

IN THE SUPREME COURT OF OHIO

IN RE: L.A.B.,
A MINOR CHILD

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Case No. **07-0895**

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District

C.A. Case No. 23309

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT L.A.B.**

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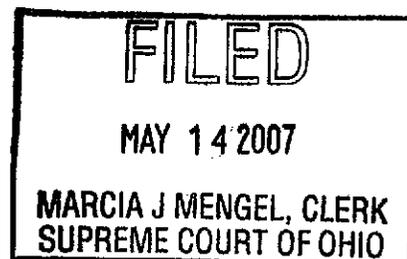


TABLE OF CONTENTS

Page Number

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....4

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....9

FIRST PROPOSITION OF LAW:

A child has the right to counsel at all stages of the proceedings against him. A child’s waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.9

SECOND PROPOSITION OF LAW:

When a child appears in juvenile court before a magistrate, the magistrate’s failure to warn the child of the child’s responsibility to file objections to the magistrate’s decision pursuant to Juvenile Rule 40 before permitting the child to waive his right to counsel is structural error and thus warrants automatic reversal.....11

CONCLUSION14

CERTIFICATE OF SERVICE15

APPENDIX

In re: L.A.B., Decision and Journal Entry, Summit County Court of Appeals, Case No. 23309, March 13, 2007..... A-1

In re L.A.B., Entry Certifying Conflict, Summit County Court of Appeals, Case No. 23309, April 18, 2007..... A-13

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents this Court with an opportunity to consider a child's right to counsel at a probation revocation hearing, a child's waiver of that right, and a child's waiver of counsel when his case is heard by a magistrate. Because this Court's consideration of the issues in this case hinges on this Court's pending decision in another case, this Court should accept jurisdiction, but stay briefing on L.A.B.'s Propositions of Law until after this Court issues a decision in In re Spears, 2006-1074, Licking App. No. 2005 CA 93, 2006-Ohio-1920. After Spears is issued, L.A.B asks this Court to order briefing in this matter.

Children have the right to counsel at all stages of the proceedings in juvenile court. This right must be zealously guarded at every stage of the proceedings. An important component to guarding the right to counsel is allowing a child to waive it only after a juvenile court has obtained a knowing, intelligent, and voluntary waiver of the child's right to counsel. While under current law there is no clear standard for obtaining a valid waiver of a child's right to counsel in juvenile court, the issue is under review in this Court in Spears.

A child's right to counsel at a probation revocation hearing is no less important than his right to counsel at any other stage of the proceedings. It follows then, that a child's waiver of his right to counsel at a probation revocation hearing must be as knowing, as intelligent, and as voluntary as it is at any other stage of the proceedings. Proposition of Law I concerns the standard for a valid waiver of a child's right to counsel at a probation revocation hearing in juvenile court. Because this Court's guidance in Spears is needed to properly address this issue, this Court should accept jurisdiction of this case and stay briefing on Proposition of Law I until after this Court's decision in Spears. After Spears is issued, L.A.B asks this Court to order briefing in this matter.

Proposition of Law II concerns a child's waiver of counsel when his case is heard by a magistrate. For children whose cases are heard before a magistrate in juvenile court, an additional responsibility attaches: unless a party files objections to the magistrate's decision according to Juvenile Rule 40(D)(3)(b), he shall not assign error to the court's adoption of the magistrate's decision on appeal. For children who have attorneys, their failures to file objections to the magistrate's decision have not prevented courts of appeals from hearing their assigned errors on appeal, because their errors can be considered through a claim of ineffective assistance of counsel. See, e.g., In re Meatchum, Hamilton App. No. C-050-291, 2006-Ohio-4128 at ¶¶30-32; In re D.B., Montgomery App. No. 20979, 2005-Ohio-5583 at ¶¶48-53 ; In re Darvius C., Erie App. No. E-00-064, 2002-Ohio-854 at ¶14.

Obviously, children who are not represented by counsel who have not filed objections to the magistrate's decision pursuant to Juv.R. 40 cannot pursue their assignments of error through an ineffective assistance of counsel claim. However, at least two courts of appeals have addressed a child's claim of invalid waiver of counsel despite the child's failure to file objections to the magistrate's decision. The Fifth District Court of Appeals has found that the child's failure to file objections to the magistrate's decision did not bar her from assigning error on appeal where the court found she had not validly waived her right to an attorney below. In re Kindred, Licking App. No. 04 CA 7, 2004-Ohio-3647 at ¶¶25-26. In L.A.B., the Ninth District Court of Appeals found that the juvenile court obtained a valid waiver of his right to counsel—even though the court did not specifically inform him of his responsibilities pursuant to Juvenile Rule 40—and refused to consider his remaining assignments of error because he did not allege plain error on appeal.

