**IN THE COURT OF APPEALS OF IOWA**

No. 1-828 / 11-0647
Filed November 23, 2011

**IN THE INTEREST OF E.G.,**
**Minor Child,**

**E.G., Minor Child,**
Appellant.

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Appeal from the Iowa District Court for Polk County, Constance Cohen, Associate Juvenile Judge.

A juvenile appeals from the imposition of a more restrictive dispositional order. **AFFIRMED.**

Colin McCormack of Van Cleaf & McCormack Law Firm, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John Sarcone, County Attorney, and Andrea Vitzthum, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

**TABOR, J.**

A juvenile who was adjudicated as delinquent for stealing cars appeals from the imposition of a more restrictive dispositional order following an incident where he allegedly missed curfew and assaulted his uncle. On appeal, he alleges he received ineffective assistance of counsel. Because the juvenile does not establish his attorney breached a material duty or that a different outcome was reasonably probable had counsel more thoroughly investigated the alleged violation or more aggressively cross-examined the juvenile court officer, we affirm the order placing the juvenile in a more restrictive setting.

## I. Background Facts and Proceedings

In November 2009, the Polk County Attorney filed delinquency petitions, alleging that fourteen-year-old E.G. took used cars from lots in Des Moines. E.G. pleaded guilty to two counts of theft in the first degree and one count of theft in the second degree. In January 2010, the juvenile's attorney successfully asked the court to suspend the proceedings and enter a consent decree. In February 2010, authorities issued a warrant for E.G.'s arrest after he "absconded from his custodial home." In March 2010, the Polk County Attorney filed another delinquency petition, charging that E.G. operated a motor vehicle without the owner's consent when he took a car from a Des Moines driveway and drove it to St. Paul, Minnesota.

On March 8, 2010, the juvenile court revoked the consent decree and ordered E.G. to be placed in residential treatment. E.G. attended Woodward Academy until January 2011 when he was released to the custody of his uncle.

The January 10, 2011 delinquency review order commended E.G. for his progress at Woodward. Notwithstanding that progress, E.G.'s juvenile court officer (JCO) was worried when the teenager shaved three slits in his eyebrow upon returning home from Woodward Academy, though E.G. denied the action symbolized gang affiliation.

On the afternoon of March 15, 2011, E.G. left his uncle's home to play basketball with his cousin. The cousin returned home at the appointed hour, but E.G. missed his designated curfew by three hours. Upon his return home, an altercation over E.G.'s cellular telephone resulted in injuries to his uncle. Police responding to the incident found the uncle with a gash to his head and a sprained ankle. Neither the uncle nor the JCO wanted to pursue additional delinquency charges against E.G. But after being assaulted, the uncle was no longer willing to be E.G.'s custodian.

On the night of the assault, E.G. was sporting a red bandana at his waist, causing the JCO to renew her concern he was associating with gang members—an allegation that E.G. again denied.

On March 21, 2011, the JCO filed an application for detention, alleging that there was probable cause that E.G. "violated conditions of his release imposed under Iowa Code sections 232.44(5)(b), 232.52 or 232.54 [2011]." The juvenile court held a hearing on March 31, 2011. That same day, the court issued an order finding E.G. "violated the terms of his probation" by breaking curfew and assaulting his uncle. The court found that placing the child outside of his home was necessary to his welfare and that group care was the least

restrictive placement appropriate to his need for structure. The juvenile appeals that order.

## II. Scope and Standards of Review

Iowa juvenile delinquency hearings are special proceedings that provide an ameliorative alternative to the criminal prosecution of children. *In re C.L.C. Jr.*, 798 N.W.2d 329, 334 (Iowa Ct. App. 2011). We review juvenile court orders de novo. *Id*. at 334-35. We give weight to the factual findings of the juvenile court, especially when considering the credibility of witnesses, but are not bound by them. *In re J.D.F.,* 553 N.W.2d 585, 587 (Iowa 1996).

We also review due process claims de novo. *State v. Johnson*, 784 N.W.2d 192, 194 (Iowa 2010). "While it is not necessary that juvenile proceedings conform with all requirements of a criminal trial, the hearing must measure up to the essentials of due process and fair treatment." *In re Dugan*, 334 N.W.2d 300, 304 (Iowa 1983).

## III. Ineffective Assistance of Counsel

A child adjudicated to be delinquent has the right to the assistance of counsel at dispositional hearings and hearings to review a dispositional order. Iowa Code § 232.11(1)(e), (f) (2009). The right to counsel necessarily implies that counsel be effective. *Cf. Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994) (discussing postconviction relief counsel).

No reported Iowa case expressly addresses the standard for effective assistance of counsel in juvenile delinquency proceedings. But in termination of parental rights proceedings, our courts have applied the test for effective

assistance of counsel in criminal proceedings set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 694 (1984). *See In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988); *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986); *In re D.P.*, 465 N.W.2d 313, 316 (Iowa Ct. App. 1990). Because juvenile proceedings are civil not criminal, the right is not guaranteed by the sixth amendment, but rather by the due process clause. *D.W.*, 385 N.W.2d at 579. We are confident that the *Strickland* test for effective assistance of counsel should apply in the juvenile delinquency context as well, and we join those other state courts that have explicitly adopted the standard. *See, e.g., In re Parris W.,* 770 A.2d 202, 206 (2001); *In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. Ct. App. 1987); *M.B. v. State*, 905 S.W.2d 344, 346 (Tex. Ct. App. 1995).

The party claiming ineffective assistance of counsel must make a two-part showing: (1) counsel's performance was deficient, and (2) actual prejudice resulted. *D.W.*, 385 N.W.2d at 580. Unless the juvenile satisfies both prongs, the claim of ineffective assistance must fail. *Id*. Our scrutiny of counsel's performance must be "highly deferential" and we indulge a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *Id*.

On appeal, E.G. claims his counsel's performance fell below par in two ways: by failing to engage in a more exacting cross-examination of JCO Pat Kilts and by failing to investigate possible defense witnesses. As for the first alleged error, E.G. claims he was prejudiced because the juvenile court gave credence to the JCO's opinion regarding gang symbols. On the failure to investigate claim,

E.G. urges us to find prejudice because the State's proof of the violation was not overwhelming and counsel's lack of investigation was "significant."

We turn first to the claim counsel should have conducted a more probing cross-examination of the JCO. As E.G. acknowledges, his attorney did question the JCO concerning her reference to gang symbols. She acknowledged that she did not know whether the red bandana E.G. wore was related to a gang, but expressed that "it's just my fear that that's what he's trying to do." We are not able to tell from this record whether additional cross-examination of the JCO would have hurt or helped E.G.'s position. It may well be that Kilts *was* knowledgeable about symbols of gang affiliation from her work in Polk County juvenile court and further questioning would have elevated her status as an expert in that field. *See State v. Burrell*, 412 N.W.2d 556, 560-61 (Iowa 1987) (concluding that potential for a more effective cross-examination did not amount to ineffective assistance where "too many variables exist in this chain of events to establish a constitutional deprivation").

Furthermore, E.G. is unable to show he was prejudiced by the minimal cross-examination. The juvenile court did not base its decision on the JCO's knowledge of street gangs. As the State argues on appeal, the juvenile court "revoked [E.G.'s] probation . . . for his assault of [his uncle]—not for being or pretending to be a gang member."

We also reject the juvenile's claim counsel was ineffective in not seeking witnesses to counter the JCO's claim E.G. violated "the terms of his probation" by missing his curfew and assaulting his uncle. Counsel may have "mounted no

defense" because there was no defense to mount. The record does not show counsel breached a material duty in not calling witnesses to the altercation between E.G. and his uncle, or that the result would have likely changed if such witnesses testified. E.G. "does not propose what an investigation would have revealed or how anything discovered would have affected the result obtained below." *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (finding claim that counsel failed to investigate defense too general to prevail).

Finally, we find it significant that E.G. chose to address the court at the March 31, 2011 hearing, but did not deny he assaulted his uncle or violated the conditions of his release. Instead, E.G. told the court he "never came home to do bad or make things more difficult for myself." E.G. cannot establish that his counsel was ineffective in not developing a defense when he did not offer any explanation for his own conduct when given the opportunity. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) ("In assessing claims of ineffective assistance of counsel, a defendant's conduct is examined as well as that of his attorney."). The juvenile's claims of ineffective assistance do not meet the *Strickland* standard. We find no reason to disturb the juvenile court's March 31, 2011 ruling.

**AFFIRMED.**