ATTORNEY FOR APPELLANT:

**ELIZABETH GAMBOA**
Franklin, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**GEORGE P. SHERMAN**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| IN THE MATTER OF: D.J., | ) | |
| | ) | |
| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0604-JV-298 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0512-JD-5139

**November 30, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Sixteen-year-old D.J. appeals his adjudication as a delinquent child for committing an act that would be battery, a Class A misdemeanor, if committed by an adult.[1] He asserts the court erred by excluding the testimony of his alibi witness. We affirm.

## FACTS AND PROCEDURAL HISTORY

On October 1, 2005, around 10:45 p.m., seventeen-year-old E.H. was approaching the convention center in downtown Indianapolis for a party. Upon seeing D.J., E.H. turned around to leave. As E.H. was walking away, D.J. hit him on the back of the head and E.H. fell into a window.

The State filed a petition alleging D.J. was a delinquent child. During trial, D.J. called R.M. as a witness. His first question to R.M. was "were you with [D.J.] on Saturday October 1st?" (Tr. at 12.) The State objected:

> Judge, I'm going to object at this time. It appears that Respondent's counsel is laying a foundation for an alibi witness. Due to Indiana Code 35-36-4-1 requires [sic] that defense counsel make notice within 10 days of trial. I would note for the Court that [defense counsel] sent our office a [sic] e-mail on Friday afternoon the 13th of January at 5:24 in the afternoon after our office had closed prior to this 3 day weekend. I received the e-mail yesterday around 10:00 and then a Notice of Alibi was e-mailed to me yesterday afternoon while I was in court. I don't believe this meets the statute – statutory requirements for an alibi – notice of alibi and State would ask that the proper remedy in this case is that the Respondent's witness not be permitted to testify concerning the alibi. This case came in for an Initial Hearing back on December 12th, approximately 5 weeks prior to today's court date. We believe there's been ample time for notice to be provided. I'm not even sure if a file stamped copy has even been provided to the Court at this time.

(*Id*. at 12-13.) Defense counsel's response was:

> Uh, the provision that [State's counsel] is referring to that – that would be appropriate in the adult trial setting where they have significantly more

[1] Ind. Code § 35-42-2-1.

> time before an actual trial, but in the juvenile setting there it's simply (inaudible) be penalized for the 10 day provision. As you know this was – he had his Initial Hearing in mid-December and we had the holidays and I did not first get a chance to speak with [R.M.] until Friday last week and immediately after doing so, I sent [State's counsel] an e-mail with – you know notifying about him and with his contact information and I filed a Notice of Alibi yesterday and he can not show any prejudice from not receiving this notice sooner. He's had ample opportunity to, you know, discuss with [R.M.] what his testimony and – and – and -

(*Id*. at 13.) On questioning by the Court, defense counsel admitted the State was sent notice about R.M. five days before the hearing. State's counsel reiterated the notice was sent after 5:00 p.m. on a Friday evening and the State's office had not been open on Monday due to a holiday. The Court excluded R.M.'s testimony "because of the lack of observance of the Trial Rules." (*Id*. at 14.) The court found the allegation of delinquency to be true and placed D.J. on a suspended commitment to the Department of Correction.

## DISCUSSION AND DECISION

D.J. claims the court erred in excluding the testimony of R.M. Whether to admit or exclude evidence is left to the sound discretion of the trial court. *C.C. v. State*, 826 N.E.2d 106, 110 (Ind. Ct. App. 2005), *trans. denied sub nom. In re C.C.*, 841 N.E.2d 181 (Ind. 2005). We may reverse only for an abuse of that discretion and only if "a substantial right of the party is affected." *Id*. An abuse of discretion has occurred if the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court." *M.T. v. State*, 787 N.E.2d 509, 511 (Ind. Ct. App. 2003).

In arguing to exclude R.M.'s alibi testimony, the State relied on Ind. Code §§ 35-36-4-1 and 35-36-4-3. The first of those provides:

> Whenever a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall, no later than:
> (1) twenty (20) days prior to the omnibus date if the defendant is charged with a felony; or
> (2) ten (10) days prior to the omnibus date if the defendant is charged only with one (1) or more misdemeanors;
> file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense. The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information.

