

[Cite as *In re B.W.*, 2010-Ohio-2092.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

B.W.

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. CT2009-0053

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Juvenile Division, Case No. 20820740

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 12, 2010

APPEARANCES:

For Appellant

JAMES E. WORKMAN, JR.
27 North Fifth Street
P.O. Box 189
Zanesville, OH 43702-0189

For Appellee

PETER N. CULTICE
121 North Fourth Street
Zanesville, OH 43701

Guardian ad Litem

R. SCOTT PATTERSON
2609 Bell Street
Zanesville, OH 43701

Farmer, J.

{¶1} On October 2, 2008, a complaint was filed alleging appellee, B.W., age twelve, to be delinquent by reason of committing rape in violation of R.C. 2907.02 and gross sexual imposition in violation of R.C. 2907.05. Said charges arose from incidents involving appellee and his eight year old half-sister. At the time, appellee was in the permanent custody of Muskingum County Children's Services.

{¶2} Pursuant to a request by Muskingum County Children's Services, the trial court ordered an evaluation of appellee to determine his competency to stand trial. A hearing before a magistrate was held on July 23, 2009. By decision filed August 28, 2009, the magistrate found appellee was incompetent to answer to the delinquency charges, and dismissed the complaint.

{¶3} Both parties filed objections. By judgment entry filed October 8, 2009, the trial court overruled the objections and approved and adopted the magistrate's decision.

{¶4} Appellant, the state of Ohio, filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE APPELLANT (STATE OF OHIO) CONTENDS THAT THE TRIAL COURT ERRED IN ITS HOLDING THAT THE JUVENILE, B.W., WAS INCOMPETENT TO STAND TRIAL, BASED UPON THE EVIDENCE SUBMITTED TO THE COURT, BECAUSE THE JUVENILE'S PRESUMED COMPETENCE TO STAND TRIAL WAS NOT REBUTTED BY A PREPONDERANCE OF THE EVIDENCE; AND THEREFORE, SUCH FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶6} "THE APPELLANT (STATE OF OHIO) CONTENDS THAT THE TRIAL COURT ERRED IN ITS HOLDING THAT THE JUVENILE, B.W., WAS INCOMPETENT TO STAND TRIAL, BECAUSE ITS LEGAL RATIONALE, WHICH WAS USED TO SUPPORT ITS DECISION, IS CONTRARY TO LAW."

III

{¶7} "THE APPELLANT (STATE OF OHIO) CONTENDS THAT THE TRIAL COURT ERRED IN ITS HOLDING THAT THE JUVENILE, B.W., WAS INCOMPETENT TO STAND TRIAL, BECAUSE IT FAILED TO APPLY JUVENILE NORMS TO THE MODERN DAY LEGAL STANDARD USED TO DETERMINE AN ADULT'S COMPETENCE TO STAND TRIAL, WHICH IS *THE DUSKY STANDARD* THAT **ONLY ANALYZES** THE ACCUSED PERSON'S PRESENT ABILITY AND REASONABLE UNDERSTANDING OF THE PROCEEDINGS; MORE SPECIFICALLY, THE RELEVANT EVALUATION ISSUE IS WHETHER THE ACCUSED HAS SUFFICIENT, PRESENT ABILITY TO CONSULT WITH A LAWYER, AND WHETHER HE OR SHE HAS A RATIONAL AS WELL AS FACTUAL UNDERSTANDING OF THE PROCEEDINGS; AND THAT THIS PRESENT TENSE EVALUATION OF COMPETENCY TO STAND TRIAL IN JUVENILE COURT SHOULD BE DETERMINED BY APPLYING JUVENILE NORMS TO THE ADULT STANDARD; THEREBY, IN EFFECT, CREATING AN ADJUSTED STANDARD THAT IS FUNDAMENTALLY FAIR AND APPROPRIATE FOR JUVENILES."

I, II, III

{¶8} Appellant challenges the trial court's determination that B.W. was incompetent to stand trial. Specifically, appellant claims the decision was against the manifest weight of the evidence and the trial court used an improper legal standard.

{¶9} An appellate court will not disturb a competency determination if there was "some reliable, credible evidence supporting the trial court's conclusion that appellant understood the nature and objective of the proceedings against him." *State v. Williams* (1986), 23 Ohio St.3d 16, 19. "[T]he adequacy of the data relied upon by the expert who examined the appellant is a question for the trier of fact." *Id.*

{¶10} In *In the Matter of, Kristopher F.*, Stark App. No. 2006CA00312, 2007-Ohio-3259, ¶25-27, this court explained the following:

{¶11} "25. Pursuant to R.C. 2945.37(G), a "defendant is presumed competent to stand trial unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or presently assisting in his defense." In *Dusky v. U.S.* (1960), 362 U.S. 402, 80 S. CT. 788, 4 L. Ed. 2d 824, the Supreme Court stated that the test for competency is whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of proceeding against him." See also, *In re Anderson* 2001PO30021, 2002 Ohio 776, appeal not allowed, 95 Ohio St.3d 1474, 2002 Ohio 2444, 768 N.E. 2d 1182.