But, can a child truly be found to have knowingly, intelligently, and voluntarily waived his right to counsel when the magistrate has not warned him of his responsibilities under Juvenile Rule 40(D)(3)(b)? The answer must be no, because a child has a right to counsel at all stages of the proceedings in juvenile court—including the fourteen days following a proceeding heard by a magistrate. The assistance of counsel at this stage is especially important because the requirements of Juvenile Rule 40(D)(3)(b) are technical, and the failure to comply with the rule can prove fatal to a child’s claims on appeal.

The waiver of a child’s right to counsel in juvenile court is a far too common occurrence. In March 2003, the American Bar Association and Central Juvenile Defender Center, with the assistance of the Juvenile Justice Coalition, Inc., released a study of Ohio’s juvenile justice system. Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio, March 2003. In that study, a juvenile court magistrate is quoted as saying, “Sixty to seventy percent of kids waive counsel, and these waivers are not knowing and voluntary.” *Id.* at 25. Of youth interviewed in facilities operated by the Ohio Department of Youth Services, roughly fifteen percent of children housed there had been unrepresented by counsel. *Id.* Site visit investigators noted that, in all but two of the twelve jurisdictions reviewed, waiver of counsel was a common and pervasive practice. *Id.* These findings were true in urban, small urban, and rural counties alike. *Id.*

Given the number of children who do not receive the benefit of counsel, this Court’s guidance regarding a child’s waiver of counsel, in light of the strict requirements of Juvenile Rule 40(D)(3)(b), is urgently needed—especially when such a large number of juvenile cases are heard by magistrates. For example, in the Hamilton County Juvenile Court, cases are heard by

twenty-six magistrates and only two judges.¹ In the Montgomery County Juvenile Court, cases are heard by 13 magistrates and two judges.² The provision contained in Juvenile Rule 40(D)(3)(b)(iv) is problematic for a child who waives counsel—especially when a uniform standard for a child’s waiver of his right to counsel has not yet been issued by this Court. This Court’s pending decision in Spears will provide guidance for this case, it but will not resolve the specific issues here. Accordingly, because this Court’s pending decision in Spears does not involve the specific circumstances at issue in this case—a child’s waiver of his right to counsel at a probation revocation hearing when the magistrate failed to warn the child of his responsibilities under Juvenile Rule 40(D)(3)(b)—this Court must accept this case and stay briefing on both Propositions of Law until Spears is decided by this Court. After Spears is issued, this Court should order briefing in this matter. Because there is uncertainty in the lower courts regarding a child’s right to counsel in a juvenile probation revocation proceeding, a child’s waiver of that right, and a child’s waiver of counsel when his case is heard by a magistrate, this case is of public and great general interest and involves a substantial constitutional question.

STATEMENT OF THE CASE AND FACTS

On June 8, 2006, L.A.B., aged 13, appeared in the Summit County Juvenile Court for a probation revocation hearing before a magistrate in case number DL-05-07-3586. (T.pp. 39-49.) During the probation revocation portion of the hearing, the court began, saying:

THE COURT: We are on the record for the matter of [L.A.B.]. Case number is DL 05-07-3586. It is before the court for a preliminary hearing on a probation violation. [L.A.B] is present with his mother and his probation officer, Mr.Sims.

¹ http://www.hamilton-o.org/juvenilecourt/Annual_Report/PDF%202005%20Annual%20Report/2005%20Annual%20Report.PDF at pp. 32 and 4.

² http://www.mcoho.org/revize/montgomery/government/juvenile_court/juvenile_court_organization.html

[***]

Okay. The probation violation indicates that you have violated your probation by not attending YOC on a regular basis and having missed the last three days in a row. Do you understand that?

[L.A.B.]:

Yes.

THE COURT:

All right, [L.A.B.]. You have the right to be represented by a lawyer at any time. If you can't afford a lawyer, I will give you one that you don't have to pay for. Do you understand that?

[L.A.B.]:

Yes.

THE COURT:

Do you want to be represented by a lawyer or do you want to proceed today without a lawyer?

[L.A.B.]:

Without a lawyer.

(T.p.39.) Then, the court explained L.A.B.'s trial rights and possible maximum penalty, which was a Department of Youth Services commitment "for a minimum period of one year, maximum until you are 21 years old." (T.p. 40.) The court continued:

THE COURT:

Understanding those things, [L.A.B.], do you want to admit or do you want to deny the probation violation?

[L.A.B.]:

Admit.

THE COURT:

You understand by doing that, you would give up the right to have an attorney and give up the right to a trial?

[L.A.B.]:

Yes.

(T.p. 41.) After the court accepted L.A.B.'s admission to the probation violation, it proceeded directly to disposition. The court did not explain that L.A.B. also had a right to counsel for disposition, or explain that it was going to proceed directly to disposition; instead, the court informed L.A.B.:

So I'm going to tell you what, Mr. [L.A.B.]. I'm going to ask you right now why you think I should not send you to the Department of Youth Services today, because I'm going to tell you what, you are not going home. Today is a very sad day for you. The bus to DYS leaves on Monday. ***

(T.p. 42.)

During the disposition portion of L.A.B.'s hearing, L.A.B.'s probation officer recommended that L.A.B. "go to intensive probation, [to] see what someone with a lesser

caseload can do with him, see if they can work with him.” (T.p. 44) Then, L.A.B.’s mother asked the court if she could add her perspective. (T.p. 46.) She told the court:

All this extending his probation, then going to YOC and all that extra, it’s not going to help. By him getting locked up in the detention center, the same day he is going to get released, he’s going to do the same thing. Enough is enough. We need to be hard on him and send him where he’s supposed to go.

(T.p.46.) Further, L.A.B.’s mother did not speak to L.A.B., offer any other dispositional alternatives on his behalf, or object to the court’s disposition at any point during his proceeding. (T.pp. 39-49.) For disposition, the court sentenced L.A.B. to the Department of Youth Services for a minimum period of one year, maximum to his twenty-first birthday. (T.p. 47.) The court did not find that L.A.B. “violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified.” See Juv.R. 35(B). Neither the magistrate’s decision nor the judge’s final decision in this case stated any findings or procedures pursuant to Juv.R. 35(B), which governs probation revocation hearings. Both documents indicate that the hearing type that occurred on June 8, 2006 was “Preliminary,” an “Adjudication,” and a “Disposition.”

L.A.B., who was not represented by counsel during his proceeding before a magistrate, did not file objections to the magistrate’s decision pursuant to Juv.R. 40.³ At no time during L.A.B.’s proceedings did the court inform him of his responsibility to file objections pursuant to Juv.R. 40, or the effect his failure to file objections would have on his ability to appeal his case. Although the court’s entry did include a very technical explanation, “THE MAGISTRATE’S DECISION IS APPROVED AND ENTERED AS A MATTER OF RECORD, SUBJECT TO THE RIGHT OF THE PARTY TO FILE WRITTEN OBJECTIONS WITHIN 14 DAYS OF ITS

³ At the time of L.A.B.’s proceeding, the requirements for filing objections to the magistrate’s decision were found in Juv.R. 40(E)(3)(a-c). Under the version of the rule adopted on July, 1 2006, the objections section is found in Juv.R. 40(D)(3)(b)(i)-(iii).

FILING, PER JUVENILE RULE 40(E)(3),” it did not warn that if objections were not filed, the party “shall not assign as error on appeal the court’s adoption of any finding of fact or conclusion of law...” according to the version of Juv.R. 40 that was in effect at that time.⁴ On July 7, 2006, L.A.B. filed an appeal of his probation violation adjudication and disposition and assigned error to the court’s failure to obtain a valid waiver of his right to counsel, to the court’s failure to comply with the requirements of Juv.R. 35(B), and to the court’s failure to appoint a guardian ad litem to represent his best interests when the record revealed that a strong possibility of a conflict existed between him and his mother.

On March 30, 2007, the Ninth District issued its opinion in this case. In its opinion, the court stated that Juvenile Rule 35(B), not Juvenile Rule 29, applies to probation revocation hearings. L.A.B. at ¶7. It found that Juv.R. 35(B) did not require the trial court to apprise L.A.B. “of the possible punishment for his probation violation before he waived his right to counsel,” because “Juv.R. 35(B) only requires that the juvenile be apprised of the ‘condition of probation’ he allegedly violated and the ‘grounds on which probation revocation is proposed.’” *Id.* at ¶12. It concluded that the juvenile court did not err by accepting L.A.B.’s waiver of his right to counsel because the court informed him “of the charge against him, advised [L.A.B.] of his right to counsel and that counsel could be appointed for him if he could not afford it.” *Id.* at ¶14.

As to L.A.B.’s second and third assignments of error, which concerned the juvenile court’s failure to follow the requirements of Juv.R. 35(B) and the court’s failure to appoint a guardian ad litem to represent his best interests when there was a strong possibility that a conflict

⁴ At the time of L.A.B.’s proceeding, the waiver provision was found in Juv.R. 40(E)(3)(d). Unlike the current version of the rule, the former version did not contain the phrase, “Except for a claim of plain error....”

existed between him and his mother, the court found that L.A.B. “failed to object to the magistrate’s decisions that culminated in the Probation Violation Order,” and that “pursuant to Juv.R. 40(D)(3)(a)[sic⁵] and Civ.R. 53(D)(3)(b), [L.A.B.] could have filed objections to the magistrate’s decision within fourteen days after the filing of that decision.” Id. at ¶16. The court found that “due to L.A.B.’s “failure to object to the magistrate’s decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate’s decision.” Id. The court noted that an exception to the so-called “forfeiture doctrine” exists if plain error is found, but declined to address L.A.B.’s remaining issues because he “neither argued plain error, nor [did he explain] why we should delve into either of these issues for the first time on appeal.” Id. at ¶19. In its opinion, the court did not address the fact that L.A.B. was not warned about the “forfeiture doctrine” at any time during or after his proceedings and failed to note that the provision for waiver in Juvenile Rule 40 that was in effect at the time of L.A.B.’s hearing did not provide an exception for a “claim of plain error;” instead, it cited to its own precedent, State v. McKee, 91 Ohio St. 3d 292, 299, n.3, 2001-Ohio-41 (Cook, J., dissenting), and Criminal Rule 52(B).

On April 18, 2007, the Ninth District Court of Appeals Certified a Conflict of L.A.B.’s question, “Does Juvenile Rule 29 apply to probation violations in juvenile court?” L.A.B.’s notification of that certified conflict is forthcoming in this Court. This appeal timely follows.

⁵ Juv.R. 40(D)(3)(a) provides for the timing; content; and, form, filing, and service of the magistrate’s decision. Juv.R. 40(D)(3)(b) provides for the filing of objections to the magistrate’s decision.

ARGUMENT

FIRST PROPOSITION OF LAW

A child has the right to counsel at all stages of the proceedings against him. A child's waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution

In 1995, the Eighth District Court of Appeals stated, "We have found no controlling Ohio case law regarding what constitutes a valid waiver of a juvenile's constitutional right to counsel." In re East (1995), 8th Dist. No. 67955, 105 Ohio App. 3d 221, 223, 663 N.E.2d 983. Because there exists no controlling case law to this day, courts have applied widely varying standards that have produced inconsistent results. All of Ohio's courts of appeals have considered juveniles' waivers of counsel. Despite this, no clear standard has emerged. This Court has taken the issue of a child's waiver of his right to counsel under review in In re Spears, 2006-1074, Licking App. No. 2005 CA 93, 2006-Ohio-1920. Until this Court issues its decision in Spears, the precise standard for reviewing a child's claim of error regarding his waiver of counsel is not certain.

But because Spears does not involve the precise issues here—the waiver of the right to counsel in a probation revocation hearing when the proceeding is heard by a magistrate—this Court's forthcoming decision in Spears will provide guidance for this case, but it will not resolve the specific issues in this case. Additionally, an important facet of the appellant's argument in Spears is that the due process protections found in Juvenile Rule 29(B)(1)-(5) are mandatory and are essential to ensuring that a child's waiver of counsel is knowing, intelligent, and voluntary.

But whether Juvenile Rule 29 applies to juvenile probation violation hearings is far from clear. In its opinion below, the Ninth District relied on its decisions in In re Rogers (May 23,

2001), Summit App. No. 20393, In re Motley (1996), 110 Ohio App. 3d 641, 674 N.E.2d 1268, and In re Collins (Sept. 27, 1995), Medina App. No. 2365-M (Dickenson, J., dissenting), and found that Juv.R. 35(B), not Juv.R. 29, applies to probation revocation hearings. L.A.B. at ¶7. It is worth noting that of the three cases cited in its opinion, only Rogers involved a child's waiver of his right to counsel; Motley and Collins involved allegations that the juvenile court erred when it accepted the child's plea. The Eighth and the Twelfth District Courts of Appeals have applied Motley and have found that Juv.R. 35(B), and not Juv.R. 29, applies to probation revocation hearings where a child has alleged improper waiver of counsel. In re Bennett (June 12, 1997), Cuyahoga App. No. 71121; In re J.B., Brown App. Nos. CA2004-09-024, CA2004-09-025, 2005-Ohio-5045.

In Collins, the dissent addressed the allegation of an improper acceptance of the child's plea and noted that although Juvenile Rule 35(B) does not incorporate the requirements of Juv.R. 29(D), it does incorporate the requirements of due process. Collins at *9-10. The Seventh District Court of Appeals, in In re Royal (1999), 132 Ohio App. 3d 496, 725 N.E.2d 685, distinguished Collins where the appellant did not have counsel, notice of the probation violation, or a probation revocation hearing. Following Royal, the Seventh District has recently held that "a 'meaningful dialogue' must take place between the magistrate or judge and the juvenile at a juvenile probation revocation proceeding before a waiver of the right to counsel can be considered valid." In re Lohr, Monroe App. No. 06 MO 6, 2007-Ohio-1130, citing In re Mulholland, Mahoning App. No. 01-C.A.-108, 2002-Ohio-2213, and Royal.

For more than forty years, many of the same safeguards of due process afforded to adult defendants have applied to juveniles in delinquency adjudications. See In re Gault (1967), 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527. Further, this Court has found 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 Cross, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶¶21-24. Until this Court's decision in Spears is released, there exists no clear standard for what constitutes valid waiver of a juvenile's right to counsel in Ohio. Therefore, because this Court's pronouncement of a clear standard is urgently needed to ensure due process and fair treatment for children who are facing probation revocation, L.A.B. asks this Court to accept jurisdiction of this appeal, but stay briefing on this Proposition of Law until Spears is decided by this Court. After Spears is issued, L.A.B asks this Court to order briefing in this matter.

SECOND PROPOSITION OF LAW

When a child appears in juvenile court before a magistrate, the magistrate's failure to warn the child of the child's responsibility to file objections to the magistrate's decision pursuant to Juvenile Rule 40 before permitting the child to waive his right to counsel is structural error and thus warrants automatic reversal.

A child in a juvenile delinquency proceeding "requires the guiding hand of counsel at every step in the proceedings against him." Gault at 36, citing Powell v. Alabama (1932), 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158. This Court has said that R.C. 2151.352, which entitles a child to the right to counsel in juvenile court, "provides a statutory right to appointed counsel that goes beyond constitutional requirements." State ex rel. Asberry v. Payne, 82 Ohio St. 3d 44, 46, 1998-Ohio-596.

The step of the proceedings at issue here is the fourteen-day period after disposition of a juvenile delinquency proceeding. When a child's proceeding is heard by a magistrate, the child or the child's attorney has fourteen days to file objections to the magistrate's decision. Juv.R. 40(D)(3)(b). The assistance of counsel at this stage is especially important because the requirements of Juvenile Rule 40(D)(3)(b) are technical, and the failure to comply with the rule

can prove fatal to a child's claims on appeal. When the child or his attorney does not file objections to the magistrate's decision, under both the current rule and the former version of the rule that was in effect at the time L.A.B. appeared before the magistrate, the child "shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion" of the magistrate. Juv.R. 40(D)(3)(b)(iv); (former) Juv.R. 40(E)(3)(d).

For children who have attorneys, their failures to file objections to the magistrate's decision have not prevented courts of appeals from hearing their assigned errors on appeal, because their errors can be considered through a claim of ineffective assistance of counsel. See, e.g., In re Meatchum, Hamilton App. No. C-050-291, 2006-Ohio-4128 at ¶¶30-32; In re D.B., Montgomery App. No. 20979, 2005-Ohio-5583 at ¶¶48-53 ; In re Darvius C., Erie App. No. E-00-064, 2002-Ohio-854 at ¶14.

But children like L.A.B., who have not received the benefit of representation by counsel and who have not filed objections to their magistrate's decision, cannot pursue their assignments of error through an ineffective assistance of counsel claim. In L.A.B., the Ninth District Court of Appeals found that the juvenile court obtained a valid waiver of his right to counsel—even though the court did not specifically inform L.A.B. of his responsibilities pursuant to Juvenile Rule 40—and refused to consider his remaining assignments of error because he did not allege plain error on appeal. In contrast, the Fifth District Court of Appeals has found that the child's failure to file objections to the magistrate's decision did not bar her from assigning error on appeal where the court found she had not validly waived her right to an attorney below. In re Kindred, Licking App. No. 04 CA 7, 2004-Ohio-3647 at ¶¶25-26.

In L.A.B., the court noted that "before permitting a waiver of counsel, the court has a duty to determine that the relinquishment is of "a fully known right" and is voluntarily,

knowingly and intelligently made. L.A.B. at ¶6, quoting Gault at 42. But under this standard, it would be improper to find that a child has knowingly and intelligently waived his right to counsel when the magistrate has not warned the of his responsibilities under Juvenile Rule 40(D)(3)(b). Because, unless the court explains the child's responsibilities, the technical requirements in the rule, and what dangers are involved if he does not know or follow the rule, the child cannot fully appreciate the right he is waiving. Further, when a magistrate fails to warn a child of the dangers of proceeding without counsel when an attorney's skills are essential, the magistrate's failure leads to a complete denial of the child's right to counsel during the critical fourteen days after the child's case is disposed.

A complete denial of counsel has been identified as one of very few errors that are so serious that they have been found to “‘defy analysis by ‘harmless error’ standards’ because they ‘affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.’” State v. Fisher, 99 Ohio St. 3d 127, 2003-Ohio-2761, at ¶9, quoting Arizona v. Fulminante (1991), 499 U.S. 279, 310, 111 S. Ct. 1246. “Unlike a garden-variety trial error, a structural error ‘transcends the criminal process’ by depriving a defendant of those ‘basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’” State v. Drummond, 111 Ohio St. 3d 14, 2006-Ohio-5084, at ¶271 (Moyer, C.J., dissenting), quoting United States v. Padilla (C.A.1, 2005), 415 F.3d 211, 219, quoting Rose v. Clark (1986), 478 U.S. 570, 577-578, 106 S.Ct. 3101. Indeed, “the United States Supreme Court has identified structural error in a very limited class of cases, such as the complete denial of counsel, trial by a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, a defective reasonable-doubt instruction, and

denial of a public trial.” Drummond at ¶271 (emphasis omitted), citing Neder v. United States (1999), 527 U.S. 1, 8, 119 S.Ct. 1827, Johnson v. United States (1997), 520 U.S. 461, 469, 117 S. Ct. 1544.

In L.A.B., despite the complete denial of counsel at a critical stage of the proceedings, the court affirmed the juvenile court’s acceptance of L.A.B.’s waiver of his right to counsel, and, citing to its own precedent, State v. McKee, 91 Ohio St. 3d 292, 299, n.3, 2001-Ohio-41 (Cook, J., dissenting), and Criminal Rule 52(B), declined to consider L.A.B.’s remaining assignments of error because he “neither argued plain error, nor [did he explain] why we should delve into either of these issues for the first time on appeal.” *Id.* at ¶19.

