IN THE COURT OF APPEALS OF IOWA

No. 7-251 / 96-1918

JUN 26 1997

000503

IN THE INTEREST OF D.T., Minor Child,

D.T., Minor Child,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Alan D. Allbee, Associate Juvenile Judge.

A juvenile appeals from the dispositional order entered upon his guilty plea for possession with intent to deliver crack cocaine in violation of Iowa Code section 124.401(1)(c) (1995). **AFFIRMED.**

Kellyann M. Lekar of Randall, Nelson & Hawbaker, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, and Steven Halbach, Assistant County Attorney, for appellee-State.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

A juvenile appeals a dispositional order placing him in a state training school following an adjudication of delinquency for possessing with intent to deliver crack cocaine.

In May of 1992, D.T. ran away from his grandmother's home and became involved in a burglary and a theft. He escaped from custody, was hospitalized, and returned to his grandmother's home. Less than a month later he ran away. Two days later he was placed in a youth shelter. The juvenile court found him to be a child in need of assistance and placed his custody with the Department of Human Services (DHS).

For the next year, DHS provided multiple community-based services to D.T. In September of 1993, he ran away and became involved in three thefts and one criminal trespass. He was placed in a youth shelter, but ran away twice and returned to his grandmother's home. He continued to run away, committed a theft, and was placed in a detention center. In the summer of 1994, he left a youth shelter to live with his grandmother, and he was placed in a detention center. A delinquency petition alleged he interfered with official acts and possessed with intent to deliver simulated crack cocaine.

Over the next two years, D.T. was placed in a group home, family foster care, a youth home, and a youth shelter. In July of 1996, he ran away from the youth

shelter. Less than a month later, Waterloo police took him into custody after discovering fourteen pieces of crack cocaine in a vehicle in which he was a passenger. An amended delinquency petition alleged he committed the felonies of possessing crack cocaine with intent to deliver and failure to affix a drug tax stamp.

Pursuant to a plea agreement, the court adjudicated D.T. a delinquent and set a dispositional hearing. D.T.'s grandmother and uncle gave testimony, but an aunt did not appear due to a job interview. The court ordered: "[G]uardianship of [D.T.] . . . is hereby placed with the director of the Iowa Department of Human Services for purposes of placement in the State Training School for Boys at Eldora, Iowa, for a period not to exceed his eighteenth birthday." The order also provided for a further dispositional review hearing within six months. D.T. appeals.

D.T. argues the dispositional order is invalid because it does not specify the duration of the placement. The State argues this claim has not been preserved for review, but even if it had, the language "not to exceed his eighteenth birthday" satisfies the durational requirement. D.T. also argues he received ineffective assistance of counsel.

The State argues error has not been preserved because D.T. did not file a Rule 179(b) motion in the juvenile court. We rejected this argument recently in *In re N.W.E.*, No. 7-049, 1997 WL 277780, at *4 (Iowa App. May 28, 1997). In *N.W.E.*, we recognized a rule 179(b) motion is generally required to preserve error when a

district court fails to resolve an issue properly submitted to it for adjudication. *Id.* We further recognized the supreme court held rule 179(b) applied to termination and CINA proceedings in juvenile court. *Id.* Nevertheless, we held the rule did not apply to dispositional orders in delinquency proceedings. We analogized to cases involving criminal sentencing orders, in which a rule 179(b) motion was not required. *Id.* (citing *State v. Boltz,* 542 N.W.2d 9, 10 (Iowa App. 1995)) (holding error preserved by raising issue of defective sentencing order on appeal); *State v. Thomas,* 520 N.W.2d 311, 313 (Iowa App. 1994)) (holding preservation rule does not apply to void, illegal, or procedurally defective sentences). We found juvenile dispositional orders were more comparable to criminal sentencing orders and held no rule 179(b) motion was required to preserve a challenge to a dispositional order.

D.T. argues the dispositional order did not state the duration of his placement at the training school. Iowa law provides that a dispositional order "shall specify the duration and the nature of the disposition." Iowa Code § 232.52(1) (1995). The juvenile court's order provided his placement "for a period not to exceed his eighteenth birthday."

The parties disagree on the application of our decision in *In re M.D.S.,* 488 N.W.2d 715 (Iowa App. 1992). Although the court ruled the trial court's order did not follow the directive of the statute, *M.D.S.,* 488 N.W.2d at 720, that decision is not

useful because the opinion does not give the text of the trial court's order or otherwise indicate whether duration was even considered by the trial court.

We hold the dispositional order satisfied the durational requirement of the statute. This case does not present a situation where an order makes no mention of when placement will cease. The order placing D.T. in the training school provided for a duration--for a period not to exceed his eighteenth birthday. Had the juvenile court judge calculated the time remaining until D.T. turned eighteen and phrased the order in terms of years, months, and days, it is clear the durational requirement would have been satisfied. Phrasing the order as it did, however, still provides a duration of placement.

D.T. argues he was denied effective assistance of counsel. Generally, we use the same test in juvenile cases as in criminal cases. *In re A.R.S.,* 480 N.W.2d 888, 891 (Iowa 1992). To prove his counsel was ineffective, D.T. has the burden to show his counsel was deficient and actual prejudice resulted. *Id.* To show prejudice, D.T. must show that any deficient performance worked to his "actual and substantial disadvantage" and constituted "'a denial of [his] due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation.'" *Taylor v. State,* 352 N.W.2d 683, 685 (Iowa 1984) (quoting *State v. Miles,* 344 N.W.2d 231, 234 (Iowa 1984)). He must show a reasonable probability exists that but for any deficient performance the result of the dispositional hearing would have been

different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Under this standard, D.T.'s claim fails because he has not shown prejudice. He argues his attorney did not adequately present evidence and arguments concerning placement in his grandmother's home or in foster group care. The record does not support this argument. His attorney asked the court to consider placement in the home of his aunt or grandmother. She informed the court that the grandmother had moved into a new home, and presented testimony of D.T., his uncle, and his grandmother. This testimony provided the court with placement alternatives beyond the training school.

D.T. has not established a reasonable probability the outcome would have been different had his attorney done more on his behalf. The evidence showed D.T. had run away from his grandmother's home at least three times, had repeatedly run away from youth shelters, and continued to engage in delinquent behavior despite being provided with multiple community-based services. D.T.'s seventh adjudication was for what would be a class C felony if committed by an adult. The juvenile court relied on this history and the seriousness of the drug adjudication, recognized D.T. did well in a structured setting, and placed him at the training school, where he could participate in sports and receive an education. D.T.'s counsel performed adequately.

AFFIRMED.