

IN THE
SUPREME COURT OF INDIANA

COURT OF APPEALS CASE NO. 18A-JV-618

A.M.)	Appeal from the
Appellant (Respondent Below))	Kosciusko Superior Court 1
)	
v.)	Cause No. 43D01-1708-JD-292
)	
STATE OF INDIANA)	The Honorable David C. Cates,
Appellee (Petitioner Below))	Judge

APPELLANT'S PETITION TO TRANSFER

Cara Schaefer Wieneke, #24374-49
WIENEKE LAW OFFICE, LLC
P.O. Box 368
Brooklyn, Indiana 46111
PH (317) 331-8293
FX (765) 813-0621
Email: cara@wienekelaw.com
Attorney for Appellant

Appellant's Petition to Transfer

QUESTION PRESENTED ON TRANSFER

Whether this Court should accept the invitation from the Court of Appeals to determine whether children deserve effective representation throughout delinquency proceedings.

TABLE OF CONTENTS

Question Presented on Transfer	2
Table of Contents	3
Background and Prior Treatment of Issues on Transfer	4
Argument	6
Conclusion	13

BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

A.M. was a 15-year-old child who suffered from an emotional disability, received special education services at school, and in the past had been hospitalized on multiple occasions for acute mental health episodes. [App. Vol. 2, pg. 11]. Consequently, A.M. participated in outpatient counseling for years and was prescribed an anti-depressant. [App. Vol. 2, pg. 11].

In October 2017, A.M. admitted to committing an act that would be Class B misdemeanor disorderly conduct if committed by an adult. [App. Vol. 2, pg. 32]. The act involved A.M. fighting with another child. [App. Vol. 2, pg. 15]. A.M. was placed on supervised probation. [App. Vol. 2, pgs. 77-78].

In January 2018, the State requested that A.M.'s disposition be modified as a result of the following allegations: a fight A.M. had with another child, A.M.'s expulsion from school, A.M.'s disobedience, A.M. drank alcohol on the bus, and A.M. committed burglary resulting in theft of a backpack. [App. Vol. 2, pgs. 87-88]. The State withdrew the alcohol and burglary allegations, and A.M. stipulated to the remaining allegations. [R. Vol. 2, pgs. 5-6].¹ Rather than provide the court with a

¹ The Court of Appeals made much ado of the fact that counsel had "negotiated" the redaction of the alcohol and burglary allegations, but the negotiation is not in the record. *See A.M.*, slip op. at 14. The Court of Appeals

Appellant's Petition to Transfer

more complete picture of A.M.'s circumstances or otherwise advocate on A.M.'s behalf, A.M.'s attorney conceded that A.M. should be placed in the D.O.C.:

I am befuddled by the actions of [A.M.]. I think he's a good kid. I think he's got a bright future ahead of him. He's smart, has some real opportunities, but the path he's going down is leading him to prison and he's just going to end up wallowing away there, probably spend most of his life there. You don't break into people's houses, you don't steal guns, don't follow the rules, get kicked out of school. You don't get an education and that's going to end up being his downfall. I think except for being kicked out of Gateway, he could have had an opportunity here. He could have been on home detention and shown everybody that he could do right. Instead he's going to go to the DOC, go to Logansport for an evaluation, do his six months, eight months or a year, as long as he does right, and hopefully will come back and have learned a lesson. I have a lot of hope for [A.M.]. I hope he understands that what's going to happen here is not a punishment but rather a chance to get a leg up in life and to try to do the right thing. I hope he does

simply assumed that a negotiation took place. However, neither allegation seemed particularly credible. Regarding the alcohol allegation, the officer investigating the incident acknowledged he could not confirm that A.M. had consumed alcohol. [App. Vol. 2, pg. 106]. With respect to the burglary allegation, the victim claimed that a backpack found in his living room looked like A.M.'s backpack. The victim later told police that a different individual was rumored to have some of the victim's electronics. This was the only "evidence" connecting A.M. to the crime. [See App. Vol. 2, pg. 103].

Appellant's Petition to Transfer

good, and when he comes back he can really grow and be a good kid.

[R. Vol. 2, pgs. 6-7].

A.M. appealed his commitment to the D.O.C., arguing, *inter alia*, that he had received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court of Appeals held that even though A.M. had a constitutional right to counsel, because the right did not derive directly from the Sixth Amendment, the *Strickland* standard did not apply. *A.M. v. State*, ___ N.E.3d ___, 2018 Ind. App. LEXIS 288, slip op. at 11-12 (Ind. Ct. App. 2018). Rather, the Court of Appeals held that a juvenile modification proceeding was more akin to a probation revocation proceeding, and counsel's performance was to be reviewed under the standard enunciated in *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989).

ARGUMENT

I. The Most Critical Stage of the Juvenile Justice Process is Disposition

Indiana was one of the first states to recognize that children engaging in delinquent behavior required treatment and rehabilitation based on their unique circumstances. *See* Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 Ind. L. Rev. 279, 279-80

Appellant's Petition to Transfer

(1997). While determining whether a child engaged in delinquent behavior is a critical part of the process, how to rehabilitate the child who has engaged in delinquent behavior is arguably the most important stage of the juvenile justice proceeding. *See* NJDC's Juv. Def. Standard 6.1, Commentary, *found at* <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf> (last checked Nov. 19, 2018).

The juvenile court judge is given "maximum flexibility" to create an individualized treatment plan for the child. *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319, 323 (Ind. 1970). But children are not robots; they, like adults, are individuals and live in an environment where circumstances change, often in ways that are outside their control. Thus, juvenile courts retain wide discretion to modify the personalized treatment plan to more specifically address a child's changing needs.

II. Counsel Plays an Essential Role in Advocating For a Disposition Plan That is Consistent With the Child's Desired Outcome

Indiana provides juvenile court judges with a multitude of dispositional alternatives and requires that judges be given a complete picture of the child's unique circumstances so that they can determine the most effective treatment plan for the child. *See generally* Ind. Code chs. 31-37-17, -18. Juvenile defense counsel has a duty to involve the child in

Appellant's Petition to Transfer

every stage of the juvenile justice process, but most particularly in the dispositional stage, where counsel and the child must create a disposition plan that “is consistent with the client’s desired outcome.” NJDC Juv. Def. Standard 6.1, *supra*. Once a disposition plan is created, counsel has a duty to “zealously advocate” on the child’s behalf for the juvenile court judge to craft a disposition that is consistent with the child’s desired plan. *Id.*

III. In Recognizing the Crucial Role Counsel Plays, Indiana Requires Appointment of Counsel in Nearly Every Delinquency Case and Throughout the Entire Juvenile Proceeding, Including Post-Disposition

For decades Indiana has recognized that “[a] juvenile is entitled to the assistance of counsel at every stage of the juvenile proceedings.” *Bridges v. State*, 260 Ind. 651, 299 N.E.2d 616, 617 (1973). *See also Pigg v. State*, 253 Ind. 329, 253 N.E.2d 266 (1969) (same). Indiana Code section 31-32-2-2 entitles juveniles to the assistance of counsel in delinquency proceedings. Indiana Criminal Rule 25 recognizes the right to counsel and requires that counsel be appointed in practically every delinquency proceeding. Moreover, Criminal Rule 25 requires counsel be appointed “before convening any hearing” in which the child may admit facts that could lead to placement outside the home; thus, counsel must be

Appellant's Petition to Transfer

appointed at the earliest opportunity and through any post-disposition matters.

IV. Simply Because The Right to Counsel For Juveniles Stems From the Due Process Clause, and Not the Sixth Amendment, Does Not Call For Watered-Down Protection For Juveniles

The right to counsel, regardless of its origin, is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). This Court has previously applied the *Strickland* standard to evaluate counsel's performance in a juvenile delinquency proceeding. See *S.T. v. State*, 764 N.E.2d 632 (Ind. 2002). The Court of Appeals held that *S.T.* was inapposite, however, because this Court's evaluation related only to counsel's performance during the adjudication phase of the delinquency proceeding and not to the pre- and post-adjudicative phases. See *A.M.*, slip op. at 12-13.

The Court of Appeals, in holding that the *Strickland* standard did not apply to those phases, cited its decision in *Jordan v. State*, 60 N.E.3d 1062 (Ind. Ct. App. 2016). In *Jordan*, the Court of Appeals held that the *Baum* standard applied to the evaluation of counsel's performance in an adult probation revocation proceeding. *Id.* at 1068-69. The *Jordan* court

Appellant's Petition to Transfer

had relied upon its decision in *Childers v. State*, 656 N.E.2d 514 (Ind. Ct. App. 1995), where the Court of Appeals first applied the *Baum* standard to a probation revocation proceeding. The *Childers* court reasoned that since an adult probation revocation proceeding was civil in nature, it was similar to a post-conviction relief proceeding and, consequently, the same standard should be used to evaluate counsel performance. *Id.* at 517.

