

[Cite as *In re G.H.*, 2016-Ohio-770.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

IN THE MATTER OF:
G.H.

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CASE NO. 14 MA 7

OPINION

CHARACTER OF PROCEEDINGS:

Juvenile Appeal from Court of Common
Pleas of Mahoning County, Ohio,
Juvenile Division
Case No. 2013 JA 1167 JUV

JUDGMENT:

Affirmed

APPEARANCES:
For Plaintiff-Appellee

Attorney Paul Gains
Mahoning County Prosecutor
Attorney Ralph Rivera
Assistant Prosecutor
21 West Boardman Street
Youngstown, Ohio 44503

For Defendant-Appellant

Attorney Sheryl Trzaska
Assistant Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: February 17, 2016

[Cite as *In re G.H.*, 2016-Ohio-770.]
DeGENARO, J.

{¶1} G.H., a minor, appeals the Mahoning County Juvenile Court's decision designating him a tier III juvenile sex offender. G.H. raises constitutional challenges to the designation and further asserts an ineffective assistance of counsel claim. As the constitutional arguments were not raised in the juvenile court they are waived on appeal, and the argument regarding counsel's effectiveness is meritless. Accordingly, the decision of the juvenile court is affirmed.

{¶2} A delinquency complaint was filed alleging that G.H., then age 17, was delinquent of four counts of gross sexual imposition, R.C. 2907.05(A)(4), third-degree felonies if committed by an adult. The victims were under the age of thirteen and reported that G.H. had sexual contact with them through their clothing. Ultimately, G.H. admitted to two counts and two counts were dismissed. The State declined to pursue discretionary transfer to the adult criminal justice system. The magistrate accepted G.H.'s admission and adjudicated him delinquent.

{¶3} For disposition, G.H. was committed to the Department of Youth Services (DYS) for a minimum period of six months on each count to run consecutively for a total minimum period of one year, with a maximum to his twenty-first birthday. The magistrate considered classification at the disposition hearing, and designated G.H. a tier III juvenile sex offender subject to community notification which required registration every ninety days. G.H. did not file objections to the magistrate's decision.

{¶4} In his first three of four assignments of error, G.H. asserts:

The juvenile court erred when it classified G.H. as a tier III juvenile offender registrant and ordered him subject to community notification for the delinquency offense of gross sexual imposition. Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution.

The juvenile court erred when it imposed a tier III registration order with community notification against G.H., because his lifetime, public registration order for gross sexual imposition violates his right to

be free from cruel and unusual punishment. Eighth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 9, Ohio Constitution.

The juvenile court erred when it classified G.H. as a tier III juvenile offender registrant because the imposition of a punitive sanction that extends beyond the age jurisdiction of the juvenile court violates his right to due process. Fourteenth Amendment to the U.S. Constitution; Article I, Section 16, Ohio Constitution.

{¶15} Written objections to a magistrate's decision must be filed within 14 days, and the failure to do so waives a party's right to appeal except for plain error. Juv. R. 40(D)(3)(b)(i), Juv.R. 40(D)(3)(b)(iv). Thus, G.H.'s failure to file objections precludes us from considering these arguments for the first time on appeal. G.H. does not assert plain error and none is discernable from the record.

{¶16} Moreover, G.H. never raised the constitutionality of a tier III juvenile sex offender designation during the proceedings before the magistrate. "It is well settled that an appellate court 'will not consider a question not presented, considered, or decided by a lower court.' " *In re Goodman*, 161 Ohio App.3d 192, 2005-Ohio-2364, 829 N.E.2d 1219, ¶26 (11th Dist.). (internal citations omitted) "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. As these arguments have been waived, G.H.'s first three assignments of error are meritless.

{¶17} In his final of four assignments of error, G.H. asserts:

G.H. was denied the effective assistance of counsel when trial counsel failed to object to the juvenile court's unconstitutional classification order. Sixth and Fourteenth Amendments to the U.S. Constitution;

Section 10, Article I, Ohio Constitution.

{¶8} The test for ineffective assistance of counsel was outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136, 137, 538 N.E.2d 373 (1989). The two-part test for ineffective assistance of counsel requires: (1) a showing that "counsel's performance was deficient"; and (2) a showing that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

{¶9} G.H. argues that his counsel was ineffective for failing to argue that he should not be classified as a tier III offender or subject to community notification, and for failing to file objections and raise constitutional challenges to the designation.

{¶10} A review of the record demonstrates trial counsel was extremely thoughtful and prepared; G.H. avoided a discretionary bindover to the adult system and two of four counts were dismissed. Counsel was strategic in how he handled this matter, including the classification. Acknowledging that his client was 17, counsel expressed his intent for G.H. to complete programs at DYS and later asked for reclassification to a lower tier.

{¶11} Counsel's performance was not deficient. Even assuming it was, G.H. was not prejudiced. We have previously rejected a similar classification challenge:

We cannot conclude that the mere fact that registration may be required past age 21 would make a scheme cruel and unusual or shocking to a sense of justice under the analysis set forth (sic) *In re C.P.* There is mandatory classification for 16 and 17 years olds such as appellant; however, there is no automatic tier placement based upon the offense as the juvenile court has discretion on the choice of tier after the juvenile has been provided with an evidentiary hearing and after the juvenile has had an opportunity to seek treatment.

* * *

Moreover, the tier placement can be appealed by the juvenile. In addition, the juvenile court can decrease the tier classification upon the juvenile's completion of the disposition. R.C. 2152.84(A)(1), (2)(c) (16 or 17 year olds can be reclassified at completion of disposition but cannot yet be declassified as 14 or 15 year olds can be). Three years thereafter, the juvenile can file a petition seeking declassification (or reclassification) and can then file another petition three years later and yet another petition five years later. R.C. 2152.85(B)(1)-(3). Importantly, there are no issues with community notification (automatic or discretionary) as that only becomes an option under tier III.

In re M.R., 7th Dist. No.13 JE 30, 2014-Ohio-2623. at ¶ 64, ¶ 65.¹

{¶12} As G.H. has not established that his counsel was deficient or that he was prejudiced by his counsel's performance, his fourth assignment of error is meritless. Accordingly, the judgment of the juvenile court is affirmed.

Waite, J., concurs

Robb, J., concurs

¹ Accepted by the Supreme Court of Ohio on a discretionary appeal. Case No. 2014-Ohio-1315.