

{¶30} The record contains clear and convincing evidence to support the court's finding that A.A.W. was unlikely to be rehabilitated within the remaining period of juvenile jurisdiction. There was no evidence that A.A.W. would be rehabilitated in the foreseeable future, but he posed a continuing threat to the staff and youth in ODYS.

{¶31} Therefore, the third assignment of error is overruled.

D. Ineffective Assistance of Counsel

{¶32} In the fourth assignment of error, A.A.W. argues he was deprived of his Sixth Amendment right to the effective assistance of counsel at the invocation hearing. He contends his trial counsel was ineffective because she failed to object to Watson's testimony and organizational charts depicting the hierarchy of the Heartless Felons.

{¶33} The Sixth Amendment to the United States Constitution guarantees an accused juvenile the same rights to effective assistance of counsel as an adult criminal defendant. *In re Gault*, 387 U.S. 1, 41, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. A defendant must show that counsel acted unreasonably and that but for counsel's errors, there exists a reasonable probability that the result of the proceeding would have been different. *Strickland* at 696; *Bradley* at paragraph three of the syllabus. In making this determination, the reviewing court must presume that counsel's conduct was competent. *Id.*

{¶34} A.A.W. argues his trial counsel was ineffective because she failed to object to the court's decision to allow Watson to testify as a gang expert and to introduce his charts depicting the organization of the Heartless Felons into evidence. However, the record shows that counsel did object to Watson being qualified as an expert witness. At the hearing, the following exchange took place:

[ASSISTANT PROSECUTOR]: Your Honor, * * * the State ask[s] to qualify this individual as an expert on gang, gang specialist, as part of that is State's Exhibit 8 shows his resume, including the certification that he just spoke about.

THE COURT: Any objections?

[DEFENSE COUNSEL]: Your Honor, I would just object. This is the first time that we've seen his resume. I don't recall receiving this in discovery, his resume. * * * We just object that he's not an expert. * * * We're not going to stipulate that he's expert. The Court can decide for itself whether or not * * * the Court feel[s] he's an expert.

(5/6/14 tr. at 159-160.) Therefore, despite A.A.W.'s argument to the contrary, his trial counsel objected to Watson's qualifications to testify as an expert.

{¶35} It is true that Watson's trial counsel did not object to the admission of Watson's organizational charts into evidence. However, as previously stated, the Ohio Rules of Evidence, including Evid.R. 803(6), which governs exceptions to the hearsay rule, and Evid.R. 901, which governs the authentication of physical evidence, were not applicable to the invocation proceeding. Evid.R. 101(A); R.C. 2151.35(B)(2); Juv.R. 35(B)(2); *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, at ¶ 16, 20; *In re T.J.*, 8th Dist. Cuyahoga Nos. 99877 and 99878, 2013-Ohio-5434. R.C. 2151.35(B)(2) and Juv.R. 35(B)(2) authorize the juvenile court to admit any evidence that is "material and relevant" including hearsay and documentary evidence. Therefore, even if A.A.W.'s trial counsel had objected to the charts, the charts were admissible and the court would have overruled the objection.

{¶36} Moreover, even if counsel had objected and the charts were excluded from evidence, the outcome of the proceedings would not have been different. As previously stated, Brad Burke, a social worker at Circleville, testified that despite 319 hours of treatment and 368 group sessions, A.A.W.'s behavior and attitude had not improved.

Based on Burke's observations and A.A.W.'s performance on a professional assessment, Burke concluded that A.A.W. posed a high risk of recidivism. (5/6/14 tr. at 134.)

{¶37} Similarly, Watson testified that although A.A.W. completed the four stages of the New Phoenix Mentality Program, he remained a leader in the Heartless Felons and demonstrated that he was not likely to disassociate from the gang in the foreseeable future. Watson testified that, in his opinion, A.A.W. posed a continuing threat to the staff and youth in ODYS. Therefore, even if the trial court had excluded the organizational charts, the court would have nevertheless concluded that A.A.W. was not likely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶38} Accordingly, the fourth assignment of error is overruled.

III. Conclusion

{¶39} The trial court was authorized by Evid.R. 101(A), R.C. 2151.35(B)(2) and Juv.R. 35(B)(2) to admit Watson's expert testimony and organizational charts. The court's determination that A.A.W. was unlikely to be rehabilitated within the remaining period of juvenile jurisdiction was supported by clear and convincing evidence. A.A.W.'s trial counsel was effective and his Sixth Amendment right to the effective assistance of counsel was not violated.

{¶40} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court, juvenile division, 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
TIM McCORMACK, J., CONCUR