

[Cite as *In re A.M.*, 2009-Ohio-7066.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN THE MATTER OF: :

A.M., : Case No. 09CA07

ADJUDICATED DELINQUENT CHILD. :

: DECISION AND JUDGMENT ENTRY

:

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Brooke M. Burns, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: C. David Warren, Athens County Prosecuting Attorney, and George Reitmeier, Athens County Assistant Prosecuting Attorney, Athens County Courthouse, 1 South Court Street, Athens, Ohio 45701

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-29-09

PER CURIAM.

{¶ 1} This is an appeal from an Athens County Common Pleas Court, Juvenile Division, judgment that adjudicated A.M. to be a delinquent child for having committed the offense of rape in violation of R.C. 2907.02(A)(1)(b).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CLASSIFIED [A.M.] AS A TIER III JUVENILE OFFENDER REGISTRANT.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED WHEN IT CLASSIFIED [A.M.] AS A TIER III JUVENILE OFFENDER REGISTRANT, IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.”

THIRD ASSIGNMENT OF ERROR:

“[A.M.] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF A CLASSIFICATION THAT WAS UNCONSTITUTIONAL AND CONTRARY TO LAW.”

{¶ 3} On January 26 or 27, 2009, a fourteen year old boy (A.M.) vaginally penetrated and performed oral sex on his five year old "half-sister."¹ A complaint alleged him to be delinquent for having committed rape. See R.C. 2907.02(A)(1). At the adjudicatory hearing, he admitted to the allegations contained in the complaint. The matter proceeded to disposition whereupon the trial court committed the offender to Ohio Department of Youth Services custody for an indeterminate period of time of at least twenty-four months, but no longer than his twenty-first birthday.

{¶ 4} The trial court then classified A.M. as a Tier III offender under provisions of the Adam Walsh Child Protection and Safety Act (AWA) enacted in 2007. See Am.Sub.S.B. 10, 2007 Ohio Laws, File No. 10. In so doing, the court explained:

“* * * I should note for the record that counsel has spent a significant time leading up to today determining what variables if any might be in place today that would impact the court’s proceeding in this manner and it has been determined that essentially they are mandatory in nature because of the age of the offender and the nature of the offense, and the fact of a

¹The exact nature of the victim's relationship to appellant appears to be that the victim is the five year old daughter of appellant's father's live-in girlfriend. Thus, no genetic or marital connection actually exists between appellant and the victim. We note that during the course of the proceedings, several reverences were made concerning the relationship. For example, the Juvenile Court Community Control Officer referred to appellant's "sister" as the victim of the offense. Also, the Juvenile Intake Form includes a handwritten notation that referred to appellant's "sister."

prior delinquency adjudication for a sexually oriented offense. * * * In this case you are a Tier III Sex Offender. . .” (Emphasis added.)

The record further indicates that both defense counsel and the prosecution agreed that such a classification was required. This appeal followed.

{¶ 5} Appellant’s first assignment of error involves the classification as a Tier III sexual offender. He contends that the trial court has discretion in the matter, but, as indicated in the transcript, the court believed that the statute required a Tier III classification. Thus, appellant contends that the court erred by not exercising its discretion.

{¶ 6} Our analysis begins with the acknowledgment that this issue was not raised at the trial court level. Indeed, all parties assumed that Tier III classification was mandatory. We further recognize that the failure to bring this issue to the trial court’s attention would, in most circumstances, result in a waiver of the error. We believe, however, that the trial court’s ability to exercise its discretion will best serve the interests of justice.

{¶ 7} Questions concerning a Juvenile Court’s discretionary authority under the AWA have dogged this state’s judiciary since the bill was enacted.² We recently held that a Juvenile Court generally has discretion in classifying a delinquent child a JOR. See In the Matter of T.M., Adams App. No. 08CA863, 2009-Ohio-4224, at ¶13. Of course, T.M. is distinguishable from the case at bar because the minor had no prior adjudication of a sexually oriented offense as A.M. does here. In the instant case, a

²We note that many Ohio juvenile courts have issued judgments similar to the one in the case sub judice. Obviously, an issue exists with the clarity of this particular provision, rather than the various trial courts’ erroneous application of the law to individual cases.

JOR classification was mandatory. See R.C. 2152.82(A)(1)-(3). The question, however, is whether, given the JOR classification, the court was also required to classify A.M. a Tier III sex offender? Our Second District colleagues recently considered this question and concluded that Juvenile Courts have discretion on this issue as well. See In re C.A., Montgomery App. No. 23022, 2009-Ohio-3303, at ¶61. Looking to R.C. 2152.831(A), which requires courts to hold hearings to determine whether JORs should be classified as Tier I, Tier II or Tier III offenders, the Second District reasoned that an implicit grant of discretion exists for the courts or the statute would not have been worded in such a way as to make those options available. 2009-Ohio-3303, at ¶61. We find the Second District's reasoning persuasive.

{¶ 8} Therefore, because the record in the case sub judice indicates that the Juvenile Court believed that it did not have discretion in the matter, we hereby sustain appellant's first assignment of error.³ This renders the remaining assignments of error moot and we disregard them pursuant to App.R. 12(A)(1)(c).

{¶ 9} Accordingly, we hereby reverse the Juvenile Court's judgment concerning the sex offender classification and remand the matter for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND
CASE REMANDED FOR
FURTHER PROCEEDINGS
CONSISTENT WITH THIS
OPINION.

³ Again, our decision should not be construed as criticism of the Juvenile Court. As mentioned earlier, all parties and many trial courts were under the impression that a Tier III classification was mandatory. Additionally, although the Juvenile Rules of Procedure make no specific provision for recognition of plain error, as in adult criminal cases, the same principle applies. See e.g. In re J.F., 178 Ohio App.3d 702, 900 N.E.2d 204, 2008-Ohio-4325, at ¶84.

Kline, P.J., dissenting.

{¶ 10} I respectfully dissent for two reasons. First, after reviewing the record, I cannot infer that the trial court necessarily believed that Tier III classification was mandatory based on A.M.'s offense. The trial court never stated that it had to classify A.M. as a Tier III offender because A.M. committed rape in violation of R.C. 2907.02(A)(1)(b). Instead, I believe it is just as reasonable, if not more reasonable, to infer that the trial court believed Tier III classification was mandatory because of the circumstances of this particular case.

{¶ 11} The record shows that the guardian ad litem "asked all those interviewed what they would recommend for [A.M.]. They all agreed that [A.M.] needed a locked, secure environment with treatment. Some did not want him released at all or, at least, until he became an adult. All felt that *he is a great risk to society.*" Guardian Ad Litem's Report at 3 (emphasis added). In my view, the trial court decided that Tier III classification was appropriate because of (1) the severity of A.M.'s crime, (2) A.M.'s past sexual offense, and (3) the shared belief that A.M. was a threat to society. Based on the circumstances of this case, I believe that anything less than a Tier III classification would have been an abuse of discretion.

{¶ 12} Secondly, I do not believe the trial court committed plain error. I do not see the result in this case as (1) either a manifest miscarriage of justice or (2) one that would have an adverse affect on the character of judicial proceedings.

{¶ 13} Accordingly, I dissent.

JUDGMENT ENTRY

It is ordered that the judgment be reversed, that the case be remanded for further proceedings and that appellant recover of appellee the 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 Athens County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

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

Kline, P.J.: Dissents with Dissenting Opinion
Abele, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Roger L. Kline
Presiding Judge

BY: _____
Peter B. Abele, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

