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NO. COA09-1652

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

IN THE MATTER OF
C.O.H.

Transylvania County
No. 08 JB 000007

Appeal by juvenile from an order entered 30 June 2009 by Judge Peter Knight in Transylvania County District Court. Heard in the Court of Appeals 13 September 2010.

Attorney General, Roy Cooper, by Assistant Attorney General, Janette Soles Nelson, for the State.

The Skerrett Firm, PLLC, by Dawn Skerrett, for *juvenile-appellant*.

MARTIN, Chief Judge.

The juvenile, C.O.H., appeals from an order adjudicating him delinquent for committing the offenses of resisting a public officer, disorderly conduct at school, assault on a school employee, assault inflicting serious injury, assault on a government official, and malicious conduct by a prisoner.

The following evidence was presented at the juvenile's trial. At the time of the incident, C.O.H. was ten years old and suffered from ADHD, bipolar disorder, and OCD. He took several types of medication for his conditions and weighed approximately 200 pounds. C.O.H. attended Pisgah Forest Elementary School, where he was a

"special needs" student. The school had developed a crisis plan for him.

On 19 March 2009, around 2:55 p.m., just before the first bell rang releasing students for the day, the P.E. teacher brought C.O.H. to the area outside the office of another teacher, Ms. Hooper. C.O.H. was agitated and "kind of pacing back and forth." He did not know how he would get home that day, and said to Ms. Hooper, "I want to call my mama." Ms. Hooper noticed that he was becoming increasingly agitated. She called his mother, and his mother said that his aunt would pick him up. C.O.H. became upset when Ms. Hooper hung up the telephone because she did not let him talk to his mother, and "kept repeating, 'I wanted to talk to my mama. You didn't let me talk to my mama,'" growing louder each time. Ms. Hooper followed C.O.H. as he turned to leave; she was not sure where he was going and thought he was "agitated enough that someone could've gotten hurt." As she followed C.O.H., she called, "Don't let him go out," to an assistant at the end of the short hallway because she did not want him in the area where other students were waiting for transportation. The assistant blocked the doorway by extending her arms and legs across it. Ms. Hooper told C.O.H. to "come sit back down" and that he did not have to go to his aunt's house, but he ignored her instructions and repeatedly shouted, "You shut up." C.O.H. then turned around, pushing into Ms. Hooper with his body, and she "just kind of hit the wall." Ms. Hooper was concerned for her safety, but, based upon her training, she continued to talk to him, telling him "it's okay," "I'm going

to call your mom back," to make sure "that he didn't realize [she] was afraid." He continued to tell her to shut up.

At that time, the first bell had rung and the hallways were full of students, ranging from kindergarten through the fifth grade, either waiting to be picked up or going out to meet the buses, and "the car riders were gathering . . . just outside th[e] door." As part of the crisis plan for C.O.H., Mr. Bailey, the principal, and Mr. Bryson, a teacher, were contacted, and Officer Berrier, the school resource officer and a deputy with the Transylvania County Sheriff's Office, was summoned over the P.A. system. When they arrived, C.O.H. was pressed against the wall, clutching a capped red pen about chest-level and yelling "shut up" at Ms. Hooper as he thrust the pen toward her. As Ms. Hooper turned to leave, C.O.H. threatened to stab her in the neck with the pen and tried to lunge past Mr. Bailey toward her. Mr. Bailey grabbed C.O.H.'s arm, and the two began to struggle. Mr. Bryson and Officer Berrier helped Mr. Bailey restrain him. C.O.H. continued to struggle, kicking and swinging at the three adults, and struck Mr. Bailey on his arms and hands with the pen. The three adults slid his body down the wall onto the floor. Mr. Bailey, who used Coumadin, a blood thinner, began to bleed, and Officer Berrier took his place so that he could tend to his injuries. C.O.H. continued to struggle, attempted to bite Officer Berrier, and spat at Officer Berrier and Mr. Bailey. During the struggle, C.O.H. yelled, "Let me go. Let my arms go." Officer

Berrier then used her baton and closed hand to apply pressure against his jaw, and C.O.H. had a bowel movement.

At that point, C.O.H.'s aunt arrived. She told the adults to stop hurting him, and C.O.H. finally became still. Law enforcement arrived shortly thereafter, and took custody of C.O.H.

Three juvenile petitions were filed on 20 March 2009 in Transylvania County District Court, alleging that the juvenile was delinquent for malicious conduct by a prisoner, assault on a government official, and assault inflicting serious injury. Four additional petitions were filed on 21 April 2009, alleging that the juvenile was delinquent for assault on a school employee, disorderly conduct at school, communicating threats, and resisting a public officer.

