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No. 3--09--0055

Order filed January 25, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

IN THE INTEREST OF C.W., Jr.,	)	Appeal from the Circuit Court
	)	for the 10th Judicial Circuit,
A Minor.	)	Peoria County, Illinois
	)	
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	No. 08--JD--416
	)	
v.	)	
	)	
C.W., Jr.,	)	Honorable
	)	Joe R. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Lytton and Schmidt concurred in the judgment.

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**ORDER**

*Held:* Respondent in a juvenile delinquency proceeding failed to establish, under the plain-error doctrine, that the trial court committed reversible error when it permitted the matter to proceed without proper notice to the respondent's mother.

The minor, C.W. (C.W.), was found guilty of unlawful possession of explosives or explosive or incendiary devices (720 ILCS 5/20--2(a) (West 2006)), a Class 1 felony, and

sentenced to three years of probation. On appeal, C.W. claims he and his mother were denied due process where juvenile proceedings were conducted in the absence of notice to the mother.

#### FACTS

On November 3, 2008, the State filed a petition for adjudication of wardship against C.W., alleging that he was delinquent for having committed the Class 1 felony of possession of explosives or explosive or incendiary devices. The petition listed the address of C.W.'s father in Peoria, Illinois, and alleged that C.W. lived there. C.W.'s mother was named in the petition, but her address was listed as "UNKNOWN NASHVILLE TN." The allegations regarding C.W.'s custody status were left incomplete in the petition.

C.W. and his father both appeared at the arraignment hearing, and the trial court requested information regarding the mother's location. C.W. reported that his mother was living in Gary, Indiana, but he did not know the exact address. C.W.'s father reported that she was in the process of moving from Nashville, Tennessee, to Gary, Indiana, but he did not know a good address. C.W. said the last time he saw his mother was in the summer. The matter was continued to the following day, at which time the court again addressed the matter of notice to C.W.'s mother. The father indicated that the mother was aware of the proceedings and that she was still in contact with C.W. The trial court told the State to obtain her address so that notice could be sent or published. No summons was ever issued to the mother, and the State made no effort to provide service by publication. The issue of notice was not revisited by the trial court.

Prior to the instant offense, C.W.'s parents had divorced. C.W. had lived with his mother for eight years in Nashville, Tennessee. In Nashville, he was adjudicated for the offenses of criminal impersonation, criminal trespass, and robbery. C.W. also violated his probation by leaving home without permission while his whereabouts were unknown and violating curfew.

C.W. relocated from Nashville to Peoria about three months before the instant offense, and his Nashville probation was transferred to Peoria. His Peoria probation officer was present at the adjudication hearing.

C.W. proceeded to a bench trial, was found guilty and was sentenced to three years of probation. During trial and at sentencing, C.W. did not raise any issue about the State's efforts to serve notice on his mother.

#### ANALYSIS

As the facts are not in dispute, this appeal involves the application of law and our review is *de novo*. *In re C.L.*, 392 Ill. App. 3d 1106, 1109 (2009). C.W. maintains that both his and his mother's due process rights were violated when the State failed to make a diligent attempt to provide the mother with notice of the proceedings.<sup>1</sup>

Ordinarily, where a minor does not raise a question at trial about the State's lack of diligence in serving notice on the noncustodial parent, the issue is forfeited<sup>2</sup> on appeal. *In re J.P.J.*, 109 Ill. 2d 129, 137 (1985). In order to overcome the State's claim of forfeiture, we must

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<sup>1</sup> Since the trial court never obtained personal jurisdiction over C.W.'s mother, her only claim of error is that the trial court lacked personal jurisdiction over her. A juvenile does not have standing to raise the lack of personal jurisdiction over a parent on appeal. *In re M.W.*, 232 Ill. 2d 408, 427 (2009). Therefore, we will not address the mother's due process claim.

<sup>2</sup> Although courts often use the word "waiver" in this context, the proper term is "forfeiture." See *People v. Blair*, 215 Ill. 2d 427, 444 (2005) (noting that forfeiture results from the failure to timely assert a right, whereas waiver results from the intentional relinquishment of a known right).

determine whether the failure to give notice to the noncustodial parent can be reviewed under the so-called "plain-error doctrine." *People v. Hillier*, 237 Ill. 2d 535, 542 (2010). This doctrine proceeds in two steps. First, we must determine whether any error occurred at all. *In re Piatkowski*, 225 Ill. 2d 551 (2007). If we find that error occurred then we must determine whether the error was reversible. There are two ways to determine whether the error constituted reversible error. Reversible error occurs "when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565.

As to the first part of the analysis, we find that a clear or obvious error did occur when diligent steps were not taken to provide notice to the respondent's mother. The Juvenile Court Act of 1987 (the Act) provides that both the minor who is the subject of proceedings under the Act and his parents are entitled to notice of the proceedings. 705 ILCS 405/1--5(3) (West 2006). Notice can be accomplished by service of summons in person or by certified mail or through publication. *C.L.*, 392 Ill. App. 3d at 1111. As an exception, section 5--525(1)(a)(ii) of the Act provides that summons need not be directed "to a parent who does not reside with the minor, does not make regular child support payments to the minor, to the minor's other parent, or to the minor's legal guardian or custodian pursuant to a support order, and has not communicated with the minor on a regular basis." 705 ILCS 405/5--525(1)(a)(ii) (West 2006).

The record does not reflect any factual determinations on the summons exception found in section 5--525(1)(a)(ii) of the Act. While it is clear from the record that the minor did not

reside with his mother at the time of the hearing, the record does not establish whether she made regular child support payments or whether she communicated with the minor "on a regular basis." 705 ILCS 405/5--525(1)(a)(ii) (West 2006). Since the only exception to notice by service of summons does not appear to apply, we find C.W.'s mother should have been served with notice of the proceedings by summons or publication. We find, therefore, that it was clear and obvious error for the trial court to proceed without notice to the noncustodial parent. See *In re M.W.*, 232 Ill. 2d at 432 (failure to comply with statutory notice requirements of the Act was clear and obvious error).

Having determined that error did, in fact, occur, we must next determine whether the error constituted reversible error. Here, the respondent acknowledges that the evidence was not closely balanced. Thus, the first prong of the plain-error analysis does not apply. C.W. must, therefore, establish that the failure to notify his mother of the proceedings was so serious in nature as to have affected the fairness of his trial and challenged the integrity of the judicial process. The burden of persuasion on this question lies with the respondent. *Piatkowski*, 225 Ill. 2d at 565 quoting *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

The State maintains that the failure to notify C.W.'s mother did not affect the fairness or the integrity of the process because she received sufficient notice from C.W. or his father. The State argues that there is a strong presumption from the record that C.W.'s mother had "actual knowledge" of the hearing, pointing out that the record contains a statement from the respondent's father that the mother knew of the hearing and a statement by the respondent indicating that he knew his mother lived in Gary, Indiana. Additionally, the record contains a statement by the respondent's father that the respondent has contact with his mother. We disagree with the State's interpretation of the record. We find the record insufficient to establish

that C.W.'s mother had "actual knowledge" of the proceedings. C.W.'s father stated that C.W. had contact with his mother. However, C.W. testified at the hearing, which was held on the third day of November, that he had not had contact with his mother since "the summer." During the hearing, the court asked the father, "Does she know about this?" The father responded, "Yes, she does." We are left to conjecture as to what "this" she had knowledge. There is nothing in the record to establish that she had knowledge of the charges against C.W., or the specific date and time of the hearing, or that she had specific rights as a necessary party to the proceedings.

Having found that C.W. was entitled to have notice of the proceedings served upon his mother, and having found that no actual notice was provided to her, we nonetheless find that C.W. has failed to establish that the State's failure to notify his mother in compliance with the Act amounted to plain error. C.W. has not persuaded us that the trial court's error in failing to require proper notice to his mother affected the fundamental fairness of the proceedings or challenged the integrity of the judicial process. He does not suggest how the fairness of the proceedings was undermined or the integrity of the judicial process was impaired by his mother's absence. His father was present during the proceedings, and C.W. was represented by counsel. The matter proceeded to a full hearing at which C.W.'s attorney cross-examined witnesses against him and aggressively argued a motion for a directed finding. The motion for a directed finding was only denied after the trial court allowed the State to re-open their case. C.W. testified that he did not commit the offense alleged in the petition and gave a plausible explanation for his actions. Thus, the record clearly indicates that C.W. received a fair trial and the integrity of the judicial process was maintained.

Moreover, there is no indication in the record that C.W. would have benefited from his mother's presence. He does not suggest a single decision or outcome that might have been

different had his mother been present. Rather, he merely maintains that the failure to notify his mother of the proceedings was such a serious error that this lack of notice alone adversely affected the fundamental fairness of the proceedings and undermined the judicial integrity of the proceedings. We disagree. The argument that the failure to notify a noncustodial parent is *per se* reversible error has been specifically rejected by our supreme court. *In re M.W.*, 232 Ill. 2d at 440; *In re J.P.J.*, 109 Ill. 2d at 139-40.

We find the respondent has failed to establish that the court committed reversible error when it permitted the matter to proceed without notice to the respondent's mother as required under the act. Therefore, we affirm the judgment of the Peoria County circuit court.

#### CONCLUSION

For these reasons, the judgment of the Peoria County circuit court is affirmed.

Affirmed.