

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

IN RE: :  
J.O. : CASE NO. CA2011-08-157  
: OPINION  
: 7/9/2012  
:  
:

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. JV2011-1213

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

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

**HUTZEL, J.**

{¶ 1} Appellant, J.O., appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, committing him to the Ohio Department of Youth Services (DYS) following appellant's violation of a court order.

{¶ 2} On June 7, 2011, appellant, then age 16, was adjudicated delinquent after he pled true to one count of escape, a fifth-degree felony if committed by an adult. On July 1, following a dispositional hearing, the juvenile court ordered appellant committed to DYS for a

minimum period of six months up to a maximum period not to exceed his 21st birthday, but suspended the commitment conditioned upon his compliance with court orders and probation rules. The juvenile court placed appellant on intensive probation, stating: "as part of that probation he will enter and successfully complete the Butler County Juvenile Rehabilitation Program." The juvenile court's entry, filed on July 1, 2011, likewise stated, "As a term of probation, the child shall be placed in the Butler County Regional Rehabilitation Center. The child and his family shall participate fully in the program at the Rehabilitation Center and shall successfully complete the program of rehabilitation[.]" Appellant was not provided with a written list of his probation rules.

{¶ 3} Afterward, appellant stated he would hit a resident in order to be discharged from the rehabilitation program. As a result, on July 12, a delinquency complaint was filed against appellant under R.C. 2152.02(F)(2), which provides that a child who violates a court order is a delinquent child. The complaint alleged that appellant violated a court order by refusing to participate in the rehabilitation program.

{¶ 4} On July 18, following appellant's true plea to the charge, the juvenile court found that appellant "did violate the terms of the Court Order and his probation, the underlying is a Felony in the 5th Degree which, was originally \* \* \* escape[.]" Based on the plea, the juvenile court adjudicated appellant delinquent. The juvenile court then committed him to DYS for a minimum period of six months up to a maximum period not to exceed his 21st birthday. The record shows that appellant was given the opportunity to avoid commitment and return to the rehabilitation center. However, appellant refused to go back to the rehabilitation center on the ground he did not need and did not want to participate in the rehabilitation program. After asking appellant several times if "that was what [he] want[ed]," and appellant replied affirmatively, the juvenile court committed appellant to DYS.

{¶ 5} Appellant appeals, raising two assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT COMMITTED [J.O.] TO THE DEPARTMENT OF YOUTH SERVICES FOR A VIOLATION OF R.C. 2152.02(F)(2), A NON-CLASSIFIED DELINQUENCY, AS THE COMMITMENT IMPOSED EXCEEDS THE STATUTORILY PERMISSIBLE DISPOSITION FOR THE OFFENSE. R.C. 2152.19. (JULY 18, 2011, T.pp. 22-23); (T.d. 25, A-9).

{¶ 8} Appellant argues that the juvenile court's decision committing him to DYS for violating a court order must be vacated because such disposition is not permissible under R.C. Chapter 2152. Specifically, appellant asserts that when a child is adjudicated delinquent for a court order violation, an unclassified offense, R.C. 2152.19 governs disposition and does not provide for commitment to DYS. By contrast, commitment to DYS is permissible under R.C. 2152.16(A)(1) whenever a child is adjudicated delinquent for an offense that would be a felony if committed by an adult.

{¶ 9} When a child is adjudicated delinquent, R.C. 2152.19(A) allows a juvenile court, in addition to any other disposition authorized or required by R.C. Chapter 2152, to make one of the listed orders of disposition. See *In re J.D.*, 10th Dist. No. 06AP-995, 2007-Ohio-3279, ¶ 9. Appellant is correct that commitment to DYS is not one of the available orders of disposition under R.C. 2152.19(A).

{¶ 10} However, we find that while appellant's failure to participate in the rehabilitation program was filed and labeled as a violation of a court order, the proceedings below were more akin to a probation revocation. The violated court order was not simply a court order; it was also one of the terms of probation imposed on appellant.

{¶ 11} "Probation may not be revoked unless the juvenile has violated a court order. The juvenile again becomes a delinquent juvenile under R.C. 2152.02(F)(2)[.] During a probation revocation hearing, the court determines whether a juvenile has violated a

condition of probation." *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354, ¶ 49. "Because the conditions of probation are established through a court order, a violation of probation also constitutes a violation of a court order. Since a probation revocation hearing may result in a finding that the juvenile has violated a court order and is delinquent, a probation hearing qualifies as an adjudicatory hearing[.]" *Id.* Therefore, "Juv.R. 29, setting forth the procedure for adjudicatory hearings, and Juv.R. 35(B), setting forth the procedure for the revocation of probation, are applicable." *Id.* at ¶ 65.

{¶ 12} A juvenile court must comply with Juv.R. 35(B) before it revokes probation and imposes a previously suspended commitment. *In re A.R.D.*, 12th Dist. Nos. CA2008-04-095 and CA2008-04-103, 2009-Ohio-1306, ¶ 11. Juv.R. 35(B) states that "[p]robation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified."

{¶ 13} Appellant asserts he could not have violated his probation rules because he did not receive a written list of his probation rules until after the violation was filed. Appellant is correct that he was not provided with the written list at the time he was adjudicated delinquent for escape and received a suspended commitment to DYS. It was not until after he was committed to DYS following his violation of a court order that he received the written list.

