

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

IN THE MATTER OF:
PHILLIP DENNIS

: **OPINION**

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CASE NO. 2006-A-0040

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Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 06 JA 109.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Appellee).

David H. Bodiker, Ohio Public Defender, and *Molly J. Bruns*, Assistant Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215 (For Appellant).

WILLIAM M. O'NEILL, J.

{¶1} Appellant, Phillip Dennis, appeals from a judgment entry of the Ashtabula Common Pleas Court, Juvenile Division, finding him to be delinquent. On May 31, 2006, Dennis was committed to the Ohio Department of Youth Services. We conclude that a conflict of interest existed between Dennis and his parents and that a guardian ad litem should have been appointed for him. For that reason, we reverse the judgment entry of the trial court.

{¶2} On February 16, 2006, Dennis was charged with receiving stolen property, a violation of R.C. 2913.51 and a fifth-degree felony if committed by an adult. The charge stated that Dennis was in possession of a stolen purse belonging to Sandra McCrosky.

{¶3} An adjudication hearing was held on May 25, 2006. At the hearing Ms. McCrosky, Dennis' parents, and the investigating officer, Officer Janek, testified for the state of Ohio. The trial court found Dennis to be delinquent at the conclusion of the hearing.

{¶4} The trial court then immediately proceeded to a dispositional hearing. After taking testimony from the probation officer, the trial court committed Dennis to the Ohio Department of Youth Services for a minimum of six months and a maximum to age 21.

{¶5} Dennis has timely appealed and raises the following three assignments of error:

{¶6} “[1.] The juvenile court committed reversible error when it failed to appoint a guardian ad litem in violation of R.C. 2151.281(A) and Juv.R. 4(B).

{¶7} “[2.] Phillip Dennis' adjudication and commitment must be reversed and remanded for a new trial because his adjudication is against the manifest weight of the evidence.

{¶8} “[3.] The trial court abused its discretion when it committed Phillip Dennis to the Ohio Department of Youth Services.”

{¶9} In the first assignment of error, Dennis argues that a conflict of interest exists between him and his parents and that a guardian ad litem should have been appointed by the trial court.

{¶10} “[A]n abuse of discretion standard applies to the juvenile court’s decision to appoint a guardian ad litem. *** The relevant question on appeal is whether the record reveals an actual or potential conflict of interest which required the appointment of a guardian ad litem.”¹

{¶11} R.C. 2151.281(A) provides, in pertinent part, as follows:

{¶12} “(A) The court shall appoint a guardian ad litem, subject to rules adopted by the supreme court, to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or unruly child when either of the following applies:

{¶13} “***

{¶14} “(2) The court finds that there is a conflict of interest between the child and the child’s parent, guardian, or legal custodian.”

{¶15} Juv.R. 4(B) provides, in pertinent part, as follows:

{¶16} “(B) Guardian *ad litem*; when appointed. The court shall appoint a guardian *ad litem* to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

{¶17} “***

1. (Internal citation omitted.) *In re Cook*, 11th Dist. No. 2003-A-0132, 2005-Ohio-5288, at ¶26.

{¶18} “(2) The interests of the child and the interests of the parent may conflict;

{¶19} “***

{¶20} “(8) Appointment is otherwise necessary to meet the requirements of a fair hearing.”

{¶21} The mandate under Juv.R. 4(B) differs from that of R.C. 2151.281(A) in that the juvenile rule requires more broadly that a guardian ad litem be appointed if there is a possibility that interests “*may conflict*,” whereas the statute provides that a guardian ad litem shall be appointed only if the trial court finds that “*there is a conflict of interest*.”²

{¶22} On the date of the adjudication hearing, Dennis was 17 years of age.

{¶23} At the hearing, McCrosky testified that her purse was stolen on February 7, 2006.

