

No. 1-09-2049

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SECOND DIVISION
May 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> JASON M., A MINOR,)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
)	Cook County.
Petitioner-Appellee,)	
)	
v.)	No. 08 JD 5857
)	
JASON M., a minor,)	Honorable
)	Lori M. Wolfson,
Respondent-Appellant).)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

HELD: Respondent's due process rights were not violated when the trial court failed to determine whether respondent was aware of his right to decide whether or not to testify and whether he was knowingly and voluntarily exercising that right.

Respondent Jason M. appeals from an order of the circuit court of Cook County adjudicating him a delinquent for possession

of less than 15 grams of a controlled substance (heroin). Respondent was placed on probation for one year. His sole contention on appeal is that his right to due process was violated because the trial court failed to *sua sponte* inform him of his right to choose whether to testify, thus failing to ensure that respondent was knowingly and voluntarily waiving that right.

The incident in question took place at about 1:30 p.m. on December 5, 2008, near the intersection of Augusta and North Massasoit in Chicago. The State based its case on the testimony of Chicago police officer John Thornton, on patrol that day with his partner, Officer Paolino, in civilian clothes and an unmarked vehicle. Two other police officers were nearby in a second car. As Thornton and Paolini drove by a two-flat building at 956 North Massasoit, they saw respondent and Sabon B. standing on the sidewalk. With his window rolled down, Thornton could hear Sabon B. yelling "blows" to passing cars and pedestrians. Thornton testified that based on his five years as a police officer, "blows" was a street term for heroin. When the officers got out of their car to investigate, respondent and Sabon B. fled into the two-flat, with Thornton first in pursuit. Thornton saw Sabon B. seized by other officers while he continued his pursuit of respondent, never losing sight of him from a distance of about three feet. Respondent ran into the basement down one set of stairs and then up another set of stairs leading to a rear exit

door. Thornton saw respondent throw an object under the stairs just before he was caught by Paolino, who had approached the two-flat from the rear. Thornton testified that he never lost sight of the object, and immediately recovered it from under the stairs. It was stipulated that the object recovered contained 22 items weighing 6.4 grams and tests on .2 gram revealed the presence of heroin. Thornton admitted that there was "junk" under the stairs, but he stated that nothing there resembled the object he saw respondent throw.

Denzell Martin testified for respondent that he lived on the second floor of the two-flat at the time in question. He denied that the police were inside that building when respondent was arrested. Shortly after 1 p.m. that day he spoke with respondent at the corner of Augusta and Massasoit about playing a video game at the two-flat. A few minutes later, as he was watching from the two-flat for respondent to arrive from a nearby store, he saw respondent arrested when an undercover police car pulled into the alley as respondent was returning from the store. On cross-examination Martin stated that he had known respondent all his life and was in court to "help him out." He also admitted to having a felony conviction for "drug conspiracy."

Sabon B. testified that just before the police entered the two-flat he was on the porch of that building, speaking with a boy who lived in the two-flat and whom he knew by the street name

"Fatt." A man walked up and Fatt gave him something in a plastic bag. Just then a police car pulled up and Fatt fled into the two-flat, followed by Sabon B. The police chased them inside, where Fatt could not be found but Sabon B. was arrested for trespassing.

Sabon B. testified that earlier that day, as he and Fatt were conversing on the sidewalk, he spoke to respondent, who was speaking to Denzell Martin on the corner of Massasoit and Augusta. He also stated on cross-examination that he had been a friend of respondent for about a year.

Respondent contends that he was deprived of due process of law because the trial court failed to *sua sponte* advise him of his right to decide whether to testify at his trial. Respondent never raised this issue at trial, inaction which would ordinarily mean he has forfeited the issue. *People v. Samantha V.*, 234 Ill. 2d 359, 368 (2009). But we may nonetheless consider the alleged error under the plain-error doctrine if the evidence was so closely balanced that the error may have affected the decision or where the error violated a substantial right and denied the aggrieved defendant or respondent a fair trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

We do not regard the evidence in this case as closely balanced. At the hearing both parties argued that certain photographs of the interior of the two-flat, in particular the

basement, bolstered the testimony of their witnesses. The trial court examined these photographs and determined that they supported the testimony of the State's witness, Officer Thornton, as to his ability to follow respondent closely, his ability to view respondent throw the packet beneath the stairs, and the ability of Thornton to pick out the thrown object from the other material beneath the stairs, which the court described as otherwise containing "some garden tools and things of that nature." Respondent has failed to include those photographs in the record on appeal and we conclude that this warrants resolution of these issues against him. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). For all of these reasons we do not find the evidence so closely balanced as to merit use of plain error.

We are, however dealing with a fundamental right of the respondent, to determine whether or not to testify at his adjudicatory hearing (see *People v. Dredge*, 148 Ill. App. 3d 911, 913 (1986)), and for that reason we will examine the record to determine if a clear error occurred which violated this right. *Piatkowski*, 225 Ill. 2d 551, 565. Respondent contends that to fully protect this right, the trial court was required to *sua sponte* advise him of the right and to determine that he was waiving it knowingly and voluntarily. We find that decisions rejecting such an obligation with respect to adult criminal

defendants also apply to juvenile offenders. In this regard we are persuaded by the recent case of *People v. Joshua B.*, 406 Ill. App. 3d 513 (2011), where the court faced the same issue before us, whether a trial court is obligated to ascertain that a juvenile respondent is aware that it is his personal right to decide whether to testify in an adjudicatory proceeding.

It is well established that an adult criminal defendant has no such right to be informed by the trial court. *People v. Smith*, 176 Ill. 2d 217, 235 (1997); *People v. Shelton*, 252 Ill. App. 3d 193, 201-02 (1993). Both cases cited a number of reasons supporting the lack of such an obligation, including the following ones which would also apply to a juvenile respondent. They noted that the decision whether or not to testify was often made during trial, so that a trial court advising a defendant prematurely of his right to testify could influence his decisions about testifying made later during the trial. These courts were also concerned about such advice from a trial court interfering with the relationship between the defendant and his attorney, as it was the role of defense counsel to advise his client about this right and its ramifications. Finally, these courts noted that only when the defense rested could a trial judge know whether a defendant was actually waiving his right to testify. But advising a defendant at that time could also interfere with the attorney-client relationship or reverse a trial strategy

based on defendant not testifying. *Smith*, 176 Ill. 2d at 235; *Shelton*, 252 Ill. App. 3d at 202.

Respondent contends these reasons are based on a faulty premise, that it is defense counsel who ultimately makes the decision of whether a defendant should testify. But it is clear that in these cases the courts were concerned with the trial court interfering with the advice given by an attorney to his client, and the decision reached by the client based on such advice. The *Shelton* court emphasized the trial court's role as adviser, stating that it was primarily defense counsel's role and responsibility to advise his client on this issue and explain the ramifications of the decision. *Shelton*, 252 Ill. App. 3d at 202.

As we have noted, in *People v. Joshua B.*, 406 Ill. App. 3d 513 (2011) this court recently decided the same issue facing us, whether trial courts in adjudicatory juvenile proceedings, like those in adult criminal proceedings, have no obligation to inquire of the respondent as to his knowledge and understanding that he and he alone has the right to make the final decision whether to testify. Like the court in *Joshua B.*, we determine that this is not an obligation which should be placed on trial courts in juvenile proceedings. We find that the same reasons which we have set out as applying to adult criminal proceedings apply to juvenile court proceedings. Therefore we find no plain error in the court's failure to instruct the respondent

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concerning his right to decide whether or not to testify, and we affirm respondent's adjudication as a delinquent and his placement on probation for one year

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.