Ind. Code § 35-36-4-1. The other provides in pertinent part:

> (b) If at the trial it appears that the defendant has failed to file and serve an original statement of alibi in accordance with section 1 of this chapter, and if the defendant does not show good cause for his failure, then the court shall exclude evidence offered by the defendant to establish an alibi.

Ind. Code § 35-36-4-3(b).

D.J. asserts those statutes should not apply to delinquency hearings. However, Ind. Code § 31-32-1-1 provides: "If a child is alleged to be a delinquent child, the procedures governing criminal trials apply in all matters not covered by the juvenile law." D.J. has directed us to no juvenile law that controls when notice must be given.

We have applied these statutes in a juvenile proceeding to demonstrate the trial court's exclusion of witnesses was, at most, harmless error:

> D.D.K. never filed a motion to present an alibi defense pursuant to IC 35-36-4-1(2), which requires a defendant to inform the trial court in writing of defendant's intention to offer an alibi defense to a misdemeanor charge. When a defendant fails to file a notice of alibi in accordance with IC 35-36-4-1, the trial court *shall exclude* any alibi offered by the defendant. *Adkins v. State*, 532 N.E.2d 6, 8 (Ind. 1989) (emphasis added). See also IC 35-36-4-3(b) (if defendant failed to file a statement of alibi, and does not show good cause, court shall exclude evidence offered to establish alibi). In this case, because no notice of alibi was ever filed, nor good cause shown for such failure, D.D.K.'s counsel would have been prohibited from presenting any alibi testimony, other than defendant's own testimony, which was not presented in this case. . . . Thus, even if D.D.K.'s counsel had timely

> disclosed the mother and aunt as witnesses, the trial court would have been justified in excluding their testimonies. Accordingly, we find no error in the court's exclusion of evidence.

*D.D.K. v. State*, 750 N.E.2d 885, 889 (Ind. Ct. App. 2001) (emphasis in original). In another case we noted, because a juvenile had not filed notice of his alibi defense under Ind. Code § 35-36-4-1, "the trial court should have excluded all alibi evidence presented by [the juvenile], other than his own testimony." *R.L.H. v. State*, 738 N.E.2d 312, 318 (Ind. Ct. App. 2000). We decline D.J.'s invitation to ignore *D.D.K.* and *R.L.H.*

D.J. also asserts even if the statute applies, the court erred by excluding the evidence because the court "made no determination" regarding whether he had demonstrated "good cause for his failure to timely file" the notice. (Appellant's Reply Br. at 3.) He claims "Counsel established good cause." (*Id.*) We disagree.[2]

"Where compliance with the statute is lacking, the defendant bears the burden to show sufficient cause to put aside the statutory requirements." *Hartman v. State*, 176 Ind. App. 375, 381, 376 N.E.2d 100, 104 (1978). Counsel's allegation was that he could not file the notice sooner because he did not have a chance to talk to R.M. "until Friday last week and immediately after doing so, I sent [State's counsel] an e-mail." (Tr. at 13.) However, aside from noting the holidays occurred in the interim, counsel alleged no reason why he did not apprise himself of D.J.'s alleged alibi between his December 12th initial hearing and the second week of January.

[2] To the extent D.J. is asserting the trial court had some duty to question counsel further to determine whether good cause existed, we disagree. *See Stapp v. State*, 259 Ind. 330, 334, 287 N.E.2d 252, 254 (1972) ("It is patently clear, however, both from the statute itself and cases interpreting the statute that it is not the duty of the court to establish excuses for the appellant's failure to file the notice. [The statute] clearly places the burden on the appellant.").

"Any potential alibi is peculiarly within the knowledge of the defendant." *Hartman*, 176 Ind. App. at 381, 376 N.E.2d at 104. We will not find "good cause" in counsel's failure to contact his client for a month after the initial hearing. If counsel spoke with D.J. during that month, D.J. has not explained why he did not inform counsel of his alibi. As our Indiana Supreme Court has explained: "These sanctions are designed to protect the State from eleventh hour defenses and to enable the State to make adequate trial preparation." *Riggs v. State*, 268 Ind. 453, 454-55, 376 N.E.2d 483, 484 (1978). D.J. has not demonstrated good cause. The trial court did not abuse its discretion when it sustained the State's objection and excluded D.J.'s alibi testimony. *See id.* at 455, 376 N.E.2d at 485.

Affirmed.

RILEY, J., and BAILEY, J., concur.