

[Cite as *In re J.S.*, 2010-Ohio-6162.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94410

In Re: J.S.

APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Appeal from the Cuyahoga County Court
of Common Pleas, Juvenile Division
Case No. DL-09116258

BEFORE: Sweeney, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: December 16, 2010

ATTORNEYS FOR APPELLANT

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JAMES J. SWEENEY, J.:

{¶ 1} The State of Ohio appeals from the decision of the juvenile court which dismissed the complaint charging J.S., a juvenile, with aggravated robbery and firearm specifications. For the reasons that follow, we reverse and remand for further proceedings.

{¶ 2} The complaint against J.S. was filed on August 24, 2009 and alleged that J.S., a Delinquent Child, committed aggravated robbery with a deadly weapon on July 19, 2007. J.S. was arraigned on October 5, 2009. The adjudicatory hearing was scheduled for November 12, 2009. By order dated October 9, 2009, the juvenile court appointed counsel MacKay to represent J.S.

{¶ 3} On October 27, 2009, the State subpoenaed the following individuals to appear for the adjudicatory hearing: Detective Woyma, Detective Bush, Kahlid Awad, and Patrolman Stockwell. The State later subpoenaed another individual, Elmostafa Benchaou, to appear for the adjudicatory hearing.

{¶ 4} The record, as set forth in the eleven-page transcript, reflects that neither the defense nor the State were prepared to go forward with the adjudicatory hearing on November 12, 2009. Primarily, we note that various conversations were held among the court and counsel off the record. But from the record we can glean that J.S. was being represented by stand-in counsel due to his appointed counsel's unavailability. The court noted on the record that there were at least two of the State's witnesses who were present at the outset of the proceedings and who had been observed by the court. The prosecutor explained that although she had not excused them, the State's witnesses had left under the mistaken impression that the court was going to continue the hearing. Counsel further indicated that defense counsel initiated the request for a continuance; to which the State had agreed.

{¶ 5} Although the court called for opening statements, the State repeatedly requested a continuance, indicating the witnesses had left and as such the State was not ready to proceed with trial. The court denied the

requested continuances and ignored the State's insistence that it was not ready to proceed with trial. When the court instructed the defense to call its first witness, the defense "rested" and asked for a dismissal for failure to prosecute. The court then proceeded to find that the State "had failed to show by evidence presented proof beyond a reasonable doubt" and dismissed the case "pursuant to [Juv.R.] 29(F)(1)."

{¶ 6} The matter is now before us on the State's appeal and no appellee brief has been submitted. Finding merit to the appeal, we reverse and remand for further proceedings.

{¶ 7} The three assignments of error are interrelated and will be addressed together for ease of discussion.

{¶ 8} "Assignment of Error I: The Juvenile Court erred to the prejudice of the State of Ohio in dismissing the case under Juvenile Rule 29(F)(1) where no witnesses had been sworn and no evidence presented."

{¶ 9} "Assignment of Error II: The Juvenile Court erred to the prejudice of the State of Ohio by essentially taking judicial notice of its prior records as it related to testimony previously given in the case against the named alleged delinquent in 2007 and subsequently dismissing the matter that was pending."

{¶ 10} “Assignment of Error III: The Juvenile Court erred to the prejudice of the State of Ohio by alleging in its journal entry that the State waived its opening statement and asking that defense call its witnesses, therefore attempting to attach double jeopardy.”

{¶ 11} Initially we note this matter has been appealed to our court on two prior occasions. *In re J.C.S.*, Cuyahoga App. No. 91121, 2008-Ohio-4712 (remanded to conduct new hearing due to failure to make a transcript of the dispositional hearing); *In re J.S.*, Cuyahoga App. No. 92504, 2009-Ohio-3470 (remanded for further proceedings due to error in permitting identification evidence based on videotape that was not produced to defense counsel despite repeated requests for production of same).