{¶12} "26. In performing competency evaluation, the courts have recognized that there are practical differences between juvenile delinquency proceedings and adult

criminal prosecutions. As a result, these differences have been taken into consideration by the juvenile court in determining whether an alleged juvenile delinquent is capable of understanding the nature and objective of the proceedings and in assisting in his or her own defense. *In re McWhorter, Supra.*

{¶13} "27. Factors which have been considered in juvenile competency evaluations include, appellants age and cognitive and intellectual development, appellant's problems with receptive or expressive language, the ability to understand and communicate during competency testing, the complexity of the case and the attorney's ability to simplify and explain complex issues, the seriousness of the charges in relation to the stress they could cause appellant during trial, any mental condition that would adversely affect appellant's ability to understand the proceedings or work with counsel, appellant's ability to understand the nature of the charges and the potential penalties, appellant's ability to provide an adequate definition of the judge, defense attorney and prosecutor. *In re McWhorter, Supra.* Furthermore, a separate and important consideration is the manner in which the system affords the juvenile additional protections such as having a parent, guardian, or other person present with the child during the proceedings. *In re Stone, Clinton App. No. CA2002-09-035, 2003 Ohio 3071.* These factors provide a gauge to evaluate a juvenile's competency to stand trial and take into consideration the best interest of the child. A below average verbal IQ alone does not in and of itself, indicate that a defendant is not competent to stand trial. *In re McWhorter, Supra.*"

{¶14} We must first analyze the evidence as it was presented to the trial court. Psychologist Gary Wolfgang, Ph.D., testified at the hearing. His conclusion is best summarized by the following excerpts from his report:

{¶15} "As to his [appellee's] knowledge of the court situation and his ability to assist his attorney in his own defense, some limitations were identified. He seemed to understand the name of one of the charges against him; he could recognize the name of the other when it was said to him. He lacked clear and comprehensive knowledge of the nature of the more serious charge, however. He decidedly did not understand the severity of the charge or the severity of the various serious consequences that could follow from a finding by the court of delinquency with regard to that serious charge. He naively and rather simply accepted the possibility that if found guilty by the court he would be sent to counseling. The possibility of other outcomes did not seem to occur to him. He understood the role of the judge and the prosecuting attorney. He did not sufficiently understand differences between the hearing itself and sentencing.

{¶16} "Consistent with [B's] lack of comprehension of the seriousness of the charges against him is his behavior of relatively calmly and compliantly discussing the behaviors he engaged in with such an open and straightforward manner. It does not seem to have occurred to [B] that he could indicate to others that what he did with his sister is something he perhaps might not want to discuss at the time. His behaviors have been an open book since the incident occurred, thus attesting to his lack of understanding of how serious they are perceived to be. He is aware that such behaviors are wrong and should be avoided, but he lacks awareness once they were

committed that to discuss them so openly could result in consequences being placed on him by the court that otherwise would not have necessarily followed.

{¶17} ****

{¶18} "On the whole, then, I would conclude that [B's] understanding of the nature of the charges against him, though present to some extent, nevertheless shows deficiencies and lack of knowledge. His understanding of the legal system itself also shows some weaknesses. His comprehension of the consequences of his actions is substantially deficient. He is for the most part able to assist counsel in his own defense, minus the various statements that he has made to others in the course of the various evaluations that have been conducted." See, January 3, 2009 Psychological Evaluation filed January 27, 2009.

{¶19} When asked during the competency hearing if B.W. would understand the nature and objective of the proceedings against him i.e., the trial and the hearing, Dr. Wolfgang responded as follows:

{¶20} "He would, again that's a, it's hard to boil that down to a yes or no answer. I think he would understand that he's in trouble and that he, that consequences could occur. You know, does he understand the various details of the process? I think he is lacking in some of them. It, it's hard to give that, that global answer to, you know, some of this stuff he knows better than others." T. at 49.

{¶21} Dr. Wolfgang termed B.W. as a "follower" and "simple" as in "very accepting and, and very naïve young man." T. at 33, 35. These descriptions were based upon B.W.'s lack of verbal skills, his struggles with the use of words and understanding them, his inability to think things through, his inability to consider

alternatives, his lack of qualms about the incident, and his vulnerability to the suggestions of others. T. at 34-35, 43, 51.

