

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

UNPUBLISHED  
January 10, 2013

In the Matter of E. KOWALSKI, Minor.

No. 311187  
Oakland Circuit Court  
Family Division  
LC No. 2011-791150-DL

---

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right an order placing him at the Oakland County Children's Village, following his adjudication by plea of admission to one count of school incorrigibility, MCL 712A.2(a)(4). Respondent argues that the trial court erred by denying his motion to withdraw his plea on the ground that he was not represented by counsel when offering his plea and that neither the waiver of counsel nor the plea was made understandingly. We affirm because respondent and his father were sufficiently informed of respondent's rights and appeared to understand them before respondent refused counsel and made his plea.

On November 15, 2011, petitioner filed a petition alleging that respondent was in violation of MCL 712A.2(a)(4), because of his incorrigibility in school. At the January 3, 2012, pretrial hearing, respondent waived his right to counsel and respondent's father also agreed to waive respondent's right to counsel. After waiving his rights to counsel, respondent entered a plea of admission to the charge of school incorrigibility. Before accepting respondent's plea, the referee asked respondent about the accuracy of most of the allegations provided in the petition. Respondent admitted that most of those allegations were true. Upon finding a sufficient factual basis for the charge, the referee accepted respondent's plea of admission to school incorrigibility.

On February 2, 2012, an emergency hearing was held because respondent had been truant from his home on three different occasions since the last hearing. At that time, the referee appointed counsel for respondent, who was subsequently charged with assaulting his father. Regarding the school incorrigibility charge, respondent's counsel moved to withdraw respondent's admission of school incorrigibility "in part because he did not have counsel for that particular petition at that particular time and [respondent's counsel did not] believe that he necessarily knew exactly what he was doing in offering his plea." In addressing the request to withdraw respondent's plea, the referee first stated that he had reviewed the psychological evaluation that was performed on respondent. The referee then noted that, while the evaluator found respondent to be in the low average IQ range, the evaluator believed the evaluation was "a

very low representation of [respondent's] abilities as [respondent] put forth at the time of the evaluation very little or minimal effort in the testing process.” The referee then denied the motion to withdraw the plea.

“There is no absolute right to withdraw a . . . plea once it is accepted.” *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989). “Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea.” MCR 3.941(D). Thus, a trial court’s decision on a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997); *Zelzack*, 180 Mich App at 126. “When a [juvenile] moves to withdraw his . . . plea before sentencing, the burden is on the [juvenile] to establish a fair and just reason for withdrawal of the plea.” *Harris*, 224 Mich App at 131.

“A juvenile may offer a plea of admission or of no contest to an offense with the consent of the court.” MCR 3.941(A). The trial court, however, “shall not accept a plea to an offense unless the court is satisfied that the plea is accurate, voluntary, and understanding,” as set forth in MCR 3.941(C), which provides in relevant part:

**(C) Plea Procedure.** Before accepting a plea of admission or of no contest, the court must personally address the juvenile and must comply with subrules (1)-(4).

(1) *An Understanding Plea.* The court shall tell the juvenile:

(a) the name of the offense charged,

(b) the possible dispositions,

(c) that if the plea is accepted, the juvenile will not have a trial of any kind, so the juvenile gives up the rights that would be present at trial, including the right:

(i) to trial by jury,

(ii) to trial by the judge if the juvenile does not want trial by jury,

(iii) to be presumed innocent until proven guilty,

(iv) to have the petitioner or prosecutor prove guilt beyond a reasonable doubt,

(v) to have witnesses against the juvenile appear at the trial,

(vi) to question the witnesses against the juvenile,

(vii) to have the court order any witnesses for the juvenile’s defense to appear at the trial,

(viii) to remain silent and not have that silence used against the juvenile, and

(ix) to testify at trial, if the juvenile wants to testify. [MCR 3.941(C)(1).]

Here, the trial court ensured that the plea was made understandingly by complying with MCR 3.941(C)(1). The trial court informed respondent of the charge against him, the possible dispositions, and the rights to a trial that respondent would forfeit once a plea of admission was accepted. While respondent argues that there were “indicators,” that respondent did not “understand his rights in the proceedings or the effect of the plea,” i.e., that respondent was previously designated as emotionally impaired and he had been receiving services during the time that he offered his plea of admission, the record shows otherwise. The trial court discussed several of the specific allegations with respondent and provided respondent the opportunity to explain, accept, or deny the factual allegations as stated in the petition. During this discussion, respondent was able to discuss the allegations without difficulty and agreed to their accuracy. Respondent also expressed no hesitation or confusion regarding his decision to offer his admission to the charge of school incorrigibility. Before accepting the plea, the trial court asked respondent if he was offering his plea of admission to school incorrigibility and explained that “incorrigible means behaving very badly.” Respondent quickly replied, “Yeah, I have been behaving very badly in school.” Considering the above, the plea was properly accepted. MCR 3.941(C).

Further, because respondent’s waiver of counsel was understandingly made and respondent’s father, who was present, did not object to respondent’s waiver, the trial court did not err in accepting respondent’s plea without the presence of counsel. “Although juvenile proceedings are not considered adversarial in nature, they are closely analogous to the adversary criminal process. Proceedings in a juvenile court need not conform with all the requirements of a criminal trial; however, essential requirements of due process and fair treatment must be met,” including the right to counsel. *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000)(internal citations omitted). “If the juvenile is not represented by an attorney, the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar, including trial, *plea of admission*, and disposition.” MCR 3.915 (emphasis added). Both MCL 712A.17c and MCR 3.915(A) govern the appointment and waiver of counsel in delinquency proceedings. Under MCL 712A.17c(3), a juvenile may waive his or her right to counsel but the waiver:

shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child’s parent or guardian ad litem objects or if the appointment is made under subsection (2)(e). [MCL 712A.17c(3).]

MCR 3.915(A)(3), similarly provides:

The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on subrule (A)(2)(e). The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made.

Respondent argues that the fact that he received services from Easter Seals or had previously been designated as emotionally impaired weighed against a finding that he

understandingly waived his right to counsel. “Low mental ability in and of itself [, however,] is insufficient to establish that a [juvenile] did not understand his rights.” *People v Cheatham*, 453 Mich 1, 35-36; 551 NW2d 355 (1996). As discussed above, there was no indication that respondent failed to appreciate or understand the proceedings or his rights to a trial or counsel. It is also important to note that respondent was later found to be competent to stand trial by two separate licensed psychologists. On the record, respondent indicated that he did not wish to be represented by counsel and then affirmed that he was waiving his right to counsel. Respondent’s father was also present and did not object to the waiver of counsel. MCL 712A.17c(3); MCR 3.915(A)(3). In discussing the right to counsel with respondent’s father, while respondent was present, the trial court explained that if counsel was requested she would be available to step in that moment. The trial court stated, counsel “is available, yes. She is here, she’s covering cases this morning. That’s her job.” At that point, neither respondent nor his father made such a request. Thus, both respondent and his father understandingly and voluntarily waived respondent’s right to counsel.

Accordingly, the trial court did not abuse its discretion in denying respondent’s motion to withdraw his plea.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro