

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

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| IN THE MATTER OF: | : | OPINION |
| B.W.K., JR., | : | |
| DELINQUENT CHILD | : | CASE NO. 2009-P-0058 |
| | : | |

Criminal Appeal from the Portage County Court of Common Pleas, Juvenile Division, Case No. 2009 JCA 00598.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut, Ravenna, OH 44266 (For Appellee-State of Ohio).

Timothy Young, Ohio Public Defender, and *Amanda J. Powell*, Assistant State Public Defender, 250 East Broad Street, #1400, Columbus, OH 43215 (For Appellant-B.W.K., Jr.).

DIANE V. GRENDALL, J.

{¶1} Appellant, B.K., appeals the Judgment Entry of the Portage County Court of Common Pleas, Juvenile Division, in which the trial court classified him as a Tier III juvenile sex offender. For the following reasons, we affirm the decision of the trial court.

{¶2} On June 18, 2009, two Complaints were filed, each alleging that B.K., d.o.b. February 11, 1994, was delinquent of Rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree if committed by an adult.

{¶3} On June 30, 2009, an adjudicatory hearing was held. B.K. admitted to the first count of the Complaint, the second count was dismissed by the trial court on the

State's motion. On August 11, 2009, the disposition hearing was held. B.K. was subsequently committed to the custody of the Ohio Department of Youth Services (DYS) for a period of not less than two years, no more than B.K.'s twenty-first birthday. Additionally, the court classified B.K. as a discretionary Tier III juvenile sex offender registrant with non-public registry. B.K.'s attorney did not object to the trial court's classification of B.K. at the disposition hearing.

{¶4} B.K. timely appeals and raises the following assignments of error:

{¶5} “[1.] The juvenile court committed plain error when it classified [B.K.] as a Tier III Juvenile Offender Registrant because it did not make that determination upon his release from a secure facility in violation of R.C. 2152.83(B)(1).

{¶6} “[2.] The trial court abused its discretion when it classified [B.K.] as a Tier III Juvenile Sex Offender Registrant in violation of R.C. 2950.01(E)-(G).

{¶7} “[3.] The juvenile court erred when it classified [B.K.] as a Tier III Juvenile Offender Registrant because application of R.C. 2152.83 to him violates his right to equal protection under the law in violation of the Fourteenth Amendment of the United States Constitution; Article I, Section 2 of the Ohio Constitution.

{¶8} “[4.] [B.K.] was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.”

{¶9} In his first assignment of error, B.K. maintains that the trial court erred when it imposed a sex offender classification upon him at the dispositional hearing; he asserts that the trial court must wait until his release from DHS to make the classification determination. In his fourth assignment of error, B.K. claims that his

counsel was ineffective for failing to object to the timing of the juvenile court's classification. Since B.K.'s first and fourth assignments of error are both interrelated, they will be discussed together.

{¶10} As no objection was raised below regarding B.K.'s classification, our court's review is limited to plain error. Under Crim.R. 52(B), plain error affecting substantial rights may be noticed by an appellate court, even though objection was not made. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶62. There are three limits on an appellate court's ability to review plain error absent an objection: (1) there must be a genuine error, a departure from a legal rule; (2) the error must be "plain" or "obvious"; and, (3) the error must have affected the defendant's substantial rights, i.e., the outcome of the trial. *Id.* (citation omitted). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶11} R.C. 2152.83(B)(1), which controls the timing of a juvenile offender's classification, provides the following: "The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a hearing for the purposes described in division (B)(2) of this section if all of the following apply: (a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002. (b) The child was fourteen or fifteen years of age at the time of committing the offense. (c)

The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.”

{¶12} B.K. was 15 at the time of the offense and he was committed to the custody of the DYS, a secure facility at the disposition hearing. B.K. argues that according to the language of the statute, he should not have been classified until his release from DYS. Accordingly, he claims this was plain error for the court to classify him at the disposition hearing. We disagree.

{¶13} Contrary to B.K.’s interpretation of R.C. 2152.83, this court has previously held that “the language contained in subsequent subsections of R.C. 2152.83 suggests the hearing prescribed in R.C. 2152.82(B) may occur *at any time* during the disposition.” *In re Thrower*, 11th Dist. No. 2008-G-2813, 2009-Ohio-1314, at ¶28 (emphasis added). Further, this court held that “‘disposition’ as used in R.C. 2152.83(B)(1) refers to the entire disposition period.” *Id.* at ¶27. Accordingly, the error, if any, is not “plain” or “obvious”, thus, failing the second prong of the plain error analysis.

{¶14} B.K.’s first assignment of error is without merit.

{¶15} The Ohio Supreme Court has adopted a two-part test to determine whether an attorney’s performance has fallen below the constitutional standard for effective assistance. To reverse a conviction for ineffective assistance of counsel, the defendant must prove “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.”

State v. Madrigal, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688.

{¶16} In order to show prejudice warranting reversal, the defendant must show that there is a reasonable probability that, but for counsel’s ineffectiveness, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Based on the analysis above, B.K. cannot demonstrate that the results of trial would have been different but for counsel’s failure to object.

{¶17} B.K.’s fourth assignment of error is without merit.

{¶18} In his second assignment of error, B.K. argues that “the court failed to exercise its discretion regarding the appropriate level for [B.K.] because it seemed to believe the classification was offense-based and mandatory.” Further, B.K. asserts that the trial court failed to consider any of the factors provided in R.C. 2152.83(D) in determining his classification.

{¶19} R.C. 2152.83(D) states that “[i]n making a decision *** as to whether a delinquent child should be classified a juvenile offender registrant, a judge shall consider all relevant factors, including, but not limited to, all of the following: (1) The nature of the sexually oriented offense or the child-victim oriented offense committed by the child; (2) Whether the child has shown any genuine remorse or compunction for the offense; (3) The public interest and safety; (4) The factors set forth in division (K) of section 2950.11 of the Revised Code ***;(5) The factors set forth in divisions (B) and (C) of section 2929.12 of the Revised Code ***; (6) The results of any treatment provided to the child and of any follow-up professional assessment of the child.”

{¶20} “Unlike the automatic classification of adult sex offenders, a juvenile court is authorized to exercise its discretion at the classification hearing.” *In re R.J.G.*, 11th Dist. No. 2008-L-187, 2009-Ohio-6150, at ¶17.¹

{¶21} Throughout the disposition process, the court made statements demonstrating that it followed the statute in determining that B.K. would be classified as a discretionary juvenile offender registrant.

{¶22} We agree with the State in that there is nothing in the statute requiring the trial court to explicitly set forth in its judgment entry that it has considered the R.C. 2152.83(D) factors.

{¶23} In the instant case, a review of the record reveals that the trial court exercised its discretion after considering the requisite statutory factors. The reports of the probation, detention, and psychology departments concerning B.K. fully explore the R.C. 2152.83(D) factors. Furthermore, at the disposition hearing, the court heard recommendations from the prosecuting attorney, the probation department, the detention center, the psychology department, the victim’s mother, as well as B.K.’s counsel before reaching a decision on B.K.’s disposition. Moreover, the record reflects that B.K. failed to respond to treatment in the past.

{¶24} B.K.’s second assignment of error is without merit.

{¶25} In his third assignment of error, B.K. claims that R.C. 2152.83 is an unconstitutional statute that violates his equal protection rights under the United States and Ohio Constitutions.

1. The question of the juvenile court’s discretion in this regard is presently pending before the Supreme Court of Ohio. Cf. *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166.

{¶26} The record reflects that B.K. did not raise this issue during the juvenile court proceedings. Consequently, he has waived his right to challenge the statute. See *State v. Awan* (1986), 22 Ohio St.3d 120, at the syllabus (“Failure to raise *** the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue *** and therefore need not be heard for the first time on appeal.”).

{¶27} The third assignment of error is without merit.

{¶28} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, Juvenile Division, classifying B.K. as a Tier III juvenile sex offender, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶29} Finding merit in B.K.'s first assignment of error, I would reverse. Regarding a delinquent child B.K.'s age, R.C. 2152.83(B)(1) provides that the trial court “may conduct at the time of disposition of the child or, if the court commits the child *** to the custody of a secure facility, may conduct at the time of the child’s release from the secure facility a hearing [to determine the child’s sexual offender classification] ***[.]” I agree with B.K. that the language chosen by the General Assembly indicates that, if

the delinquent child is sent to a secure facility, a sexual offender classification hearing may be held only when the child is released from that facility. I dissented from this court's disposition of the appeal in *Thrower*, supra, at ¶¶60-63. I still believe it contravenes the plain meaning of the statute and would reverse, finding plain error.

{¶30} I respectfully dissent.