{¶ 12} For the first time on appeal, J.S. asserts that this adjudicatory proceeding was barred by double jeopardy because following remand from this court the State dismissed and re-filed the complaint. “[T]he United States Supreme Court [has] held that double jeopardy protection is not absolute until there is a dismissal or acquittal based upon a factual finding of innocence.” *In re Mojica*, 107 Ohio App.3d 461, 669 N.E.2d 35, quoting, *United States v. Scott* (1978), 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65. Although this Court reversed the juvenile court’s delinquency adjudication and remanded for further proceedings in *In re J.S.*, J.S. was not acquitted nor

were the charges against him dismissed based upon a factual finding of innocence. The State's decision to voluntarily dismiss and re-file the complaint in the instant matter was not based on a factual finding of innocence. Therefore, the adjudicatory proceedings in this matter did not violate double jeopardy and the juvenile court did not dismiss the case on that basis. At issue is whether the juvenile court erred by dismissing the case pursuant to Juv.R. 29 under the circumstances.

{¶ 13} The juvenile court's own comments reflect that the State's witnesses were initially present to testify at the hearing. After preliminary discussions that were held off of the record, the witnesses left. The prosecutor indicated she had not excused the witnesses and explained that, although she had concurred with a continuance, it was the defense who had initiated the request. The record does establish that J.S.'s appointed counsel was not present at the adjudicatory hearing and that another attorney was "substituting for" J.S.'s appointed counsel on that day. Despite the apparent confusion, the juvenile court denied the request for a continuance and proceeded to dismiss the case pursuant to Juv.R. 29(F)(1).

{¶ 14} Juv.R. 29(F)(1) provides:

{¶ 15} "Upon the determination of the issues, the court shall do one of the following:

{¶ 16} “(1) If the allegations of the complaint, indictment, or information were not proven, dismiss the complaint.”

{¶ 17} Under these circumstances, the standard for a dismissal pursuant to Juv.R. 29(F)(1) is the functional equivalent of a dismissal pursuant to Crim.R. 29. *In re Williams* (March 13, 1986), Cuyahoga App. 50315.

{¶ 18} No evidence was presented for the reasons indicated previously. Although the trial court summarized its recollection of testimony from a previous hearing, it is pure conjecture to surmise that the same evidence would have been produced or elicited at the new proceeding.

{¶ 19} The trial court’s dismissal is more fairly characterized as a penalty for a perceived failure to prosecute rather than an insufficiency of evidence. Within the context of the sparse record before us, it was an abuse of discretion for the trial court to dismiss the case with prejudice¹ on that basis. See, *State v. Walton*, Cuyahoga App. No. 87347, 2006-Ohio-4771, ¶4-5 (dismissals with prejudice are permissible “only where it is apparent that the defendant has been denied a constitutional or statutory right, the violation of

¹Although the entry of dismissal is silent with regard to whether it was with or without prejudice, the trial court intended the dismissal to be with prejudice as evidenced by its statements on the record. While the State objected to dismissal, it specifically requested that any dismissal be without prejudice, to which the trial court responded, “the judgment will stand. No just reason for delay.” Tr. 11.

which would, in itself, bar prosecution.”) Because the trial court made no finding that J.S. was denied a constitutional or statutory right, it abused its discretion by dismissing the case with prejudice. *Id.* at ¶6.

{¶ 20} Even assuming the juvenile court had the discretion to dismiss the case pursuant to Juv.R. 29(F)(1), the dismissal is an abuse of discretion where it does not serve the interests of justice. *State v. Busch* (1996), 76 Ohio St.3d 613, 669 N.E.2d 1125; see also, *State v. Miller*, Mahoning App. No. 07 MA 215, 2008-Ohio-3085 and *City of Columbus v. Storey*, Franklin App. No. 03AP-743, 2004-Ohio-3377. “An abuse of discretion * * * implies a decision which is without a reasonable basis or one which is clearly wrong.” *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280.

{¶ 21} In *Miller*, the Tenth District found that a trial court abused its discretion where it dismissed a case under circumstances similar to those before us.

{¶ 22} The record does not establish that the dismissal served the interest of justice. The State was present for the adjudicatory hearing, along with multiple witnesses. The defense was not prepared to proceed with the hearing. The State was only rendered unable to proceed due to its witnesses leaving under the mistaken impression that the court was going to continue

the matter. Although the court made mention of evidentiary issues that arose in a prior case, there is no basis from which we could conclude that the same issues would arise in these new proceedings. These facts indicate that the trial court erred by dismissing by the case pursuant to Juv.R. 29(F)(1). The assignments of error have merit.

{¶ 23} The judgment of the trial court is reversed and the matter is remanded to the trial court for further proceedings consistent with the law.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court 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.

JAMES J. SWEENEY, PRESIDING JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR