

Dated: March 12, 2010

VUKOVICH, P.J.

¶{1} Delinquent child-appellant C.L.P. appeals the decision of the Mahoning County Juvenile Court accepting his admission to two counts of aggravated robbery with gun specifications and committing him to a term in the Ohio Department of Youth Services (DYS). Appointed appellate counsel filed a no merit brief and requested leave to withdraw. A review of the case file and brief reveals that there was a technical difficulty and the admission hearing was not recorded as is required by Juv.R. 37. Thus, as the Juvenile Court failed to comply with the prescribed rules, the admission is reversed and the cause is remanded for a new admission hearing. Counsel's motion to withdraw is denied.

STATEMENT OF CASE

¶{2} On October 23, 2007 a complaint was issued against C.L.P. alleging two counts of aggravated robbery in violation of R.C. 2911.01 if committed by an adult and one count of attempted murder, in violation of R.C. 2903.02 and 2923.02 if committed by an adult. All three alleged offenses contained gun specifications in violation of R.C. 2941.145.

¶{3} C.L.P. originally denied the charges, however, after reaching an agreement with the state where the attempted murder charge was dismissed, C.L.P. entered an admission to both of the aggravated robbery charges with the gun specifications. The magistrate accepted the admissions. 02/14/08 J.E. However, the record does not contain a transcript of this adjudicatory hearing. Counsel, in the brief, asserts that he was informed by the juvenile court that the recording device malfunctioned.

¶{4} The dispositional hearing was held on February 21, 2008. The juvenile court committed C.L.P. to DHS for "a minimum of Twelve (12) months with credit for time served in Mahoning County Juvenile Detention Center" for the first aggravated robbery offense and "[t]hirty six (36) months on the Gun Specification" attached to that aggravated robbery offense. 02/21/08 J.E. As to the second count of aggravated robbery and the attached gun specification, he received "a minimum of Twelve (12)

months and Thirty six (36) months on the Gun Specification * * * to run consecutive.”
02/21/08 J.E. There is a transcript of this proceeding.

¶{5} C.L.P. now appeals and counsel has filed a no merit brief asking to withdraw because there are allegedly no appealable issues.

ANALYSIS

¶{6} When appellate counsel seeks to withdraw and discloses that there are no meritorious arguments for appeal, the filing is known as a no merit or an *Anders* brief. See *Anders v. California* (1967), 386 U.S. 738. In this district, it has also been called a *Toney* brief. See *State v. Toney* (1970), 23 Ohio App.2d 203.

¶{7} In *Toney*, this court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

¶{8} “3. Where court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

¶{9} “4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

¶{10} “5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.

¶{11} “* * *

¶{12} “7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.” *Id.* at syllabus.

¶{13} The no merit brief was filed by counsel on August 11, 2009. On September 23, 2009, this court informed C.L.P. of counsel's no merit brief and granted him 30 days to file his own written brief. 09/23/09 J.E. C.L.P. did not file a pro se

brief. Thus, we will proceed to independently examine the record to determine if the appeal is frivolous.

¶{14} The no merit brief reviews the disposition, whether trial counsel was ineffective and whether the admission was knowingly, intelligently and voluntarily made. A review of the file reveals that these are the only possible arguments that could be made in this appeal. In reviewing each of these areas, counsel concludes that the appeal is frivolous. As such, each of these three areas will be reviewed in turn.

DISPOSITION

¶{15} We have recently explained our standard of review as follows:

¶{16} “A juvenile court enjoys the broad discretion to create a dispositional order for an adjudicated delinquent child. *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, at ¶6. In fact, a juvenile court is allowed more discretion in its dispositional sentencing than for comparable actions under criminal law. *In re Tiber*, 154 Ohio App.3d 360, 2003-Ohio-5155, at ¶25. An appellate court thus reviews a juvenile court's order of disposition with great deference, and must not reverse the decision absent an abuse of discretion. *In re D.S.*, supra; *State v. Matha* (1995), 107 Ohio App.3d 756, 760. An abuse of discretion is more than an error of judgment; it means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.” *In re P.S.*, 7th Dist. No. 08MA239, 2009-Ohio-5269, ¶16.

¶{17} A review of this record does not show that the juvenile court abused its discretion in ordering the disposition that it did. At the dispositional hearing it was confirmed that C.L.P. has previously been found to be a delinquent child and that there have been previous attempts at rehabilitating him. The rehabilitative attempts were made through the Wrap Around Services and he ran away from three of those facilities. (02/21/08 Tr. 3-6). As the court noted:

¶{18} “So now we have this PDR which recommends that the youth be sent to the Department of Youth Services, and basically it was determined by the probation officer that he should be committed because he has run away from three facilities and has received new charges on each case every time he’s been caught, that he has little

remorse and fails to take any responsibility for his actions and that he needs a victim awareness program to understand the pain that he has caused his victims, as Mr. Jackson notes, if a follower, seems to look for negative influences.” (02/21/08 Tr. 4).

¶{19} Likewise, the state also commented:

¶{20} “And I certainly don’t negate the hard road that he’s led prior to coming to this court; however, I don’t know that there’s any other place for [C.L.P.] other than the Department of Youth Services. And given his age, he was not eligible for even a discretionary bindover because he was too young (C.L.P. was thirteen years old at the time of the offense). If C.L.P. was one-year older, the state would have filed a motion to relinquish jurisdiction in this matter and he would have been a mandatory bindover. So a stay at the Department of Youth Services is not out of the question. I’m sorry we haven’t been successful in rehabilitating him at this point.” (02/21/08 Tr. 8-9).

¶{21} Thus, considering the juvenile’s record and failed rehabilitative attempts, it cannot be found that an order committing him to DYS for a minimum of 12 months for each aggravated robbery offense and three years for each firearm specification to run consecutive was an abuse of discretion.

¶{22} Furthermore, it is noted that merger of the firearm specifications was not required because the firearm was used in two separate transactions; it was used on October 21, 2007, during the commission of the aggravated robbery against James Bryant and it was again used on October 22, 2007 during the commission of the aggravated robbery against Arthur Williams. *State v. Gilmore*, 7th Dist. No. 04MA214, 2005-Ohio-2936, ¶14 (stating that two separate transactions do not require merger of gun specifications).

¶{23} Consequently, for the above reasons, appellate counsel is correct that there is no appealable issue regarding the disposition of C.L.P.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶{24} To prove an allegation of ineffective assistance of counsel, the two-prong *Strickland* test must be met. *Strickland v. Washington* (1984), 466 U.S. 668. First, one must establish that counsel's performance fell below an objective standard of reasonable representation. *Strickland*, 466 U.S. at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Second, one must show that he/she

was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 687. Or in other words, it must be shown that but for counsel's errors the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. If this court finds that either prong fails, there is no need to analyze the remaining prong because in order for ineffective assistance of counsel to be shown both prongs must be established by the appellant. *State v. Herring*, 7th Dist. No. 06JE8, 2007-Ohio-3174, ¶43.

¶{25} We have recently explained that for adult offenders a guilty plea waives ineffective assistance of counsel claims for defects that occur prior to the guilty plea. *State v. Maguire*, 7th Dist. No. 08MA188, 22009-Ohio-4393, ¶18. It does not, however, waive defects that occur after the plea was entered, such as sentencing errors caused by counsel's ineffective assistance that prejudice the offender. *Id.* Those holdings equally apply to the juvenile system when a juvenile admits the charges.

¶{26} Here, the record shows that counsel argued for merger of the firearm specifications and argued for minimum and concurrent time. His arguments were based on the juvenile's hard life and his age. While the juvenile court may not have found merit with counsel's argument and did not necessarily follow the recommendation that does not mean that counsel was ineffective. As aforementioned, C.L.P. has a previous record and the court's attempts at rehabilitation were futile because of the child's previous actions. Thus, counsel made the best argument it could and, therefore, this court should not find that counsel provided deficient performance.

¶{27} Furthermore, there is no indication in the record, that C.L.P. was prejudiced by counsel's arguments and actions at the dispositional hearing. Thus, for all those reasons, this court could find that appellate counsel is correct that there are no appealable issues regarding counsel's assistance at the disposition hearing.

ADMISSION

¶{28} In the appellate brief, counsel asserts that there is no issue as to whether C.L.P.'s admission was knowingly, intelligently, and voluntarily made. This assertion is based on the fact that there is no transcript of the adjudicatory hearing. In the brief,

counsel contends that he spoke to the clerk of the juvenile court and was informed that the recording of the adjudicatory hearing was not available because the recording equipment malfunctioned. Counsel then admits that when a transcript is unavailable submitting a statement of the evidence pursuant to App.R. 9(C) and/or (E) is permitted. He then asserts that an App.R. 9 statement of the evidence was not created because at the adjudicatory hearing the juvenile did not present any evidence.¹ Given these facts, counsel concludes, pursuant to *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, we must presume the regularity of the proceedings. In addition to presuming the regularity, he asserts that the magistrate's adjudicatory order also indicates that the admission was knowingly, intelligently, and voluntarily entered. In that order, the magistrate states that C.L.P., present with counsel, was advised of the effect of his plea and that the plea was made freely and voluntarily with full knowledge of the consequences.

¶{29} In determining whether counsel is correct that there is no appealable issue, we must look at two of the Rules of Juvenile Procedure – Juv.R. 29 and Juv.R. 37.

¶{30} Regarding a knowing, intelligent, and voluntary admission, Juv.R. 29(D) states:

¶{31} “The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

¶{32} “(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

¶{33} “(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

¹It is noted that counsel's statement that he could not file an App.R. 9 statement because C.L.P. did not present evidence at the adjudicatory hearing is incorrect. An App.R. 9 statement is not always a statement of the evidence, sometimes it is a statement of the proceedings. The rule specifically used the word “statement of evidence or **proceedings**.” App.R. 9(C) (Emphasis added). If counsel present at the adjudicatory hearing remembered what occurred, a statement could have been submitted to the state and juvenile court for approval.

¶{34} “The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.” Juv.R. 29(D).

¶{35} We have previously stated that following the directive of Juv.R. 29 is mandatory. *In re Whatley*, 7th Dist. No. 06MA56, 2007-Ohio-3039, ¶26, citing *In re Royal* (1999), 132 Ohio App.3d 496, 502, *In re Gault* (1967), 387 U.S. 1, 41 and *In re Graham*, 7th Dist. No. 01-CA-92, 2002-Ohio-6615.

¶{36} Also at play in this case is Juv.R. 37, which requires a juvenile court to make a record of all adjudicatory hearings, dispositional hearings, and all proceedings before a magistrate. Juv.R. 37(A). See, also, *In re Whatley*, 7th Dist. No. 06MA56, 2007-Ohio-3039, ¶28. According to that rule, the juvenile court here was under a mandatory duty to record the proceedings because not only did a magistrate preside over the adjudicatory hearing, but also because it was an adjudicatory hearing.

¶{37} In 2000, the Ninth Appellate District reviewed the assigned error of whether the juvenile’s admission was knowingly, intelligently, and voluntarily entered. *In re Hoover* (Sept. 27, 2000), 9th Dist. No. 19284. Like the case at hand, there was a malfunction with the recording instrument and, as such, there was no transcript of the adjudicatory hearing available. The Ninth Appellate District provided the following reasoning for reversing and remanding the matter so that the juvenile could enter a new plea.

¶{38} “In the case at bar, the State has asserted that pursuant to App.R. 9(C), appellant had the burden to provide the record for appeal. The Ohio Supreme Court has previously determined that if an appellant fails to provide the record for appeal, courts should presume the regularity of a lower court's proceedings. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. However, the present case is distinguishable from *Knapp* because this matter involves the fundamental constitutional right of a juvenile-defendant's waiver of his right to trial and a silent record. The United States Supreme Court has held that a reviewing court cannot presume that a defendant voluntarily, knowingly, and intelligently entered a plea of guilty from a silent record. *Boykin v. Alabama* (1969), 395 U.S. 238, 242-244. Because the presumption is against a defendant's waiver of his right to trial, the State

bears the burden of overcoming this presumption. *State v. Dyer* (1996), 117 Ohio App.3d 92, 95. '[T]he waiver must affirmatively appear in the record.' *Id.*, citing *In re East* (1995), 105 Ohio App.3d 221, 224. Finally, this Court has previously held that 'the use of a form or stamp entry reciting that all rights have been fully explained is not a substitute for a proper recording of proceedings[.]' *State v. Minor* (1979), 64 Ohio App.2d 129, 131.

¶{39} "In case *sub judice*, Appellant attempted to provide this Court with the transcript of the proceedings; however, a malfunction with the recording equipment thwarted his efforts. As such, the record in this case was silent. When faced with a silent record, the burden shifted to the State to show that Appellant voluntarily waived his right to trial and entered a plea knowingly, voluntarily, and intelligently. See *Boykin*, 395 U.S. at 242-244; *Dyer*, 117 Ohio App.3d at 95. Although the magistrate's journal entry indicated that Appellant 'knowingly and voluntarily waived his rights to a trial and entered a plea of admission to the charge of Aggravated Robbery,' the journal entry is not a substitute for a recording of the proceedings. See *Minor*, 64 Ohio App.2d at 131. Based upon the foregoing, the State did not overcome the presumption against Appellant voluntarily waiving his right to trial because the waiver must affirmatively appear on the record. Appellant's argument is well taken." *Id.* See, also, *In re Grace*, 5th Dist. No. 01CA85, 2002-Ohio-1450 (also reversing and remanding for a new adjudicatory hearing where there was no record available of the adjudicatory hearing because the tape was erased. However, in this case, the appellate court did not discuss App.R. 9 and whether the juvenile could have attempted to make a record of the adjudicatory proceeding by using that rule) and *In re Raypole*, 12th Dist. Nos. CA2002-01-001 and CA2002-01-002, 2003-Ohio-1066, ¶32 (holding that because the juvenile court complied with Juv.R. 37 (even though the record was destroyed in compliance with Sup.R. 26.03(H)(1)), but no attempt was made to reconstruct the record in accordance with App.R. 9(C), the matter was remanded for findings of fact pursuant to Juv.R. 29(F)(3) for the limited purpose of determining whether the waiver was knowingly, intelligently and voluntarily entered). But, see, *State v. Hutchinson* (Nov. 17, 2000), 11th Dist. No. 99-P-0054; *State v. Moody* (Mar. 16, 1998), 4th Dist. No. 97CA14 (appellate court decisions that have

held, regarding Crim.R. 11 plea hearings and claims that the constitutional rights were not advised, that when no transcript is filed the appellate court must presume the regularity of the proceedings at the Crim.R. 11 plea hearing.

¶{40} Likewise, regarding the state's burden of proving the admission was properly made when the record is silent, the Third Appellate District has explained that when the state failed to file its appellate brief, it failed to meet its burden. *In re Amos*, 154 Ohio App.3d 434, 2003-Ohio-5014, ¶8.

¶{41} We find the reasoning of our sister districts to be sound. Accordingly, we hold that the presumption of regularity of proceedings vanishes and the burden falls upon the State to show any waiver of fundamental constitutional rights whenever a juvenile court fails to make a record of the proceedings at an adjudicatory or dispositional hearing. Here, the State failed to file a brief or present any argument and therefore, failed its burden. Furthermore, we additionally agree with those appellate court decisions that have held that the judgment entries, like the one in the instant case, stating that all the rights have been explained, is not sufficient to show that the admission was knowingly, voluntarily and intelligently entered. *In re Amos*, 154 Ohio App.3d 434, 2003-Ohio-5014, ¶8; *In re Grace*, 5th Dist. No. 01CA85, 2002-Ohio-1450; *In re Hoover* (Sept. 27, 2000), 9th Dist. No. 19284.

¶{42} For the foregoing reasons, the judgment of the trial court regarding appellant's admission is reversed and vacated and this cause is remanded back to the Juvenile Court for a new admission hearing. Counsel's motion to withdraw is denied.

Donofrio, J., concurs.

Waite, J., concurs.