{¶24} James Dennis, Dennis’ father, testified that he found items belonging to McCrosky in Dennis’ top dresser drawer in his bedroom on February 13, 2006. He discussed this matter with his wife, Sandra Dennis, the matter was reported to Dennis’ probation officer and to the police, and the police responded that day. Additional items belonging to McCrosky were located under Dennis’ bed a week later. The police were again contacted concerning these additional items.

{¶25} Officer Janek testified that he had taken a statement from McCrosky on the day she reported her purse was stolen, that he took possession of McCrosky’s property from Dennis’ parents, and that McCrosky identified those same items as the contents of her purse that was stolen on February 7, 2006.

2. (Emphasis in original.) *Id.* at ¶25. See, also, *In re K.B.*, 8th Dist. No. 87899, 2007-Ohio-396, at ¶21.

{¶26} At the conclusion of the adjudication hearing, the trial court made a finding of true as to the delinquency charge of receiving stolen property. The court then immediately proceeded to the dispositional phase of the hearing.

{¶27} Dennis argues that the record clearly reflected that a conflict of interest existed between Dennis and his parents: “[t]he parents initiated contact with juvenile court authorities; they testified against [Dennis]; and they did not want him back in their home.” We agree that a conflict of interest existed.

{¶28} “In the context of a delinquency proceeding, a parent’s speaking out against the child’s penal interest raises a colorable claim of conflict. *** That colorable claim of conflict requires a ‘thorough inquiry’ by the juvenile court to determine whether a conflict of interest exists such that the court must appoint a guardian ad litem.”³

{¶29} We note that the record does not reflect that Dennis requested the appointment of a guardian ad litem. However, because the provisions of R.C. 2151.281(A) and Juv.R. 4(B) are mandatory,⁴ and the trial court has a duty to “inquire further into whether a guardian ad litem is necessary,”⁵ we conclude that the juvenile does not need to specifically request the appointment of a guardian ad litem.

3. (Internal citations omitted.) *In re Bostwick*, 4th Dist. No. 05CA2820, 2005-Ohio-5123, at ¶8.

4. *In re Cook* at ¶26.

5. *Id.* at ¶29, quoting *In re Slider*, 160 Ohio App.3d 159, 2005-Ohio-1457, at ¶12.

{¶30} On a plain error analysis, this court noted that “the [juvenile’s] failure to object does not preclude a reversal based upon the juvenile court’s failure to appoint a guardian ad litem.”⁶ In addition, this court has held that “the absence of an objection does not preclude a reversal due to the juvenile court’s failure to appoint a guardian ad litem when required under R.C. 2151.281(A)(2) or Juv.R. 4(B)(2).”⁷

{¶31} We further note that, though counsel was appointed to represent Dennis, the role of a guardian ad litem differs from that of counsel. As stated by the Supreme Court of Ohio:

{¶32} “The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. The role of a guardian ad litem is to investigate the ward’s situation and then to ask the court to do what the guardian feels is in the ward’s best interest. The role of the attorney is to zealously represent his client within the bounds of the law.”⁸

{¶33} Further, in a case similar to the instant case, this court has stated that “a juvenile court’s failure to find a conflict and appoint a guardian ad litem when the parent or guardian initiated the delinquency proceedings represented an abuse of discretion.”⁹ Thus, where, as in the instant case, a conflict of interest exists, the trial court has the duty to appoint a guardian ad litem. Failure to do so in this case constituted an abuse of discretion.

6. *In re Cook* at ¶28.

7. *Id.* at ¶30.

8. (Citations omitted.) *In re Baby Girl Baxter* (1985), 17 Ohio St.3d 229, 232.

9. (Citations omitted.) *In re Cook* at ¶32.

{¶34} The first assignment of error has merit.

{¶35} For the reasons stated in the analysis under the first assignment of error, the remaining assignments of error are moot, because this matter is being returned to the trial court for a new adjudicatory hearing.

{¶36} The judgment entry of the trial court is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶37} The majority reverses appellant, Phillip Dennis', delinquency adjudication on the grounds that a guardian ad litem should have been appointed for him. This result is not mandated by the case law pertinent to this issue. The majority obviously disagrees with the juvenile court's failure to appoint Dennis a guardian ad litem. Under the circumstances of this case, however, that decision was well within the juvenile court's discretion. Under the applicable deferential standard of review, the juvenile court's decision should be affirmed.

{¶38} The Revised Code provides as follows: "The court shall appoint a guardian ad litem, subject to rules adopted by the supreme court, to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or

unruly child when *** [t]he court finds that there is a conflict of interest between the child and the child's parent, guardian, or legal custodian." R.C. 2151.281(A)(2).

{¶39} In like manner, the Rules of Juvenile Procedure provide: "The court shall appoint a guardian *ad litem* to protect the interests of a child *** when *** [t]he interests of the child and the interests of the parent may conflict." Juv.R. 4(B)(2).

{¶40} "While the plain language of the rule mandates that the possibility that interests 'may conflict' suffice[s], 'the juvenile court is in the best position to weigh the relevant facts in determining whether a potential conflict of interest exists between the parent and child.' *** Therefore, an abuse of discretion standard applies to the trial court's decision whether to appoint a guardian *ad litem*. *** Thus, the relevant question here is whether the record *** 'reveals a strong enough possibility of conflict of interest between [the legal guardian] and the child to show that the juvenile court abused its discretion [by not appointing a guardian *ad litem*]'." *In re Spradlin*, 140 Ohio App.3d 402, 407, 2000-Ohio-2003, citing *In re Sappington* (1997), 123 Ohio App.3d 448, 453-454; *In re K.B.*, 8th Dist. No. 87899, 2007-Ohio-396, at ¶23 ("[t]he relevant question on appeal is whether the record reveals an actual or potential conflict of interest which required the appointment of a GAL").

{¶41} Accordingly, there is no "hard and fast rule that requires the appointment of a guardian *ad litem* in every case." *In re Wilson*, 4th Dist. No. 04CA26, 2004-Ohio-7276, at ¶17.

{¶42} In the present case, the record does not reveal an actual or potential conflict of interest between Dennis and his parents.

{¶43} The majority bases its determination that a conflict exists on the erroneous supposition that Dennis' parents "initiated the delinquency proceedings" against him. In fact, Dennis's parents did not initiate proceedings against Dennis. They merely reported to the police that they had found items, such as a checkbook, driver's license, and prescription medicine, in Dennis' room which obviously belonged to another person. These items were turned over to the police. Dennis' parents did not turn Dennis in to the police. They did not allow the police to search Dennis' room. They never confronted Dennis about these items or inquired how they came to be in Dennis' room. They simply turned over to the police items of personal property that did not belong to them or to Dennis.

{¶44} The actual proceedings against Dennis were initiated by the Ashtabula Police Department. The complaining witness was Sandra McCroskey. Thus, it is misleading to say that Dennis' parents initiated the proceedings.

{¶45} This fact distinguishes the present case from the authority relied upon by the majority. In *In re Cook*, 11th Dist. No. 2003-A-0132, 2005-Ohio-5288, the juvenile's biological father "initiated the complaint against appellant after appellant assaulted him with a pipe or rod." *Id.* at ¶33. See also, *K.B.*, 2007-Ohio-396, at ¶1 (juvenile "found delinquent for trespassing into her mother's bedroom and using her mother's phone without her mother's permission"); *Slider*, 2005-Ohio-1457, at ¶¶2-3 (juvenile was accused of kidnapping and gross sexual imposition against the natural daughter of his legal guardians). Cf. *In re D.M.*, 158 Ohio App.3d 780, 2004-Ohio-5858, at ¶¶34-36 (holding that no conflict existed and that appointment of a guardian ad litem was not

necessary, although the parents testified against the juvenile, where the parents were not the parents of the victim and did not advocate for commitment to Youth Services).

{¶46} In contrast, Dennis' parents were neither the victims of the alleged crime nor the complaining witnesses. They testified at trial about the items they found in Dennis' room, but they testified under subpoena, not as voluntary witnesses.

