

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BROWN COUNTY

IN RE: : CASE NO. CA2021-07-009  
T.D. : OPINION  
 : 2/28/2022  
 :  
 :  
 :

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS  
JUVENILE DIVISION  
Case No. 20192062

Zac Corbin, Brown County Prosecuting Attorney, and Mary McMullen, Assistant Prosecuting Attorney, for appellee.

Office of the Public Defender, and Abigail Christopher, Assistant State Public Defender, for appellant.

**M. POWELL, P.J.**

{¶1} Appellant, T.D., appeals a decision of the Brown County Court of Common Pleas, Juvenile Division, adjudicating him a delinquent child.

{¶2} Appellant was born on March 29, 2005. On June 29, 2019, a complaint was filed in the juvenile court alleging that appellant was a delinquent child for having committed two counts of rape and one count of gross sexual imposition, acts that would be felony

offenses if committed by an adult. The complaint alleged that the offenses occurred between February 15, 2018, and March 25, 2019. The matter proceeded to an adjudicatory hearing on November 11, 2019. During the hearing, appellant entered an admission to one count of rape in violation of R.C. 2907.02(A)(1)(b). Specifically, appellant admitted he digitally penetrated the victim's anus on February 25, 2019, when they were alone on a couch watching television. The juvenile court adjudicated appellant a delinquent child and the remaining counts were dismissed.

{¶3} A dispositional hearing was held on January 9, 2020. The juvenile court committed appellant to the Ohio Department of Youth Services ("DYS") for a minimum of 12 months to the maximum period of his 21st birthday, suspended the commitment, and placed appellant on probation for an indefinite period of time. The court further ordered appellant to complete sex offender treatment. Appellant was continued on probation several times after probation violations. However, on April 22, 2021, following appellant's admission to a fourth probation violation, the juvenile court imposed the previously suspended 12-month commitment to DHS.

{¶4} Appellant filed a direct appeal but subsequently voluntarily dismissed it. In reviewing appellant's fourth probation violation, appellant's counsel believed that appellant had been adjudicated delinquent for rape under R.C. 2907.02(A)(1)(b), contrary to the Ohio Supreme Court's opinion in *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671. Consequently, appellant moved this court for leave to file a delayed appeal of his original delinquency adjudication. This court granted appellant's motion for delayed appeal in *In re T.D.*, 12th Dist. Brown No. CA2021-07-009 (Sept. 13, 2021) (entry granting motion for leave to file delayed appeal).

{¶5} Appellant now appeals his original delinquency adjudication, raising two assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} THE LOWER COURT ERRED WHEN IT ADJUDICATED T.D. DELINQUENT OF RAPE UNDER R.C. 2907.02(A)(1)(b).

{¶8} Citing the supreme court's *In re D.B.* opinion, appellant argues that his delinquency adjudication for rape under R.C. 2907.02(A)(1)(b) is unconstitutional under the Due Process and Equal Protection Clauses of the Ohio and United States Constitutions because he was under the age of 13 when the offense occurred. In support of his argument, appellant also cites *In re S.L.McC. Jr.*, 5th Dist. Coshocton No. 2013CA0016, 2014-Ohio-2485, and *In re M.B.*, 5th Dist. Ashland No. 15-COA-028, 2016-Ohio-4780.

{¶9} R.C. 2907.02(A)(1)(b), the statutory rape provision, provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender \* \* \* when \* \* \* [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶10} In 2011, the Ohio Supreme Court held that "R.C. 2907.02(A)(1)(b) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13." *In re D.B.*, 2011-Ohio-2671 at ¶ 33. The court held that

As applied to offenders who are under the age of 13 themselves, the statute is unconstitutionally vague in violation of the Due Process Clause of the United States Constitution because arbitrary and discriminatory enforcement is encouraged. Application of the statute in this case also violates the Equal Protection Clause of the United States Constitution because only one child was charged with being delinquent, while others similarly situated were not.

*Id.* at ¶ 32.

{¶11} In *In re S.L.McC. Jr.*, the juvenile was adjudicated delinquent after he entered admissions to two counts of statutory rape. The complaint alleged that the offenses occurred between November 1, 2008, and February 28, 2009. The juvenile turned 13 years

old on January 4, 2009. Citing *In re D.B.*, the Fifth District Court of Appeals held that the juvenile's "due process rights were violated when he was adjudicated delinquent for rape in violation of R.C. 2907.02(A)(1)(b)" because he was under the age of 13 during most of the time frame in the complaint. *In re S.L.McC. Jr.*, 2014-Ohio-2485 at ¶ 16-17.

{¶12} In *In re M.B.*, the juvenile was adjudicated delinquent on three counts of statutory rape. The complaint alleged that the first incident of rape occurred between March 11, 2011, and October 21, 2014. The juvenile turned 13 years old on September 28, 2012. The victim did not provide the date of the incident but testified it occurred when she was in "first or second grade." Citing *In re D.B.* and noting that when the victim was in first grade, the juvenile "would have been in sixth grade and approximately 12 to 13 years of age," the Fifth District Court of Appeals found that the juvenile "could not be adjudicated delinquent of rape for the first count of rape when he himself may have been under the age thirteen at the time of the offense[.]" *In re M.B.*, 2016-Ohio-4780 at ¶ 73. Consequently, the court of appeals held that the juvenile's "adjudication of delinquency on Count One is against the manifest weight and sufficiency of the evidence as the evidence demonstrates [he] was thirteen or under at the time he committed the first count of rape." *Id.* at ¶ 77.

{¶13} We find that the case at bar is readily distinguishable from both *In re D.B.* and the Fifth District's opinions above. The complaint alleged that the statutory rape offense, to which appellant entered an admission, occurred between February 15, 2018, and March 25, 2019, when appellant and the victim were sitting on a couch watching television. Appellant was born on March 29, 2005, and therefore turned 13 years old on March 29, 2018. Thus, according to the complaint, the offense could have occurred either before or after appellant was 13 years old. However, unlike the cases cited above, appellant explicitly admitted during the adjudicatory hearing that the offense occurred on February 25, 2019, when he was 13 years, 10 months, and 27 days old. There is "no nebulous timeframe"

regarding the statutory rape offense to which appellant entered an admission. *In re B.J.S.*, 7th Dist. Belmont No. 15 BE 0057, 2017-Ohio-1258, ¶ 16 (upholding a juvenile's delinquency adjudication for statutory rape where an incident report in the record reflected that the offense occurred when the juvenile was 14 years old, where the juvenile admitted to conduct which occurred when he was 14 years old, and where no objections were made during the plea hearing when the juvenile entered his admission). Furthermore, no objections were made during the adjudicatory hearing regarding appellant's age at the time of the offense. *Id.* at ¶ 13, 16.

{¶14} Accordingly, based upon appellant's explicit admission that the statutory rape offense occurred on a date *after* his 13th birthday, we find that *In re D.B.* does not apply here. The juvenile court did not err in adjudicating appellant delinquent of statutory rape under R.C. 2907.02(A)(1)(b).

{¶15} Appellant's first assignment is overruled.

{¶16} Assignment of Error No. 2:

{¶17} T.D. WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO OBJECT TO HIS UNLAWFUL ADJUDICATION OF RAPE UNDER R.C. 2907.02(A)(1)(b).

{¶18} Appellant argues that his trial counsel was ineffective because he failed to object to appellant's unlawful adjudication for rape under R.C. 2907.02(A)(1)(b). Appellant asserts that his trial counsel "was aware that T.D. was only 12 when the offense occurred and should have corrected the [juvenile] court's mistaken assumption that T.D. could receive a rape adjudication under R.C. 2907.02(A)(1)(b)."

{¶19} To establish ineffective assistance, appellant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors,

the proceeding's result would have been different. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 62. The failure to make an adequate showing on either prong is fatal to appellant's ineffective assistance of counsel claim. *State v. Haynes*, 12th Dist. Butler No. CA2010-10-273, 2011-Ohio-5743, ¶ 16.

{¶20} In light of our resolution of appellant's first assignment of error based upon his explicit admission he committed the statutory rape offense on a date *after* his 13th birthday, we find that trial counsel was not ineffective in failing to object to appellant's delinquency adjudication for rape under R.C. 2907.02(A)(1)(b).

{¶21} Appellant's second assignment of error is overruled.

{¶22} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.