

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

G.E.J.,)	NOT FOR PUBLICATION
Appellant,)	APPROVED FOR
v.)	RELEASE TO PUBLIC
THE STATE OF OKLAHOMA,)	No. J-2019-65
Appellee.)	FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
<u>SUMMARY OPINION</u>		MAY 23 2019
		JOHN D. HADDEN
		CLERK

ROWLAND, JUDGE:

On August 27, 2018, Appellant, G.E.J., was charged as a juvenile with Soliciting for First Degree Murder, in violation of 21 O.S.2011, § 701.16 (Count 1) and Reckless Conduct with a Firearm, in violation of 21 O.S.Supp.2012, § 1289.11 (Count 2), in Rogers County District Court Case No. JDL-2018-76.¹ A show cause hearing was held on August 7, 2018, and the Honorable Stephen Pazzo, Associate District Judge, heard testimony and found probable cause to continue Appellant's juvenile detention. On October 30, 2018, Appellant entered a stipulation of no contest and Judge Pazzo entered

¹ G.E.J. was 16 years, 3 months, and 22 days old at the time of this incident.

an order adjudicating Appellant a delinquent child pursuant to 10A O.S.Supp.2014, § 2-2-402. Appellant filed a motion to withdraw his stipulation with the clerk of the district court on November 9, 2018, and Judge Pazzo denied the motion following a January 17, 2019, hearing. Appellant appeals from this order pursuant to 10A O.S.2011, § 2-2-601. On appeal, Appellant raises the following issues:

1. G.E.J. WAS DENIED DUE PROCESS OF LAW WHEN HE WAS HELD IN DETENTION FOR TWENTY-FOUR DAYS BEFORE THE FILING OF A DELINQUENT PETITION;
2. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW G.E.J. TO WITHDRAW HIS PLEA BECAUSE THE RECORD FAILS TO SHOW THE REQUIRED INQUIRY AND DETERMINATION THAT HE WAS COMPETENT TO WAIVE HIS CONSTITUTIONAL RIGHTS AND THAT THE RESULTING PLEA WAS KNOWING, INTELLIGENT, AND VOLUNTARY;
3. G.E.J.'S PLEA WAS NOT ENTERED IN A KNOWING, INTELLIGENT, AND VOLUNTARY MANNER, AS REQUIRED BY THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, § 7, OF THE OKLAHOMA CONSTITUTION, BECAUSE HE PLED ONLY BECAUSE HE THOUGHT HE WOULD BE RELEASED FROM DETENTION;
4. G.E.J.'S PLEA THEREFORE WAS NOT ENTERED IN A KNOWING, INTELLIGENT, AND VOLUNTARY MANNER, AS REQUIRED BY THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, § 7, OF THE

OKLAHOMA CONSTITUTION, BECAUSE HE PLED ONLY BECAUSE HE DID NOT UNDERSTAND THE CHARGES AGAINST HIM;

5. BECAUSE G.E.J. HAD NO KNOWLEDGE OF THE STATE'S EVIDENCE AGAINST HIM HE COULD NOT MAKE AN INTELLIGENT DECISION AS TO WHETHER OR NOT TO ENTER A PLEA, AND HIS PLEA WAS THEREFORE NOT KNOWING AND VOLUNTARY;
6. THE RECORD DOES NOT ESTABLISH A FACTUAL BASIS FOR G.E.J.'S PLEA OF NO CONTEST, AND THE PLEA THEREFORE WAS NOT ENTERED IN A KNOWING, INTELLIGENT, AND VOLUNTARY MANNER, AS REQUIRED BY THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, § 7, OF THE OKLAHOMA CONSTITUTION;
7. G.E.J.'S PLEA WAS NOT KNOWING AND VOLUNTARY BECAUSE HE WAS NOT GIVEN THE OPPORTUNITY TO MEET AND CONSULT WITH HIS PARENTS BEFORE HE ENTERED HIS PLEA;
8. G.E.J. RECEIVED THE INEFFECTIVE ASSISTANCE OF PLEA COUNSEL; AND
9. G.E.J. RECEIVED THE INEFFECTIVE ASSISTANCE OF WITHDRAWAL COUNSEL.

Pursuant to Rule 11.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), this appeal was automatically assigned to the Accelerated Docket of this Court. Appellant filed a Motion to File Amended Juvenile Petition in Error and tendered for filing an Amended Juvenile Petition in Error with the Clerk of this

Court on April 24, 2019. Appellant's motion is **GRANTED** and the Clerk of this Court is ordered to **FILE** the tendered Amended Juvenile Petition in Error. Oral argument was held April 26, 2019, pursuant to Rule 11.2(E). Rule 11.2(E), *Rules, supra*. At the conclusion of oral argument, the parties were advised of the decision of this Court. After a review of the record before this Court and hearing oral argument, we find the record does not support the propositions of error raised by Appellant. The district court order denying Appellant's motion to withdraw his stipulation is **AFFIRMED**.

This Court reviews the denial of a motion to withdraw stipulation for an abuse of discretion. *Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The burden is on Appellant to show a defect in the stipulation process that entitles him to withdraw his stipulation. *Elmore v. State*, 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80.

Appellant's arguments in Propositions II, VI, VII, and VIII are made for the first time on appeal. As a result, these claims are waived because he did not raise them in his motion to withdraw his stipulation and hearing on that motion. *Weeks v. State*, 2015 OK CR 16, ¶¶ 27-29, 362 P.3d 650, 657.

Appellant's first proposition alleges the trial court lost jurisdiction because twenty-four days passed between Appellant's arrest and being charged. Appellant maintains the petition was required to be filed within five days of Appellant being taken into custody. See 10A O.S.2011, § 2-2-106. Appellant relies on *T.F.M. v. State*, 1977 OK CR 323, 572 P.2d 280. In *T.F.M.* this Court granted relief where a juvenile was arrested and spent twenty-four days in custody without an attorney, twenty-five days in custody without a petition filed, and thirty-one days in custody without bond being set. Appellant's case is distinguishable from *T.F.M.*

While Appellant was in custody for twenty-four days prior to charges being filed, he did not spend this time without representation or a bond being set as in *T.F.M.* Appellant retained private counsel between his fourth and eleventh day in custody. Counsel appeared with Appellant at an August 14, 2018, hearing. A bond was set at

this appearance. Unlike the appellant in *T.F.M.*, Appellant did not spend twenty-five days in custody without an attorney or thirty-one days in custody without bail being set. At a minimum, Appellant had both on August 14, 2018, which was his eleventh day in custody. Appellant's case was continued without objection at the August 14, 2018, appearance and, although the record lacks evidence to so indicate, the State contended at oral argument this delay was at the request of Appellant's lawyer so that she could provide certain mitigating information to the prosecution. Particularly in juvenile cases time deadlines are in place for a reason and are of critical importance. We will not condone holding a juvenile in custody past the statutory deadline for the filing of a petition unless counsel for the juvenile expressly agrees and some memorialization is made of that agreement. Nonetheless, the delay here did not deprive the trial court of jurisdiction and Proposition I is accordingly denied.

In his Proposition III, Appellant maintains that based on his conversations with his stipulation counsel Tim Wantland, he believed he would be released immediately if he entered a stipulation of no contest to these charges. The evidence at the hearing on Appellant's motion to withdraw his stipulation does not support relief on this

claim. Appellant, his mother, and his father all testified at the hearing that they all believed, after speaking with Wantland, Appellant would be released within a few days if he entered a stipulation to the charges. However, none of the three testified Wantland made this statement. When asked specifically, each stated Wantland said if Appellant stipulated he would be released more quickly than if he chose to go to trial. Wantland's statements were not inaccurate in this case. Appellant has failed to show a defect in the stipulation process where the comments attributed to Wantland are an accurate statement of the law. *Wellnitz v. Page*, 420 F.2d 935, 936-37 (10th Cir. 1970). Proposition III is denied.

Propositions IV and V espouse Appellant's overarching claims the trial court erred in denying his motion to withdraw his stipulation because it was not knowing and voluntary. According to Appellant, because he did not see the State's evidence before entering a stipulation, he did not understand the charges against him. These claims are without merit.

Appellant acknowledges that prior to entering his stipulation he had multiple meetings with his attorneys, multiple meetings with his parents, and read the petition filed in this case. Appellant and his

parents were present for Appellant's August 7, 2018, show cause hearing where they heard Detective Stone explain the evidence against Appellant in detail. The record supports the trial court's determination that Appellant understood the charges and was aware of the evidence against him. Propositions IV and V are denied.

In Proposition IX, Appellant argues withdrawal counsel, and in turn stipulation counsel, were ineffective. He maintains both were ineffective for inadequately arguing Propositions I, III, IV, and V and for failing to raise claims that he is not competent, there was an insufficient factual basis to support his stipulation, it was error to not have Appellant meet with his parents prior to entering a stipulation, and stipulation counsel was ineffective for failing to request a transcript be made of his stipulation hearing. These omitted claims are Appellant's waived Propositions II, VI, VII, and VIII claims on appeal to this Court, respectively. Propositions II, VI, VII, and VIII are reviewed here as claims of ineffective assistance of withdrawal counsel because this could be Appellant's first opportunity to raise the issues.

Claims of ineffective assistance of counsel are reviewed under the standard for ineffective assistance of counsel set forth in

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000). Under *Strickland*, an appellant must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89, 104 S.Ct. at 2064-66. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011)(quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). As with any claim of ineffective assistance of counsel, this Court need not determine whether counsel's performance was deficient if the appellant was not prejudiced by counsel's actions. See *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207.

Proposition II challenges Appellant's competency to enter his stipulation and whether the trial court made a proper determination

of competency prior to the stipulation. *See King v. State*, 1976 OK CR 103, ¶ 10, 553 P.2d 529, 533-34. Judge Pazzo presided at each of Appellant's appearances in this case, interacted with Appellant, and personally observed Appellant's demeanor. Neither Appellant's three trial court attorneys nor the prosecutor questioned Appellant's competency. *See Ocampo v. State*, 1989 OK CR 38, ¶ 5, 778 P.2d 920, 922. Evidence Appellant's auditory processing problems might cause him to process information slower does not render him incompetent to enter a stipulation. There is no evidence establishing Appellant was incompetent at the time his stipulation was entered. *See Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d 624, 630. Proposition II is without merit.

Appellant contends his withdrawal counsel was ineffective for failing to raise Proposition VI, which claims stipulation counsel was ineffective by not insuring there was a sufficient factual basis provided to support Appellant's stipulation. While there is no recording of the stipulation hearing and the summary of facts form does not include a lengthy factual basis, the record, including the petition, show cause hearing transcript, summary of facts form, and the transcript of the hearing on the motion to withdraw establish

there was an adequate factual basis for the stipulation. *See Hagar v. State*, 1999 OK CR 35, ¶ 4, 990 P.2d 894, 896-97. Appellant's Proposition VI claims are without merit and denied.

Appellant alleges for the first time at Proposition VII that withdrawal counsel, and in turn stipulation counsel, were ineffective for not securing a court reporter for Appellant's stipulation hearing. 20 O.S.2011, § 106.4 states “[a] trial or proceedings may proceed without the necessity of a court reporter being present, unless there is objection by a party or counsel.” 20 O.S.2011, § 106.4; *Higgins v. State*, 1973 OK CR 59, ¶ 20, 506 P.2d 575, 578; *See also Funnell v. Cannon*, 1978 OK 166, ¶ 8, 577 P.2d 1287, 1289. A violation only occurs when a transcript is requested and denied. *Id.* This court has held that an appellant is not denied a fair opportunity to appeal solely based on the fact that a transcript was not made. *Parker v. State*, 1994 OK CR 56, ¶ 23-27, 887 P.2d 290, 294-95. This claim has no merit.

Appellant's final claim in Proposition IX is that his withdrawal counsel was ineffective for failing to allege stipulation counsel's ineffectiveness because Appellant was not allowed to meet with his parents immediately prior to entering his stipulation. This was

Appellant's Proposition VII. There is no evidence Appellant requested to meet with his parents. Further, Appellant cites no authority establishing a juvenile is required to be allowed to meet with his parents on the day a stipulation is entered. This claim is without merit.

Appellant must establish ineffective assistance of counsel based on the *Strickland* standard. Counsel is presumed to be competent. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. It is Appellant's burden to show counsel's performance was deficient, and that the deficiency resulted in prejudice. Even if we assume withdrawal counsel was deficient, Appellant does not prove it is reasonably probable that the outcome in this case would have been different but for these alleged errors. Proposition IX is denied.

Resolving conflicting testimony is the task of the trial court, not an appellate court. *Fields*, 1996 OK CR 35, ¶ 66, 923 P.2d at 636. Judge Pazzo is the exclusive judge of the weight of the evidence and the credibility of the witnesses in this case. *Id.* He was present at each of Appellant's appearances and was able to repeatedly interact with and observe Appellant and his parents. At the conclusion of the hearing on Appellant's motion to withdraw his stipulation, Judge

Pazzo denied the motion and gave a very thorough explanation of his reasoning for the decision. Judge Pazzo determined Appellant failed to establish his stipulation was not knowingly and voluntarily entered.

We agree. Appellant has not met his burden. He has not shown any defect in his stipulation process that entitles him to withdraw his stipulation. *Elmore*, 1981 OK CR 8, ¶ 8, 624 P.2d at 80. Appellant has failed to establish Judge Pazzo's handling of this case was an unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to his decision or that his denial of Appellant's motion to withdraw his stipulation was a clearly erroneous conclusion and judgment, that was clearly against the logic and effect of the facts. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. Appellant has not proven the trial court's determination that Appellant's stipulation was knowing and voluntary was an abuse of discretion in this case. *Lewis*, 2009 OK CR 30, ¶ 5, 220 P.3d at 1142.

DECISION

It is therefore the order of this Court that the Rogers County District Court order denying Appellant's motion to withdraw his

stipulation is **AFFIRMED**. Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, THE HONORABLE STEPHEN PAZZO,
ASSOCIATE DISTRICT JUDGE**

**APPEARANCES AT
WITHDRAWAL HEARING**

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OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur