

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE No. 2015-0924
	:	
PLAINTIFF-APPELLEE	:	
	:	ON APPEAL FROM THE FRANKLIN
V.	:	COUNTY COURT OF APPEALS
	:	TENTH APPELLATE DISTRICT
RAYMOND MORGAN,	:	
	:	
DEFENDANT-APPELLANT.	:	C.A. CASE No. 13AP-620

REPLY BRIEF OF APPELLANT RAYMOND MORGAN

Franklin County Prosecutor's Office

Seth L. Gilbert #0072929
Assistant Prosecuting Attorney

373 South High Street
Columbus, Ohio 43215
(614) 525-3555
(614) 525-6103 – Fax
slgilbert@franklincounty.gov

Counsel for the State of Ohio

The Office of the Ohio Public Defender

Charlyn Bohland #0088080
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

Counsel for Raymond Morgan

Table of Contents

	Page No.
Table of Authorities	iii
Statement of the Case and Facts.....	1
Argument.....	1
Proposition of Law I:	
A child does not need to request a GAL in the absence of his parents, guardian, or legal custodian at a juvenile court hearing.....	1
Proposition of Law II:	
A child does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a GAL when required by law	1
A. The juvenile court must fulfill its duty in ensuring a fair hearing by appointing a GAL when required by the revised code and the juvenile rules	3
B. For good reason, the duty to appoint a GAL is placed on the juvenile court. In order protect the attorney-client relationship, the duty is not placed on the child or his attorney	7
C. Prejudice must be presumed when the error impacts a child’s best interests, and infects the right to a fair hearing	9
Conclusion	13
Certificate of Service.....	14

Table of Authorities

	Page No.
Cases:	
<i>Children’s Home of Marion Cty. v. Fetter</i> , 90 Ohio St. 110, 106 N.E. 761 (1914).....	2
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)	4
<i>Griffin v. Illinois</i> , 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).....	4
<i>Haley v. Ohio</i> , 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948).....	1, 2
<i>In re B.G.</i> , 5th Dist. No. 2011-COA-012, 2011-Ohio-5898.....	6
<i>In re Caldwell</i> , 76 Ohio St.3d 156, 666 N.E.2d 1367 (1996)	2, 3, 6
<i>In re D.R.B.</i> , 8th Dist. Cuyahoga No. 102252, 2015-Ohio-3346.....	10
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).....	3, 6
<i>In re Kirby</i> , 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476	2
<i>In re J.C.</i> , 5th Dist. Knox Nos. 14CA23, 14CA24, 2015-Ohio-4664.....	9
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).....	4
<i>State v. D.W.</i> , 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894	3, 5, 6, 12
<i>State v. Perry</i> , 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643.....	12
Constitutional Provisions:	
Article IV, Section 3, Ohio Constitution	4
Statutes:	
R.C. 2151	3, 12
R.C. 2151.01	4, 5, 6, 12
R.C. 2151.011	13

Table of Authorities

Page No.

Statutes (cont'd):

R.C. 2151.281 *passim*
R.C. 2152 3, 12
R.C. 2152.01 2
R.C. 2152.12 11
R.C. 2505.03 4
R.C. 2929.11 2
R.C. 2953.02 4

Rules:

Sup.R. 48 5, 6, 10, 11
Juv.R. 4 *passim*

Other Authorities:

Prof.Cond.R. 1.14 8
Prof.Cond.R. 1.6 8

Statement of the Case and Facts

Contrary to the State's assertion, if evidence existed to demonstrate that Raymond held the gun during these offenses, the State would have moved for a mandatory transfer. (Merit Brief of Plaintiff-Appellee at 1-2). The State did not have evidence to prove that Raymond was the shooter. (8/9/2012 T.pp.3, 9, 11). In fact, his statement to the police and the statement of one of the witnesses support the opposite conclusion—that Raymond was not the shooter. (8/9/2012 T.pp.3, 9, 11). Raymond relies on the remainder of the Statement of the Case and Facts set forth in his merit brief.

Argument

Proposition of Law I

A child does not need to request a GAL in the absence of his parents, guardian, or legal custodian at a juvenile court hearing.

Proposition of Law II

A child does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a GAL when required by law.

In its response brief, the State asserts that a child must request a juvenile court to fulfill its mandatory duty to appoint a GAL. And, that a child must request that the juvenile court ensure that the child's best interests are represented. Utilizing the plain-error standard to require that prejudice must be demonstrated when a juvenile court fails to fulfill its mandatory duty to ensure that a child's best interests are protected, creates an impossible standard. *See Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed.

224 (1948) (noting that a child is “an easy victim of the law”). The State fails to acknowledge that the legislature placed the burden on the court to ensure that an interested adult represents the child’s best interests, especially when a parent is not available to fulfill that role. R.C. 2151.281; Juv.R. 4(B). Placing the requirement on the juvenile court, and not on the child, recognizes the fundamental differences between juvenile and adult courts.

Since its inception, the objective of the juvenile court has been to protect wayward children from evil influences, save them from criminal prosecution, and provide them social and rehabilitative services. *Children’s Home of Marion Cty. v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914). “Therefore, our inquiry must begin with the premise that the goal of the juvenile code is to rehabilitate, not to punish, while protecting society from criminal and delinquent acts during rehabilitation.” *In re Caldwell*, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996). Accordingly, juvenile courts are to remain centrally concerned with the care, protection, development, treatment, and rehabilitation of youthful offenders who remain in the juvenile justice system. *Id.*; *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476; R.C. 2152.01. Conversely, the adult court’s driving purpose is incapacitation and punishment. *See* R.C. 2929.11(A).

What would happen if Raymond were retained in the juvenile system and placed on probation services? Where would he live? Who would assume responsibility for his welfare? Under the State’s argument, the juvenile court would never be required to appoint a GAL to protect Raymond’s best interests; unless of course, Raymond requested a GAL, or if Raymond could demonstrate all the ways in which a trained

GAL would protect his best interests and advocate on his behalf. This line of reasoning violates long-held standards in Ohio regarding the important role of a parent or GAL in protecting the child's best interests, fails to fulfill *Gault's* promise of due process and fair treatment, and makes a child even more vulnerable. See *In re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). This case is important, and its outcome has wide applicability for two reasons: first, the revised code and the juvenile rules require the juvenile court to ensure fair proceedings by appointing a guardian ad litem when parents are unable to protect their child's best interests; and, second, the plain-error analysis erroneously assumes that an attorney is in the position to object or request a guardian ad litem.

A. The juvenile court must fulfill its duty in ensuring a fair hearing by appointing a GAL when required by the revised code and the juvenile rules.

The purpose of the juvenile court is to provide for the care and rehabilitation of children. See *Caldwell* at 157. In a juvenile court amenability proceeding, the juvenile court's focus is two-fold: protecting the child's best interests and the safety of the community. See *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 13. As the State recognized, in juvenile court, children are afforded due process protections. (Merit Brief of Plaintiff-Appellee at 6). Amenability hearings are no exception, and this Court has recognized that an amenability determination is a "critical stage of the juvenile proceeding." *D.W.* at ¶ 12. And, "[p]rocedural protections are vital." *Id.* at ¶ 13. The procedures in R.C. 2151 and 2152 are provided to ensure that parties receive "a fair

hearing, and their constitutional and other legal rights are recognized and enforced.”
R.C. 2151.01(B).

Contrary to the State’s suggestion, there are differences between substantive and procedural due process protections. (*See* Merit Brief of Plaintiff-Appellee at 6-10). For instance, neither the U.S. nor Ohio Constitutions provide for a right to appeal. However, the Ohio Constitution establishes an appellate court system with jurisdiction “in any cause on review as may be necessary to its complete determination.” Article IV, Section 3, Ohio Constitution. And, R.C. 2505.03 provides a statutory right to appeal as follows: “[e]very final order, judgment, or decree of a court * * * may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.” *See also* R.C. 2953.02 (“In a criminal case . . . the judgment or final order of a court of record inferior to the court of appeals may be reviewed by the court of appeals.”). Accordingly, because Ohio offers that protection to defendants in criminal or juvenile cases, the appellate procedure must measure up to due process and fair treatment. *See Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Similarly, children do not have the right to a trial by jury, but if a state elects to offer that protection or right, the procedure must be fair. *Compare McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (holding that “in our legal system the jury is not a necessary component of accurate factfinding”) with Kan.Stat. Ann. § 38-2357 (2014) (providing children with the right to request a trial by jury); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-539, 540-544, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (holding that because Ohio’s law conferred a property

interest in the employment as a civil service agent, procedural due process protections and safeguards must apply before the employment can be terminated).

Likewise, it is well settled that the states can provide heightened protections for its citizens, and especially for children. Because Ohio has required the appointment of a GAL to protect a child's best interests in the revised code and in the juvenile rules, the procedure and protection is necessary to ensure a fair hearing. R.C. 2151.01(B); 2151.281; Juv.R. 4(B); *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 12-13 (holding that "[p]rocedural protections are vital" during the amenability hearing).

Additionally, the State's reliance on *C.S.* and *Watson* in this context are misplaced. (Merit Brief of Plaintiff-Appellee at 9-10). As the State notes, this Court "refused to adopt" new standards regarding waiver of constitutional rights "absent legislative action." (Merit Brief of Plaintiff-Appellee at 9, citing *In re C.S.* and *In re Watson*). But, what the State fails to acknowledge is that the legislature *has acted* in this arena. R.C. 2151.281. The legislature requires that a juvenile court appoint a GAL to protect a child's best interests in every juvenile court proceeding if the child's parents are unable to do so. R.C. 2151.281. The legislature's pronouncement was not limited; rather, it was all encompassing. *Compare* R.C. 2151.281(A) (requiring appointment when the child has no parent) *with* 2151.281(B) (requiring appointment when the child has a conflict with his parent). And, in response to the legislature's enactment, this Court fashioned mandates to ensure that GALs are well trained to fulfill their purposes in juvenile court. Sup.R. 48; Juv.R. 4(B).

And, Raymond does not suggest that “every procedural protection” be incorporated into the amenability hearing. (Merit Brief of Plaintiff-Appellee at 6). He does not suggest that a new rule be written to require a jury determination about amenability, that he be provided bail during amenability proceedings, or raise a new constitutional claim akin to *State v. Quarterman*. (Merit Brief of Plaintiff-Appellee at 34). Rather, he asks that the juvenile courts follow the law and the rules that have already been established for fair hearings in the juvenile court system. R.C. 2151.01(B); 2151.281; Juv.R. 4(B); *D.W.* at ¶ 12-13 (holding that “[p]rocedural protections are vital” during the amenability hearing). And, one of those basic protections is that if a child’s parents are dead, a GAL will be appointed to protect his best interests; thereby, furthering the fundamental purpose of the juvenile system and ensuring fair treatment. R.C. 2151.281; Juv.R. 4(B); *Caldwell*, 76 Ohio St.3d at 157, 666 N.E.2d 1367; *Gault*, 387 U.S. at 33, 87 S.Ct. 1428, 18 L.Ed.2d 527.

Finally, in the same breath that the State concedes the importance of the parental role in juvenile court proceedings and highlights the GAL’s responsibilities, the State claims that the GAL is not a substitute for a parent. (See Merit Brief of Plaintiff-Appellee at 10). Specifically, the State claims that “a GAL does not share wisdom, experience, and support with the juvenile.” (Merit Brief of Plaintiff-Appellee at 10). But, appellate courts and this Court have placed importance on the GAL’s role in the juvenile system and protecting the child’s best interests. Sup.R. 48; *In re B.G.*, 5th Dist. No. 2011-COA-012, 2011-Ohio-5898, ¶ 20 (reversing because of the juvenile court’s failure to appoint a

guardian ad litem when the “[14]-year-old boy pled true to very serious charges with only his counsel to advise him”).

Yet, the State claims that an unnamed person in the juvenile court room, whose name is not listed in any record of the case and who was never appointed as custodian, was an adequate substitute. (Merit Brief of Plaintiff-Appellee at 2-4, 29-30). The State’s assertion that an unnamed person sitting in a courtroom, which is open to the public, can stand in for a parent or a GAL, comes woefully short of the protections afforded in R.C. 2151.281 and Juv.R. 4(B); it belittles the important training and requirements that this Court necessitates for GALs; and, it makes light of the role that GALs play in the juvenile court system.

B. For good reason, the duty to appoint a GAL is placed on the juvenile court. In order protect the attorney-client relationship, the duty is not placed on the child or his attorney.

In fact, the State concedes and it is abundantly clear from the record that the juvenile court was aware that Raymond’s mother had died prior to the amenability hearing. The error was apparent. R.C. 2151.281; Juv.R. 4(B). What more needs to be done to ensure that a juvenile court follows its mandatory duties? If this Court were to hold that an attorney had a duty to object and request that a GAL be appointed in a case, that attorney may very well be in violation of attorney-client privilege and Ohio’s ethics rules. There are times that the need for a GAL is plain to all in the courtroom: for instance, when a child’s parent is speaking against the child’s best interests in a non-protective manner, or when a child’s parent is not present. But, there are times in which the need is not as plain. A defense attorney could reveal evidence of a conflict to a

juvenile court if the child-client consents; but, the defense counsel is bound to represent the child's expressed interests. *See* Prof.Cond.R. 1.14. But, the attorney may not have the child's permission to reveal privileged information. Prof.Cond.R. 1.6(a). That is why Juv.R. 4(B) heightens the protection and requires appointment when there is a potential conflict between the child and his parent. Requiring the defense attorney to object and request a GAL creates an impossible standard: ensure that a child's due process rights are protected and that the juvenile court performs its mandated duties, or reveal potentially privileged information. *See* Prof.Cond.R. 1.6(a).

The State also notes that a single attorney can fulfill both roles in the juvenile court, but the State fails to acknowledge the limitations in Juv.R. 4(C)(2). "If a person is serving as [GAL] and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of [GAL], the court shall appoint another person as guardian ad litem for the ward." Juv.R. 4(C)(2). This rule ensures that there is no possibility of a breach of confidentiality, or the attorney-client privilege.

Finally, the State's claim that defense attorneys will invite error by not requesting a GAL invents a problem that does not exist. (Merit Brief of Plaintiff-Appellee at 32-34). In fact, if this Court agrees with Raymond's propositions of law, "gamesmanship" is eliminated, because it requires juvenile courts to follow the established law and appoint a GAL when required. Attorneys are removed from the equation, and the juvenile court retains sole responsibility to appoint a GAL when required, just as the legislature intended. R.C. 2151.281; Juv.R. 4(B).

C. Prejudice must be presumed when the error impacts a child's best interests, and infects the right to a fair hearing.

In its brief, the State dismisses Raymond's assertions that prejudice should be presumed and cites examples of cases where plain-error is used in the criminal court in different contexts; but, the State also readily acknowledges that a "plain-error as a matter of law" analysis exists in Ohio courts. (Merit Brief of Plaintiff-Appellee at 14, 27; *see* Merit Brief of Appellant Raymond Morgan at 17-19). Raymond is not requesting that this Court apply a brand new analysis; rather, he asks that this Court recognize the importance of the error in the juvenile court amenability hearing, just as this Court has done in other instances. (*See* Merit Brief of Appellant Raymond Morgan at 16-24).

The State's attempts to distinguish the appellate court cases that support a "reversible error" or plain error as a matter of law-type approach in GAL cases fails. (Merit Brief of Plaintiff-Appellee at 23-26). Although each of the cited GAL cases plainly holds that an objection is not necessary to warrant reversal or that the error is reversible, the State's suggestion that the cases are different from Raymond's case is not appropriate. For instance, in *In re J.C.*, the Fifth District Court of Appeals found error in the juvenile court's failure to appoint a GAL, when the 14-year-old child had no other adult, aside from his attorney, to advise him before he admitted responsibility to the charges against him. *In re J.C.*, 5th Dist. Knox Nos. 14CA23, 14CA24, 2015-Ohio-4664, ¶ 26. Yet, the State asserts that Raymond, a 16-year-old child with no adult to support him or protect his best interests during the only hearing to determine if he would be retained in juvenile court or transferred to adult court, was not prejudiced by a lack of a

GAL. (Merit Brief of Plaintiff-Appellee at 24, 28). This difference does not make sense. In fact, it strains credulity to suggest that in cases of a potential conflict between a child and his parent, a reversible error approach, as utilized by several appellate districts, is appropriate; but, it is not appropriate when a child has no parents at all. (Merit Brief of Plaintiff-Appellee at 27). And, the State does not address the Eighth District Court of Appeals's recent decision that wholly rejected a plain-error analysis when a juvenile court failed to appoint a guardian ad litem when a child has no parent at the juvenile court hearings. (See Merit Brief of Appellant Raymond Morgan at 15, 19-20). *In re D.R.B.*, 8th Dist. Cuyahoga No. 102252, 2015-Ohio-3346, ¶ 26.

The amenability hearing is a fact-intensive inquiry, much like a sentencing or competency hearing. (Compare Merit Brief of Plaintiff-Appellee at 26 with Merit Brief of Appellant Raymond Morgan at 19-20). As the State has noted, the GAL is required to provide the juvenile court with a best interests recommendation. And, this Court has recognized the GAL's important role. Sup.R. 48. This role is different from counsel and is different from the evaluator in the amenability hearing. (See Merit Brief of Appellant Raymond Morgan at 11-12). The defense attorney has a duty to defend his client against the accusations, but the defense attorney has no duty to provide the juvenile court with a best interests assessment. (See Merit Brief of Appellant Raymond Morgan at 10). The State posits that Raymond "has not even bothered to speculate as to what a GAL could have done or said that would even have possibly resulted in him not being bound over to common pleas court." (Merit Brief of Plaintiff-Appellee at 14). This is simply not true.

As Raymond noted in his merit brief, a GAL is required to provide a best interests recommendation after interviewing the child, family, teachers, and “other significant individuals who may have relevant knowledge regarding the issues of the case”; reviewing all relevant court, medical, educational, and family records; requesting evaluations and mental health assessments; and, investigating potential outcomes or future plans for the child. Sup.R. 48. A defense attorney is not required to do any of these things, determine a plan for the child’s future, or provide a best interests recommendation; rather, a defense attorney’s role is to protect the child’s stated interests and defend the child from the accusations. (Merit Brief of Appellant Raymond Morgan at 10). And, although an evaluator is expected to speak to the amenability factors, the evaluator is not required to determine a plan for the child’s future or provide a best interests recommendation. R.C. 2152.12(C). Without the presentation of the GAL’s best interests recommendation after full investigation, it is difficult to say what decision the juvenile court would have made. But, without that recommendation and the plan for the child’s future as is required to be presented by the GAL, the juvenile court did not consider that information before it made its decision.

Importantly, the State sets forth factors that it believes could demonstrate prejudice, and these factors do not require presentation of any specific set of information or a recreation of information that is outside the appellate record. (Merit Brief of Plaintiff-Appellee at 21-23). The State pays particular attention to the role of defense counsel in the proceedings. (Merit Brief of Plaintiff-Appellee at 21-23). Yet, the State ignores the significant fact, raised in the appellate proceedings in this case, that

Raymond tried to fire his defense counsel during his juvenile court proceedings, and that defense counsel admitted that there was a breakdown in the attorney-client relationship. (Merit Brief of Appellant Raymond Morgan at 2). Surely, under the State's proposed factors, this information would weigh significantly towards prejudice. (See Merit Brief of Plaintiff-Appellee 21-22).

This case is unlike that of *State v. Perry*, upon which the State so heavily relies. (Merit Brief of Plaintiff-Appellee at 33). In *Perry*, this Court held that where the court failed to maintain a written record of proposed jury instructions, there was no affront to the fairness of the proceeding because the court, defense counsel, and the state had no challenges to the jury instructions, and the instructions were transcribed for appellate review. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 24. In this case, no GAL was appointed to protect Raymond's best interests, and the juvenile court was never presented with a best interests recommendation to consider prior to making its amenability determination. This error infected the fairness of the proceedings.

This Court has recognized that an amenability determination is a "critical stage of the juvenile proceeding." *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 12. And, "[p]rocedural protections are vital." *Id.* at ¶ 13. The procedures in R.C. 2151 and 2152 are provided to ensure that parties receive "a fair hearing, and their constitutional and other legal rights are recognized and enforced." R.C. 2151.01(B). As the State notes in civil cases, plain error should only be recognized when it "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." (Merit Brief of

Plaintiff-Appellee at 13, citing *Goldfuss v. Davidson*). This case presents such an example. This amenability hearing proceeded without one of the most basic protections afforded in the juvenile court system—a substitute for the child’s parents and a voice for the best interests of the child. R.C. 2151.281; Juv.R. 4(B); R.C. 2151.011. And, this error infected the legitimacy of the rest of the proceedings, because the juvenile court made the critical amenability determination without the best interests perspective. (Merit Brief of Raymond Morgan at 21-24).

Conclusion

Raymond Morgan asks this Court to hold that a child does not need to request a GAL in the absence of his parents, guardian, or legal custodian at a juvenile court hearing and a child does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a guardian ad litem when required by law.

Respectfully submitted,

The Office of the Ohio Public Defender

/s/ Charlyn Bohland

Charlyn Bohland #0088080

Assistant State Public Defender

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 644-0708 – Fax

charlyn.bohland@opd.ohio.gov

Counsel for Raymond Morgan

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing **Reply Brief of Appellant Raymond Morgan** was served by ordinary U.S. Mail this 11th day of July, 2016 to Seth L. Gilbert, Franklin County Prosecuting Attorney, Franklin County Prosecutor's Office, 373 South High Street, Columbus, Ohio 43215.

/s/ Charlyn Bohland
Charlyn Bohland #0088080
Assistant State Public Defender

Counsel for Raymond Morgan

#468343