The trial court entered an adjudication order dismissing the petition for communicating threats and adjudicating the juvenile delinquent for his commission of the remaining offenses. The court ordered a level 2 disposition, placing the juvenile in a residential treatment facility with twelve months of probation. The juvenile's mother filed a timely notice of appeal.

I.

The juvenile first contends the petitions filed on 21 April 2009 were untimely under N.C.G.S. § 7B-1703, and that the trial court therefore lacked subject matter jurisdiction over them.

Our juvenile code provides that,

> if the juvenile court counselor determines that a complaint should be filed as a

> petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after *the complaint is received*, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor.

N.C. Gen. Stat. § 7B-1703(b) (2009) (emphasis added). Therefore, the petition must be filed, at a maximum, within thirty days after the receipt of the complaint. *In re J.B.*, 186 N.C. App. 301, 303, 650 S.E.2d 457, 458 (2007).

In *In re D.S.*, 364 N.C. 184, 694 S.E.2d 758, *remanded*, ___ N.C. App. ___, ___ S.E.2d ___ (2010), our Supreme Court held that the date the complaint is received "is the date on which the [juvenile court counselor's] office receives a document alleging that a juvenile is delinquent[.]" *Id.* at 191, 694 S.E.2d at 762. The Court noted that nothing in the applicable statutes suggests that the juvenile court counselor "is permitted, let alone obligated, to investigate beyond the specific allegations contained in the complaint to determine every possible criminal offense that may arise or to include additional allegations in the petition that were not specifically articulated in the complaint." *Id.* at 191, 694 S.E.2d at 762-63. The Court "further conclude[d] that our legislature did not intend the timing requirements of section 7B-1703 to be jurisdictional." *Id.* at 193, 694 S.E.2d at 763.

In accord with the Supreme Court's holding in *In re D.S.*, we conclude the 21 April 2009 juvenile delinquency petitions were not untimely under § 7B-1703. After receiving three complaints on 19 March 2009, the day of the incident, and filing them as petitions the following day, 20 March 2009, the court counselor received four

additional complaints alleging offenses arising out of the same incident. Those complaints were received on 7 April 2009 and filed as petitions on 21 April 2009. Thus, the filing of the second group of petitions was well within the 30-day window prescribed by § 7B-1703. Moreover, even if the petitions had been untimely filed under § 7B-1703, the juvenile's argument that this would deprive the trial court of subject matter jurisdiction would likewise fail. *See id.*

II.

The juvenile next argues that he received ineffective assistance of counsel when his counsel failed to challenge the constitutionality of his detention and physical seizure, failed to raise his right to resist the unlawful arrest and his right to defend himself against the use of excessive force, and failed to move to dismiss the petition charging him with assault on a government official.

To succeed on a claim of ineffective assistance of counsel, the juvenile must first show that "counsel's performance was deficient[,]" which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "The defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

The juvenile first contends he received ineffective assistance of counsel as a result of his "court[-]appointed counsel's failure to make a constitutional challenge [to] the detention and physical seizure of C.O.H." We note that the juvenile does not identify the procedural mechanism by which his counsel should have challenged the constitutionality of his detention. However, after carefully reviewing his brief, it appears the juvenile contends his counsel should have done so by moving to dismiss the petitions alleging malicious conduct by a prisoner and assault on a government official for insufficient evidence. Specifically, his brief states that his counsel should have "challenged the constitutionality . . . *at trial*." *See State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) ("As a general rule, motions to suppress must be made before trial." (emphasis in original omitted)). Furthermore, he argues that if his counsel had challenged the constitutionality of his seizure, the State would have been unable to prove "two of the elements" of the offense of malicious conduct by a prisoner and that Officer Berrier was "performing the duties of her job" as was required to establish the offense of assault on a government official. We therefore evaluate the juvenile's ineffective assistance of counsel argument under the standard of

review applicable to a motion to dismiss for insufficient evidence, although we note that the evidence in this case is uncontested.

To determine whether the failure to move to dismiss prejudiced the juvenile's defense, we must determine whether the trial court would have granted such a motion had one been made. The standard of review for a motion to dismiss for insufficient evidence is whether, in the light most favorable to the State, giving it the benefit of all reasonable inferences, there is substantial evidence of (1) each essential element of the offense charged, and (2) of the juvenile's being the perpetrator of such offense. *In re Heil*, 145 N.C. App. 24, 29, 550 S.E.2d 815, 819 (2001). In the present case, however, the sufficiency of the evidence is not in question because the juvenile does not deny the events which took place following his detention, and only challenges the legality of his detention. *See In re J.F.M.*, 168 N.C. App. 143, 146, 607 S.E.2d 304, 306, *appeal dismissed and disc. review denied*, 359 N.C. 411, 612 S.E.2d 320 (2005) (noting that, in reviewing the denial of a motion to dismiss where the juveniles argued their detention was unlawful and in no way denied the events which took place subsequent to the detention, the sufficiency of the evidence was not in question). Therefore, we should consider the evidence in the light most favorable to the State and apply the "proper legal framework" to determine whether the juvenile's detention was lawful. *Id.*

In examining the constitutional standards applicable to searches in the school setting, the United States Supreme Court

recognized that "the child's interest in privacy must be set [against] the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," *New Jersey v. T.L.O.*, 469 U.S. 325, 339, 83 L. Ed. 2d 720, 733 (1985), and in light of that, held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.* at 341, 83 L. Ed. 2d at 734. Our Courts have measured the constitutionality of seizures in the school setting by the same standard. *In re J.F.M.*, 168 N.C. App. at 149, 607 S.E.2d at 308. A seizure must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place[.]" *Id.* (alteration in original) (quoting *T.L.O.*, 469 U.S. at 341, 83 L. Ed. 2d at 734; *In re D.D.*, 146 N.C. App. 309, 321, 554 S.E.2d 346, 353-54, *appeal dismissed and disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001); *In re Murray*, 136 N.C. App. 648, 651, 525 S.E.2d 496, 499 (2000); *Wofford v. Evans*, 390 F.3d 318, 326-27 (2004)). A seizure is justified at its inception if "there is a reasonable basis for believing that the pupil has violated the law or a school rule." *Id.*

The juvenile argues that his initial detention occurred when an assistant blocked the doorway to prevent his exit from the office area. He contends this detention was unjustified because there was no evidence that he was about to violate the law or a school rule. He also argues that Ms. Hooper's stated reason for detaining him–her concern for the safety of the other students–was

unsupported by the evidence, noting that the assistant blocking the doorway would not have had her back to him if he posed a threat to her safety. We disagree.

This Court has previously noted that "[s]chool officials not only educate students who are compelled to attend school, but they have a responsibility to protect those students and their teachers from behavior that threatens their safety[.]" *In re D.D.*, 146 N.C. App. at 316, 554 S.E.2d at 351. When C.O.H. left Ms. Hooper's office, he was visibly upset, ignored her instruction to come back, and repeatedly told her to "shut up." At that time, students enrolled in kindergarten through the fifth grade were in the hallways. Under these circumstances, the detention was justified at its inception. *See In re J.F.M.*, 168 N.C. App. at 149, 607 S.E.2d at 308.

The juvenile next contends his initial detention was not reasonably related in scope to the circumstances which justified the interference in the first place because more reasonable alternatives existed. He argues that Ms. Hooper could have walked him to the front area and waited with him and the other car-riders until his aunt arrived, or that she could have called his mother back while he was in her office and allowed him to talk to her. Although the juvenile may be correct that other, more appropriate courses of action existed, in evaluating the legality of the juvenile's detention, we do not consider whether it was reasonable as compared to other available courses of action, but whether it was reasonably related in scope to the circumstances that justified

the interference in the first place. Detaining C.O.H. by physically blocking the doorway to prevent him from entering the hallway where the other students were located was reasonably related to Ms. Hooper's concern for the safety of the other students.

The juvenile also argues that his subsequent detention and physical seizure by Mr. Bailey, Mr. Bryson, and Officer Berrier was not justified at its inception because "[t]he facts show that C.O.H. did not break a law or a school rule at the time he was initially detained" as evidenced by the trial court's dismissal of the petition for communicating threats and because Ms. Hooper would not have walked away without turning around to "see what was going on" if she believed she was in danger of being assaulted.

Although the evidence indicates that Ms. Hooper was not close enough to hear C.O.H., Mr. Bailey, Mr. Bryson, and Officer Berrier heard him threaten to stab Ms. Hooper in the neck with a pen and saw him lunge toward her as she walked away. This conduct gave Mr. Bailey grounds to physically restrain C.O.H.

With regard to whether his subsequent detention was reasonably related in scope to the circumstances that justified it in the first place, the juvenile argues that "there is no evidence to show that [he] had committed a crime or violated a law" which would have justified his continued detention by Mr. Bailey, Mr. Bryson, and Officer Berrier, and that Officer Berrier used excessive force when she applied pressure to his neck and lower jaw with her metal baton.

