

IN RE: RAHEEM L.,
adjudicated delinquent child

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Case No. **10-2030**

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

C.A. Case No. C-100608

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT RAHEEM L.**

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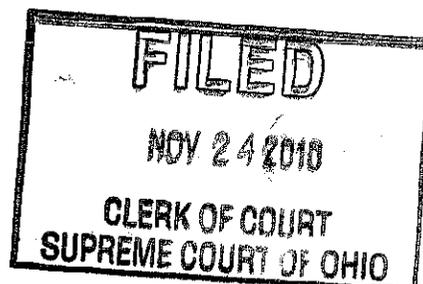


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PROPOSITION OF LAW: A juvenile court proceeding is a civil action; therefore, an appeal is timely if filed within thirty days after service of the judgment and its entry if service is not made as provided in Civil Rule 58(B). If service is never made and the notation of service is never entered on the journal, the time for filing an appeal has not begun to run......5

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

In 2001, this Court held that juvenile court proceedings are civil; therefore Civil R. 58(B) and App.R. 4(A) apply to juvenile court proceedings. *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131. This Court should accept review in this case because the First District Court of Appeals has blatantly disregarded this Court's holding in *Anderson*.

In *Anderson*, this Court provided an explanation of the application of App.R. 4(A) and Civ.R. 58(B) to civil cases. Specifically, under App.R. 4(A), a notice of appeal is timely if it is filed "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in [Civ.R.] 58(B)." *Id.* at 67. App.R. 4(A) contains a tolling provision that applies in civil cases when a judgment has not been properly served on a party pursuant to Civ.R. 58(B). *Id.* Civ.R. 58(B) requires the court to endorse on the judgment "a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal." *Id.* Then, the clerk must serve the parties within three days of entering judgment upon the journal and note the service in the appearance docket. *Id.* "The thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B)." *Id.*

In 1989, following this Court's decisions in *Moldovan v. Cuyahoga County Welfare Dep't* (1986), 25 Ohio St.3d 293, 496 N.E.2d 466, and *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, Ohio made changes to Civ.R. 58(B) and App.R. 4(A). In *Moldovan* and *Atkinson*, this Court recognized the harm caused by a court's failure to provide

notice of final orders to litigants. *Moldovan* at 295; *Atkinson* at 83. In both cases, this Court recognized that the failure to give reasonable notice of a final appealable order is a denial of the right to appeal without due process of law. *Moldovan* at 295; *Atkinson* at 81-82.

After *Anderson*, Ohio changed App.R. 5(A) to include provisions that allow juvenile delinquents and those delinquents deemed Serious Youthful Offenders, the right to file a delayed appeal. App.R. 5(A). But, Ohio did not change App.R. 4(A) in response to *Anderson*. Therefore, a delinquent child has the right to a timely direct appeal if the child is not served with the final judgment and the judgment is not entered on the journal, pursuant to App.R. 4(A); and the child has the right to request a delayed appeal if the child is properly served with the final order. The amendment to App.R. 5(A) did not supersede *Anderson*. See, contra, *In re T.M.*, 6th Dist. Nos. L-10-1245, L-10-1246, 2010-Ohio-5506, ¶12.

In this case, the magistrate's decision from August 25, 2009 indicates that Raheem received a copy of the magistrate's decision and "therefore waive[d] service by the Clerk." Below that notation, the juvenile court judge signed the entry, stating that "The Magistrate's Decision is hereby approved and entered as the judgment of the Court." The court entered a nunc pro tunc entry three days later, adding a juvenile sex offender classification, that included the same notation. Further, the docket of the journal indicates that the court adopted the magistrate's decision, but does not indicate service of the final judgment as required by Civ.R. 58(B).

Accordingly, Raheem filed a timely appeal pursuant to *Anderson* in September 2010. The First District Court of Appeals dismissed the appeal because it found that:

the appeal was not timely filed. See Appellate Rule 4(A). In addition, appellant did not file a motion for delayed appeal. See Appellate Rule 5(A).

(A-1).

The First District's denial of Raheem's timely direct notice of appeal and the juvenile court's failure to follow Civ.R. 58(B) constitutes a denial of due process. *Moldovan* at 295; *Atkinson* at 81-82. This case, therefore, presents a substantial constitutional question and is of public and great general interest. Accordingly, this Court should accept jurisdiction; or, in the alternative, summarily reverse the First District's dismissal of Raheem's timely notice of appeal under the authority of *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131.

STATEMENT OF THE CASE AND FACTS

On August 25, 2009, the Hamilton County Juvenile Court magistrate found Raheem L. delinquent for committing gross sexual imposition, a felony of the third degree if committed by an adult, and placed Raheem on probation with a suspended commitment to the Ohio Department of Youth Services. The entry indicates that Raheem received a copy of the magistrate's decision and "therefore waive[d] service by the Clerk." Below that notation, the juvenile court judge signed the entry, stating that "The Magistrate's Decision is hereby approved and entered as the judgment of the Court." Then, on August 28, 2009, the court entered a nunc pro tunc entry adding a juvenile sex offender classification, which included the same notation, showing that Raheem waived service of the magistrate's decision, but not the final judge's decision. The docket of the journal indicates that the court adopted the magistrate's decision on August 28, but does not indicate service of the final judgment as required by Civ.R. 58(B). Neither Raheem nor his attorney filed a notice of appeal of the judgment at that time.

On September 10, 2010, Raheem filed a timely appeal pursuant to *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131. In the memorandum in support, he noted that although he had waived service of the magistrate's decision, there was no indication that he had received or

waived service of the judge's final entry adopting the magistrate's decision. And, he averred that the docket of journal entries did not reflect service of the final order upon him as is required by Civ.R. 58(B).

On September 20, 2010, the State of Ohio opposed Raheem's notice of appeal. The State asserted incorrectly that after Anderson was decided, Juv.R. 40(D) was amended to clarify that "although the decision of the magistrate must be served upon both parties, service of the judge's adoption of the magistrate's decision is not required[; i]nstead, pursuant to Juv.R. 40(D), the court automatically adopts the magistrate's decision within 14 days, unless a party files an objection to the magistrate's decision.¹

On October 13, 2010, the First District Court of Appeals dismissed the appeal:

The Court *sua sponte* dismisses the appeal for failure of the appellant to comply with the Ohio Rules of Appellate Procedure to wit: the appeal was not timely filed. See Appellate Rule 4(A). In addition, appellant did not file a motion for delayed appeal. See Appellate Rule 5(A).

(A-1) (emphasis in original.)

Raheem's appeal of the dismissal of his appeal timely follows.

¹ Juvenile Rule 40(D)(4)(a)-(b) provides that "A magistrate's decision is not effective unless adopted by the court," and that "If no timely objections are filed, the court *may* adopt or reject a magistrate's decision...." (Emphasis added.) It does not specify that a final appealable order of the judge need not be served upon the juvenile.

ARGUMENT

PROPOSITION OF LAW

A juvenile court proceeding is a civil action; therefore, an appeal is timely if filed within thirty days after service of the judgment and its entry if service is not made as provided in Civil Rule 58(B). If service is never made and the notation of service is never entered on the journal, the time for filing an appeal has not begun to run.

Rules of procedure are as important as they are technical. Accordingly, their technical requirements must be scrupulously implemented and enforced.

In 1989, following this Court's decisions in *Moldovan v. Cuyahoga County Welfare Dep't* (1986), 25 Ohio St.3d 293, 496 N.E.2d 466, and *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, Ohio made changes to Civ.R. 58(B) and App.R. 4(A). In both cases, this Court recognized that the failure to give reasonable notice of a final appealable order is a denial of the right to appeal without due process of law. *Moldovan* at 295; *Atkinson* at 81-82. In 2001, this Court held that "a juvenile court proceeding is a civil action[;]" therefore, "the Civil Rules and the Appellate Rules pertaining to the filing of a civil notice of appeal apply to appeals from the juvenile court." *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131.

After *Moldovan*, *Atkinson* and *Anderson*, courts would have been wise to incorporate the technical requirements set forth in Civ.R. 58(B): (1) that "the court shall endorse" on the judgment, a direction to the clerk to serve "notice of the judgment" and "its date of entry upon the journal" upon the parties; (2) that "[w]ithin three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B);" and, (3) that the clerk shall also "note the service in the appearance docket." But courts have not uniformly implemented these requirements, and courts of appeals have not required Civ.R. 58(B) to be enforced as it is written. Therefore, although it should be a relatively simple task for a clerk, a

party, or a higher court to determine whether service is complete, because Civ.R. 58(B) has not been uniformly implemented or enforced, that determination is often unclear.

In this case, although Raheem received a copy of the magistrate's decision, the juvenile court did not serve Raheem with a copy of the final order of disposition as is required by Civ.R. 58(B). Accordingly, pursuant to *Anderson*, the appeal he filed more than a year later was filed timely. *Anderson* at 67; App.R. 4(A). But, apparently following the State's incorrect assertion that the juvenile need not receive the final appealable order in his case under Juv.R. 40(D), the First District dismissed Raheem's appeal.

The amendment to Appellate Rule 5(A) after *Anderson* did not supersede *Anderson*. See, contra, *In re T.M.*, 6th Dist. Nos. L-10-1245, L-10-1246, 2010-Ohio-5506, ¶12. Rather, App.R. 5(A) allows a juvenile delinquent to request leave to appeal if the time to timely appeal pursuant to App.R. 4(A) has lapsed. Further, the recent changes to Juv.R. 40(D) do not, as the State asserted, obviate the juvenile court's duty to serve the final entry upon a juvenile in a delinquency proceeding. *Anderson* is still good law. Juvenile court proceedings are still civil proceedings. *Anderson* at 67. And, App.R. 4(A) still controls the filing of an appeal in a juvenile case, when the court has failed to properly serve notice of the final entry pursuant to Civ.R. 58(B).

The First District Court of Appeals dismissed Raheem's timely appeal, which was filed pursuant to *Anderson*. The court's dismissal, and the juvenile court's failure to comply with Civ.R. 58(B) is a denial of Raheem's right to due process. This Court should accept this case and require trial courts to implement Civ.R. 58(B) as written, and require the courts of appeals to follow *Anderson*, which remains in full effect. Only then can Ohio's juvenile and civil litigants

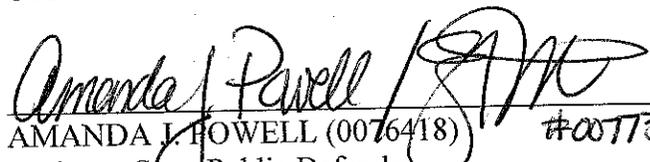
be certain that their right to appeal will be protected. In the alternative, Raheem respectfully asks this Court to accept this case and summarily reverse the decision below pursuant to *Anderson*.

CONCLUSION

This Court should accept Raheem's appeal because it raises a substantial constitutional question, involves a felony-level offense, and is of great public and general interest. In the alternative, this Court should summarily reverse the decision of the First District Court of Appeals and reinstate Raheem's appeal below.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

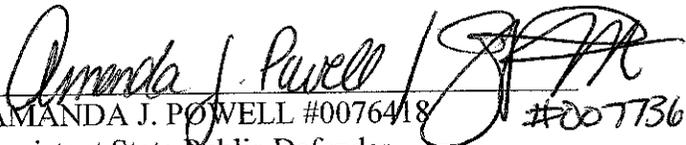

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COUNSEL FOR RAHEEM L.

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Minor Child-Appellant Raheem L.**, was served by ordinary U.S. Mail, postage-prepaid, this 24th day of November, 2010, to the office of Rachel Lipman Curran, Assistant Hamilton County Prosecutor, Hamilton County Prosecutor's Office, 230 E. 9th Street, Suite 4000, Cincinnati, Ohio 45202.


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Assistant State Public Defender
Counsel of Record

COUNSEL FOR RAHEEM L.

IN THE SUPREME COURT OF OHIO

IN RE: RAHEEM L.,
adjudicated delinquent child

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Case No. _____

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

C.A. Case No. C-100608

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT RAHEEM L.**

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: RAHEEM L.,

APPEAL NO. C-100608
TRIAL NO. 09-08835 X

ENTRY OF DISMISSAL

This cause came on to be considered upon the notice of appeal, upon the appellant's memorandum in support, and upon the appellee's memorandum in opposition.

The Court *sua sponte* dismisses the appeal for failure of the appellant to comply with the Ohio Rules of Appellate Procedure to wit: the notice of appeal was not timely filed. See Appellate Rule 4 (A). In addition, appellant did not file a motion for delayed appeal. See Appellate Rule 5 (A).

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on OCT 13 2010 per order of the Court.

By: _____

Presiding Judge

(Copy sent to counsel)