

IN THE SUPREME COURT OF OHIO

IN RE: J.F., : Case No. 2007-2239
a minor child. :
: On Appeal from the Greene County Court of
: Appeals, Case No. 06-CA-123
:

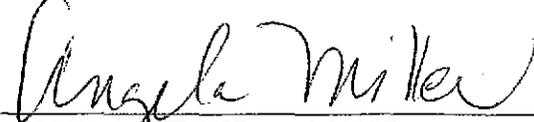
NOTICE OF ADDITIONAL AUTHORITY IN SUPPORT OF APPELLANT'S
MOTION FOR RECONSIDERATION

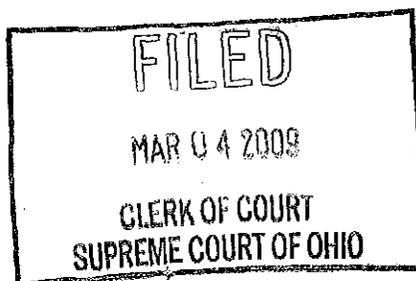
Pursuant to Practice Rule IX, § 9, Appellant, through counsel, submits the following authority in support of his Motion for Reconsideration, filed February 13, 2009.

1] In the Matter of: Thomas Von Stein, 3rd Dist. No. 5-08-22, 2009-Ohio-913. Von Stein cites to this Court's decision in J.F. for the proposition that a court does not need to provide a child with notice of a probation violation, before invoking a suspended commitment, if the condition allegedly violated was mentioned in an earlier entry. Von Stein at ¶ 26- ¶ 35. J.F. cites Von Stein in further support of Argument III in his motion, which states that the J.F. decision contradicts In re: Cross, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258. The Von Stein decision is attached as Exhibit A.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER


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CERTIFICATE OF SERVICE

I certify a copy of the foregoing NOTICE OF ADDITIONAL AUTHORITY IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION has been sent by regular U.S. mail, to Stephen Haller, Greene County Prosecutor and Elizabeth Ellis, Assistant Greene County Prosecutor, 61 Greene St., 2nd Floor, Xenia, Ohio 45385, this 4th day of March, 2009.



ANGELA MILLER #0064902
Assistant Public Defender

COUNSEL FOR J.F.

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

IN THE MATTER OF:

THOMAS VON STEIN,

CASE NO. 5-08-22

ALLEGED DELINQUENT CHILD

OPINION

[THOMAS VON STEIN -
APPELLANT]

IN THE MATTER OF:

THOMAS VON STEIN,

CASE NO. 5-08-31

ALLEGED DELINQUENT CHILD

OPINION

[THOMAS VON STEIN -
APPELLANT]

Appeal from Hancock County Common Pleas Court
Juvenile Division
Trial Court No. 20720074

Judgments Affirmed in Part and Reversed in Part

Date of Decision: March 2, 2009

APPEARANCES:

Amanda J. Powell for Appellant

Mark C. Miller for Appellee



SHAW, J.

{¶1} Appellant Thomas V. (“Thomas”) appeals from the May 24, 2007,¹ November 26, 2007, and April 15, 2008 Journal Entries of the Court of Common Pleas, Juvenile Division, Hancock County, Ohio finding him to be a delinquent child for committing one count of Rape, in violation of R.C. 2907.02(A)(1) and 2152.02, a felony of the first degree if committed by an adult, and three counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4) and 2152.02, felonies of the third degree if committed by an adult. The juvenile court ordered and suspended a two and a half year commitment to the Ohio Department of Youth Services, ordered the payment of restitution and future counseling expenses of the victim, and ordered that Thomas not obtain a drivers’ license until all restitution and counseling expenses were paid in full.

{¶2} On February 20, 2007 a complaint was filed in the Court of Common Pleas, Hancock County, Ohio, Juvenile Division alleging that Thomas committed one count of Rape, in violation of R.C. 2907.02(A)(1) and 2152.02, a felony of the first degree if committed by an adult and three counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4) and 2152.02, felonies of the third degree if committed by an adult. Thomas denied all of the allegations

¹ We note that, although no direct appeal was taken from the initial finding of delinquency and disposition, because a copy of the order was not properly served on the parties pursuant to *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67, 2001-Ohio-131, this court was required to accept the late appeal as timely filed.

contained in the complaint.