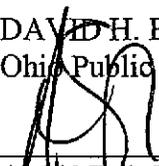
L.A.B. was not the first time a court of appeals has declined to consider an unrepresented child’s assigned errors on appeal when he has failed to file objections to the magistrate’s decision pursuant to Juvenile Rule 40, and it is certain not to be the last. Therefore, because this Court’s pending decision in Spears does not involve the specific circumstances at issue in this case—a child’s waiver of his right to counsel at a probation revocation hearing when the magistrate failed to warn the child of his responsibilities under Juvenile Rule 40(D)(3)(b)—L.A.B. asks this Court to accept jurisdiction of this appeal, but stay briefing on this Proposition of Law until Spears is decided by this Court. After Spears is issued, L.A.B. asks this Court to order briefing in this matter.

CONCLUSION

This case involves a substantial constitutional question, as well as questions of public or great general interest. This Court should grant jurisdiction and stay briefing in this matter until Spears is decided by this Court. After Spears is issued, L.A.B. asks this Court to order briefing in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant L.A.B.** was forwarded by regular U.S. Mail this 14th day of May, 2007 to the office of Philip D. Bogdanoff, Assistant Summit County Prosecutor, Safety Building, 53 University Avenue, 7th Floor, Akron, Ohio 44308.



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IN THE SUPREME COURT OF OHIO

IN RE: L.A.B.,
A MINOR CHILD

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Case No.

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District

C.A. Case No. 23309

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT L.A.B.**

COURT OF APPEALS
DANIEL M. HOEHLER

STATE OF OHIO)

2007 MAR 30 11 03 AM
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

SUMMIT COUNTY
CLERK OF COURTS No. 23309

IN RE: L.A.B.

APPEAL FROM JUDGMENT
ENTERED IN THE
JUVENILE COURT
COUNTY OF SUMMIT, OHIO
CASE No. DL0507003586

DECISION AND JOURNAL ENTRY

Dated: March 30, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶1} Appellant, L.A.B., appeals the judgment of the Summit County Juvenile Court finding that he had violated the conditions of his probation. We affirm.

I.

{¶2} On May 31, 2006, a complaint was filed in the Summit County Juvenile Court alleging that Appellant had violated his probation by not attending the Youth Outreach Center ("YOC") on a regular basis. On June 8, 2006, Appellant appeared in court before a magistrate. Appellant was accompanied by

his mother but without counsel. Appellant admitted that he had committed a probation violation. The court then asked Appellant whether he wished to be represented by an attorney. Appellant stated that he wished to proceed without counsel. The court then explained Appellant's trial rights and the possible maximum penalty, which consisted of a Department of Youth Services ("DYS") commitment "for a minimum period of one year, maximum until you are 21 years old." Appellant was 13 years old at the time of the hearing. After the court accepted Appellant's admission to the probation violation, it proceeded directly to disposition.

{¶3} During disposition, Appellant's probation officer recommended that Appellant "go to intensive probation, [to] see what someone with a lesser caseload can do with him, see if they can work with him." In addition, Appellant's mother voiced her opinion. She suggested that the court "be hard on him and send him where he's supposed to go." The court sentenced Appellant to the DYS for a minimum period of one year, maximum to his 21st birthday. Appellant timely appealed the court's decision, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT VIOLATED [APPELLANT'S] RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352, AND JUVENILE RULES 4 AND 35."

{¶4} In Appellant's first assignment of error, he contends that the trial court violated his right to counsel and right to due process under the U.S. Constitution, Ohio Constitution, R.C. 2151.352 and Juv.R. 4 and 35. We disagree.

{¶5} R.C. 2151.352 codifies a juvenile's right to counsel and states that "[i]f a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person." Juv.R. 29 governs adjudicatory hearings. Juv.R. 29(B)(3) and (4) state that "[a]t the beginning of the hearing, the court shall do all of the following: (3) [i]nform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel; (4) [a]ppoint counsel for any unrepresented party under Juv.R. 4(A) who does not waive the right to counsel[.]" Juv.R. 4 states that "[e]very party shall have the right to be represented by counsel *** if indigent *** when a person becomes a party to a juvenile court proceeding." Juv.R. 35(B) governs revocation of probation and provides that the court may revoke probation only

"after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to Juv.R. 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified."

{¶6} A juvenile may waive the right to counsel in most proceedings with permission of the court. Juv.R. 3. However, before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the

relinquishment is of “a fully known right” and is voluntarily, knowingly and intelligently made. *In re Gault* (1967), 387 U.S. 1, 42. *Gault* established that juveniles facing possible commitment were guaranteed many of the same constitutional rights at the adjudicatory stage as were their adult counterparts, including notification of the right to counsel and the appointment of counsel to indigent juveniles.

{¶7} This Court has held that the provisions of Juv.R. 29 do not apply to probation violation hearings. *In re Rogers* (May 23, 2001), 9th Dist. No. 20393, at *1; *In re Motley* (1996), 110 Ohio App.3d 641, 642; *In re Collins* (Sept. 27, 1995), 9th Dist. No. 2365-M, at *2 (J. Dickinson, dissenting). Rather, we concluded that Juv.R. 35(B) applies to such hearings. *Id.* To the extent we have previously applied Juv.R. 29 instead of Juv.R. 35 in our review of probation violation hearings, we have erred.

{¶8} In *Rogers*, as in this matter, the juvenile waived the right to counsel and admitted to a probation violation. Upon review, we found that the magistrate more than met the requirements of Juv.R. 35(B) where the magistrate instructed the juvenile of her right to appointed counsel as well as her right to call and cross-examine witnesses. *Id.* at *2. In *Motley*, 110 Ohio App.3d 641, 642, this Court held that the juvenile court was not required to advise the juvenile that he had a right to present evidence at the probation revocation hearing. Given our holdings in *Rogers* and *Motley*, “and the clear provisions of Juv.R. 35(B), the juvenile court

here was obliged only to advise [Appellant] that [he] had the right to counsel, and if appropriate, to have counsel appointed at the state's expense." *Rogers*, supra, at *2.

{¶9} Reviewing the transcript of the probation violation hearing in the instant case, we find that the magistrate advised Appellant that he was charged with violating his probation by not attending YOC on a regular basis and specifically by missing three days in a row. The magistrate asked Appellant whether he understood that he was so charged. Appellant responded that he did. The magistrate then told Appellant he had a right to be represented by a lawyer and that if he could not afford a lawyer, the court would appoint one to represent him. Appellant indicated he understood these rights. The magistrate then asked Appellant whether he wished to be represented by a lawyer or proceed without one. Appellant stated that he wished to proceed without a lawyer. Appellant's disposition hearing was held immediately thereafter. Having reviewed the record, we find that the trial court complied with Juv.R. 35(B) in the proceeding leading to Appellant's waiver of his right to counsel.

{¶10} Appellant cites *In re William B.*, 163 Ohio App.3d 201, 2005-Ohio-4428, and *In re C.A.C.*, 2d Dist. No. 2005-CA-134-35, 2006-Ohio-4003, in support of his contention that the trial court failed to properly inform him that he had a right to counsel, notwithstanding his intention to admit or deny the charge. He contends that as a result of the trial court's omission, he did not receive a full

and clear explanation of his right to counsel and therefore, could not have validly waived his right to counsel.

{¶11} *C.A.C.* is inapplicable to the within matter as it involved the waiver of counsel at an adjudicatory hearing, not a probation revocation hearing. *William B.* is also distinguishable. Rather than ask William B. whether he wished to waive his right to counsel, the trial court told him that if he wanted his rights, he should deny the probation violation charge. *William B.*, supra, at ¶20. The court found that “appellant was advised that in order to be afforded his constitutional rights, including his Sixth Amendment right to counsel, he would have to deny the charges levied against him.” *Id.* at ¶23. Unlike *William B.*, in the trial court’s discussion of Appellant’s right to counsel, the court did not differentiate between a juvenile who chooses to deny a charge and one who admits the charge. *Id.*

{¶12} Appellant additionally alleges that he was not informed that he could be sentenced to the DYS until age 21 before he waived his right to counsel. Pursuant to Juv.R. 35(B), the trial court was not required to apprise Appellant of the possible punishment for his probation violation before he waived his right to counsel. Juv.R. 35(B) only requires that the juvenile be apprised of the “condition of probation” he allegedly violated and the “grounds on which revocation is proposed.” Moreover, the record reflects that (1) the trial court specifically apprised Appellant of the consequences of violating probation on at least two

previous occasions within four months of this disposition hearing and (2) the trial court informed Appellant of these sanctions before he admitted to this offense.

{¶13} Appellant further contends that the trial court violated his right to counsel by failing to obtain a second waiver of counsel at his disposition hearing. He contends that the trial court's failure to advise him of his right to counsel at the disposition hearing was reversible error, citing this Court's decision in *In re S.J.*, 9th Dist. No. 23058, 2006-Ohio-4467. We discussed the doctrine of "substantial compliance" in *S.J.*, supra, at ¶8, and found that the trial court substantially complied with the requirements for waiving counsel at S.J.'s adjudication hearing and that the juvenile properly waived his right to counsel. At the disposition hearing, held on a different day, however, we found that the trial court erred because it "did not reiterate Appellant's right to counsel during disposition or allow him either to invoke or to waive his right to counsel at that stage." *Id.* at ¶10. The situation in *S.J.* is distinguishable from the within matter. Appellant's adjudication hearing and disposition hearing were held as part of the same proceedings on the same day.

{¶14} We find that the trial court's colloquy meets the requirements set forth in Juv.R. 35(B) and our holdings in *Rogers*, *Collins* and *Motley*. The trial court informed Appellant of the charge against him, advised Appellant of his right to counsel and that counsel could be appointed for him if he could not afford it.

Therefore, the trial court did not err by accepting Appellant's waiver of his right to counsel. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE JUVENILE COURT VIOLATED [APPELLANT'S] RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION; AND JUV.R. 35, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF JUV.R. 35(B)."

ASSIGNMENT OF ERROR III

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

{¶15} In Appellant's second assignment of error, he contends that the trial court violated his due process rights under federal and state law as well as Juv.R. 35, when the court failed to follow the requirements of Juv.R. 35(B). In Appellant's third assignment of error, he contends that the trial court erred in failing to appoint a guardian ad litem in violation of R.C. 2151.281(A) and Juv.R. 4(B). We disagree.

{¶16} In the instant case, Appellant failed to object to the magistrate's decisions that culminated in the Probation Violation Order. Pursuant to Juv.R. 40(D)(3)(a) and Civ.R. 53(D)(3)(b), Appellant could have filed written objections to the magistrate's decision within fourteen days after the filing of that decision. Absent objections to the magistrate's findings or conclusions, a party shall not

assign as error on appeal the magistrate's findings or conclusions as stated in the decision or "the court's adoption of any finding of fact or conclusion of law[.]" (Emphasis omitted.) *Lewis v. Savoia* (Aug. 28, 1996), 9th Dist. No. 17614, at *1, quoting Civ.R. 53(E)(3)(b). See, also, Juv.R. 40(D)(3)(a) and Civ.R. 53(D)(3)(b). Due to Appellant's failure to object to the magistrate's decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate's decision. See *In re Etter* (1998), 134 Ohio App.3d 484, 492, citing *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. See, also, *Lewis*, supra, at *1; *In re Clayton* (Nov. 9, 2000), 8th Dist. No. 75757, at *6 (O'Donnell, P.J., dissenting).

{¶17} Initially, we must note the distinction between the waiver of an objection and the forfeiture of an objection. Although the terms are frequently used interchangeably, a waiver occurs where a party affirmatively relinquishes a right or an objection at trial; a forfeiture occurs where a party fails to assert a right or make an objection before the trial court in a timely fashion. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9, quoting *United States v. Olano* (1993), 507 U.S. 725, 733. Where a party has forfeited an objection by failing to raise it, the objection may still be assigned as error on appeal if a showing of plain error is made. *Hairston* at ¶9, quoting *State v. McKee* (2001), 93 Ohio St.3d 292, 299 fn. 3 (Cook, J., dissenting); Crim.R. 52(B). Where a party

has affirmatively waived an objection, however, the error may not be asserted on appeal even if it does amount to plain error. *Id.*

{¶18} This Court has applied the above-referenced doctrine where an unrepresented juvenile appeals an issue to which he failed to object in the trial court. In those instances, we have held that the juvenile waived¹ (more specifically “forfeited”) his right to object to the magistrate’s findings as supported by the hearing transcript. *In re J-M. W.*, 9th Dist. Nos. 23066 & 23144, 2006-Ohio-6156, at ¶¶5-9, citing *In re Stanford*, 9th Dist. No. 20921, 2002-Ohio-3755.

{¶19} An exception to the forfeiture doctrine exists, however, if plain error is found. *Etter*, 134 Ohio App.3d at 492; *Hairston* at ¶9, quoting *State v. McKee* (2001), 93 Ohio St.3d 292, 299 fn. 3 (Cook, J., dissenting); Crim.R. 52(B). Plain error is defined as any error or defect that affects an individual’s substantial rights, which is not brought to the attention of the trial court through an objection. Crim.R. 52(B). However, Appellant has neither argued plain error, nor has Appellant explained why we should delve into either of these issues for the first time on appeal. Accordingly, we decline to address these issues. Appellant’s second and third assignments of error are overruled.

¹ We are mindful that this Court has frequently interchanged these terms. See *Hairston*, *supra*, at ¶9, quoting *Olano*, 507 U.S. at 733.

III.

{¶20} Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Juvenile Court, County of Summit, 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 to Appellant.



CARLA MOORE
FOR THE COURT

WHITMORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

DAVID H. BODIKER, Ohio Public Defender, and AMANDA J. POWELL,
Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF,
Assistant Prosecuting Attorney, 44308, for Appellee.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HERRIGAN
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2007 APR 18 PM 2:13

IN RE: L.A.B.

SUMMIT COUNTY
CLERK OF COURTS
C.A. No. 23309

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on March 30, 2007, and the judgment of the Seventh District Court of Appeals in *In re Lohr*, 7th Dist. No. 06 MO 6, 2007-Ohio-1130. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” “[T]he alleged conflict must be on a rule of law -- not facts.” *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that a conflict exists between this district and the Seventh District on the following issue:

Does Juvenile Rule 29 apply to probation revocation hearings in juvenile court?

We find that a conflict of law exists; therefore, the motion to certify is granted.



Judge



Judge