V. The *Baum* Standard is Not Appropriate For Evaluating the Representation of Children in Delinquency Proceedings

This Court's decision in *Baum* was limited to post-conviction relief proceedings, which involve collateral challenges to a conviction or sentence for which defendants have no constitutional right to the assistance of counsel. *See Baum*, 533 N.E.2d at 1201. This Court has never decided the issue of whether the *Baum* standard applies to adult probation revocation proceedings. The issue is apparently not settled in the Court of Appeals either. *See, e.g., Hart v. State*, 889 N.E.2d 1266 (Ind. Ct. App. 2008) (applying *Strickland*, not *Baum*, standard to probation revocation proceeding). Moreover, probation revocation proceedings are not collateral to a criminal case but a "critical stage" of a criminal proceeding. *See, e.g., Mempa v. Rhay*, 389 U.S. 128, 134-35 (1967).

Appellant's Petition to Transfer

Additionally, the decision by the Court of Appeals in this case creates a confusing and difficult standard to apply in future cases. Courts will be required to review counsel's performance in some phases of the juvenile delinquency process under the *Strickland* standard and counsel's performance in the remaining phases under the *Baum* standard. What if a juvenile raises several instances of ineffective assistance in a delinquency proceeding and claims they cumulatively caused him to suffer prejudice? Applying both standards and evaluating their cumulative effect would be burdensome.

Finally, the consequences in juvenile delinquency proceedings are often comparable in seriousness to a felony prosecution. *Gault*, 387 U.S. at 36. The harshest disposition involves commitment to the D.O.C. for an indeterminate length of time. The decisions made by the juvenile court during the post-adjudicative phases are often more consequential to the child than the adjudication itself. Thus, the effective assistance of counsel is more, and not less, necessary during those times.

VI. Under the *Strickland* Standard, Defense Counsel's Representation Constituted Ineffective Assistance of Counsel

A.M.'s counsel did not provide advocacy on A.M.'s behalf. Rather than presenting evidence or arguing to the juvenile court why one of a

Appellant's Petition to Transfer

number of intermediary dispositional alternatives (which had not been utilized) would have been a more appropriate placement, counsel actually argued to the court that A.M. should go to the D.O.C. [See R. Vol. 2, pgs. 6-7]. During his brief "argument" to the court, A.M.'s trial counsel expressed "befuddlement" at A.M.'s behavior, chastised A.M. for engaging in delinquent behavior, and argued as true the allegations that counsel allegedly negotiated to have redacted. [R. Vol. 2, pgs. 6-7].

Moreover, there was so much information noticeably missing from the record that would have had a significant impact on disposition but that A.M.'s counsel failed to provide to the court: the nature and extent of A.M.'s disability, and its impact on A.M.'s behavior; the medication A.M. was taking and its effect on A.M.'s behavior; what special education services and outpatient services A.M. received; A.M.'s home environment and the effect it had on A.M.'s actions; any disciplinary strategies that were attempted both at home and at school, and what impact, if any, they had on A.M.; and any information at all about the reason for A.M.'s multiple "acute mental health hospitalizations," which certainly had an effect on his behavior.

In sum, there was a total breakdown in the adversarial process. In fact, A.M.'s attorney made a more compelling argument than the State

Appellant's Petition to Transfer

did as to why A.M. deserved to be placed in the D.O.C. It was A.M.'s own counsel, and not the State, who encouraged the court to hold A.M. responsible for conduct the State redacted from the modification proceeding. It was A.M.'s own counsel, and not the State, who chastised A.M. for his behavior. And it was A.M.'s own counsel, and not the State, who expressed bewilderment at A.M.'s behavior, as if it defied any reasonable explanation. Stated differently, counsel provided no real assistance to A.M. at all. For this reason, prejudice can be presumed. *See U.S. v. Cronin*, 466 U.S. 648 (1984).

CONCLUSION

A.M. respectfully requests that this Court grant transfer and reverse the modification of his disposition.

Respectfully submitted,



Cara Schaefer Wieneke, #24374-49
WIENEKE LAW OFFICE, LLC
P.O. Box 368
Brooklyn, Indiana 46111
PH (317) 331-8293
FX (765) 813-0621
Email: cara@wienekelaw.com

WORD COUNT CERTIFICATE

I verify that this Brief contains no more than 4,200 words, according to Microsoft Word 2016's word count function.

Cara Schaefer Wieneke

Cara Schaefer Wieneke, #24374-49
WIENEKE LAW OFFICE, LLC
P.O. Box 368
Brooklyn, Indiana 46111
PH (317) 331-8293
FX (765) 813-0621
Email: cara@wienekelaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been delivered through IEFS to the following, this 19th day of November, 2018:

Angela Sanchez, Office of the Indiana Attorney General

Cara Schaefer Wieneke

Cara Schaefer Wieneke, #24374-49
WIENEKE LAW OFFICE, LLC
P.O. Box 368
Brooklyn, Indiana 46111
PH (317) 331-8293
FX (765) 813-0621
Email: cara@wienekelaw.com