{¶3} On May 24, 2007 Thomas entered an admission to all charges. After Thomas admitted to the charges, he was found to be a delinquent child for one count of Rape, in violation of R.C. 2907.02(A)(1) and 2152.02, and three counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4) and 2152.02. The matter was continued for disposition pending an evaluation.

{¶4} Disposition of the matter occurred on November 20, 2007. The juvenile court ordered that Thomas be committed to the Ohio Department of Youth Services ("ODYS") for a minimum period of two and a half years. Thomas's commitment was suspended on a day-to-day basis and he was placed on probation. As a condition of probation, Thomas was ordered to attend and complete counseling. Thomas was ordered to pay restitution in the amount of \$487.49 and the court further indicated he would be held responsible for the future costs of the victim's counseling. The juvenile court further ordered that Thomas would not be able to obtain a temporary or permanent operator's license until all restitution and fees were paid in full.

{¶5} On December 26, 2007 an affidavit was filed with the juvenile court alleging that Thomas violated the conditions of his probation by failing to complete his assigned Sexual Offender Treatment Program homework. Thomas admitted to this probation violation on January 15, 2008. On February 15, 2008

an affidavit was filed alleging that Thomas violated the terms of his probation by failing to complete his assigned homework for individual treatment as recommended by his therapist and failing to bring his daily journal to therapy.

{¶6} On February 19, 2008 the juvenile court committed Thomas to ODYS for a minimum period of two and a half years and a maximum period not to exceed his twenty first birthday. Commitment was again suspended upon Thomas's successful completion of the treatment program at the Juvenile Residential Center of Northwest Ohio ("JRC"). The trial court was clear in its order that if Thomas did not successfully complete the JRC program, he would serve the suspended ODYS commitment.

{¶7} After an escape attempt, Thomas was terminated from the JRC program. On April 10, 2008 the juvenile court imposed the previously suspended term of commitment to ODYS.

{¶8} Thomas now appeals, asserting four assignments of error.

ASSIGNMENT OF ERROR I

THOMAS V.'S ADMISSION TO RAPE AND THREE COUNTS OF GROSS SEXUAL IMPOSITION WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS TEN AND SIXTEEN OF THE OHIO CONSTITUTION, AND JUVENILE RULE 29.

ASSIGNMENT OF ERROR II

THE HANCOCK COUNTY JUVENILE COURT ABUSED ITS DISCRETION WHEN IT IMPOSED IMPROPER ORDERS OF DISPOSITION IN VIOLATION OF R.C. 2152.19.

ASSIGNMENT OF ERROR III

THE JUVENILE COURT VIOLATED THOMAS V.'S RIGHT TO NOTICE AND 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.

ASSIGNMENT OF ERROR IV

THOMAS V. WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS TEN AND SIXTEEN OF THE OHIO CONSTITUTION.

First Assignment of Error

{¶9} In his first assignment of error, Thomas argues that his admission was not knowing, intelligent, and voluntary. Specifically, Thomas argues that the juvenile court failed to comply with the requirements of Juv. R. 29(D)(1) & (2). Juvenile R. 29(D) provides, in pertinent part, as follows:

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.

“An admission in a juvenile proceeding, pursuant to Juv.R. 29, is analogous to a guilty plea made by an adult pursuant to Crim.R. 11 in that both require that a trial court personally address the defendant on the record with respect to the issues set forth in the rules.” *In re C.S.*, 115 Ohio St.3d 267, 285, 874 N.E.2d 1177, 2007-Ohio-4919 quoting *In re Smith*, Union App. No. 14-05-33, 2006-Ohio-2788. In determining whether a trial court complied with the requirements of Crim. R. 11, only substantial compliance is required. See *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. In *In re C.S.*, the Ohio Supreme Court held that in a juvenile delinquency case, the preferred practice is strict compliance with Juv.R. 29(D). *In re C.S.*, 115 Ohio St.3d at 285.

[I]f 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. For purposes of juvenile delinquency proceedings, substantial compliance means that in the totality of the circumstances, the juvenile subjectively understood the implications of his plea.

In re C.S., 115 Ohio St.3d at 285-286.

