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IN THE
COURT OF APPEALS OF INDIANA

M.H.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner

December 1, 2022

Court of Appeals Case No.
22A-JV-1170

Appeal from the Elkhart Circuit
Court

The Honorable Michael A.
Christofeno, Judge

The Honorable Elizabeth A.
Bellin, Magistrate

Trial Court Cause No.
20C01-2103-JD-64

May, Judge.

- [1] M.H appeals his placement in the Department of Correction (“DOC”) following his violation of the probation he was serving for his delinquency

adjudication. M.H. raises two issues on appeal, which we reorder and restate as:

1. Whether the trial court violated M.H.'s right to due process by holding virtual hearings without complying with Administrative Rule 14, which governs the use of telephone and audiovisual telecommunication by trial courts; and
2. Whether the trial court abused its discretion by granting wardship of M.H. to the DOC.

Because both of M.H.'s arguments fail, we affirm.

Facts and Procedural History

[2] When M.H. appealed his adjudication as a delinquent, we reported the underlying facts:

On July 20, 2020, T.J. was at his house with A.L. and B.D. At one point, there was a “ruckus” outside, and T.J. encountered a “bunch of people” who were yelling at him. The people “surrounded” T.J., and one girl got “physical” with him. T.J. pushed the girl off of him, and the girl went to get M.H. M.H. arrived at T.J.'s house and “pointed a gun” at T.J.'s head. M.H. then “smacked” T.J. with his hand and “smacked [T.J.] with the gun.” M.H. told T.J. that T.J. “would be killed” if he “ever c[a]me around” M.H. or the girl. M.H. then left, and T.J.'s mother called the police.

M.H. v. State, No. 21A-JV-2122, slip op. at *1 (Ind. Ct. App. March 24, 2022)
(record citations omitted).

[3] On March 23, 2021, the State filed a petition alleging M.H. was a delinquent child for committing acts that, if committed by an adult, would be the following crimes: Level 5 felony intimidation,¹ Level 5 felony battery by means of a deadly weapon,² and Class A misdemeanor carrying a handgun without a license.³ M.H. denied the allegations, so the trial court held a fact-finding hearing, after which the trial court found the allegations true and adjudicated M.H. a delinquent child on July 23, 2021. After a dispositional hearing on August 4, 2021, the trial court rejected the probation department's recommendation to place M.H. in the DOC. Instead, the trial court placed M.H. on probation and ordered probation to investigate "alternate rehabilitation services." (App. Vol. 2 at 81.) The trial court also set a further dispositional hearing for September 8, 2021.

[4] On September 7, 2021, the probation department filed a modification report with the trial court because M.H. tested positive for marijuana on one occasion and submitted a diluted test sample on another occasion. The trial court held a further dispositional hearing on September 13, 2021, at which the trial court heard evidence of additional possible services and placements available for M.H. The trial court continued M.H. on probation and ordered M.H. to complete a substance abuse evaluation and follow any recommendations;

¹ Ind. Code § 35-45-2-1(a)(4) & (b)(2)(A).

² Ind. Code § 35-42-2-1(c)(1) & (g)(2).

³ Ind. Code § 35-47-2-1.

participate in the Youth Advocate Program and Fatherhood Engagement; and complete an interview within fifteen days with Rite of Passage for possible placement in that program. On September 29, 2021, the trial court entered a six-month review hearing order that continued all services and M.H.'s placement at home with his mother.

[5] On March 28, 2022, the probation department filed a petition for the trial court to modify M.H.'s disposition based on an allegation that M.H. committed dangerous possession of a firearm, which would be a Class A misdemeanor if committed by an adult. (*Id.* at 136.) On March 31, 2022, M.H. appeared via Webex from the Juvenile Detention Center (“JDC”) for an initial hearing on the new allegation of delinquency and the petition to modify probation based on that alleged violation. M.H. denied the new allegation of delinquency and denied violating probation, so the trial court set the matters for a fact-finding hearing on April 21, 2022.