{¶47} Many courts have held that where a parent or guardian merely testifies against a juvenile's penal interest, no conflict arises so as to require appointment of a guardian ad litem in the absence of other evidence of adverse interests. *In re Becerra*, 8th Dist. No. 79715, 2002-Ohio-678, 2002 Ohio App. LEXIS 705, at *7 ("[w]hen nothing in the record supports that a conflict exists, we will not presume as much merely because a parent *** has brought the charges against that child"); *In re Taylor* (June 10, 1999), 8th Dist. No. 74257, 1999 Ohio App. LEXIS 2610, at *3.¹⁰

{¶48} In *In re Howard* (1997), 119 Ohio App.3d 201, the principal case for the proposition that "when a parent does speak against a child's penal interest, a colorable claim of a conflict is at least raised," the court concluded there was no conflict. The court noted that "nothing in the record *** suggest[ed] that [the juvenile's] mother was acting other than in [the juvenile's] best interest" and that the juvenile "was represented by counsel throughout the proceedings." *Id.* at 207.

10. As the majority recognizes, a juvenile's penal interests are typically protected by an attorney while a juvenile's best interests are the concern of a guardian ad litem. What is contrary to a juvenile's penal interest may not be adverse to his best interest. As has been observed: "No attempt at juvenile rehabilitation would be complete without instilling in the child the idea that she alone bears responsibility for her actions. A parent, guardian or custodian is often the best person to make that point. *** It would serve no meaningful rehabilitative purpose for a court to appoint legal counsel to a clearly delinquent child for the sole purpose of dragging out proceedings and delaying the inevitable, particularly when *** all agree that a certain disposition would be in the child's best interests. Juvenile court should not be the place where children learn they can finesse the system." *In re Smith* (2001), 142 Ohio App.3d 16, 21-22.

{¶49} Likewise, in the present proceedings, the record is devoid of evidence of hostility or animosity on the part of Dennis' parents or evidence that they acted to prejudice his penal interests, such as by denying Dennis counsel or recommending commitment. Cf. *K.B.*, 2007-Ohio-396, at ¶25 (juvenile's guardian testified the juvenile "had behavior issues that needed to be corrected and urged the court to commit [the juvenile] to ODYS"); *Cook*, 2005-Ohio-5288, at ¶33 (juvenile's father testified that he "believed [the juvenile] had violent tendencies and behavioral issues which needed to be corrected"); *Slider*, 2005-Ohio-1457, at ¶13 (juvenile's "guardians had expressed a clear intention to distance themselves from him, and counsel did not represent him during the hearing"); *In re Bostwick*, 4th Dist. No. 05CA2820, 2005-Ohio-5123, ¶¶12-16 (father testified the juvenile was "better off" in Sheriff's custody and "don't want to do nothing *** but argue with me").

{¶50} The only evidence of hostility alluded to by the majority is that Dennis' parents did not want him back in their home. This statement is not supported by the record. Dennis' parents did not testify regarding their personal feelings toward Dennis or whether he would be allowed home, and made no recommendation regarding the disposition of this case.¹¹

11. As a practical matter, Dennis had been held in detention for other, unrelated probation violations, from the time Dennis' parents found the stolen items until trial. It is misleading to suggest that Dennis' parents have put him out of the house or have prevented his return.

{¶51} Dennis' trial counsel reported Dennis' mother as indicating Dennis would be allowed back in the home but that Dennis "wish[es] to establish himself independently." Dennis' probation officer also testified to this effect, noting that Dennis is almost eighteen-years-old and that he would benefit from "an independent living program."

{¶52} In sum, the law does not require a guardian ad litem be appointed merely because Dennis' parents testified against his penal interest. Nor do the facts of this case suggest any conflict of interest between Dennis' parents and Dennis best interests. There are no cases where an adjudication has been reversed for failure to appoint a guardian ad litem in circumstances such as these. Our standard of review is a deferential one, abuse of discretion. The juvenile court's judgment should be affirmed.