{¶10} In the present case, the hearing at which Thomas’s admission was accepted by the juvenile court began with a court employee reading a statement of

the charges. For the charge of rape, the following statement was read at the commencement of the hearing:

Count 1 alleges that [Thomas], age 10, appears to be a delinquent child in that between June 1st, 2005, and June 30th, 2005, in Hancock County, Ohio, did engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender when the other person is less than 13 years of age whether or not the offender knows the age of the other person; to-wit: He did insert his finger into the vagina of [the victim], date of birth, March 31st, 2001, in violation of Section 2907.02(A)(1)(b) and 2152.02 of the Ohio Revised Code which constitutes a charge of rape, a felony of the first degree, if committed by an adult.

(Tr.p. 3-4). Similar descriptions were read for the three counts of Gross Sexual Imposition.

{¶11} Subsequently, Thomas's counsel indicated that he was withdrawing a pending motion to suppress, and that Thomas wished to change his plea. After the juvenile court established that Thomas wished to admit to the charges, the following discussion was held:

The Court: Okay. You understand, Thomas, what it is you're admitting to?

[Thomas]: Yes, sir.

The Court: Okay. And you understand that by admitting that you are giving up your right to a trial. Do you understand that?

[Thomas]: Yes, sir.

The Court: You understand what a trial is? In a trial, that's where all the witnesses would have to come into Court, they'd have to raise their right hands, swear to tell the truth and then testify in that witness chair over there to your right.

Following their testimony, either you or your attorney would have the right to ask these witnesses any questions you would have regarding what they said. And that's what we call the right of cross examination. And do you understand you're giving up that right by admitting –

[Thomas]: Yes, sir.

The Court: And do you also understand if it came to a trial, you would have the right to testify yourself if you wanted to, although you don't have to testify. In fact, if you don't testify, it cannot be used against you. Do you understand that?

[Thomas]: Yes, sir.

The Court: And you also understand that if it came to a trial that you would have the right to bring into Court any witnesses that you feel might be able to help you in your own defense?

Now, if these witnesses do not want to come to Court on their own, you'd have the right to make them come into Court and that's what we call the right of subpoena. And you understand you're giving up that right?

[Thomas]: Yes, sir.

The Court: Okay. And, most importantly, at the end of all the testimony, the burden would be upon the State to prove your guilt by evidence beyond a reasonable doubt. So if it came to a trial it's not up to you to prove you're innocent, but rather it's up to the State to prove you're guilty. You understand that?

[Thomas]: Yes, sir.

The Court: Okay. And you understand this is a pretty serious offense. In fact, very serious offense. There's a – one's a felony of the first degree and there are ...

Three felonies of the third degree. * And that means that the maximum penalty could be a permanent commitment to the, what we call the Ohio Department of Youth Services. That's the State agency that gives – that runs institutions for delinquent youth. And if you were committed to their custody, they would have the right to keep you until your 21st birthday but could not release you sooner than two and a half years without the Court's consent. I'm not saying that necessarily will happen in this case, but that is a possibility. Do you understand that?**

[Thomas]: Yes, sir.

The Court: Okay. Now, all the questions you've had up until now your attorney, Mr. Ried, has answered to your satisfaction?

[Thomas]: Yes, sir.

The Court: You've been satisfied with what he's represented to you up to this stage?

[Thomas]: Yes, sir.

(Tr.p. 7-11). At this point, the juvenile court accepted Thomas's admission.

{¶12} On appeal, Thomas now argues that the trial court failed to substantially comply with the requirements of Juv. R. 29(D) because it did not adequately address the nature of the charges, failed to adequately explain the right to remain silent, and failed to ascertain whether Thomas understood all possible consequences of the charges.

{¶13} The record demonstrates that a full explanation of the charges was read by a court employee. All of the charges, as read, contained a description of the conduct that constituted the offense. Moreover, the trial court personally addressed Thomas and inquired as to whether he understood the charges, to which Thomas replied, "Yes, sir." We find that this discussion substantially complies with the requirements of Juv. R. 29.

{¶14} Thomas additionally argues that he was not adequately informed of his right to remain silent. However, the juvenile court inquired of Thomas "do you also understand if it came to a trial, you would have the right to testify yourself if you wanted to, although you don't have to testify. In fact, if you don't testify, it cannot be used against you. Do you understand that?" Although the trial court did not expressly explain "silence," it did instruct Thomas that he would not have to testify. To a child, that may even be more instructive as to the actual consequences of his choices. Here, the discussion between the juvenile court and Thomas was sufficient to ensure his understanding that he would not have to testify if the matter progressed to trial.

