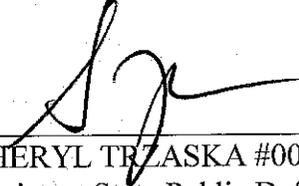


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CERTIFICATE OF SERVICE

A copy of the foregoing **Notice of Supplemental Authority** was served by ordinary U.S. Mail, postage-prepaid, this 9th day of October, 2012, to the office of Dennis P. Will, Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035.



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#378132

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN THE MATTER OF:

L.B.B.

CASE NO. CA2012-01-011

OPINION
10/8/2012

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. JV2010-0063

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee

Charlyn Bohland, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for appellant

HENDRICKSON, J.

{¶ 1} Appellant, L.B.B., appeals from a judgment of the Butler County Court of Common Pleas, Juvenile Division, which revoked his parole and committed him to the Ohio Department of Youth Services ("DYS") for a minimum period of 90 days. For the reasons discussed below we reverse the juvenile court's decision and remand this matter for further proceedings.

{¶ 2} On January 20, 2010, L.B.B. was adjudicated a delinquent child based on his admission to complicity in breaking and entering in violation of R.C. 2923.03 and 2911.13, a fifth-degree felony if committed by an adult. The juvenile court committed L.B.B. to DYS for an indefinite term ranging from a minimum of six months to a maximum of his 21st birthday. L.B.B.'s commitment was suspended on the condition that he successfully complete probation.

{¶ 3} L.B.B. violated his probation in November 2010, and the juvenile court invoked the previously suspended six-month commitment to DYS. On February 5, 2011, L.B.B. was placed on DYS supervised release ("parole"). On March 14, 2011, a complaint was filed alleging that L.B.B. violated the terms of his parole by changing his residence without prior approval from his parole officer. On December 20, 2011, the juvenile court accepted L.B.B.'s admission to violating the terms of his parole and revoked his parole, ordering that he be returned to DYS for "a minimum of ninety (90) days." L.B.B.'s trial counsel did not object to the juvenile court's 90-day commitment.

{¶ 4} L.B.B. appeals the revocation of his parole, raising two assignments of error.¹

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE JUVENILE COURT ERRED WHEN IT COMMITTED [L.B.B.] TO DYS FOR A MINIMUM PERIOD OF NINETY DAYS FOR A PAROLE REVOCATION, AS ONLY A THIRTY-DAY MINIMUM DYS COMMITMENT IS AUTHORIZED BY R.C. 5139.52(F).

{¶ 7} In his first assignment of error, L.B.B. argues that the trial court committed plain error when it ordered a 90-day minimum DYS commitment. L.B.B. contends that R.C. 5139.52(F) "does not provide for the child to be committed to DYS by a juvenile court for

1. On January 9, 2012, substitute trial counsel filed a "Motion to Vacate or In the Alternative for Relief from Judgment" with the juvenile court. The court denied the motion on January 12, 2012. L.B.B.'s appeal challenges the juvenile court's December 20, 2011 dispositional entry committing him to DYS for 90 days, not the juvenile court's decision to deny his "Motion to Vacate or In the Alternative for Relief from Judgment."

more than one [30-day] period of commitment for a parole violation." He further contends that he was prejudiced by the juvenile court's failure to comply with the revocation commitment set forth in R.C. 5139.52(F), "as the juvenile court's failure resulted in [L.B.B.] receiving a commitment to DYS for [90] days, rather than [30] days."

{¶ 8} As an initial matter, we note that L.B.B. did not object to the length of his recommitment to DYS in the juvenile court. As such, we review the juvenile court's disposition for plain error only. *In re J.B.*, 12th Dist. No. CA2004-09-226, 2005-Ohio-7029, ¶ 37. See also *In re T.K.*, 9th Dist. No. 26076, 2012-Ohio-906, ¶ 5. Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Plain error does not exist unless it can be said that but for the error, the outcome *** would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 436 (1997).

{¶ 9} R.C. 5139.52(F) states that the juvenile court, upon determining that a child has committed a serious violation of the terms of his supervised release, "may revoke the child's supervised release and order the child to be returned to the department of youth services for institutionalization or, in any case, may make any other disposition of the child authorized by law that the court considers proper." If the juvenile court orders the child to be returned to DYS:

*the child shall remain institutionalized for a minimum period of thirty days, the department shall not reduce the minimum thirty-day period of institutionalization *** , the release authority, in its discretion, may require the child to remain in institutionalization for longer than the minimum thirty-day period, and the child is not eligible for judicial release or early release during the minimum thirty-day period of institutionalization or any period of institutionalization in excess of the minimum thirty-day period.*

(Emphasis added.) R.C. 5139.52(F).

{¶ 10} There is a disagreement among the district courts that have considered whether the juvenile court may order a child returned to DYS for more than a "minimum period of thirty days" pursuant to R.C. 5139.52(F). The Eighth, Ninth, and Eleventh Districts have determined that R.C. 5139.52(F) establishes a minimum, not an exact or maximum, amount of time for which the juvenile court must recommit the child. See *In re D.B.*, 8th Dist. No. 97445, 2012-Ohio-2505, ¶ 18 (finding use of the word "any" within R.C. 5139.52(F) "means that the trial court had discretion to take 'any' steps the court believed necessary to fully and completely implement the rehabilitative disposition of the child, including * * * committing [him] to DYS for 90 days"); *In re T.K.*, 9th Dist. No. 26076, 2012-Ohio-906; *In re A.N.*, 11th Dist. Nos. 2011-A-0057, 2011-A-0058; 2012-Ohio-1789, ¶ 12 (finding that R.C. 5139.52(F) does not speak to a maximum allowable time, but rather "merely establishes an absolute minimum amount of time").

{¶ 11} Conversely, the Second District has held that R.C. 5139.52(F) does not authorize a juvenile court to return a child to DYS custody for more than the minimum period of thirty days. See *In re I.M.*, 2nd Dist. No. 2012 CA 20, 2012-Ohio-3847. In the Second District's view, "the trial court does not 'sentence' a juvenile to DYS for a prescribed period of time once it revokes the child's supervised release. Rather, the trial court's discretion is limited to determining whether the juvenile's suspension should be revoked and the child returned to the DYS." *Id.* at ¶ 28. If the juvenile court chooses to revoke the child's supervised release rather than "make any other disposition of the child authorized by law that the court considers proper," R.C. 5139.52(F) then operates to ensure that the child remains institutionalized for the minimum period of 30 days. *Id.* at ¶ 25 and 28.

{¶ 12} We agree with the rationale expressed by the Second District in *In re I.M.* Under R.C. 5139.52(F), the available sanctions for when a child commits a serious violation of his parole are either a revocation of his supervised release or another authorized

disposition (e.g., half-way house, inpatient drug program, house arrest, confinement in the local juvenile detention facility, etc.). If the court determines revocation of the child's supervised release is appropriate, then R.C. 5139.52(F) operates to ensure that the child "shall remain institutionalized for a minimum period of 30 days." The juvenile court may not impose a longer minimum period of institutionalization as doing so would encroach upon DYS's statutory authority to determine a child's release date following a parole violation and recommitment. R.C. 5139.52(F) expressly provides that DYS, as "the release authority" may, "in its discretion, * * * require the child to remain in institutionalization for longer than the minimum thirty-day period." See also *In re I.M.* at ¶ 30. We therefore find that the ability to keep a child committed to DYS for more than the minimum 30-day period following a parole violation rests with the discretion of the release authority, and not the juvenile court.

{¶ 13} Accordingly, we find that the juvenile court committed plain error in ordering L.B.B. returned to DYS for a "minimum of ninety (90) days," rather than for a minimum period of 30 days as required by statute. L.B.B.'s first assignment of error is sustained.

{¶ 14} Assignment of Error No. 2:

{¶ 15} TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO [L.B.B.'S] ILLEGAL PAROLE REVOCATION COMMITMENT, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

{¶ 16} In his second assignment of error, L.B.B. argues that he received ineffective assistance of counsel as his trial counsel failed to object to the juvenile court's 90-day parole revocation. However, based on our finding that the trial court committed plain error in ordering that L.B.B. be returned to DYS for a "minimum of ninety (90) days," we now find L.B.B.'s argument under his second assignment of error to be rendered moot. See App.R. 12(A)(1)(c).

{¶ 17} Judgment is hereby reversed and the matter remanded to the juvenile court for the entry of a modified judgment entry that eliminates the phrase "for a minimum of ninety (90) days" and includes the language "for a minimum period of thirty days" as required by R.C. 5139.52(F).

POWELL, P.J., and RINGLAND, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>