[Cite as *In re T.J.*, 2010-Ohio-4253.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94471

IN RE: T.J.
A Minor Child

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 07111179

BEFORE: Cooney, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 9, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, T.J.,[1] appeals the judgment of the juvenile court finding him delinquent for violating his probation. We find merit to the appeal and reverse.

{¶ 2} In November 2007, complaints were filed charging fifteen-year-old T.J. with one count each of receiving stolen property, aggravated vehicular assault, and criminal damaging. The trial court found T.J. delinquent on all counts and placed him on probation. T.J. violated his probation in August 2009, and the juvenile court ordered that he be committed to Abraxas, a children's residential treatment center. In September 2009, T.J.'s probation officer, Michelle Miller ("Miller"), filed a motion for probation violation, alleging that T.J. violated his probation when he punched another child and knocked out three of his teeth. On October 5, 2009, the juvenile court held a hearing on the motion, at which T.J. admitted that he punched the other child in the face. The court found T.J. to be in violation of his probation but ordered him to continue with his treatment plan at Abraxas.

{¶ 3} On November 2, 2009, Miller filed another motion for probation violation alleging that on October 18, 2009, T.J. attempted to harm another child by placing him in a headlock until the child became unconscious. On November 30, 2009, the juvenile court held a hearing on the motion, at which T.J.'s counsel

[1] The juvenile defendant is referred to herein by his initials in accordance with this court's established policy.

denied the allegation, claiming T.J. was acting in self-defense. The staff report from Abraxas indicated that the other child was attempting to get away from T.J. when T.J. put him in a choke hold. Jeffrey Sengstock ("Sengstock"), a spokesperson from Abraxas, informed the court that T.J.'s behavior never improved during his stay at Abraxas because T.J. "never really invested in his treatment."

{¶ 4} Addressing T.J., the court stated:

> "[I]t doesn't matter if you admit or deny, [T.J.], because when we were here last time you admitted and I continued it and sent you to Abraxas. So whether or not you admit to the violation is moot at this point because when we were here back on October 5th you already admitted and I gave you an opportunity to go to Abraxas and now we're back again."

{¶ 5} At the conclusion of the hearing, the juvenile court adjudicated T.J. delinquent, stating: "I'm going to find you to be in violation of your probation by your admission back on October 5th." T.J.'s counsel did not object, and the court committed T.J. to the Ohio Department of Youth Services ("ODYS") for a minimum of six months and a maximum to his twenty-first birthday for the underlying offense of receiving stolen property. T.J. now appeals, raising three assignments of error.

{¶ 6} In his first assignment of error, T.J. argues the juvenile court committed plain error when it found him delinquent for violating his probation because the juvenile court did not comply with Juv.R. 29(E). Specifically, T.J. argues the juvenile court erroneously adjudicated him delinquent for conduct he

allegedly committed on October 18, 2009 because he admitted his prior violation on October 5, 2009, involving a separate incident. We agree.

{¶ 7} In *In re L.A.B.*, the Ohio Supreme Court recently explained that because "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 under the Ohio Rules of Juvenile Procedure." *In re L.A.B.,* 121 Ohio St.3d 112, 2009-Ohio-354, 902 N.E.2d 471, ¶49. Juv.R. 29 sets forth the procedures for conducting an adjudicatory hearing. Juv.R. 29(E) provides:

{¶ 8} "If a party denies the allegations, the court shall:

"(1) Direct the prosecuting attorney or another attorney-at-law to assist the court by presenting evidence in support of the allegations of a complaint;

"(2) Order the separation of witnesses, upon request of any party;

"(3) Take all testimony under oath or affirmation in either question-answer or narrative form; and

"(4) Determine the issues by proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings * * *."

{¶ 9} Here, the juvenile court conducted an adjudicatory hearing on Miller's motion for probation violation in which she alleged that T.J. violated the court's order when, "on or about 10/18/09 * * * Child attempted to harm another peer by placing peer in headlock until peer became unconscious, in direct defiance of said Court order." T.J. denied the allegations, and the court heard statements from Miller and Sengstock regarding the incident. Neither Miller nor Sengstock

testified "under oath or affirmation" as required by Juv.R. 29(E)(3), and T.J.'s counsel never objected. We therefore review the issue for plain error.[2]

{¶ 10} Although the court held the adjudicatory hearing pursuant to Miller's motion for probation violation filed on November 2, 2009 in which she alleged that T.J. violated his probation on October 18, 2009, the juvenile court adjudicated T.J. delinquent based on a prior admission of a probation violation he made at a hearing held on October 5, 2009 for conduct that occurred in September 2009. The court stated: "I'm going to find you to be in violation of your probation by your admission back on October 5th."

{¶ 11} The transcript of the November 30, 2009 adjudicatory hearing establishes that T.J. denied the allegations relating to Miller's November 2, 2009 motion for probation violation. Yet, contrary to the mandates of Juv.R. 29(E), no one gave testimony under oath to prove the allegations. The transcript also indicates that the court considered the unsworn staff report concerning T.J.'s conduct at Abraxas. Moreover, by its own admission, the court chose not to consider whether T.J. committed the acts alleged in Miller's November 2, 2009 motion, calling them "moot," and thus never decided the issues beyond a reasonable doubt.

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[2] In order to find plain error, it must be determined that but for the error, the outcome of the proceeding clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 96-97, 372 N.E.2d 804.

{¶ 12} Juv.R. 29(F) provides that if the allegations in the complaint, indictment or information are not proven, the court shall dismiss the complaint. *In re R.W.*, Cuyahoga App. No. 91923, 2009-Ohio-1255. Miller's motion alleging that T.J. "attempted to harm another peer by placing peer in headlock until peer became unconscious" was not proven beyond a reasonable doubt. Accordingly, the first assignment of error is sustained.

{¶ 13} Having vacated the adjudication of delinquency, the second and third assignments of error, which also challenge the validity of the delinquency adjudication, are moot.

Judgment is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR