

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

IN RE: :  
N.A. : CASE NO. CA2011-06-106  
: OPINION  
: 4/30/2012  
:  
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. JV2011-0679

Amanda J. Powell, 250 8 East Broad Street, Suite 1400, Columbus, Ohio 43215, for appellant

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee

**POWELL, P.J.**

{¶ 1} A juvenile found delinquent claims the Butler County Juvenile Court erred and his defense counsel was ineffective when his competency was not considered before he was committed to the Department of Youth Services (DYS). Finding prejudicial errors by both the juvenile court and defense counsel for not following through on questions about the juvenile's competency, we reverse the judgment and remand for further proceedings.

{¶ 2} The record indicates N.A., born on January 24, 1994, was represented by

counsel when he admitted in Delaware County Juvenile Court that he assaulted a DYS employee at the facility where he was being held. Delaware County adjudicated N.A. a delinquent child and in March 2011 transferred the case for disposition to Butler County, the juvenile's home county.

{¶ 3} By the time N.A. received his first hearing in Butler County, he had two additional charges filed against him. N.A.'s appointed counsel moved for a competency evaluation of N.A. The written motion contained in the file will be discussed more fully below.

{¶ 4} In the first hearing before a juvenile court judge, N.A.'s trial counsel asked the court for a competency evaluation, stating that "[m]y client won't speak with me and I'm not sure if he understands what's going on, but the only thing that is really clear is that he is not participating in the case whatsoever."

{¶ 5} The juvenile court said,

"Alright. We have two open cases that we've not had a plea on.  
\* \* \* We'll come back in about 30 days and see what that says on those open charges. Just for the record, the Court is also here on an Assault that was plead to in Delaware County. It says....'Sent here for sentencing.' For that we're going to get an assessment from the Butler County Juvenile Rehabilitation Center \* \* \*."

{¶ 6} The juvenile court said it would continue to hold N.A. in detention under the parole violation and the competency hearing on the two open cases. The juvenile court told N.A. and the juvenile's parents that N.A. needed to talk to and cooperate with people.

{¶ 7} The record indicates the next hearing was held nine days later. According to the hearing transcript, a new charge alleging that N.A. assaulted a detention center officer was added to the list of delinquency complaints filed against the juvenile.

{¶ 8} The juvenile court reiterated that N.A.'s counsel previously filed a competency evaluation request, and stated that the court was "going to put that in the new un-adjudicated charge as well. I'm going to hold the three un-adjudicated charges in abeyance, as well as,

your motion to determine competency and we're going to proceed with the case that was plead to in Delaware and set for a disposition here." [sic]

{¶ 9} The probation department recommended a commitment to DYS and agreed that the other charges would be held in abeyance. The court asked N.A.'s attorney what she wanted to say and she replied "[m]y only comment is that I hope that he can get some level of treatments. That he has some psychological issues that he needs to deal with." N.A. said he had nothing to say.

{¶ 10} The juvenile court committed the juvenile to DYS for six months; the juvenile could be held by DYS until he is 21 years of age. N.A. now appeals the judgment, raising two assignments of error for our review.

{¶ 11} Assignment of Error No. 1:

{¶ 12} THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED [N.A.'S] RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, OHIO REVISED CODE 2151.25, CRIM.R. 43, AND JUV.R. 27, 29(F) AND 34(J) WHEN IT ENTERED DISPOSITION IN [N.A.'S] CASE. [sic] [citations to record omitted]

{¶ 13} N.A. argues that the juvenile court erred by failing to make a determination about his competency before disposition when it knew "he may not be competent."

{¶ 14} As previously stated in our review of the facts and procedural posture, N.A.'s counsel moved for an evaluation of the juvenile's competency, but did not object to the juvenile court's decisions to proceed with disposition on this case and hold the competency issue "in abeyance."

{¶ 15} Generally, where an appellant has failed to preserve the alleged error by lodging an objection, his right to contest it is waived, absent plain error. *See State v.*

*Wogenstahl*, 75 Ohio St.3d 344, 357 (1996); see *In re S.M.*, 8th Dist. No. 91408, 2008-Ohio-6852.

{¶ 16} Plain error is recognized "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 111 (1990). In order to prevail under the plain error standard, an appellant must demonstrate that the outcome of his case would clearly have been different but for the error that he alleges. *State v. Waddell*, 75 Ohio St.3d 163, 166 (1996).

{¶ 17} It is a fundamental notion of due process that a criminal defendant who is not legally competent may not be tried or convicted of a crime. *State v. Berry*, 72 Ohio St.3d 354, 359 (1995). "Because an incompetent defendant may not be convicted of a crime, a court's decision concerning the competency of an individual to stand trial will always be deemed outcome-determinative in the most fundamental sense." *In re Williams* 116 Ohio App.3d 237, 240-42 (2nd Dist.1997), appeal not allowed, 80 Ohio St.3d 1415. Therefore, if an error occurred in the competency proceedings such that the determination of competency to stand trial cannot be relied upon, the decision must be reversed. *Id.*

{¶ 18} We are mindful that the constitutional test under the Fourteenth Amendment for competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960).

{¶ 19} Under Ohio's codification of this standard, a defendant is presumed to be competent unless it is demonstrated by a preponderance of the evidence that "because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense." *In re Williams* at 242, citing R.C. 2945.37(A).

{¶ 20} The competency standard for pleading guilty is the same as competency to stand trial. *State v. Bolin*, 128 Ohio App.3d 58, 62 (8th Dist.1998). Although juveniles charged with a delinquency are not criminal defendants, the right not to be tried or convicted while incompetent is as fundamental in juvenile proceedings as it is in criminal trials of adults. *In re Bailey*, 150 Ohio App.3d 664, 2002-Ohio-6792 (2nd Dist.).

{¶ 21} Juv.R. 32(A)(4) provides that the court may order a mental examination where competency is in issue, but no statutory standard has been enacted to guide competency determinations in juvenile proceedings. *In re Williams*, 116 Ohio App.3d 237 at 242. Courts have determined that the standard enunciated in R.C. 2945.37(A) governs competency evaluations of juveniles, so long as it is applied in light of juvenile rather than adult norms. *In re Stone*, 12th Dist. No. CA2002-09-035, 2003-Ohio-307; *In the Matter of Kristopher F.*, 5th Dist. No. 2006CA00312, 2007-Ohio-3259; *In re Williams*.

{¶ 22} R.C. 2945.37(B) states that in a criminal action, the court, prosecutor, or defense may raise the issue of a defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in the section. *Id.* If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion. *Id.*

{¶ 23} Where the issue of competency was raised after a defendant pled guilty, but before he was sentenced -- which occurred in the juvenile proceedings in the case at bar -- R.C. 2945.37(B) mandates a hearing on the issue only for "good cause shown" or a showing of "sufficient indicia of incompetency." *State v. Burns*, 12th Dist. Nos. CA2004-07-084, CA2004-10-126, 2005-Ohio-5290, ¶ 35-37; see *In re Adams*, 4th Dist. Nos. 01-CA-237, 01-CA-238, 02-CA-120, 2003-Ohio-4112, ¶ 32.

{¶ 24} When there is evidence to create sufficient doubt of a defendant's competence to stand trial, a trial court may be required to conduct further inquiry on the question and a

trial court must always be alert to circumstances suggesting that the accused may be incompetent to stand trial. *Burns* at ¶ 35-37; see *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896 (1975). However, the decision regarding whether to hold a competency hearing once trial has commenced is in the court's discretion. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 159 (reiterated rebuttable presumption of competency as outlined in R.C. 2945.37).

{¶ 25} The motion for a competency evaluation alleged there were concerns about N.A.'s ability to understand the nature and consequences of the charges and the trial process, and to meaningfully participate both with his attorney and in the courtroom procedures. Counsel also supported the motion by mentioning that N.A. was found incompetent to stand trial in 2006, ordered to undergo involuntary medical treatment in 2010, "and the opinion of Dan Behnen, Psychologist from the Ohio Department of Youth Services." [sic]

{¶ 26} Because this case had already been adjudicated, R.C. 2945.37(B) requires a hearing on the issue only for "good cause shown" or a showing of "sufficient indicia of incompetency." See *Burns*, 12th Dist. Nos. CA2004-07-084, CA2004-10-126, 2005-Ohio-5290 at ¶ 35-37. The record before this court does not indicate any discussion of competency issues as they pertain to this particular case. There is no record that any of the allegations or claims were explored, rejected, or found insufficient. The juvenile court appeared to ignore the suggestion of incompetency. In fact, N.A.'s evaluation request was applied to the three un-adjudicated delinquency offenses, but the competency proceedings and those offenses were suspended while N.A. was committed to DYS on this delinquency finding.

{¶ 27} The juvenile court plainly erred in failing to consider and make any finding as to N.A.'s competency when the issue was raised. See *In re Bailey*, 150 Ohio App.3d 664,

2002-Ohio-6792, at ¶ 13. N.A.'s first assignment of error is sustained.

{¶ 28} Assignment of Error No. 2:

{¶ 29} [N.A.] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶ 30} Under this assignment of error, N.A. argues that his trial counsel in juvenile court was ineffective in dealing with the competency issues. First, we note that N.A.'s appellate counsel argues that trial counsel was ineffective for not adequately protecting her client "when the record reflects that [he] is not competent[.]" We address this assignment of error based upon a record wherein no findings were made with regard to competency, not on the assertion that the record reflected that N.A. was incompetent.

{¶ 31} For ineffective assistance of counsel claims, counsel's performance will not be deemed ineffective unless counsel's performance is proved to have fallen below an objective standard of reasonable representation and prejudice arises from counsel's performance. *State v. Bradley*, 42 Ohio St.3d 136, 137 (1989), paragraph two of the syllabus, following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

{¶ 32} To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Bradley*, paragraph three of the syllabus; *In re Gooch*, 2nd Dist. No. 19339, 2002-Ohio-6859, ¶ 29.

{¶ 33} While trial counsel initially raised concerns about whether N.A. was competent to understand and participate in the juvenile court proceedings, she inexplicably failed to raise the issue of competency at disposition. We find trial counsel's representation was prejudicially deficient. N.A.'s second assignment of error is sustained.

{¶ 34} Judgment reversed and remanded.

RINGLAND and HUTZEL, JJ., concur.