[6] On April 21, 2022, M.H. appeared via Webex from the JDC and was in shackles due to his behavior at the JDC. The State moved to dismiss the new delinquency allegation without prejudice. After the new petition was dismissed, M.H. admitted he violated his probation by possessing a firearm. The trial court accepted M.H.'s admission of probation violation and asked if the parties were ready to proceed to disposition. Probation requested the trial court delay the dispositional hearing so probation could investigate what M.H. had done at the JDC to result in his being shackled for the hearing. The trial court set the dispositional hearing for eight days later.

[7] On April 28, 2022, probation filed an updated recommendation as to M.H.'s disposition. (*Id.* at 156-8.) On April 29, 2022, the court heard testimony from probation and M.H. After the hearing, the trial court entered an order that contained the following, in pertinent part:

After weighing all of the evidence presented and judging the credibility of the witnesses, the Court makes the following findings of fact:

1. On April 21, 2022, the Child admitted to violating the terms and conditions of his probation by admitting that he possessed a loaded handgun with an extended magazine while on probation supervision.
2. This was not the first time the Child has violated the terms and conditions of probation, as the Child has a history of violations and a history of delinquent acts that involve firearms.
3. The facts and circumstances that led to the Child's adjudication are particularly concerning; the Child pointed a gun at another child's head and threatened to kill him.
4. The Child continued to use marijuana while on probation supervision, and had six (6) positive and/or diluted screens while on probation supervision.
5. The Child was not regularly attending school prior to his detention at the Juvenile Detention Center (JDC).
6. The Child has been offered multiple services and alternatives to support a rehabilitation plan and keep the Child in the community, but those services have been unsuccessful.
7. The Child displayed aggressive behavior with other children and staff while in the JDC.

8. The Child's Indiana Youth Assessment System tool places the Child in a high risk category to reoffend.
9. The Child's probation officer testified that the Child is a danger to the community due to his continued possession of firearms and failing to take advantage of community based services that have been offered.
10. If placed at the Indiana Department of Corrections [sic], the Child can participate in the "Why Try" program, can continue with his education, and can participate in other rehabilitative services while remaining in a secure locked facility.
11. Notwithstanding the aggressive behavior displayed while at the JDC, the Child has done well educationally while in the secure locked facility, as there has been more individualized assistance.
12. The Child expressed his willingness to accept help from others and has been working to address some of his issues while at the JDC.

The Court finds that the Child previously admitted to the following offenses:

- | | |
|----------------------|--|
| I.C. 35-45-2-1(a)(4) | Intimidation, Level 5 felony |
| I.C. 35-42-2-1(c)(1) | Battery by means of deadly weapon,
Level 5 felony |
| I.C. 35-47-2-1 | Carrying a handgun without a license,
A misdemeanor |

The child has a prior history of delinquent adjudications as follows:

- | | |
|------------------------|---|
| I.C. 35-47-10-5(1) | Dangerous possession of a firearm, A
misdemeanor |
| I.C. 35-44.1-3-1(a)(1) | Resisting law enforcement, A
misdemeanor |

- | | |
|-------------------|---|
| I.C. 8-3-15-3(a) | Unauth use of railroad right of way, B
misdemeanor |
| I.C. 35-43-4-2(a) | Auto theft, Level 6 felony |

The following services have been provided:

1. Probation Supervision
2. Victim Offender Reconciliation Program (VORP).
3. Electronic Monitor.
4. Substance Abuse Assessment.
5. Case Management.
6. Community Service Restitution.
7. Positive Activity.
8. Safety Plan.
9. Individual Therapy.
10. No Contact as term of Probation.
11. Community Connections Program.
12. Services for Mother, including Positive Parenting Program.
13. Drug Screens.
14. Fatherhood engagement.
15. Lunch with a Cop.

The Court finds that it is in the Child's best interest to continue to be removed from the home because his behaviors are contrary to his interests and those of the community by placing himself and others at serious risk of harm. Rehabilitative efforts have been unsuccessful due to the Child's prior unwillingness to engage in services, and he continues to engage in delinquent behavior. Community resources have been exhausted and testimony was provided that the Child can receive the help he needs at IDOC.

* * * * *

Pursuant to I.C. 31-37-19-6, the Court now awards wardship of the Child to the Indiana Department of Corrections [sic] for housing in any correctional facility for children.

The Court's Dispositional Order is entered for the following reasons:

1. Community resources have been exhausted.
2. The Child's behavior is dangerous to himself and the community and therefore requires the most restrictive placement available to the Court.
3. Placement is in the Child's best interest because it will give Child the opportunity for more intensive rehabilitation in a secure setting.

(*Id.* at 159-61.) The trial court granted wardship of M.H. to the DOC.

Discussion and Decision

[8] The juvenile court system is founded on the notion of *parens patriae*, which allows the court to step into the shoes of the parents. *In re K.G.*, 808 N.E.2d 631, 635 (Ind. 2004). The *parens patriae* doctrine gives juvenile courts power to further the best interests of the child, "which implies a broad discretion unknown in the adult criminal court system." *Id.*

1. Due Process

[9] M.H. asserts the trial court denied him due process by holding hearings virtually without complying with Administrative Rule 14. The Fourteenth

Amendment to the United States Constitution⁴ prohibits a person being deprived of life, liberty, or property without the due process of law. *Harris v. State*, 165 N.E.3d 91, 98 (Ind. 2021). “Children in the juvenile justice system have many of the same due process rights guaranteed to adults accused of crimes, plus a few extra protections.” *Id.* While the due process clause applies in juvenile proceedings, “a juvenile [court] must respect the informality and flexibility that characterize juvenile proceedings while insuring that such proceedings comport with the fundamental fairness demanded by the due process clause.” *In re K.G.*, 808 N.E.2d 631, 637 (Ind. 2004) (quoting 47 Am. Jur. 2d *Juvenile Courts* 6 (1995)).

[10] M.H. acknowledges he did not object to the trial court’s use of virtual proceedings. Where a party fails to alert a trial court to a due process argument, that argument is waived for appeal. *See Harris*, 165 N.E.3d at 99 (declining to address “complex due process question” when argument presented to the trial court “did not put the court or the State on notice that he was making a due process argument”). M.H. urges us to address his due process assertion as “Fundamental Error.” (Appellant’s Br. at 20) (capitalization in original). Error is fundamental “if it made a fair trial impossible or was a

⁴ M.H. also mentions “Article I Section 12 of the Indiana Constitution provide[s] for due process in judicial proceedings[.]” (Appellant’s Br. at 19.) However, he does not develop that assertion in an argument separate from his Fourteenth Amendment argument and, thus, we decline to address them separately. *See Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005) (“Where a party, though citing Indiana constitutional authority, presents no separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from its federal counterpart, we resolve the party’s claim ‘on the basis of federal constitutional doctrine[.]’”) (quoting *Williams v. State*, 690 N.E.2d 162, 167 (Ind. 1997)), *cert. denied*, 547 U.S. 1148 (2006).

‘clearly blatant violation[] of basic and elementary principles of due process’ that presented ‘an undeniable and substantial potential for harm.’” *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022) (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)). We briefly consider M.H.’s argument on the merits to determine whether M.H. has demonstrated fundamental error.

[11] M.H.’s argument cites Administrative Rule 14, which gives trial courts discretionary authority to “use telephone or audiovisual telecommunication pursuant to the provisions of this rule.” Admin. R. 14(A). In addition, he relies heavily on *C.S. v. State*, 131 N.E.3d 592 (Ind. 2019), in which our Indiana Supreme Court discussed proper implementation of Administrative Rule 14 in juvenile proceedings. M.H. asserts those two authorities are the controlling law because “Indiana was no longer under a COVID emergency order relating to remote/virtual hearings at the time of M.H.’s modification of disposition hearing.” (Appellant’s Br. at 13.) However, M.H. is incorrect about the absence of an emergency order.

[12] On May 13, 2020, our Indiana Supreme Court entered an “Emergency Order Permitting Expanded Remote Proceedings.” *In the MATTER OF ADMINISTRATIVE RULE 17 EMERGENCY RELIEF FOR INDIANA TRIAL COURTS RELATING TO the 2019 NOVEL CORONAVIRUS (COVID-19)*, 144 N.E.3d 197, 197 (Ind. May 13, 2020) (capitalization in original). That order provided, in relevant part:

Indiana’s ongoing emergency relating to the 2019 novel coronavirus (COVID-19), first declared by Executive Order on

March 6, 2020, continues to affect public health practices and it has required restriction of judicial operations. Pursuant to Indiana Administrative Rule 17 and this Court’s inherent authority to supervise the administration of all courts of this state, the Court finds that the trial courts’ efficient and effective operation to hold timely hearings and dispose of cases requires broader authority to conduct court business remotely.

Being duly advised, the Court ORDERS that Indiana Administrative Rule 14 is modified as follows, **effective until further order of the Court**:

1. The court may use audiovisual communication to conduct proceedings whenever possible to ensure all matters proceed expeditiously and fairly under the circumstances. This includes all proceedings in felony cases, including (1) guilty pleas; (2) sentencing where the defendant waives the right to be present in court; and (3) any other proceeding with witness testimony where the defendant waives the right of confrontation.

2. Any party not in agreement to the manner of the remote proceeding must object at the outset of the proceeding, on the record, and the court must make findings of good cause to conduct the remote proceeding.

* * * * *

4. All proceedings must be consistent with a party’s Constitutional rights.

144 N.E.3d at 197-98 (emphasis in original).

[13] On November 10, 2020, our Indiana Supreme Court entered an “Order on Continued Emergency Actions” that extended the effective date of Court’s

Emergency Order Permitting Expanded Remote Proceedings until “July 1, 2021, unless this Court orders otherwise.” 155 N.E.3d 1191, 1192 (Ind. 2020).

That Order emphasized

all trial courts should do the following until further direction is given by this Court:

1. Communicate with local bar associations and attorneys to maximize the use of remote proceedings in accordance with this Court’s May 13, 2020 Emergency Order Permitting Expanded Remote Proceedings and maintain public confidence in the health and safety of court proceedings.

* * * * *

4. Minimize in-person proceedings in non-essential matters where remote proceedings will be as effective.

Id. (emphasis in original). Then, on May 7, 2021, our Indiana Supreme Court entered an Order Extending Authority for Expanded Remote Hearings that continued the expanded use of remote proceedings “until further order of the Court.” 167 N.E.3d 289, 289 (Ind. 2021). Our Indiana Supreme Court did not issue any further order modifying its May 7, 2021, decree prior to the hearings at issue herein.

[14] Thus, the trial court’s authority to utilize a remote hearing in April 2022 was controlled not by Administrative Rule 14 or *C.S.*, but by our Supreme Court’s orders on remote hearings from 2020 and 2021. As M.H. has failed to cite the controlling law or provide cogent argument based on that law, his argument is

waived yet again. *See Zoller v. Zoller*, 858 N.E.2d 124, 127 (Ind. Ct. App. 2006) (“A party waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority.”) (quoting *Steiner v. Bank One Ind., N.A.*, 805 N.E.2d 421, 429 n.6 (Ind. Ct. App. 2004)). Although we prefer to decide cases on the merits when possible, neither of the parties has provided argument regarding whether the trial court’s utilization of virtual proceedings violated the standards established by our Indiana Supreme Court in response to the COVID-19 emergency. Nor has M.H. asserted the result of his proceeding would have been different if virtual proceedings had not been utilized. Accordingly, we hold M.H. has demonstrated neither fundamental error nor a denial of due process.

2. Placement in DOC

[15] Next, M.H. asserts the trial court abused its discretion when it made him a ward of the DOC. “The specific disposition of a delinquent child is within the juvenile court’s discretion,” *K.S. v. State*, 114 N.E.3d 849, 854 (Ind. Ct. App. 2018), *trans. denied*, and we thus review a trial court’s dispositional order for an abuse of discretion. *Id.* A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the trial court or against “the reasonable, probable, and actual deductions to be drawn” from those facts and circumstances. *Id.*

[16] While juvenile courts have “wide latitude and great flexibility” in fashioning dispositions for delinquents, *id.* (quoting *C.T.S. v. State*, 781 N.E.2d 1193, 1203

(Ind. Ct. App. 2003), *trans. denied*), our legislature delineated factors the trial court should consider as it makes its decision:

If consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that:

(1) is:

(A) in the least restrictive (most family like) and most appropriate setting available; and

(B) close to the parents' home, consistent with the best interest and special needs of the child;

(2) least interferes with family autonomy;

(3) is least disruptive of family life;

(4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and

(5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

Ind. Code § 31-37-18-6.

[17] M.H. argues the trial court's dispositional decision should not have relied on the court's finding that M.H. had not been attending school regularly because "[t]he record does not reflect seventeen-year-old M.H. had been ordered to attend school." (Appellant's Br. at 16.) Regardless of whether the trial court had ordered M.H. to attend school, attending school "regularly" was one of the standard terms and conditions of probation to which M.H. and his mother agreed in October 2021. (*See* App. Vol. 2 at 118.) Thus, M.H.'s failure to

attend school regularly was evidence of M.H.'s violating his probation in addition to the probation violation he admitted for possessing a firearm in March 2022, and it was relevant for the trial court's dispositional decision.

[18] M.H. also challenges the trial court's finding regarding the "Why Try" program being available at the DOC. However, M.H.'s assertion that "the probation officer was unaware of whether other facilities used that program or used a similar program[,] " (Appellant's Br. at 17), mischaracterizes the probation officer's testimony. The officer did not say she was unaware of whether other facilities used the program – as if she might have found another facility if she had looked for one. She said, "I don't know any of the residential facilities that use that program." (Tr. Vol. 2 at 191.) Her testimony supports the trial court's finding that M.H. could only participate in that program if he was placed in the DOC.

[19] M.H. argues "community resources had not been exhausted," (Appellant's Br. at 17), and "community placement would have been appropriate for his family." (*Id.*) In support, M.H. notes he is a new father and cites testimony that he is a good father. He also notes that he was beginning to succeed at schoolwork with individual educational assistance at the JDC. However, none of these facts or arguments invalidate the trial court's decision.

[20] M.H. had been under the supervision of the probation department for most of the time between June 2019, when he committed dangerous possession of a firearm, resisting law enforcement, and unauthorized use of a railroad right of way, and March 2022, when the court sent him to the DOC. During those

nearly three years, as the trial court found, M.H. had been provided many kinds of services intended to help him rehabilitate his behavior. Nevertheless, M.H. continued using marijuana, skipping school, and possessing firearms, rather than taking advantage of the services that were offered to him. On April 5, 2022, while housed in the JDC, M.H. was “involved in a physical altercation.” (*Id.* at 183.) The probation officer also testified she was concerned that placing M.H. in a residential treatment facility, rather than the DOC, would create safety concerns for the other residents placed in the treatment facility. Given the number of years M.H. had been on probation, his two prior adjudications as a delinquent, his three findings of being in possession of a firearm while a minor, his failure to take advantage of the multitude of services provided, and probation’s recommendation that the Why Try program at the DOC would benefit M.H., we find no abuse of discretion in the trial court’s decision to make M.H. a ward of the DOC. *See, e.g., D.S. v. State*, 829 N.E.2d 1081, 1086 (Ind. Ct. App. 2005) (“In light of D.S.’s failure to respond to the numerous less restrictive alternatives already afforded to him, we cannot say that the juvenile court abused its discretion in committing him to the Department of Correction.”).

Conclusion

[21] As M.H. failed to provide argument based on our Indiana Supreme Court’s orders that expanded the availability of remote hearings, and as M.H. has not argued he was prejudiced by the virtual hearings that occurred, M.H. has not

demonstrated fundamental error or a denial of due process by the trial court's holding some hearings virtually. Neither can we say the trial court abused its discretion in ordering M.H. to be a ward of the DOC when numerous less-restrictive services had not modified M.H.'s behavior. Accordingly, we affirm.

[22] Affirmed.

Crone, J., and Weissmann, J., concur.