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Supreme Court, Appellate Division, Fourth Department, New York.

GERALD III v.

Matter of GERALD R.M., Also Known as Gerald R.M., III, Respondent-Appellant. Seneca County Attorney, Petitioner-Respondent.

-- November 19, 2004

PRESENT: PIGOTT, JR., P.J., PINE, SCUDDER, KEHOE, AND LAWTON, JJ.

Jaya Shurtliff, Law Guardian, Oswego, for Respondent-Appellant.Steven J. Getman, County Attorney, Waterloo (Frank R. Fisher of Counsel), Petitioner-Respondent Pro Se.

On appeal from an order adjudging him to be a juvenile delinquent and, inter alia, placing him in the custody of the New York State Office of Children and Family Services, respondent contends that the petition fails to comply with Family Ct. Act § 311.2(c) and that this contention is a non-waivable jurisdictional defect that may be raised for the first time on appeal. We disagree and conclude that the contention must be preserved and is waived by respondent's admission to one of the charges in the petition.

Pursuant to section 311.2(c) a petition in a juvenile delinquency proceeding is sufficient on its face when “non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof.” The Court of Appeals has held that section 311.2(c) should be interpreted the same way as CPL 100.40(1)(c), which has a parallel requirement for misdemeanor informations (see Matter of Edward B., 80 N.Y.2d 458, 464, 591 N.Y.S.2d 962, 606 N.E.2d 1353; Matter of Jahron S., 79 N.Y.2d 632, 636-637, 584 N.Y.S.2d 748, 595 N.E.2d 823; see also Matter of Desmond J., 246 A.D.2d 111, 116, 679 N.Y.S.2d 61, affd. 93 N.Y.2d 949, 694 N.Y.S.2d 338, 716 N.E.2d 173). In People v. Alejandro, 70 N.Y.2d 133, 138, 517 N.Y.S.2d 927, 511 N.E.2d 71, the Court held that “an information must, for jurisdictional purposes, contain non[-]hearsay factual allegations sufficient to establish a prima facie case.” In interpreting its own holding in Alejandro, the Court held that, where a juvenile delinquency petition fails to contain non-hearsay allegations sufficient to support each element of the crime charged, “an omission of this nature in a criminal information renders the accusatory instrument

jurisdictionally defective" (Matter of David T., 75 N.Y.2d 927, 928, 555 N.Y.S.2d 675, 554 N.E.2d 1263; see generally Jahron S., 79 N.Y.2d at 637-640, 584 N.Y.S.2d 748, 595 N.E.2d 823). Subsequent delinquency cases have held that the failure of a petition to contain non-hearsay allegations to support each element of the crime charged constituted a non-waivable jurisdictional defect that could be raised for the first time on appeal and was not waived by entry of an admission to the petition (see Matter of Wesley M., 83 N.Y.2d 898, 899-900, 613 N.Y.S.2d 853, 636 N.E.2d 1386; Matter of Rodney J., 83 N.Y.2d 503, 507, 611 N.Y.S.2d 485, 633 N.E.2d 1089; Matter of Shane B., 4 A.D.3d 650, 651, 772 N.Y.S.2d 133).

In People v. Casey, 95 N.Y.2d 354, 362, 717 N.Y.S.2d 88, 740 N.E.2d 233, however, the Court revisited its holding in Alejandro and stated that the only issue concerning CPL 100.40(1)(c) in Alejandro was the "total absence" of evidence supporting an element of the crime charged and not the existence of hearsay information supporting that charge. "Therefore, Alejandro's suggestion that the second, non-hearsay requirement of CPL 100.40(1)(c) was 'jurisdictional' and, thus, non-waivable and reviewable on appeal without preservation was not essential to the Court's holding" (id.). In Casey, the Court was "squarely confronted with the issue whether a hearsay pleading [in] violation of CPL 100.40(1)(c) is jurisdictional and non-waivable" (id.). The Court, without mentioning David T., Wesley M., or Rodney J., concluded that the violation is not jurisdictional and is waivable (id. at 362-363, 717 N.Y.S.2d 88, 740 N.E.2d 233; see People v. Keizer, 100 N.Y.2d 114, 119-122, 760 N.Y.S.2d 720, 790 N.E.2d 1149; see also People v. Robinson, 1 A.D.3d 1019, 1020, 767 N.Y.S.2d 363, lv. denied 2 N.Y.3d 745, 778 N.Y.S.2d 471, 810 N.E.2d 924). We conclude, therefore, that those juvenile delinquency cases have been tacitly overruled by Casey and Keizer. Thus, we conclude that respondent's contention, raised for the first time on appeal, is not preserved for our review and is waived by respondent's admission to the petition.

We further conclude that Family Court complied with Family Ct. Act §§ 321.3(1) and 341.2(3) when it accepted respondent's admission. The record indicates the presence of a parent in the courtroom at the time respondent entered his admission. The record further indicates that the court properly conducted an allocution with the parent, informing her of the possible specific dispositions. Although the record does not indicate the presence of respondent's legal guardian, the statute requires only the presence and allocution of either a "parent or other person legally responsible for [respondent's] care" (§ 321.3[1]; see also § 341.2[3]). "[T]he word 'or' as used in a statute is a disjunctive particle [sic] indicating an alternative and it often connects a series of words or propositions presenting a choice of either" (Colbert v. International Sec. Bur., 79 A.D.2d 448, 463, 437 N.Y.S.2d 360, lv. denied 53 N.Y.2d 608, 442 N.Y.S.2d 1025, 425 N.E.2d 899).

We further conclude that respondent's "conclusory allegations against [the law guardian] fail to establish a denial of meaningful representation" (People v. De Leo, 214 A.D.2d 762, 762, 624 N.Y.S.2d 982; see generally People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400). Finally, we conclude that the initial judge did not abuse his discretion in accepting the admission before withdrawing from the case. "[A] court's decision to withdraw from a case after previously declining to do so will not transform a 'worthless recusal claim into one with merit' " (Rochester Community Individual Practice Assn. v. Excellus Health Plan [Appeal No. 2], 305

A.D.2d 1007, 1008, 758 N.Y.S.2d 576, lv. dismissed 1 N.Y.3d 546, 775 N.Y.S.2d 242, 807 N.E.2d 292, quoting Bank of Tokyo Trust Co. v. Urban Food Malls, 229 A.D.2d 14, 34, 650 N.Y.S.2d 654). Further, " '[j]udicial acts taken before the [recusal] may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts' " (id. at 1008-1009, 758 N.Y.S.2d 576, quoting United States v. Murphy, 768 F.2d 1518, 1541, cert. denied 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304). Respondent herein has made no such showing.

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously affirmed without costs.

MEMORANDUM:

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