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SEP 11 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2009-0028
	)	DEPARTMENT A
	)	
IN RE KALVIN C.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JV-2008-00145

Honorable Charles A. Irwin, Judge

AFFIRMED

Edward G. Rheinheimer, Cochise County Attorney
By Nancy J. Galey — Sierra Vista
Attorneys for State

Ronald Zack — Tucson
Attorney for Minor

H O W A R D, Chief Judge.

¶1 Kalvin C. appeals from the juvenile court's order adjudicating him delinquent after the court found he had committed the following offenses: knowingly consuming spirituous liquor while under the age of twenty-one, having spirituous liquor in his body

while under the age of twenty-one, and driving or being in actual physical control of a vehicle with spirituous liquor in the body while under the age of twenty-one. He contends his counsel was ineffective and the court abused its discretion by denying his motion to dismiss counsel, his motion to suppress his statements to police and the results of field sobriety and breath tests, and his request that the court recuse itself. We affirm for the reasons stated below.

¶2 Viewed "in the light most favorable to sustaining the adjudication," *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001), the evidence presented at the adjudication hearing established the following. At around midnight one evening, Benson resident Dale Hazzard and his tenant Amanda McAbee heard cars being driven recklessly in an alley near their apartments. Hazzard called the police, and Benson Police Corporal Brian Williams responded. Williams found vehicles fitting the description of those involved and came into contact with Kalvin and his companion Zach. Kalvin was in his car with the engine running and the lights on; a red truck was next to Kalvin's car and was stuck in the mud. Williams called Kalvin and Zach to him and spoke with them; Zach had walked to where Williams was standing, and Kalvin had driven there.

¶3 Williams asked Kalvin if he had been driving in that area, and Kalvin responded he had. Williams "detect[ed] a moderate odor of . . . an intoxicating beverage from [Kalvin's] breath as he spoke," and when he asked Kalvin if he had been drinking, Kalvin admitted he had consumed "a couple beers." Williams conducted the Horizontal

Gaze Nystagmus test (HGN), noted four out of six cues for alcohol impairment, and administered a portable breath test (PBT), which detected the presence of alcohol in Kalvin's system. Kalvin was then arrested.

¶4 Zach testified at the adjudication hearing and admitted he and Kalvin had been drinking beer together that evening. He insisted the two had not been drinking and driving but had drunk the beers after Zach's truck had gotten stuck in the mud.

¶5 At the close of the state's presentation of evidence, the juvenile court denied Kalvin's motion for a "directed verdict" on the charge that Kalvin had been driving or was in actual physical control of a vehicle while spirituous liquor was in his body based on Williams's testimony that Kalvin had been in the car with the engine running and lights on when Williams had arrived at the scene. But the court granted the motion as to the last count charged in the delinquency petition, driving or being in actual physical control of a vehicle while impaired to the slightest degree.

¶6 Kalvin then testified, admitting he had consumed one beer that night, which Zach had given him as soon as he had arrived to help pull Zach's truck out of the mud. During cross-examination, when the state tried to impeach Kalvin with testimony from the suppression hearing, which was held just before the adjudication hearing, Kalvin insisted he and his companion had approached Williams, as requested, but that the headlights of his car were still turned on. He stated he had asked Williams if he could turn them off, and Williams had told him to drive the car "out of the area." But on rebuttal, Williams denied having

directed Kalvin to drive the car. Instead, he explained, he directed Kalvin and Zach to come toward him, and Kalvin had asked if he could drive his car out of the desert area, before Williams had detected the odor of alcohol, and Kalvin had done so.

¶7 The juvenile court found Kalvin responsible for the three remaining charges. As to the third count, the court found Kalvin had been in control of a vehicle based on the testimony that the lights had been on and the engine was running when Williams had arrived. Additionally, the court found Kalvin had driven, believing Williams's testimony in that regard. The court subsequently placed Kalvin on six months' probation.

¶8 Two of the issues Kalvin raises on appeal are interrelated, and we address them simultaneously. First, he contends his counsel was ineffective in a variety of respects, including the following: (1) counsel did not file a motion for disclosure seeking items listed in a motion that Kalvin's father had prepared; (2) when the issue regarding this disclosure request was raised during the adjudication hearing, Kalvin's attorney stated he had asked for the items listed, but there was nothing in the record to support that statement; (3) counsel had failed to find and interview witnesses other than Williams; (4) the pretrial motion to suppress Kalvin's statements to Williams was untimely, was based on voluntariness only, did not challenge whether there had been reasonable suspicion to interview Kalvin, did not challenge whether the statements were inadmissible because of a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and did not seek to suppress the HGN and PBT results; and (5) counsel's performance during the adjudication hearing was insufficient, particularly with respect to the

cross-examination of Williams. Kalvin also contends the court erred when it denied his request for new counsel because counsel had told Kalvin he thought Kalvin was responsible and would be found so by the court and because of what Kalvin refers to on appeal as counsel's "lackluster pre-trial investigation."

¶9 In order to be entitled to relief based on a claim of ineffective assistance of counsel, Kalvin must establish his counsel's performance was deficient, based on prevailing professional norms, and that this deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *In re Maricopa County Juv. Action No. JV-511576*, 186 Ariz. 604, 606, 925 P.2d 745, 747 (App. 1996). Thus, Kalvin must show that, but for counsel's inadequate performance, there is a reasonable probability that the outcome of the case would have been different. *Strickland*, 466 U.S. at 694. Kalvin has not sustained that burden, nor has he raised even a colorable claim for relief. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim is "one that, if the allegations are true, might have changed the outcome"). Nor has Kalvin established the juvenile court abused its discretion in denying his requests to have his attorney removed from the case. *See State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998) (trial court's ruling on motion for new counsel reviewed for abuse of discretion); *see also State v. Peralta*, ___ Ariz. ___, ¶ 3, 212 P.3d 51, 52 (App. 2009) (same).

¶10 During the adjudication hearing, prompted to a large degree by his father, Kalvin asked the juvenile court to remove his counsel.[1] The court asked Kalvin what he had "to say about that issue." Kalvin responded that counsel had been asked by Kalvin's father to file a motion requesting "video and audio, and to interview all the witnesses," but counsel had not done so. The court then asked counsel to address Kalvin's complaints.

¶11 Counsel explained he had asked the state to produce the requested items, but "[t]he State [had] assured [him] that a majority of them d[id] not exist." Counsel added, "I did get and listen to the radio traffic call log and interviews as best I know, and all the witnesses." The court responded that it was

> aware of [counsel's] abilities and his expertise in representing juvenile defendants. If there were issues there he needed to explore, he has my confidence that he would have done that. Oftentimes, defendants think that there may be things out there, but oftentimes those thoughts are not based in reality. If there was an avenue to explore regarding evidence, I think that he would have done so. If you have questions that you want him to ask during the testimony here regarding the officers, whether or not there is video, let's say, for example, as to the videos, if the officers tell me today, yes, we have a video of this—they previously represented that they don't—we'll address that as it comes up.

[1]At the beginning of the hearing, Kalvin's father had moved for the appointment of new counsel, claiming Kalvin's attorney had failed to file motions the father apparently had asked him to file and had not questioned certain witnesses. The court correctly and repeatedly explained to Kalvin's father that he did not have standing to raise objections or arguments on behalf of Kalvin. At the end of the adjudication hearing, Kalvin's father's conduct had become so disruptive he was told to leave the courtroom.

¶12 Even assuming, arguendo, counsel had a duty to request items and conduct discovery simply because Kalvin or his father had asked him to, counsel avowed he had, in fact, sought those items from the state. The juvenile court clearly believed counsel, and we will not second-guess that assessment of credibility. *Cf. In re Richard B.*, 216 Ariz. 127, ¶ 12, 163 P.3d 1077, 1080 (App. 2007) (juvenile court in "best position to determine the credibility of witnesses"). Consequently, that the record may not contain a formal disclosure request for these items or "any audio recordings, notes or transcripts to show that [counsel] interviewed the other police officers, the reporting witnesses, or Zach" does not mean counsel did not request the discovery or investigate the case adequately. Moreover, implicit in counsel's response was his belief there was no reason to conduct further discovery or present additional evidence at the adjudication hearing. As the court essentially found, counsel's decisions were tactical in nature. Scrutiny of an attorney's tactical decisions is highly deferential, and counsel is granted great latitude in this regard. *See State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). Counsel's decisions need only have some reasoned basis and will not be reexamined by a reviewing court "in the harsh light of hindsight." *State v. Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978).

¶13 Kalvin neither established below nor on appeal that counsel had performed deficiently in conducting discovery and investigating the case. Counsel did request further discovery as Kalvin, through his father, had asked him to do. And, Kalvin's attorney chose which matters warranted pursuing further and determined whether any additional witnesses

should be located, interviewed, or presented at trial. Kalvin has not established what additional evidence existed that counsel could have but failed to obtain and precisely what evidence counsel neglected to present at the adjudication hearing that might have changed the outcome of the case. Thus, Kalvin failed to sustain his burden of proving how counsel's performance had not only been deficient but also prejudicial. *See Maricopa County No. JV-511576*, 186 Ariz. at 606, 925 P.2d at 747. Consequently, and given the juvenile court's colloquy with defense counsel, the court did not abuse its discretion in denying Kalvin's related request for new counsel.[2]

¶14 Kalvin separately argues that the juvenile court erred in denying his request for new counsel on the ground that the attorney-client relationship was fractured. He cites counsel's allegedly "lackluster pre-trial investigation" and counsel's statements to Kalvin about the likelihood that he would be found responsible of the charges as the reasons he

[2]Nor has Kalvin sustained his burden of establishing counsel otherwise performed deficiently. Kalvin appears to contend the motion to suppress was untimely because it was filed two days before the adjudication hearing. And, he asserts, the motion was deficient because it had been based on lack of voluntariness only and "did not address whether the police had [had] reasonable suspicion to interiew [Kalvin]; whether [Kalvin] was under custodial interrogation for purposes of *Miranda* to apply; nor did it fully or competently argue for the suppression of the HGN and PBT results, which were the only pieces [of] evidence presented showing the presence of alcohol in [Kalvin's] body." As discussed below, the juvenile court held the suppression hearing just before the adjudication hearing began, and the court correctly denied Kalvin's motion to suppress. Therefore, even assuming arguendo counsel should have filed the motion to suppress sooner, Kalvin has not established the court would have ruled differently if he had. Nor has Kalvin established any other colorable claim of ineffective assistance of counsel related to the motion to suppress.

"seriously question[ed]" the relationship. Kalvin asserts the court failed to address the factors set forth in *Moody*, as it was required to do.

¶15 In ruling on a motion for new counsel, a trial court should consider whether there exists an irreconcilable conflict between counsel and the client, whether a new attorney would have the same conflict, the timing of the motion for new counsel, the inconvenience to any witnesses, the amount of time that had passed between the offense and the trial, whether the defendant has a proclivity to change attorneys, and the quality of counsel's performance. *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580; *see also State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). "A defendant is not . . . entitled to counsel of choice or to a meaningful relationship with his or her attorney." *State v. Cromwell*, 211 Ariz. 181, ¶ 28, 119 P.3d 448, 453 (2005); *see also Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580. And although new counsel is usually required when the relationship between counsel and his or her client is "completely fractured" or the conflict between them irreconcilable, mere conflict between the two "is only one factor for a court to consider in deciding whether to appoint substitute counsel." *Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d at 453.

> To constitute a colorable claim, a defendant's allegations must go beyond personality conflicts or disagreements with counsel over trial strategy; a defendant must allege facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial.

Id. ¶ 30.

¶16 Based on the record before us, which demonstrated counsel's representation of Kalvin was appropriate and effective, and given the discussion about this issue that took place on the record, the juvenile court did not abuse its discretion. It appears the court considered the appropriate factors in denying Kalvin's requests for new counsel. Moreover, we may "assume the trial court made all necessary *Moody*-related findings required to support its ruling." *Peralta*, ___ Ariz. ___, ¶ 9, 212 P.3d at 53-54. The court's questions of Kalvin about the nature and quality of counsel's representation and the reasons Kalvin, whether on his own or at his father's prompting, wanted counsel removed from the case demonstrate the court was aware of, and applied, the correct test.

¶17 The juvenile court expressed confidence in counsel's expertise in representing juveniles generally and Kalvin in this case particularly. That counsel might have felt it was in Kalvin's best interest to try to obtain the best possible plea agreement does not mean the relationship had become completely fractured or that the two had an irreconcilable conflict. Nor does the fact that counsel apparently told Kalvin the evidence against him was strong and he would likely not be successful at an adjudication hearing require such conclusions. Rather, it demonstrates counsel made tactical decisions based on his consideration of what the evidence against Kalvin likely would be; that evidence was compelling. As the court correctly pointed out to Kalvin, counsel was "obligated to tell [him] in his honest opinion what the merits of the case [were], the weaknesses, [its] strong points," adding, "he is bound to give you his honest opinion." The court also pointed out to Kalvin that counsel was also

required to discuss possible plea agreements with him. The court soundly exercised its discretion, and we see no error in the court's denial of Kalvin's requests to appoint new counsel.

¶18 Kalvin also contends the juvenile court erred when it denied his motion to suppress the HGN and PBT testing and statements he had made to Williams. Kalvin contends his statements to Williams and his consent to the HGN and the PBT had all been involuntary, given his "age, lack of police contact, and his obvious submission to . . . Williams'[s] authority." He also contends his parents' absence contributed to the involuntariness of his statements and the testing, asserting he had asked Williams to call them before Williams administered the PBT.

¶19 We will not disturb the juvenile court's ruling on a motion to suppress absent clear and manifest error. *In re Roy L.*, 197 Ariz. 441, ¶ 7, 4 P.3d 984, 987 (App. 2000). We consider only the evidence that was presented at the suppression hearing, which we view "in the light most favorable to upholding the juvenile court's factual findings." *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005). "To determine whether a confession is voluntary, we consider the totality of the circumstances surrounding the confession." *In re Andre M.*, 207 Ariz. 482, ¶ 11, 88 P.3d 552, 555 (2004). Among the relevant factors is the presence of a parent. *Id.*

¶20 The juvenile court conducted the suppression hearing just before the adjudication hearing. Williams testified he had responded to the call about the reckless

driving and found Kalvin and Zach in the "driver's seats of their respective vehicles." When Williams asked the two to approach him, Zach walked and Kalvin drove. He questioned them together about the reckless driving report. He detected the odor of an alcoholic beverage on Kalvin's breath. The two were not under arrest, were not restrained in handcuffs, and Williams described the conversation as "consensual" and "investigatory." Williams then investigated whether Kalvin, who he knew was sixteen, had been consuming alcohol or driving while under the influence of alcohol and questioned him further. He testified the questioning had not been lengthy, lasting only about three to five minutes, that he had not coerced Kalvin in any way, and that Kalvin was polite and cooperative. Williams did not contact Kalvin's parents until Kalvin was arrested, nor did he ask Kalvin whether he wanted them there, although Kalvin did not ask for them. He admitted he did not give Kalvin the *Miranda* warning before questioning him.

¶21 Kalvin testified at the hearing that he called his father after he was arrested, claiming he told Williams he wanted his parents there just before Williams administered the PBT. He agreed Williams used no physical or other coercive force in questioning him. After Kalvin testified, the juvenile court found, first, there had been no custodial interrogation; therefore, *Miranda* was not implicated. Referring to the factors set forth in *Andre M.*, 207 Ariz. 482, ¶ 11, 88 P.3d at 555, and *Doody v. Schriro*, 548 F.3d 847 (9th Cir. 2008), the court stated,

> looking at the totality of the circumstances . . . I find that the conduct of the police was appropriate; that the manner in which

> they asked preliminary investigatory questions was appropriate, and not in a menacing manner, non-threatening, and non-coercive. That the time and place of the questioning was on a roadside stop.

The court added, "the officers [were] trying to determine what was happening . . . at the scene, as well as the potential of linking these two vehicles to earlier reports regarding reckless driving." The court also stated it had considered Kalvin's age and maturity, noting he had been polite, but that it could not consider Kalvin's prior experiences with the law because the court had no such information. The court considered the fact, too, that Kalvin's parents were not present when he was questioned and found, nevertheless, his statements had been made voluntarily. The court also distinguished the facts in this case from *Doody*.

¶22 Thus, the record reflects the juvenile court carefully considered the relevant circumstances and the applicable law. The record amply supports the court's factual findings, and there is no basis upon which we can conclude the court abused its discretion in denying the motion to suppress. We likewise reject any claim relating to the HGN and PBT. Neither below nor on appeal is it clear on what basis Kalvin is challenging this evidence. To the extent those arguments are premised on the involuntariness of his admission that he had been drinking beer, it necessarily fails, given our determination that the court did not err in finding the statements were voluntary. If the argument is based on the independent contention that Kalvin did not voluntarily submit to such testing, we question whether the issues were adequately preserved for appellate review in light of the arguments that were made at the hearing on the motion in limine. Moreover, Kalvin only mentions the

admissibility of the HGN results in passing in his opening brief. The argument is not sufficiently developed, and we need not consider it further. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 88, 181 P.3d 219, 242 (App. 2008) (appellate court will not address issues or arguments waived by party's failure to adequately develop them in briefs). And even assuming the argument that Kalvin did not voluntarily agree to provide a PBT sample had been adequately preserved and presented, the court implicitly found Kalvin had submitted voluntarily to all testing, and that finding is supported by the record.

¶23 Finally, we reject Kalvin's contention the juvenile court erred when it refused to recuse itself after Kalvin disclosed to the court his counsel's evaluation of the strength of the state's case. This court will not disturb a trial court's ruling on a motion requesting that the court recuse itself based on bias or prejudice unless the court affirmatively has abused its discretion. *See State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987).

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

State v. Ellison, 213 Ariz. 116, ¶ 38, 140 P.3d 899, 912 (2006), *quoting Liteky v. United States*, 510 U.S. 540, 555 (1994) (alteration in *Ellison*); *see also State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997). Moreover, we presume a trial judge is able to remain impartial and the party who sought the court's recusal has the burden of establishing the

judge's "bias or prejudice by a preponderance of the evidence" and that the party has been prejudiced. *Perkins*, 141 Ariz. at 286, 686 P.2d at 1256.

¶24 In denying Kalvin's request, the juvenile court stated the disclosure would not affect its decision. The court noted the state had the burden of proof on all counts, adding that it would not "allow" the information "to interfere with [its] decision . . . ." The court subsequently found the state had not sustained its burden of proof as to one of the counts. On appeal, Kalvin has not established the court abused its discretion in refusing to recuse itself. The record shows Kalvin received a fair trial, just as the court had assured him he would. And, as we have previously stated, there was an abundance of evidence to support the court's finding that Kalvin was responsible on three out of the four counts charged in the delinquency petition.

¶25 For the reasons stated herein, we affirm the juvenile court's adjudication and disposition orders.

_____
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Presiding Judge

_____
PETER J. ECKERSTROM, Judge