{¶15} Finally, Thomas argues that the trial court did not inform him of all of the possible consequences of his admission, i.e., the imposition of restitution, the requirement that he not obtain a drivers' license until restitution has been paid, etc. However, typically, when the courts inform a defendant of the consequences

of a plea, they are required to inform him of the possible prison sentence, as well as the potential for post-confinement supervision. See *State v. Sarkozy*, 117 Ohio St.3d 86, 881 N.E.2d 1224, 2008-Ohio-509. A court is typically not required to inform a defendant of every possible consequence. In the present case, disposition was continued for approximately five months while an evaluation was completed. It is unlikely that the juvenile court was even aware, at the time of sentencing, what the specific consequences of the admission would be.

{¶16} Moreover, we note that Thomas is unable to show any prejudice that may have resulted from his admission. The test for prejudice is “whether the plea would have otherwise been made.” *State v. Nero*, 56 Ohio St.3d at 108 citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163. Here, Thomas cannot show that that he would not have entered his plea had he been notified that he would be forced to pay restitution and be subject to a penalty, which is not yet effective, on his ability to apply for a drivers’ license at some point in the future.

{¶17} Looking at the discussion between Thomas and the juvenile court, the totality of the circumstances surrounding the plea support the conclusion that Thomas subjectively understood the implications of his plea as required by *In re C.S.* Therefore, we find that there was substantial compliance with Juv. R. 29. Accordingly, Thomas’s first assignment of error is overruled.

Second Assignment of Error

{¶18} In his second assignment of error, Thomas argues that the trial court made improper dispositional orders when it ordered him to pay restitution, ordered a restriction on his future right to apply for a drivers' license, and continued the matter for review after disposition.

{¶19} Pursuant to R.C. 2152.19(A)(4), a juvenile court has broad discretion to craft an appropriate disposition for a child adjudicated delinquent. The court may place the child on community control "under any sanctions, services, and conditions that the court prescribes." Nevertheless, R.C. 2152.01(B) provides that dispositions must be "reasonably calculated" to achieve certain statutory purposes. Those purposes are "to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." R.C. 2152.01(A).

{¶20} "Accordingly, a juvenile court must consider those purposes in determining which conditions of probation to impose in crafting a community-control sanction." *In re D.S.*, 111 Ohio St.3d 361, 363, 856 N.E.2d 921, 2006-Ohio-5851. Therefore, a juvenile court's disposition will be upheld unless there has been an abuse of discretion. *Id.* An abuse of discretion constitutes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217,

219, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court.

Id.

{¶21} Thomas does not argue that the trial court erred simply by ordering restitution. Instead, Thomas argues that the trial erred because it ordered restitution in an amount that was not precisely defined. In the present case, the trial court ordered “restitution in the amount of \$487.49 payable through the Court” and then stated that Thomas “will be responsible for any future counseling expenses of the victim while under the Court’s jurisdiction.” We do not find, however, that this language merely stating the future intentions of the trial court, amounts to an order of the court. On the contrary, we find that the only actual order of the court was for the imposition of restitution in the amount of \$487.49, which is not an abuse of discretion.

{¶22} Turning next to the juvenile court’s restriction on Thomas’s ability to obtain a drivers’ license, we note that R.C. 2152.19 governs situations where the juvenile court may suspend a delinquent’s right to apply for a drivers’ license, as follows:²

(B) If a child is adjudicated a delinquent child, in addition to any order of disposition made under division (A) of this section, the court, in the following situations and for the specified

² We note that different rules apply if the juvenile is a juvenile traffic offender; however, those rules are not at issue in the current case.

periods of time, shall suspend the child's temporary instruction permit, restricted license, probationary driver's license, or nonresident operating privilege, or suspend the child's ability to obtain such a permit:

(1) If the child is adjudicated a delinquent child for violating section 2923.122 of the Revised Code, impose a class four suspension of the child's license, permit, or privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or deny the child the issuance of a license or permit in accordance with division (F)(1) of section 2923.122 of the Revised Code.

(2) If the child is adjudicated a delinquent child for committing an act that if committed by an adult would be a drug abuse offense or for violating division (B) of section 2917.11 of the Revised Code, suspend the child's license, permit, or privilege for a period of time prescribed by the court. The court, in its discretion, may terminate the suspension if the child attends and satisfactorily completes a drug abuse or alcohol abuse education, intervention, or treatment program specified by the court. During the time the child is attending a program described in this division, the court shall retain the child's temporary instruction permit, probationary driver's license, or driver's license, and the court shall return the permit or license if it terminates the suspension as described in this division.

{¶23} In the present case, Thomas did not commit an act that would qualify him for a license suspension under R.C. 2152.19(B). Moreover, when other courts have ruled on this issue, they have found, in similar situations, that a restriction on a juvenile's future right to apply for a drivers' license is an improper sanction by the juvenile court.

{¶24} In *In re Boss B.*, 6th Dist No. L-07-1343, 2008-Ohio-2995, the juvenile court suspended the delinquent's right to apply for a drivers' license until he reached age 21. In considering this order, the Sixth District Court of Appeals found "that the juvenile court's order, *** simply does not fit within the limited parameters of R.C. 2152.19 which permit the court to suspend a juvenile's right to apply for a driver's license." *In re Boss B.*, 2008-Ohio-2995, ¶15. Moreover, the Sixth District considered that, by upholding the trial court's order it would essentially render the circumstances specified in division (B) of R.C. 2152.19 irrelevant, as the trial court could impose a license restriction wherever it saw fit. See also, *In re Kirby*, 5th Dist No. 06-CA-6, 06-CA-91, 2008-Ohio-876. Therefore, we find that imposing a bar on Thomas's future ability to obtain an operators' license in this case was an improper sanction.

{¶25} Finally, Thomas argues that the juvenile court erred by continuing this matter for review. In its entry, the juvenile court stated that "[t]he Court orders that said matter is continued until *Wednesday, April 17, 2008* for review." As this review never occurred, we find that this issue is moot and the continuing jurisdiction of the juvenile court will be discussed more fully in Thomas's third assignment of error. Accordingly, Thomas's second assignment of error is overruled in part (as to the issue of future restitution) and sustained in part (as to the order purporting to bar the future application for an operators' license).

Third Assignment of Error

{¶26} In his third assignment of error, Thomas argues that the juvenile court was without jurisdiction to impose the suspended DYS commitment. Specifically, Thomas argues that the juvenile court was required to comply with the requirements of Juv. R. 35 to invoke its continuing jurisdiction. Juvenile R. 35 provides as follows:

(A) Continuing jurisdiction; invoked by motion

The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

(B) Revocation of probation

The court shall not revoke probation except 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.

{¶27} Thomas makes two competing arguments. First, Thomas argues that if he was not on probation, because no motion was filed pursuant to Juv. R. 35(A), then he was not under the continuing jurisdiction of the court. Second, Thomas argues that if he was on probation, the requirements of Juv. R. 35(B) were not met.

{¶28} As an initial matter, we note that we believe Thomas was on probation with the juvenile court at the time he was committed to ODYS. At the

November 24, 2007 hearing, Thomas was placed on probation. The January 15, 2008 and February 19, 2008 probation violation hearings were held because Thomas failed to comply with the terms of his probation. During the January 15, 2008 hearing the juvenile court committed Thomas to JRC. This did not amount to a revocation of probation. Instead, the trial court imposed a new condition on the suspended ODYS sentence, successful completion of the program at JRC.

{¶29} The Ohio Supreme Court has recently held that “unmodified portions of an original order will remain in effect unless otherwise specified.” *In re J.F.*, 2009-Ohio-318. In *In re J.F.*, the Ohio Supreme Court found that where any unexpired conditions of probation existed, probation remained in effect. ¶16. Here, we believe that the program at JRC was another condition of probation and of the suspended commitment. Therefore, as Thomas was on probation at the time ODYS commitment was imposed, the juvenile court was required to comply with the requirements of Juv. R. 35(B).

{¶30} As previously stated, Juv. R. 35(B) requires that “[t]he court shall not revoke probation except 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

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has violated a condition of probation of which the child had, pursuant to Juv. R. 34(C), been notified.”

{¶31} At the February 19, 2008 hearing, the trial court made the following verbal order, as follows:

So what I'm going to do is make a permanent commitment to the Ohio Department of Youth Services. We'll keep the terms as initially stated. Until his 21st birthday with a minimum period of two-and-a-half years.

But I will do this. I'll suspend that on the provision of the successful completion of the Juvenile Residential Center Program and also aftercare.

(Tr.p. 89).

{¶32} Moreover, the juvenile court memorialized this order in writing in its February 19, 2008 Journal Entry, as follows:

Upon due consideration, the Court Orders that said youth is hereby committed to the Ohio Department of Youth Services with each count running consecutively with the other totaling a minimum period of two and one-half (2 ½) years and a maximum period not to exceed the child's attainment of his 21st birthday.

The Court further orders that said commitment is suspended on a day-to-day [sic] upon said youth's successful completion of the treatment program at [JRC] upon his acceptance and the aftercare program upon his release.

Thomas was present at the April 10, 2008 hearing and was accompanied by counsel.

{¶33} Therefore, we find that Thomas was apprised of the nature of this violation at the beginning of the April 10, 2008 hearing on Thomas's attempt to escape from JRC. Moreover, Thomas was clearly apprised that, if he did not successfully complete the program at JRC, the suspended commitment to ODYS would be imposed.

{¶34} Based on his failure to complete the JRC program, the juvenile court committed Thomas to ODYS and noted in its April 10, 2008 Entry that

The Court further notes that on February 19, 2008 the Court suspended a minimum period of two and one-half (2 1/2) year commitment to the Ohio Department of Youth Services on the condition of said youth's successful completion of the treatment program at JRC, however on April 18, 2008 said youth was unsuccessfully discharged from JRC.

Upon due consideration of all matters, the Court Orders that said youth's commitment to the Ohio Department of Youth Services is hereby invoked for a minimum period of two and one-half (2 ½) years and a maximum period not to exceed the child's attainment of the age of twenty-one (21) years.

{¶35} Therefore, we find that, although perhaps not fully articulated by the juvenile court, the trial court properly imposed successful completion of JRC as a condition of probation. Therefore, we find that Thomas was notified that he was required to complete treatment at JRC and the juvenile court properly found that Thomas had not successfully completed JRC treatment and was no longer welcome in the program. Accordingly, Thomas's third assignment of error is overruled.

Fourth Assignment of Error

{¶36} In his fourth assignment of error, Thomas argues that he received ineffective assistance of counsel based on counsel's failure to object to the imposition of the restitution and the drivers' license sanction and based on counsel's failure to object to the juvenile court's failure to properly conduct the April 10, 2008 hearing.

{¶37} The right to effective assistance of counsel has been extended to juvenile defendants. *In re Gault* (1967), 387 U.S. 1, 30, 87 S.Ct. 1428, 18 L.Ed.2d 527. An ineffective assistance of counsel claim requires proof that trial counsel's performance fell below objective standards of reasonable representation and that the defendant was prejudiced as a result. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the outcome at trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, at paragraph three of the syllabus. "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *State v. Waddy* (1992), 63 Ohio St.3d 424, 433, 588 N.E.2d 819 (superseded by constitutional amendment on other grounds as recognized by *State v. Smith*, 80 Ohio St.3d 89, 103, 684 N.E.2d 668, 1997-Ohio-355).

{¶38} Furthermore, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. See also, *State v. Richardson*, 3d Dist. No. 13-06-21, 2007-Ohio-115, citing *State v. Hoffman* (1998), 129 Ohio App.3d 403, 407, 717 N.E.2d 1149. Tactical or strategic decisions, even if unsuccessful, generally do not constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, 1995-Ohio-104. Additionally, the court must look to the totality of the circumstances and not isolated instances of an allegedly deficient performance. *State v. Fritz*, 3d Dist. No. 13-06-39, 2007-Ohio-3138, ¶35, citing *State v. Malone* (Dec. 13, 1989), 2d Dist. No. 10564.

{¶39} In the present case, we found that the April 10, 2008 hearing was conducted with proper notice to Thomas, and that the suspended ODYS commitment was properly imposed. Therefore, no ineffective assistance can stem from a failure to object to a correct proceeding. With respect to the operators' license sanction that we have ruled was improper, that sanction will be vacated from the juvenile court's orders. The future restitution statement was found not to be a sanction and thus a failure to object to it was not ineffective assistance of counsel. Moreover, Thomas was not prejudiced by the failure of trial counsel to

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challenge either of these issues. Therefore, Thomas's fourth assignment of error is overruled.

{¶40} Based on the foregoing, the May 24, 2007, November 26, 2007 and April 15, 2008 Journal Entries of the Court of Common Pleas, Juvenile Division, Hancock County, Ohio are affirmed in part and reversed and vacated only as to the issue of Thomas's future ability to apply for an operators' license.

*Judgments Affirmed in Part
Reversed in Part*

WILLAMOWSKI and ROGERS, J.J., concur.

/jlr