{¶22} Overall, Dr. Wolfgang opined B.W. would not be good at assisting his trial counsel, and "his verbal skills would, would not make him competent to stand trial." T. at 52-53. Besides the lack of comprehension of how serious the charges were, B.W. would not understand the concept of cross-examination and would not question his attorney or ask him to explain a point he did not understand. T. at 30-31, 68, 70. Dr. Wolfgang further opined B.W. would have had little understanding of what was happening during the competency hearing. T. at 69.

{¶23} Psychologist Bradley Hedges, Ph.D. also evaluated appellee and opined the following:

{¶24} "Based on the current available information, it appears that Bo has a relatively limited understanding of the charges levied against him and of fully understanding the court process or the negative repercussions for his behavior. Based on the available information, it does not appear as though he meets the adult standard for competency to stand trial, and perhaps only is appropriately managed through the juvenile court system inasmuch as it affords him access to treatment services." See, May 21, 2009 Psychological Evaluation filed June 2, 2009.

{¶25} The overall evidence presented was contra to appellant's position that B.W. was competent to stand trial. Appellant argues despite the record, the magistrate's decision indicated B.W. was competent:

{¶26} "While B.W.'s counsel and guardian ad litem have failed to show by a preponderance of the evidence that B.W. could not, with his limited abilities, understand

the nature of the proceedings, reasonably communicate with counsel, and participate in his own defense at this time, they have shown by a preponderance of the evidence that B.W., due to his unfortunately deprived and depraved previous upbringing, was unable to understand or comprehend the negative consequences (or repercussions) that did, will or could result from his choices and actions, at the time of the incidents. However, the evidence presented would also show that B.W. has been gaining in competency skills and abilities, even since the filing of the complaint, and is probably now competent to answer to any new delinquency charge against him."

{¶27} Appellant argues this decision is contra to the magistrate's ultimate determination that appellee was "incompetent to answer to the delinquency charges brought against him in this case." In its judgment entry filed October 8, 2009, the trial court concluded the following:

{¶28} "The Magistrate's Decision may be paraphrased or restated as holding that a juvenile who was unable, at the time of the offense, to understand and comprehend the negative consequences (court imposed or otherwise) that will or can result from the choices that the juvenile made in the incident, that led to the filing of the charges or allegations against the juvenile, is incompetent to stand trial; that such a juvenile lacked 'the capacity to understand the nature and object of the proceedings against him'. This Court agrees."

{¶29} Despite the joint conclusions of the magistrate and the trial court, the testimony and report of Dr. Wolfgang and the report of Dr. Hedges establish B.W.'s lack of competency regardless of the mens rea theory advanced by the magistrate and the trial court.

{¶30} As this court acknowledged in the *Kristopher F.* case cited supra, the issue requires a blending of adult competency law with the overall best interests of the child as mandated in juvenile proceedings.

{¶31} Because we find the record supports the conclusion of appellee's incompetency to stand trial, we affirm the decision. However, we are unable to accept as law the trial court's unsupported conclusion that insanity may be considered in determining competency or that lack of mens rea at the time of the offense is an indication of incompetency to stand trial.

{¶32} Assignments of Error I, II, and III are denied.

{¶33} The judgment of the Court of Common Pleas of Muskingum County, Ohio, Juvenile Division, is hereby affirmed.

By Farmer, J.

Wise, J. concur and

Hoffman, P.J. dissents.

s/ Sheila G. Farmer

s/ John W. Wise

JUDGES

Hoffman, P.J., dissenting

{¶34} While I agree there was sufficient record evidence to support the trial court's conclusion Appellee was incompetent to stand trial, I, nevertheless, respectfully dissent from its decision to affirm.

{¶35} I find the trial court and magistrate arrived at their decisions by applying an erroneous legal rationale as argued by Appellant in his second assignment of error. Appellee's lack of mens rea at the time of the offense does not bear on his competency to stand trial. If tried and convicted of rape, a strict liability offense in the case sub judice, Appellee's lack of appreciation of the seriousness of his conduct is a proper consideration for disposition. It is facially inconsistent for the magistrate, and vicariously as interpreted by the trial court, to find Appellee to be probably now competent to answer any new charges, but not now competent to answer the instant charges. Consideration of Appellee's lack of ability to fully understand the nature of his conduct at the time of commission of the alleged crime in determining his present competency to answer those charges is error.

{¶36} I would sustain Appellant's second assignment of error, and reverse and remand the matter to the trial court for redetermination of the competency issue.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

B.W.

:
:
:
:
:
:
:

JUDGMENT ENTRY

CASE NO. CT2009-0053

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, Juvenile Division, is affirmed. Costs to appellant.

s/ Sheila G. Farmer_____

s/ John W. Wise_____

JUDGES