

[Cite as *In re R.H.*, 2017-Ohio-7064.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104455

IN RE: R.H.

A Minor Child

JUDGMENT:
APPLICATION GRANTED

Cuyahoga County Court of Common Pleas
Juvenile Court Division
Case No. DL 13117582
Application for Reopening
Motion No. 506952

RELEASE DATE: August 2, 2017

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EILEEN T. GALLAGHER, P.J.:

{¶1} On May 9, 2017, the applicant, R.H., pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), applied to reopen this court's judgment in *In re R.H.*, 8th Dist. Cuyahoga No. 104455, 2017-Ohio-467, in which this court affirmed R.H.'s sentences. R.H. now contends that his appellate counsel was ineffective for not arguing that R.C. 5139.52(F) prohibits the imposition of consecutive sentences when one of the sentences is for a parole violation. On June 6, 2017, the state of Ohio filed its response to R.H.'s application and concurred with the appellant. For the following reason, this court grants the application, reinstates the appeal, vacates the sentence, and remands this case to the trial court for resentencing according to the statute.

{¶2} In the summer of 2015, in *In re R.H.*, Cuyahoga J.C. No. DL 13117582, R.H. admitted to the allegations of an amended complaint that he possessed cocaine. The trial court found him to be delinquent and imposed a six-month commitment at the Ohio Department of Youth Services, but suspended the commitment and released R.H. to the custody of his uncle and ordered him to comply with the terms of his supervised release.

{¶3} Subsequently, the trial court adjudicated him delinquent for committing felonious assault in *In re R.H.*, Cuyahoga J.C. No. DL 15118059 and for receiving stolen property in Cuyahoga J.C. No. DL 16100920. In March 2016, the trial court committed R.H. to the ODYS for a period of one year in Case No. DL 15118059 and for 90 days in Case No. DL 16100920.¹ For the earlier case, Case No. DL 13117582, the

¹The sentence in Case No. DL 16100920 was extinguished by time served.

juvenile court found that R.H. had violated the terms of his parole and imposed the suspended commitment for an indefinite term consisting of a minimum period of six months and a maximum period not to exceed his 21st birthday. The court further ordered the term imposed in Case No. DL 15118059 to run consecutively to the term imposed in Case No. DL 13117582 for a total commitment period of 18 months.

{¶4} On appeal, R.H.'s counsel argued that the imposition of consecutive sentences was improper and excessive. Relying on *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, 7 N.E.2d 1173, this court ruled that consecutive sentences were proper. However, appellate counsel did not cite R.C. 5139.52(F), effective September 19, 2014. That statute provides that if a child is on supervised release and violates one or more of the terms and conditions of the supervised release, the juvenile court may revoke the supervised release and return the child to the department of youth services for institutionalization, but "the period of institutionalization shall be served concurrently with any other commitment to the department of youth services." Thus, R.C. 5139.52 requires that the sentence for the parole violation be served concurrently.

{¶5} In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. The petitioner establishes prejudice by showing that but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and *State v. Reed*, 74 Ohio St.3d 534, 660 N.E.2d 456 (1996).

{¶6} In this case, appellate counsel did not cite the statute. The state of Ohio admits that the statute supersedes *In re H.V.* and that if counsel had raised the statute, “there is a reasonable probability of a different outcome * * * and that appellant’s application to reopen his appeal should be granted.” (State’s response.)

{¶7} The statute’s direction is clear. Sentences for juvenile parole violations must be served concurrently. There is no other alternative. Therefore, the sentence imposed was in error.

{¶8} Accordingly, this court grants the application to reopen. This court reinstates the appeal to the court’s active docket, vacates the sentence for the parole violation in Case No. DL 13117582, and remands the case for resentencing on the parole violation.

It is ordered that the state of Ohio pay the costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas, Juvenile Division, 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.

Accordingly, the application for reopening is granted.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR