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IN THE
COURT OF APPEALS OF INDIANA

L.R.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-1101-JV-25
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent	.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Gary Chavers, Judge Pro Tem
Cause No. 49D09-0808-JD-2325, 0901-JD-101, 0902-JD-397

September 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

L.R. appeals the trial court's denial of his motion to vacate and set aside his juvenile delinquency adjudications. We affirm.

Issue

L.R. raises one issue, which we restate as whether the trial court properly denied his motion to vacate and set aside his delinquency adjudications based on his alleged incompetency.

Facts

On September 15, 2008, L.R. was adjudicated a delinquent child following an admission to an allegation of what would have been Class D felony criminal recklessness if committed by an adult. On March 25, 2009, L.R. was adjudicated a delinquent child following an admission to an allegation of what would have been Class A misdemeanor criminal mischief if committed by an adult. Also on March 25, 2009, L.R. was adjudicated a delinquent child following an admission to an allegation of what would have been Class A misdemeanor operating a motor vehicle while intoxicated if committed by an adult.

In 2009, the State filed additional juvenile delinquency allegations against L.R. In January 2010, a hearing was held to determine L.R.'s competency as it related to the pending allegations. In March 2010, the trial court issued an order concluding that L.R. was incompetent to stand trial on the pending allegations because he lacked the mental ability to meaningfully consult with counsel and to assist in preparing his defense.

On November 1, 2010, L.R. filed a written motion to vacate and set aside the 2008 and 2009 delinquency adjudications based on his incompetency. On November 22, 2010, the trial court held another competency hearing. On December 15, 2010, after another hearing, the trial court concluded that L.R. remained incompetent regarding the pending allegations but denied L.R.'s motion to vacate and set aside the 2008 and 2009 adjudications.[1] L.R. now appeals the denial of his motion to vacate and set aside the adjudications.

Analysis

L.R. argues that the trial court improperly denied his motion to vacate and set aside his 2008 and 2009 delinquency adjudications. He contends that he is entitled to relief from judgment pursuant to Indiana Trial Rule 60(B)(6) because, if he was incompetent in 2010, he likely was incompetent at the time of the 2008 and 2009 adjudications.

"A juvenile may use a Trial Rule 60(B) motion for relief from judgment to challenge an adjudication of delinquency." J.A. v. State, 904 N.E.2d 250, 254 (Ind. Ct. App. 2009), trans. denied. A Trial Rule 60(B) motion cannot be used as a substitute for a direct appeal nor to revive an expired attempt to appeal. Id. "The burden is on the movant to establish ground for Trial Rule 60(B) relief." In re Paternity of P.S.S., 934 N.E.2d 737, 740 (Ind. 2010). A Trial Rule 60(B) motion is addressed to the "equitable discretion" of the trial court. Id. at 740-41. A trial court's ruling on a Trial Rule 60(B)

[1] Although the trial court appears to have mixed-up the cause numbers in its written order, it referred to the correct cause numbers during the hearing.

motion will be disturbed only for an abuse of discretion, which occurs when the trial court's action is clearly erroneous, that is, against the logic and effect of the facts before it and the inferences which may be drawn therefrom. Id. at 741.

In the context of criminal proceedings, our supreme court has observed that "retrospective competency hearings are generally disfavored." Edwards v. State, 902 N.E.2d 821, 825 (Ind. 2009). "A nunc pro tunc competency determination is nevertheless permissible 'whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant.'" Id. (quoting Maynard v. Boone, 468 F.3d 665, 674-75 (10th Cir. 2006)). Courts typically consider the following factors in determining the feasibility of retrospective competency hearings:

> "(1) [T]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials."

Id. at 826 (quoting Maynard, 468 F.3d at 675) (alteration in original).

In support of his argument that he must have been incompetent in 2008 and 2009, L.R. relies on the expert testimony of Dr. Ann Lagges, a psychologist, who testified at both 2010 competency hearings. Both times Dr. Lagges concluded that L.R. was incompetent. At the November 2010 hearing, Dr. Lagges testified that L.R.'s incompetence related to his intellectual disability and that it "is likely" that L.R. has never been competent. Tr. p. 198. On the other hand, Dr. David Posey, a psychiatrist,

who testified at the January 2010 hearing that L.R. was incompetent, testified at the November 2010 hearing that he believed L.R. was malingering and was likely competent. Other than Dr. Lagges's testimony, L.R. offered no evidence relating to his competency at the time of the 2008 and 2009 adjudications.

Although it appears that the trial court was persuaded by Dr. Lagges's testimony as it related to L.R.'s competency in November 2010 because it found L.R. to be incompetent in December 2010, the trial court was not required to credit Dr. Lagges's testimony as it related to retroactively determining L.R.'s competency in 2008 and 2009. See Foulks v. State, 582 N.E.2d 374, 377 (Ind. 1991) ("The trier of fact is free to believe one part of a witness' testimony and disbelieve another part."). At the December 2010 hearing, the trial court acknowledged that L.R. was asking it "to go back and say wow, the Judge missed it, the attorneys missed it, the probation department didn't raise it." Tr. p. 262. Given the less than clear picture of L.R.'s competency in 2010, let alone in 2008 and 2009, L.R. has not established that the trial court abused its discretion by denying his motion to vacate and set aside the 2008 and 2009 delinquency adjudications.

Conclusion

L.R. has not established that the trial court abused its discretion in denying his motion to vacate and set aside his 2008 and 2009 adjudications. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.