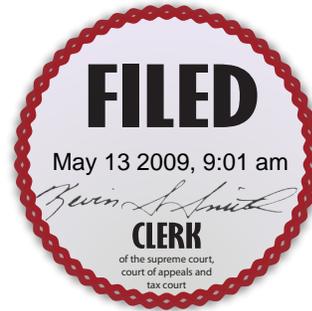


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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J.W., )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 82A01-0812-JV-556  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable Brett J. Niemeier, Judge  
Cause No. 82D01-0803-JD-115

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**May 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

J.W. was adjudicated a juvenile delinquent for committing an act that would constitute the crime of theft if committed by an adult. After being so adjudicated, J.W. filed a motion to correct error on the basis of ineffective assistance of counsel. On appeal, J.W. contends the court erred by summarily denying his motion to correct error.

We affirm.

On July 20, 2007, fifteen-year-old J.W. and his friend, C.W., went into the J.C. Penney department store in the Eastland Mall in Evansville. J.W. carried another merchant's bag into the store, which he eventually handed to C.W. While in the men's department on the second floor, J.W. tried on a hat and two jerseys. Instead of returning the items to where they belonged, J.W. placed them on top of another clothing rack right next to C.W. As he did so, he said something to C.W. and walked away. C.W. then placed the items in the bag he was carrying and followed closely behind J.W. toward the escalator. Nancy Graff, one of the store's loss prevention officers, had been watching the pair and was able to "jump" in between the two as they went down the escalator. *Transcript* at 19. Once the boys exited the store without paying for the items, Graff confronted them and escorted them to the loss prevention office. The items were recovered from the bag, which also contained a Mountain Dew bottle.

Soon thereafter, the police and each boy's parents were contacted. Before the parents arrived, however, Graff presented the boys with acknowledgment forms, which they signed in the presence of two loss prevention officers and a police officer. The State introduced J.W.'s acknowledgement into evidence at the delinquency hearing. Although J.W.'s counsel

did not object to the exhibit, the record reveals counsel clearly questioned its validity.<sup>1</sup>

At the conclusion of the delinquency hearing, on May 9, 2008, the court indicated that it believed the boys were acting together based upon their actions at the store. After concluding that the State had proven its case beyond a reasonable doubt, the court made the following statement: “Of course, that’s not even taking into account that he signed that he took these things.” *Id.* at 29. Thereafter, J.W. was given a suspended commitment to the Department of Correction and placed on probation for a period of six months.

On July 25, J.W. filed a motion to correct error. In his motion, J.W. argued that counsel was ineffective for failing to object to the admission of the acknowledgment, which was signed by J.W., a juvenile, without the presence of one of his parents. The motion alleged in part:

12. That the Respondent was clearly in custody at the time this “acknowledgment” was obtained.
13. That there was no evidence that his parents or guardian were present.
14. That Respondent’s counsel failed to establish that this “acknowledgment” was obtained in compliance with I.C. 31-32-5-1.<sup>[2]</sup>

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<sup>1</sup> Upon cross-examination, Graff acknowledged that the form was not read to J.W. and that a police officer was present. Further, defense counsel asked Graff if there was any reason why she did not wait to have the forms signed until the boys’ parents arrived, and Graff replied in the negative. Finally, J.W. testified that he was nervous and scared when he signed the form and that Graff did not explain to him that the acknowledgment was a confession. Rather, he testified that Graff informed him that by signing the form he was only admitting to being with C.W.

<sup>2</sup> Ind. Code Ann. § 31-32-5-1 (West, PREMISE through 2008 2nd Regular Sess.) provides:  
Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:  
(1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;  
(2) by the child’s custodial parent, guardian, custodian, or guardian ad litem if:  
    (A) that person knowingly and voluntarily waives the right;  
    (B) that person has no interest adverse to the child;  
    (C) meaningful consultation has occurred between that person and the child; and  
    (D) the child knowingly and voluntarily joins with the waiver; or  
(3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:

15. That there was no credible evidence introduced by the State to establish the commission of a criminal act by the Respondent other than the “acknowledgment” introduced without objection during the course of the delinquency hearing.

16. That as a result of the Respondent’s counsel’s failure to object to inadmissible evidence, including by not limited to, State’s Exhibit A, your Respondent was denied effective assistance of counsel and was deprived of a fair hearing upon the Petition to determine that he was a delinquent child.

\* \* \*

*Appendix* at 7-8. The day it was filed, the juvenile court denied J.W.’s motion to correct error and vacated the scheduled hearing on the motion. J.W. now appeals.

J.W. challenges the denial of his motion to correct error on both procedural and substantive grounds. Procedurally, he claims that the trial court erred in summarily denying his motion without holding a hearing. J.W. also argues, substantively, that he was denied effective assistance of counsel due to counsel’s failure to object to the admission of the acknowledgment into evidence. We will address each argument in turn.

Initially, we observe that our Supreme Court “has long and consistently held that a trial court is not required to hold an evidentiary hearing on a motion to correct error.” *Ortiz v. State*, 766 N.E.2d 370, 376 (Ind. 2002). Even when the motion is based on evidence outside the record, Criminal Rule 17 and Trial Rule 59(H) contemplate filing affidavits that set forth sufficient grounds in support of a motion to correct error. *See Ortiz v. State*, 766 N.E.2d 370. “The trial court may then rule on the merits of the motion without the necessity of an evidentiary hearing.” *Id.* at 377. In the instant case, J.W.’s motion was not based upon

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(A) the child knowingly and voluntarily consents to the waiver; and  
(B) the child has been emancipated....

evidence outside of the record. In light of the fact that a transcript of the delinquency hearing was included with the motion to correct error, the trial court was fully able to consider the merits of the motion without holding an evidentiary hearing. *See Perkins v. State*, 718 N.E.2d 790, 794 n.6 (Ind. Ct. App. 1999) (“there are times when [a juvenile’s ineffective assistance] claim may be determined from the trial record alone”). There was no error committed by the trial court in failing to hold an evidentiary hearing on J.W.’s motion to correct error.<sup>3</sup>

We now turn to the merits of J.W.’s ineffective assistance claim. “Like defendants in criminal proceedings, respondents in juvenile delinquency proceedings have a Sixth Amendment right to the effective assistance of counsel.” *Id.* at 793. A claim of ineffective assistance of counsel requires a showing that: (1) counsel’s performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel’s performance prejudiced the defendant so much that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Thus, the failure to satisfy either component will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006).

The State correctly argues that J.W.’s ineffectiveness claim fails for lack of prejudice.

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<sup>3</sup> If J.W. believed his ineffective assistance claim required the development of additional evidence and thus a hearing, a proper avenue for relief would have been to file a Trial Rule 60(B) motion for relief from judgment. *See Perkins v. State*, 718 N.E.2d 790 (observing that T.R. 60(B) is an appropriate means for juveniles to raise an ineffective assistance claim that will afford them an opportunity to present evidence).

“In determining whether the defendant was prejudiced, we look to the totality of the evidence and ask whether there is a reasonable probability that the outcome would have been different but for counsel’s errors.” *Elisea v. State*, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002). As set forth above, although counsel did not object to the admission of the evidence in question, the record reveals that counsel otherwise attacked its validity. Accordingly, in pronouncing its judgment, the juvenile court made clear that it was not relying upon said evidence. Therefore, J.W. cannot establish prejudice with respect to counsel’s failure to object, and the court correctly denied J.W.’s motion to correct error.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.