The evidence shows that C.O.H. weighed close to 200 pounds. As Mr. Bailey restrained him, C.O.H. physically resisted. He continued to resist as Officer Berrier and Mr. Bryson assisted in restraining him, kicking, striking Mr. Bailey several times on his arms and hands with his pen, and spitting on and attempting to bite Officer Berrier. Officer Berrier testified that she used her baton on the pressure point on C.O.H.'s jaw because Mr. Bailey had left to tend to his injuries and she and Mr. Bryson were "exhausted." Given his threat to Ms. Hooper, his continued resistance during the ensuing struggle, and the school personnel's responsibility for the safety of the other students, C.O.H.'s detention was reasonably related in scope to the circumstances which initially justified it. *See id.* at 150, 607 S.E.2d at 308 ("Because [the deputy] otherwise had authority to detain her, the fact that [the juvenile's] resistance escalated the measures [the deputy] employed for the purposes of such detainment does not implicate the Fourth Amendment.").

Because the uncontested evidence shows that the juvenile's detention was reasonable, the failure of his counsel to move to dismiss the petitions alleging assault on a government official and malicious conduct by a prisoner was not deficient performance and did not prejudice C.O.H.'s defense. *See State v. China*, 150 N.C. App. 469, 478-79, 564 S.E.2d 64, 70-71 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 683, 577 S.E.2d 899 (2003) (holding that counsel was not deficient for failing to move to suppress

where evidence showed that defendant's fourth amendment rights were not violated).

The juvenile next contends he received ineffective assistance of counsel when his counsel failed to assert his right to defend himself against the use of excessive force and his right to resist an unlawful arrest. The juvenile argues that, had his counsel raised those issues, his assault on the school personnel would have been excused and the State would have been unable to prove all the elements of malicious conduct by a prisoner, assault on a government official, and assault inflicting serious injury.

Based on our previous conclusion that the juvenile was lawfully detained, the juvenile did not have the right to assault the school personnel. *See In re J.F.M.*, 168 N.C. App. at 150, 607 S.E.2d at 308 ("Based upon our conclusion that the detainment . . . was lawful[,] . . . the undisputed resistance and assaults . . . that ensued were without legal justification."). Furthermore, based on our previous conclusion that C.O.H.'s detention was reasonably related in scope to the circumstances justifying the interference in the first place, the school personnel did not use excessive force in detaining him and he had no right to defend himself against them. Accordingly, the juvenile can satisfy neither prong of the *Strickland* test.

The juvenile's final argument is that he received ineffective assistance of counsel when his counsel failed to move to dismiss the petition alleging assault on a government official. The juvenile argues that his counsel should have moved to dismiss this

petition because the State presented no evidence to prove the facts alleged in the petition, including that he assaulted Officer Berrier by stabbing her in her right leg with a pen and biting her in the chest. We disagree.

A respondent in a juvenile adjudication hearing has the right to have the evidence "evaluated by the same standards as apply in criminal proceedings against adults." *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 202 (1981). "In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence." *In re B.D.N.*, 186 N.C. App. 108, 111-12, 649 S.E.2d 913, 915 (2007) (internal quotation marks omitted). "[T]here must be substantial evidence of each of the material elements of the offense charged." *Id.* at 112, 649 S.E.2d at 915 (internal quotation marks omitted).

Our General Statutes provide that

> any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . [a]ssaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties.

N.C. Gen. Stat. § 14-33(c)(4) (2009). "To convict a defendant of this offense, the State must allege and prove: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties." *State v. Crouse*, 169 N.C. App. 382, 387, 610 S.E.2d 454, 458, *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923

(2005). "[T]he crime of assault is governed by common law rules." *Id.* (internal quotaton marks omitted). At common law, assault is defined as

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

Id. (internal quotation marks omitted).

In the present case, the juvenile contests only the assault element, and we therefore examine the record to determine whether there was sufficient evidence of an assault to withstand a motion to dismiss. *See State v. Davis*, ___ N.C. App. ___, ___, 678 S.E.2d 709, 713-14 (2009) (stating that, where defendant contends that the State failed to present substantial evidence of one element of an offense, "but does not challenge the State's evidence of the other elements of the crime[,]" the court examines only whether the State's evidence could support the challenged element).

The evidence presented at the juvenile's trial included testimony from three adults involved in the struggle with C.O.H., each of whom testified that he attempted to bite Officer Berrier. Officer Berrier testified that C.O.H. "tried to bite me above my badge on the left part of my chest," Mr. Bryson testified that he "was trying to bite toward" Officer Berrier, and Ms. Hooper testified that she "saw him biting and hitting and kicking." This was substantial evidence of the element of assault such that, had counsel moved to dismiss the petition alleging assault on a

government officer, the motion would have been denied. We therefore conclude that the juvenile can satisfy neither prong of the *Strickland* test.

No error.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).