[Cite as *In re M.N.*, 2010-Ohio-6465.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| IN RE: M.N., | JUDGES: |
| | Hon. William B. Hoffman, P.J. |
| A MINOR CHILD | Hon. Sheila G. Farmer, J. |
| | Hon. John W. Wise, J. |
| | Case No. CT10-0025; CT10-0031 |
| | OPINION |

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| CHARACTER OF PROCEEDING: | Appeal from the Muskingum County Court of Common Pleas, Juvenile Divison, Case No. 20820671 |
| JUDGMENT: | CT10-0025 - Affirmed<br>CT10-0031 - Dismissed |
| DATE OF JUDGMENT ENTRY: | December 27, 2010 |

APPEARANCES:


| For Appellee | For Appellant |
|---|---|
| D. MICHAEL HADDOX | BROOK M. BURNS |
| Muskingum County Prosecuting Attorney | Assistant State Public Defender |
| 27 N. Fifth Street | 250 East Broad Street |
| Suite 201 | Suite 1400 |
| Zanesville, Ohio 43701 | Columbus, Ohio 43215 |

*Hoffman, P.J.*

**{¶1}** Michael N., a juvenile delinquent, appeals his adjudication entered by the Muskingum County Court of Common Pleas, Juvenile Division. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On September 3, 2008, in Case Number 20820671, a complaint was filed in the Muskingum County Court of Common Pleas, Juvenile Division, alleging Appellant was delinquent of two counts of rape, in violation of R.C. 2907.02(A)(1)(c), felonies of the first degree if committed by an adult.

**{¶3}** On November 18, 2008, Appellant entered an admission to the first count of rape, and the State agreed to dismiss the second count of rape. The State also recommended the trial court commit Appellant to the Ohio Department of Youth Services for a minimum of one year. Appellant signed rules of probation on November 20, 2008.

**{¶4}** The trial court further classified Appellant a Tier III juvenile offender registrant with a duty to comply with registration requirements every ninety days for life.

**{¶5}** On March 25, 2009, a complaint was filed, in Case Number 20920211, alleging Appellant was delinquent for violating the terms of his probation. At the violation hearing, the State recommended the trial court impose Appellant's suspended commitment to DYS in Case Number 2082067 in exchange for Appellant's admission to the violation.

**{¶6}** Via Judgment Entry of May 11, 2009, the trial court revoked Appellant's probation, in Case Number 20820671, and committed him to DYS for a minimum period of one year, maximum of his twenty-first birthday.

**{¶7}** On April 28, 2010, Appellant filed an appeal from the trial court's May 11, 2009 Judgment Entry, in Case Number 20920211, and on June 24, 2010, Appellant filed a notice of appeal from the trial court's adjudication and commitment on November 18, 2008, in Case Number 20820671. Appellant filed a single merit brief in both appellate cases, assigning as error:

**{¶8}** "I. THE TRIAL COURT ERRED WHEN IT ADJUDICATED MICHAEL N. DELINQUENT OF RAPE, DESPITE THE FACT THAT MICHAEL NEVER ENTERED AN ADMISSION TO THE COMPLAINT, AND THE FACT THAT THE COURT FAILED TO EXPLAIN TO HIM THE CONSEQUENCES OF HIS ADMISSION AS IT RELATED TO SEX OFFENDER CLASSIFICATION.

**{¶9}** "II. THE TRIAL COURT ERRED WHEN IT ADJUDICATED MICHAEL N. DELINQUENT OF A PROBATION VIOLATION, WHEN THE STATE FAILED TO PROPERLY INVOKE THE JURISDICTION OF A JUVENILE COURT PURSUANT TO JUV.R. 35(A).

**{¶10}** "III. MICHAEL N. WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO OBJECT OT THE JUVENILE COURT'S FAILURE TO COMPLY WITH JUV.R. 29, OR TO OBJECT WHEN THE COURT HELD A PROBATION REVOCATION HEARING WHEN IT LACKED JURISDICTION TO DO SO. SIXTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

I.

(Appeal No. CT10-0031)

**{¶11}** Appellant maintains his appeal of the November 20, 2008 adjudication in Case Number 20820671 is timely as the trial court did not comply with the civil rules governing service. More specifically, Appellant asserts the appearance docket does not indicate Appellant or his counsel waived service of the dispositional judgment entry, and does not reference the specific parties served. Appellant maintains the appeal is timely pursuant to *In re Anderson* (2001), 92 Ohio St.3d 63, as neither the judgment entry or docket denotes actual service specifically on Appellant.

**{¶12}** In *In re Anderson*, the Ohio Supreme Court held:

**{¶13}** "For civil cases, App.R. 4(A) requires the notice of appeal to be filed within thirty days of 'the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in [Civ.R.] 58(B).' App.R. 4(A) thus contains a tolling provision that applies in civil matters when a judgment has not been properly served on a party according to Civ.R. 58(B). Civ.R. 58(B) requires the court to endorse on its judgment "a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal." The clerk must then serve the parties within three days of entering judgment upon the journal. 'The thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry

of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B).' *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.* (1998), 131 Ohio App.3d 734, 741, 723 N.E.2d 633, 638.

**{¶14}** "Here, the trial court never endorsed upon the judgment entry the required 'direction to the clerk to serve upon all the parties * * * notice of the judgment and its date of entry upon the journal' pursuant to Civ.R. 58(B). Moreover, the juvenile court's docket contains no indication that appellant was ever served with notice. Therefore, the time for filing a notice of appeal never began to run because the trial court failed to comply with Civ.R. 58(B). Therefore, appellant's appeal in this case was timely filed under App.R. 4(A)."

**{¶15}** Ohio Civil Rule 58(B) states:

**{¶16}** "(B) Notice of filing

**{¶17}** "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A)."

**{¶18}** Ohio Appellate Rule 4(A) reads,

**{¶19}** "(A) Time for appeal

**{¶20}** "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

**{¶21}** Upon review of the trial court docket, the November 18, 2008 entry states:

**{¶22}** "Within three (3) days after entering this judgment upon the journal, the clerk shall serve notice of this decision and its date of entry upon all parties not in default for failure to appear. Service shall be made in the manner prescribed by Civil Rule 5 and shall be noted in the appearance docket."

**{¶23}** On November 19, 2008, Deputy Clerk, Shelia A. Halsy, filed a Proof of Service with the trial court, indicating service on Appellant's mother and father and Muskingum County Child Services, via regular mail; service on Appellant via "regular mail to Thompkins Center;" and upon Appellant's counsel "Moorehead" via "box @ court."

**{¶24}** Ohio Civil Rule 5 states, in pertinent part:

**{¶25}** "(B) Service: how made

**{¶26}** "Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile transmission, mailing it to the last known address of the person to be served or, if no address is known, leaving it with the clerk of the court. The served copy shall be

accompanied by a completed copy of the proof of service required by division (D) of this rule. "Delivering a copy" within this rule means: handing it to the attorney or party; leaving it at the office of the person to be served with a clerk or other person in charge; if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion then residing in the dwelling house or usual place of abode. Service by mail is complete upon mailing. Service by facsimile transmission is complete upon transmission."

**{¶27}** Appellant filed his notice of appeal from Case No. 20820671 [Appellate Case No. CT2010-00310] on April 28, 2010.

**{¶28}** Based upon the above, we find Appellant was properly served with the trial court's November 18, 2008 entry. Accordingly, this Court finds Appellant's appeal of his underlying conviction in Case Number 20820671 is untimely. It is ordered dismissed.

II.

(Appeal No. CT10-0025)

**{¶29}** In the second assignment of error, Appellant maintains the trial court erred in adjudicating him delinquent of the probation violation in Case Number 20920211 because the State failed to properly invoke the jurisdiction of the juvenile court pursuant to Juvenile Rule 35(A). Specifically, Appellant argues the State should have invoked the motion in the original proceedings, trial court case no 20820671.

**{¶30}** Juvenile Rule 35 reads, in pertinent part:

**{¶31}** "(A) Continuing jurisdiction; invoked by motion

**{¶32}** "The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

**{¶33}** "(B) Revocation of probation

**{¶34}** "The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to Juv. R. 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv. R. 34(C), been notified."

**{¶35}** In this matter, the State filed a new complaint in trial court Case Number 20920211 alleging Appellant had violated the terms and conditions of his probation. [Trial court case number 20920211]. Appellant asserts the State erred in not complying with Juvenile Rule 35 by filing a motion in the original case number 20820671.

**{¶36}** The probation officer filed a new complaint pursuant to R.C. 2151.23(A)(1) and R.C. 2152.02(F) alleging Appellant had violated the terms and conditions of his probation. The clerk assigned the complaint a separate case number.

**{¶37}** Section 2151.23(A)(1) reads:

**{¶38}** "(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

**{¶39}** "(1) Concerning any child who on or about the date specified in the complaint, indictment, or information is alleged to have violated section 2151.87[1] of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant;" (Footnote added).

**{¶40}** Section 2152.02(F) reads:

**{¶41}** "(F) "Delinquent child" includes any of the following:

**{¶42}** "(1) Any child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult;

**{¶43}** "(2) Any child who violates any lawful order of the court made under this chapter or under Chapter 2151. of the Revised Code other than an order issued under section 2151.87 of the Revised Code;

**{¶44}** "(3) Any child who violates division (C) of section 2907.39, division (A) of section 2923.211, or division (C)(1) or (D) of section 2925.55 of the Revised Code;"

**{¶45}** We find the juvenile court had continuing subject matter jurisdiction in this matter; however, the complaint was not properly filed under the original case number in compliance with Juvenile Rule 35. However, the State's procedural error does not divest the trial court of jurisdiction. Appellant did not raise the procedural error in the

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[1] R.C. 2151.87 governs prohibitions relating to cigarettes or tobacco products, and is irrelevant to the case sub judice.

trial court, and has not demonstrated surprise or prejudice as a result thereof. Accordingly, Appellant's second assignment of error is overruled.

III.

**{¶46}** In the third assignment of error, Appellant maintains he was denied the effective assistance of trial counsel when counsel failed to object to the trial court's failure to comply with Juvenile Rule 29, or to object when the court held a probation revocation hearing without jurisdiction to do so.

**{¶47}** Based upon our analysis and disposition of Appellant's first and second assignments of error, we find Appellant's ineffective assistance of counsel argument with regard to his original adjudication in Case Number 20820671 barred by res judicatata. As to Appellant's arguments relative to failure to object to the trial court's jurisdiction in the probation revocation hearing, as noted supra, we find Appellant has not demonstrated prejudice as a result of the error.

**{¶48}** Appellant's Assignment of Error No. III is overruled.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer ___________________
HON. SHEILA G. FARMER

s/ John W. Wise ______________________
HON. JOHN W. WISE

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

IN RE: M.N., :
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A MINOR CHILD :
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: JUDGMENT ENTRY
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: Case No. CT10-0025

For the reasons stated in our accompanying Opinion, Appellant's May 11, 2009 adjudication entered by the Muskingum County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer ___________________
HON. SHEILA G. FARMER

s/ John W. Wise ______________________
HON. JOHN W. WISE

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

IN RE: M.N., :
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A MINOR CHILD :
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: JUDGMENT ENTRY
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: Case No. CT10-0031

For the reasons stated in our accompanying Opinion, Appellant's appeal of the November 18, 2009 Judgment Entry of the Muskingum County Court of Common Pleas, Juvenile Division is hereby dismissed. Costs to Appellant.

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer ___________________
HON. SHEILA G. FARMER

s/ John W. Wise________________________
HON. JOHN W. WISE