

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: A.K.

C.A. No. 09CA0025-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 2007 11 DQ 0925

DECISION AND JOURNAL ENTRY

Dated: September 21, 2009

WHITMORE, Judge.

{¶1} Appellant, A.K., appeals from the judgment of the Medina County Court of Common Pleas, Juvenile Division, adjudicating him a delinquent child and classifying him as a Tier II juvenile sex offender registrant. This Court affirms in part and reverses in part.

I

{¶2} On November 9, 2007, Officer Daniel Hazek responded to a call regarding a missing or runaway juvenile identified as A.K. Officer Hazek interviewed A.K.'s mother and discovered that A.K. had fled his home after he and his mother had quarreled. A.K.'s mother informed Officer Hazek that she had argued with her son after her twelve year old daughter, A.K.'s sister, told her that A.K. had sexually assaulted her. After receiving this information, Officer Hazek contacted other officers to search for A.K. while he interviewed the victim. Officer Hazek also called the Medina County Juvenile Prosecutor. She advised that A.K. be detained and transported to the Juvenile Detention Center once he was found based on the

allegations of gross sexual imposition. Officers found A.K. hiding in the back seat of a friend's car and took him into custody. A.K. admitted that he had sexually assaulted his sister, and officers transported him to the Juvenile Detention Center.

{¶3} On November 13, 2007, a complaint was filed against A.K. The complaint charged A.K. with gross sexual imposition, a violation of R.C. 2907.05(A)(4) and a third-degree felony if committed by an adult. On January 29, 2008, a magistrate held a hearing. A.K. admitted the charge contained in the complaint, and the magistrate found him to be a delinquent child. On March 10, 2008, the trial court held a dispositional hearing and a classification hearing. The court issued orders adopting the magistrate's adjudication decision, committing A.K. to the Department of Youth Services ("DYS"), and classifying A.K. as a Tier II sex offender pursuant to Senate Bill 10.

{¶4} On April 9, 2008, A.K. filed a notice of appeal. This Court dismissed A.K.'s appeal for lack of a final appealable order because the trial court adopted the decision of the magistrate without independently entering judgment. *In re A.K.*, 9th Dist. No. 08CA0024-M, 2009-Ohio-394, at ¶3. On remand, the trial court issued another order declaring A.K. to be a delinquent child and approving DYS's case plan for A.K.¹ The order noted that the court would delay any reclassification hearing. Specifically, the order noted that A.K. "may request reclassification of his sexual offender registrant status once he has completed the community based sexual offender treatment program required as part of his case[]plan."

¹ A.K. was released from DYS on March 22, 2009.

{¶5} A.K. now appeals from the trial court’s order and raises eight assignments of error for our review. For ease of analysis, we combine several of the assignments of error.

II

Assignment of Error Number One

“THE MEDINA COUNTY JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT ADJUDICATED [A.K.] TO BE A DELINQUENT CHILD BECAUSE AT THE TIME THE OFFENSE WAS ALLEGEDLY COMMITTED THERE EXISTED NO STATUTORY AUTHORITY TO FILE A COMPLAINT TO INVOKE THE JURISDICTION OF THE JUVENILE COURT AND THERE WERE NO STATUTORY DEFINITIONS FOR ‘DELINQUENCY’ OR ‘GROSS SEXUAL IMPOSITION[.]’”

{¶6} In his first assignment of error, A.K. argues that the juvenile court lacked jurisdiction to adjudicate him delinquent because Senate Bill 10 divested the court of jurisdiction from July 1, 2007 to January 1, 2008. Specifically, he argues that because the legislature repealed R.C. 2151.23 as of July 1, 2007 and did not make the amendments to that statute and others contained in Senate Bill 10 effective until January 1, 2008, no governing statute existed at the time the juvenile court adjudicated him delinquent. This Court has previously considered and rejected A.K.’s argument. *In re T.C.H.*, 9th Dist. Nos. 24130 & 24131, 2008-Ohio-6614, at ¶8-15. While we recognize that the Ohio Supreme Court has accepted *In re T.C.H.* for review, this Court will not revisit this issue absent a pronouncement from the Supreme Court. A.K.’s first assignment of error is overruled.

Assignment of Error Number Two

“THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM FOR [A.K.] IN VIOLATION OF OHIO REVISED CODE SECTION 2151.281(A) AND JUVENILE RULE 4(B).”

{¶7} In his second assignment of error, A.K. argues that the juvenile court abused its discretion when it failed to appoint him a guardian ad litem (“GAL”). Specifically, he argues

that the court was required to appoint him a GAL based upon the existence of a conflict of interest between himself and his parents.

{¶8} A.K. never requested that a GAL be appointed in the court below and never filed objections to the magistrate’s report on that basis. This Court has held that the “[forfeiture] doctrine applies where a juvenile appeals the magistrate’s failure to appoint a [GAL], but does not file objections to the magistrate’s report.” *In re J-M.W.*, 9th Dist. Nos. 23066 & 23144, 2006-Ohio-6156, at ¶7. Consequently, we review the juvenile court’s decision not to appoint A.K. a GAL solely for plain error. *Id.* at ¶8-9. Plain error “exists when an error ‘seriously affects the basic fairness, integrity or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.’” *Id.* at ¶9, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122-23.

{¶9} A GAL is a “person appointed to protect the interests of a party in a juvenile court proceeding.” Juv.R. 2(O). The juvenile court “shall appoint a [GAL] *** to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child *** when *** [t]he court finds that there is a conflict of interest between the child and the child’s parent.” R.C. 2151.281(A)(2). See, also, Juv.R. 4(B)(2). “[T]he juvenile court is in the best position to weigh the relevant facts in determining whether a potential conflict of interest exists between the parent and child.” *In re J-M.W.* at ¶11, quoting *In re Sappington* (1997), 123 Ohio App.3d 448, 453-54. “The question is whether or not ‘the record from below reveals a strong enough possibility of conflict of interest between parent and child to show that the juvenile court [committed plain error] by not [appointing a GAL].’” *In re J-M.W.* at ¶11, quoting *In re Sappington*, 123 Ohio App.3d at 454.

{¶10} A.K. argues that the trial court should have appointed a GAL because his parents acted against his penal interests by calling the police after they learned of his sister’s accusations against him. A.K. argues that the fact that his parents called the police demonstrates “at least the possibility of a conflict.” In support of his argument, A.K. points to several cases in which a juvenile’s parent or guardian took actions against the juvenile’s penal interests by testifying against the juvenile and recommending that the juvenile be committed. See, e.g., *In re Cook*, 11th Dist. No. 2003-A-0132, 2005-Ohio-5288, at ¶33.

{¶11} Unlike the cases upon which A.K. relies, A.K.’s parents did not testify against him and did not recommend that he be committed. A.K. chose to admit to the charge of gross sexual imposition with the advice of his counsel and only after the juvenile court conversed with him at length about his rights, what the effect of his admission would be, and what his potential disposition could be. A.K.’s parents appeared with him at his adjudication and disposition hearings and, more than once, expressed concern over the length and severity of the disposition that A.K. might receive. Compare *In re Cook* at ¶33 (identifying conflict where juvenile’s father initiated the complaint for assault against him and testified against the juvenile at his hearing); *In re Bostick*, 4th Dist. No. 05CA2820, 2005-Ohio-5123, at ¶19-20 (identifying conflict where juvenile’s father spoke out against his penal interests by telling the magistrate that he thought his son should remain in DYS’s custody). The record does not support A.K.’s assertion that a GAL should have been appointed based solely on his parents having called the police. See *In re Howard* (1997), 119 Ohio App.3d 201, 207 (declining to adopt a bright-line rule that the appointment of a GAL is necessary every time a parent speaks against his or her child’s penal interest). A.K.’s parents called the police both because of the victim’s allegations and because A.K. had run away. Officer Hazek’s report indicates that he did not even learn of any abuse

allegations until after he arrived at A.K.’s residence for a missing/runaway juvenile dispatch and spoke with A.K.’s mother. Based on the foregoing circumstances, we cannot say that the trial court committed plain error by not appointing A.K. a GAL. *In re Smith*, 3d Dist. No. 14-05-33, 2006-Ohio-2788, at ¶37 (concluding that court did not commit plain error by not appointing GAL where juvenile had counsel and his mother appeared at his dispositional hearing and urged the court not to commit him to DYS). A.K.’s second assignment of error is overruled.

Assignment of Error Number Three

“THE MEDINA COUNTY JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT CLASSIFIED [A.K.] AS A JUVENILE OFFENDER REGISTRANT PURSUANT TO R.C. 2152.82.”

{¶12} In his third assignment of error, A.K. argues that the juvenile court erred in classifying him as a Tier II juvenile sex offender registrant. Specifically, A.K. argues that he was never previously adjudicated delinquent for committing a sexually oriented or child-victim oriented offense, a necessary prerequisite to classification under R.C. 2152.82. We agree.

{¶13} This Court applies a de novo standard of review to an appeal from a trial court’s interpretation and application of a statute. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. “A de novo review requires an independent review of the trial court’s decision without any deference to the trial court’s determination.” *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶4.

{¶14} R.C. 2152.82 provides that a juvenile court must classify a delinquent child pursuant to Senate Bill 10 as part of the court’s dispositional order if certain criteria apply. Among other criteria, the court must determine that “the child previously was adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense, regardless of when the prior offense was committed and regardless of the child’s age at the time

of committing the offense.” R.C. 2152.82(A)(3). Here, the juvenile court indicated that it was classifying A.K. pursuant to R.C. 2152.82. The record reflects, however, that none of the offenses for which A.K. was previously adjudicated were sexually oriented or child-victim oriented offenses. The State does not dispute this. Rather, the State argues that any error on the part of the juvenile court was harmless because the court was required to classify A.K. at some point, either before committing him to DYS or after his release.

{¶15} R.C. 2152.83 provides, in relevant part, as follows:

“(A)(1) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order *or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child’s release from the secure facility* an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

“(a) The act for which the child is or was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

“(b) The child was sixteen or seventeen years of age at the time of committing the offense.

“(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.” (Emphasis added.)

When a child falls within R.C. 2152.83(A)’s confines and the juvenile court commits the child to DYS, the court has no authority to classify the child before his release. *In re H.P.*, 9th Dist. No. 24239, 2008-Ohio-5848, at ¶16-17. This Court has held that such a classification is void and must be vacated. *Id.* at ¶17.

{¶16} The juvenile court adjudicated A.K. a delinquent child and ordered that he be committed to DYS. A.K. was sixteen at the time of his offense (gross sexual imposition) and was not required to be classified as a juvenile offender registrant under R.C. 2152.82 or a public

registry-qualified juvenile offender registrant under R.C. 2152.86. R.C. 2152.83(A)(1)(a)-(c). See, also, R.C. 2152.86(A)(1) (including as a requirement for public-registry qualified status that a juvenile be given a serious youthful offender dispositional sentence). Consequently, he fell within R.C. 2152.83(A)'s confines. By classifying A.K. before his release from DYS, the trial court acted without authority. *In re H.P.* at ¶17. Therefore, A.K.'s classification is void and is vacated pursuant to that determination. A.K.'s third assignment of error is sustained.

Assignment of Error Number Four

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT [A.K.’S] CLASSIFICATION AS A TIER II JUVENILE SEX OFFENDER REGISTRANT WAS OFFENSE-BASED IN VIOLATION OF R.C. 2950.01(E)-(G).”

Assignment of Error Number Five

“THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO [A.K.], AS THE LAW VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW.”

Assignment of Error Number Six

“[A.K.] WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.”

Assignment of Error Number Seven

“THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO [A.K.] AS THE APPLICATION OF SENATE BILL TO [A.K.] VIOLATES HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE 1 OF THE OHIO CONSTITUTION.”

Assignment of Error Number Eight

“THE RETROACTIVE APPLICATION OF SENATE BILL 10 TO A.K. VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION.”

{¶17} In his remaining assignments of error, A.K. raises various constitutional challenges to Senate Bill 10 and argues that his counsel was ineffective for failing to educate himself on juvenile sex offender registration laws so that he could inform the juvenile court of its classification error. Based on our resolution of A.K.'s third assignment of error, his remaining assignments of error are moot and will not be addressed. *Id.* at ¶19; *In re T.C.H.* at ¶18; App.R. 12(A)(1)(c).

III

{¶18} A.K.'s first and second assignments of error are overruled, his third assignment of error is sustained, and his remaining assignments of error are moot. The judgment of the Medina County Court of Common Pleas, Juvenile Division, is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

AMANDA J. POWELL, Assistant State Public Defender, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MEGAN L. FORSYTHE, Assistant Prosecuting Attorney, for Appellee.