{¶ 14} However, the record shows that appellant was specifically notified by the juvenile court's July 1, 2011 entry that one of his terms of probation was to "participate fully in the program at the [Butler County Regional] Rehabilitation Center and \* \* \* successfully complete the program of rehabilitation[.]" Likewise, at the July 1, 2011 dispositional hearing, the juvenile court notified appellant it was suspending the commitment to DYS and that one of his terms of probation was to "enter and successfully complete the Butler County Juvenile Rehabilitation Program." Appellant does not argue he did not know about the court's orders

or that he was required to abide by the orders.

{¶ 15} We therefore find that appellant was informed of (and provided with) this particular term of probation in compliance with Juv.R. 34(C) and Juv.R. 35(B). *In re Haggard*, 3d Dist. Nos. 2-08-20, 2-08-21, 2-08-22, and 2-08-23, 2009-Ohio-3821, ¶ 15-18.

{¶ 16} A juvenile court may properly commit a delinquent juvenile to DYS for a probation violation even though a suspended commitment was not imposed at the time of the initial disposition. *In re Guy*, 12th Dist. No. CA96-10-196, 1997 WL 133527, \*2 (Mar. 24, 1997). Similarly, upon revocation of probation, a court may impose any sentence that it could have originally imposed. *In re Burt*, 5th Dist. No. 2006-CA-00328, 2007-Ohio-4034, ¶ 58. Where probation is conditioned on certain terms, the sentence can be modified for non-compliance with those terms. *In re Thomas*, 12th Dist. No. CA2001-02-013, 2002 WL 471958, \*1 (Mar. 29, 2002).

{¶ 17} In the case at bar, the juvenile court adjudicated appellant delinquent for escape, a fifth-degree felony if committed by an adult, committed him to DYS, and suspended the commitment conditioned upon his compliance with court orders and probation rules, and specifically, the court order that he successfully complete the rehabilitation program. Appellant was told during that dispositional hearing that his failure to abide by the foregoing court order would result in the commitment to DYS. Appellant subsequently violated that court order, and thus violated probation, and admitted to the violation. The juvenile court, in turn, found that appellant violated a court order and probation, with the underlying offense being escape, and committed him to DYS for a minimum period of six months up to a maximum period not to exceed his 21st birthday.

{¶ 18} In light of all of the foregoing, we find no error in the juvenile court's decision to commit appellant to DYS for his violation of a court order and probation. *In re Thomas*. Appellant's first assignment of error is overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} [J.O.] WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION. (JULY 18, 2011, T.pp. 22-23); (T.d. 25, A-9).

{¶ 21} Appellant argues that trial counsel's failure to object to the commitment to DYS following appellant's admission he violated a court order deprived him of his right to effective assistance of counsel.

{¶ 22} To demonstrate ineffective assistance of counsel, a two-prong test is employed. First, a defendant must establish that counsel's representation fell below an objective standard of reasonableness, and second, that the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989); *State v. Bradford*, 12th Dist. No. CA2010-04-032, 2010-Ohio-6429, ¶ 97.

{¶ 23} Under the first prong, reversal "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 199. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. There is also a presumption that the challenged action may be "sound trial strategy." *Id.* Under the second prong, the defendant has the burden to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶ 24} Appellant asserts that his trial counsel was ineffective because counsel did not object to the juvenile court's decision to commit appellant to DYS after appellant admitted violating the court-ordered term of probation to participate in and complete the rehabilitation

program. The rehabilitation program was an integral part of the juvenile court's decision to suspend the commitment to DYS, and it gave appellant a chance to stay out of DYS by complying with the juvenile court order. However, appellant flatly refused to participate in the program. As the Fifth Appellate District stated, "Appellant received the benefit of a suspended sentence and Appellant chose not to comply with probation, thus bringing himself back before the court on a probation violation where the court had to reconsider imposing a DYS commitment." *In re Steven H.*, 5th Dist. No. 08-CA-138, 2009-Ohio-2349, ¶ 16.

{¶ 25} Appellant subsequently admitted he violated the court-ordered term of probation by refusing to participate in the rehabilitation program. Before the imposition of the suspended commitment to DYS, appellant was given the opportunity to avoid commitment and return to the rehabilitation center. However, appellant refused to go back to the rehabilitation center on the ground he did not need and did not want to participate in the rehabilitation program. After asking appellant several times if "that was what [he] want[ed]," and after appellant replied affirmatively, the juvenile court committed appellant to DYS.

{¶ 26} "Attorneys are not required to make frivolous objections, and as Appellant violated probation, admitted to the violation, and was already aware that he was on a suspended commitment to DYS, we cannot find that counsel was ineffective in failing to object" to the commitment to DYS. *In re Steven H.*, 2009-Ohio-2349 at ¶ 16. Likewise, given appellant's deliberate violation of the court-ordered term of probation, his admission to the violation, and his clear decision to choose DYS over rehabilitation, appellant cannot show that the outcome would have been different had counsel objected to the commitment to DYS.

{¶ 27} In light of the foregoing, and given our holding under appellant's first assignment of error, we cannot say appellant was denied effective assistance of counsel. Appellant's second assignment of error is overruled.

{¶ 28} Judgment affirmed.

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