

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1237

Filed: 15 October 2019

Orange County, No. 10 JA 6

IN THE MATTER OF: F.S.

Appeal by respondent from order entered 31 August 2018 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 4 September 2019.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for the guardian ad litem.

TYSON, Judge.

This Court’s unanimous opinion reversed the trial court’s adjudication of F.S. (“Finley”) as a neglected and dependent juvenile. *In re F.S.*, __ N.C. App. __, 810 S.E.2d 411, 2018 WL 1162599 (2018) (unpublished); *see also* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of juveniles). The mandate for that opinion issued 26 March 2018.

On that date, Orange County Department of Social Services (“OCDSS”) filed its second juvenile petition alleging Finley was: (1) neglected in that he does not

receive proper care, supervision or discipline and that he lives in an injurious environment; and, (2) dependent in that Respondent-mother is unable to provide care for him and lacks an appropriate alternative arrangement. Respondent-mother appeals from the trial court's 31 August 2018 order adjudicating her minor son, Finley, to be a neglected and dependent juvenile. We reverse.

I. Background

The underlying facts are set forth in detail in our Court's previous opinion. *Id.* Respondent-mother and OCDSS were previously involved in 2010 due to her substance addiction. Finley was returned to Respondent-mother's care until she relapsed with alcohol and marijuana use over five years later in December 2016. Respondent-mother presented for a four-hour visit to the Duke Hospital Emergency Department on 25 December 2016 and OCDSS obtained nonsecure custody of Finley that same night. *In re F.S.*, 2018 WL 1162599 at *1. OCDSS filed its original petition alleging Finley was neglected and dependent on 28 December 2016. *Id.*

A hearing was held in April 2017 and the trial court adjudicated Finley to be neglected and dependent on 15 May 2017 ("15 May Order"). *Id.* Respondent-mother entered notice of appeal and this Court unanimously reversed the adjudication.

In the months after the 15 May Order, Respondent-mother entered into a case plan with OCDSS, submitted to a psychological evaluation, completed a parenting capacity evaluation, and visited with her son. She also was hospitalized at least eight

times due to her alcohol addiction and illness and from effects she was suffering from withdrawal.

During the pendency of Respondent-mother's case, her working relationship with her OCDSS social worker, David Byrd, deteriorated. The record contains copies of emails Respondent-mother sent to Byrd and an Order for No Contact and Protective Order filed 15 December 2017.

Periodic review hearings were held and a permanency planning order was entered during the pendency of Respondent-mother's prior appeal. The trial court entered an order designating adoption as the primary plan and reunification as the secondary plan. On 12 January 2018, the court signed an order indicating that the matter "shall come on for Permanency Planning or Termination of Parental Rights on the 19th day of April 2018."

On 26 March 2018, this Court's mandate was filed with the Orange County Clerk of Superior Court. OCDSS filed the instant juvenile petition to prevent Finley's return to Respondent-mother's custody. On 13 July 2018, OCDSS filed notice of its intention to introduce the hearsay statements purportedly made by Finley to a social worker and therapist.

On 19 July 2018, an adjudicatory hearing was held on OCDSS' new petition. Prior to the start of testimony, Respondent-mother's counsel sought a ruling to exclude the proposed introduction and admission of the hearsay testimony. The trial

court indicated it would allow the testimony “under the business records rule (inaudible), reliable hearsay rule, or it’s going to (inaudible) hearsay rule.”

OCDSS Program Manager for Child Welfare Services, Crystal Mitchell, testified to statements purportedly made by Finley to other individuals during his therapy sessions. Finley allegedly related that Respondent-mother would become “unpredictable and angry” when she drank, that he had to take care of her when she drank too much, that he had missed school and that “there were times when he had to act like a grownup.”

Over objection, Mitchell also testified about Respondent-mother’s 2017 and 2018 hospitalizations at UNC Hospital and Duke Hospital from summaries of Respondent-mother’s medical records, and not from the actual records themselves. Also over objection, Mitchell read into evidence redactions from police reports of Respondent-mother’s purported interactions with police and her subsequent arrest for assault on a government official in October 2017.

Mitchell had become the point of contact for Respondent-mother after the no contact order with David Byrd was issued. Respondent-mother reached out to Mitchell indicating that she was not doing well and needed an inpatient program. Mitchell became concerned that Respondent-mother continued to be under the influence of alcohol or other impairing substances. Mitchell opined Respondent-mother’s thought process was “disjointed and disorganized,” and she switched rapidly

to differing subjects. Respondent-mother reported to Mitchell she had suffered short-term memory loss. Mitchell testified to her concern about Respondent-mother's ability to be a "fulltime care-giver" for Finley. In January 2018, Respondent-mother telephoned Mitchell and told her that she "would not be okay to take care of Finley at that point in time."

Respondent-mother was offered weekly visitation with Finley until mid-November 2017. Her visitation was suspended purportedly due to missed visits and OCDSS' concerns with Respondent-mother's mental health, stability, and how she may "present" to Finley at visitation. The primary permanent plan of reunification was modified to become the secondary plan behind a primary plan of adoption by court order entered 16 January 2018.

Respondent-mother offered no evidence at the 19 July hearing. On 31 August 2018, the trial court entered an order, which concluded Finley was neglected and dependent. The order required Respondent-mother to continue to participate in recommended substance abuse treatment of group and individual therapy, attend NA/AA meetings, submit to random drug screens, and participate in psychological evaluation and follow all recommendations. The order kept Finley in OCDSS' physical and legal custody. Respondent-mother entered timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2017).

III. Issues

Respondent-mother argues the trial court erred by: (1) admitting hearsay under the residual exception, (2) adjudicating Finley to be neglected, and (3) adjudicating Finley to be dependent.

IV. Analysis

A. Hearsay Evidence

Our Constitution and General Statutes require the trial court to protect the due process rights and the parental rights of the juvenile's parent and of the juvenile at the adjudicatory hearing. N.C. Gen. Stat. § 7B-802 (2017). The rules of evidence apply in adjudication hearings. N.C. Gen. Stat. § 7B-804 (2017).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, 801(c) (2017). Admission of hearsay denies confrontation with the declarant and is inadmissible except by statute or under the Rules of Evidence. N.C. Gen. Stat. § 8C-1, 802 (2017). The trial court made no finding regarding the availability of the declarant.

Hearsay may be admissible under the residual exception where the statement is:

Opinion of the Court

not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, 803(24) (2017). The statute requires the trial court to make findings of fact of (A), (B) and (C) and to provide the required prior notice to the adverse party. *Id.*

1. Standard of Review

In the absence of a confrontation clause challenge, “[t]he admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown.” *In re W.H.*, __ N.C. App. __, __, 819 S.E.2d 617, 620 (2018) (internal quotation marks and citation omitted). Respondent-mother must show she “was prejudiced and a different result would have likely ensued had the error not occurred.” *Id.*

2. Analysis

“Our Supreme Court has often used the following factors in determining a statement’s trustworthiness: (1) the declarant’s personal knowledge of the underlying event; (2) the declarant’s motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.” *Id.* at ___, 819 S.E.2d at 620 (citing *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 852-53 (2003) and *State v. Smith*, 315 N.C. 76, 93-94, 337 S.E.2d 833, 845 (1985)).

In the case of *In re W.H.*, the respondent-father argued the trial court erred in determining the admissibility of his daughters’ out-of-court statements concerning their father’s sexual abuse of them. *In re W.H.*, ___ N.C. App. at ___, 819 S.E.2d at 619. The respondent-father also challenged the trial court’s conclusion that the statements “possessed circumstantial guarantees of trustworthiness.” *Id.* at ___, 819 S.E.2d at 620.

The respondent-father pointed to the finding’s lack of mention that the daughters had recanted their accusations during forensic evaluations at a children’s advocacy center several years prior. *Id.* This Court recognized our Supreme Court’s holding in *Valentine* that the trial court’s failure was not fatal where the court’s findings and the record revealed the trial court had not abused its discretion in determining that the out-of-court statements were trustworthy. *Id.* (citing *Valentine*, 357 N.C. at 519, 591 S.E.2d at 853).

Opinion of the Court

Here, Mitchell testified to statements Finley had purportedly made to a third party as follows:

He reported that his mom would become angry and unpredictable when she would drink, and she would yell at him. He also reported that there were times where he had to take care of his mother when she slept too much or was sick, and he referenced, “because of her drinking” and the mold in their home. He also referenced that he felt there were times where he had to act like a grownup. There were times when he missed school due to his mom not feeling well and not being able to take him to school.

And he expressed concerns of being fearful of individuals at times that were brought into the home to stay.

The trial court’s order references these statements purportedly made by Finley:

8. . . . Respondent mother would become angry after drinking; brought strangers into the home that made him feel uncomfortable and scared; and he had to miss school to take care of Respondent mother due to her drinking.

. . . .

33. . . . Respondent mother would become angry and unpredictable when she was intoxicated, and he was afraid of her because of her explosive and unpredictable behavior. He had to take care of his mother when she slept too much or was sick from drinking alcohol.

OCDSS’ pretrial notice of residual hearsay indicates merely, “That the juvenile herein has made statements to social worker D. Byrd and therapist N. Berson regarding the impact of Respondent mother’s alcohol use.” Neither Finley, Byrd, nor

Berson were called to testify and no ruling was made regarding their unavailability as witnesses or explanation why OCDSS had failed to produce those witnesses. At the start of the adjudication hearing, Respondent-mother objected and sought a ruling on the admission of the residual hearsay. Without taking any testimony or hearing any arguments or making any findings required under Rule 803(24), the trial court indicated it would admit the hearsay statements under the business records rule or reliable hearsay exception.

At the time the statement was offered by Mitchell over objection by Respondent-mother, Mitchell simply testified that the meeting notes taken by Respondent-mother's former social worker, indicated what Finley purportedly stated. None of the statements were witnessed by Mitchell. The notes allegedly taken by Byrd, appear to have been further summarized by Mitchell in court, double hearsay, and do not indicate when Finley reported these feelings, who he told, or where he was.

The OCDSS and the Guardian *ad litem* ("GAL") do not indicate where in the transcript the trial court engaged in the careful consideration and made the required findings on the specific factors required by the residual hearsay exception, Rule 803(24). Further, we utterly reject OCDSS' argument that with respect to Finley's availability, Respondent-mother "failed" to issue a subpoena for Finley. OCDSS, not Respondent-mother, bears the burden of proof. *See* N.C. Gen. Stat. § 7B-805 (2017)

(“allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence”).

The trial court failed to make any findings regarding the circumstantial guarantees of trustworthiness of the conditions and situation under which the purported statements were made. The court’s order makes no reference to the motivation or lack thereof for Berson, Byrd, Finley, or Mitchell to be truthful. The record and findings do not support the trial court’s admission of the hearsay evidence under Rule 803(24).

By further comparison, in response to the respondent-father’s argument in *In re W.H.* that the trial court had erred in its determination that his daughters were unavailable to testify, this Court pointed to specific findings of the trial court. *In re W.H.*, __ N.C. App. at __, 819 S.E.2d at 621. “The trial court made this determination based on its findings that the out-of-court statements were trustworthy, that testifying would traumatize the daughters, that testifying would cause them confusion, and that there would be a risk that they would not be truthful out of guilt and fear.” *Id.*

Here, the court failed to address Finley’s or the other declarants’ availability or whether the hearsay statement would be more probative than having Finley or them testify. The trial court made no findings that the statements it allowed and

admitted were trustworthy. Without the improperly admitted hearsay evidence, the record does not support the trial court's conclusion. *See id.*

Here the trial court failed to properly apply Rule of Evidence 803(24). Respondent-mother has shown she was prejudiced by this failure. Without the hearsay, no findings demonstrate harm or potential risk of harm to Finley returning to Respondent-mother's care.

B. Allegations of Neglect and Dependency

1. Standard of Review

This Court reviews the trial court's adjudication of Finley to be a neglected and dependent juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

2. Neglect

OCDSS alleged Finley was a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15) in that he did not receive "proper care, supervision, or discipline" from Respondent-mother and that he "lives in an environment injurious" to his welfare. N.C. Gen. Stat. § 7B-101(15) (2017).

Respondent-mother argues the trial court erred by adjudicating Finley neglected based upon reasons similar to those reversed in her previous appeal to this Court. *In re F.S.*, __ N.C. App. __, 810 S.E.2d 411, 2018 WL 1162599 (“*In re F.S. I*”). In *In re F.S. I*, this Court held that “[i]n assessing Finley’s status as a neglected or dependent juvenile, the court was obliged to determine . . . whether he is exposed to a ‘substantial risk of [physical, mental, or emotional] impairment,’” and “whether Respondent ‘is unable to provide for [his] care or supervision.’” *Id.* at *3.

We recognized Respondent-mother’s prior substance abuse met the minimum standard for relevancy because it provided “context for the incidents described in the petition filed 28 December 2016.” *Id.* This Court reversed the trial court’s adjudication of neglect because “the facts before the court do not establish that Finley was harmed or placed at substantial risk of harm as a result of her conduct on 25 December 2016.” *Id.* at *4.

Our case law requires “there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide ‘proper care, supervision, or discipline’ in order to adjudicate a juvenile neglected.” *In re J.R.*, 243 N.C. App. 309, 313, 778 S.E.2d 441, 444 (2015) (citations omitted). “[P]arental behavior constituting ‘neglect’ [is] ‘either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing

injury to the juvenile.” *Id.* at 315, 778 S.E.2d at 445 (citing *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003)).

The 15 May Order initially appealed focused solely on Respondent-mother’s alcohol-infused behavior on 25 December 2016. The court’s findings showed no nexus of harm or substantial risk of harm to Finley. Respondent-mother argues OCDSS was collaterally estopped from arguing her hospitalizations showed risk of harm to Finley in the instant case. The doctrines of collateral and judicial estoppel would preclude OCDSS from retrying the fully litigated issue that was decided in *In re F.S. I. In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987) (“The doctrine of collateral estoppel operates to preclude parties ‘from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.’” (citation omitted)). The doctrine of collateral estoppel does not preclude the trial court’s adjudication of facts from new allegations and events which transpired after the 15 May 2017 adjudication in *In re F.S. I.*

Since Finley was not in Respondent-mother’s custody at the time of the adjudication hearing, the trial court must assess and find the probability that there is substantial risk of future neglect. In assessing the risk of future neglect, the trial court considers the “risk for a particular kind of harm given [the juvenile’s] age and the environment in which they reside.” *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999); *see also In re A.N.L.*, 213 N.C. App. 266, 272, 714 S.E.2d 189,

194 (2011) (trial court has some discretion in its determination and must “consider the circumstances and conditions surrounding the child” (citation omitted)).

This Court is required to consider the totality of the evidence to determine whether the trial court’s findings sufficiently support its ultimate conclusion that Finley is a neglected juvenile. *In re J.R.*, 243 N.C. App. at 315, 778 S.E.2d at 445.

The trial court found that Respondent-mother had been hospitalized numerous times for alcohol and substance abuse and symptoms of withdrawal. Based upon a portion of Respondent-mother’s medical records summarized by OCDSS, the court found records indicated Respondent-mother was: (1) hospitalized at UNC Hospital from 27 September 2017 to 4 October 2017; (2) hospitalized at UNC Hospital from 31 October 2017 to 2 November 2017; (3) released from the UNC Emergency Department on 9 November 2017; (4) presented to the UNC Emergency Department on 24 November 2017; (5) admitted at Duke Hospital on 15 December 2017 to 26 December 2017; (6) admitted at Duke on 1 January 2018 to 7 January 2018; (7) admitted at the Alcohol and Drug Abuse Treatment Center from 22 January 2018 to 2 February 2018; (8) admitted at UNC from 10 February 2018 to 11 February 2018; (9) presented to Duke on 13 February 2018; and, (10) presented to UNC on 14 February 2018. Finley was not in Respondent-mother’s care during any of these periods of time.

Notwithstanding our exclusion of double hearsay statements of Finley, there is no support for the court’s finding that Finley “is at substantial risk of physical,

mental or emotional impairment if returned to her custody.” In assessing whether a child is neglected, this Court has held that the trial court must consider “the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent.” *In re B.P.*, __ N.C. App. __, __, 809 S.E.2d 914, 920 (2018).

In the case of *In re E.P., M.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775-76, *aff’d*, 362 N.C. 82, 653 S.E.2d 143 (2007), this Court held evidence of a parent’s substance abuse is not in and of itself “clear and convincing evidence that the [parent’s] problems created a substantial risk of harm to the child[.]” In that case, the trial court “found no instances of neglect or harm to the children [and] the treatment records requested by DSS contained no evidence that actual harm to the children had occurred, or that the parents’ substance abuse issues created a substantial risk of harm to the children.” *Id.* This Court held DSS had provided no evidence that the children had been harmed because of their parents’ substance abuse. *Id.*

Here, OCDSS summarized and paraded Respondent-mother’s lengthy hospital records at the adjudication hearing. However, no records show Respondent-mother harmed Finley during these times. Finley was not in Respondent-mother’s care. OCDSS’ only indication of harm to Finley came from hearsay statements purportedly made long before Respondent-mother had sought and engaged in treatment.

OCDSS Case Supervisor Melissa McDonald testified that Respondent-mother had been meeting with OCDSS regularly since the filing of the petition in March. She had begun to attend UNC's ASAP Services. She was assessed and began their individual and group therapy sessions.

Respondent-mother has provided eight drug screens since entering treatment, and all have been negative. McDonald reported to the court that Respondent-mother "has been compliant in her treatment" and attending NA and AA meetings weekly and providing proof to her social worker.

No clear and convincing evidence exists of current circumstances or future probability that present a risk to Finley to support the conclusion that to immediately return Finley to Respondent-mother's care would place him "in an environment injurious to the juvenile's welfare." *See* N.C. Gen. Stat. § 7B-101(15). We reverse the trial court's conclusion that Finley is a neglected juvenile. *See* N.C. Gen. Stat. § 7B-805 (2017) (quantum of proof in adjudicatory hearing shall be "by clear and convincing evidence").

3. Dependency

A juvenile may be adjudicated to be dependent when "the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2017). The trial court's findings must address both prongs of the statutory definition.

In re P.M., 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

It is uncontested the record contains no information on Finley's father or paternal relatives. Respondent-mother does not challenge the court's finding that there was no credible information on Finley's father or paternal relatives or the conclusion that she lacks an appropriate alternative childcare arrangement. She argues OCDSS made no showing that she was presently incapable of taking care of Finley.

Chronic alcoholism may impair a parent's ability to parent her child. In *In re T.B.*, 203 N.C. App. 497, 506, 692 S.E.2d 182, 188 (2010), this Court held the findings supported the trial court's conclusion of dependency where "taken in their entirety" demonstrated the respondent-mother had significant mental health issues, the children had special needs, and the respondent-mother had not "demonstrated the ability to meet the children's special needs or to otherwise care for them in such a way as to produce successful outcomes."

In *T.B.*, the respondent-mother had been diagnosed with paranoid schizophrenia and failed to take her medication as prescribed. *Id.* at 499, 692 S.E.2d at 184. The trial court received into evidence a summary of a psychological evaluation. *Id.* at 501-02, 692 S.E.2d at 185. The court specifically found: "The report indicates that Respondent[-M]other has suicidal ideation and tendencies, that she is in a state of chronic and substantial stimulus overload, and that she suffers from

Chronic Post Traumatic Stress Disorder, Major Depressive Disorder, and Dependent Personality Disorder. Respondent[-M]other's serious psychological problems impair Respondent[-M]other's ability to parent." *Id.*

Here the trial court concludes Respondent-mother is unable to provide for Finley's care or supervision and lacks an appropriate child care arrangement. As set forth *supra*, the trial court's order includes no findings reflecting Respondent-mother's present inability to supervise Finley. While Respondent-mother had been in treatment in April of 2018, the court records showed her last relapse to have been six weeks before, in February 2018.

Respondent-mother contends that since the last finding of hospitalization six weeks before the adjudication hearing, nothing indicates she is presently unable to care for Finley.

The GAL points to Mitchell's testimony that there was ongoing concern about Respondent-mother's ability to care for Finley. Mitchell testified her concerns were developed from a January 2018 voicemail Respondent-mother had left for Mitchell indicating she was experiencing some short term memory loss. More relevant and timely is Supervisor McDonald's testimony that Respondent-mother presently was compliant in her treatment and her case plan. This evidence tends to show an ability or a capability of Respondent-mother to parent Finley, rather than an inability to care for him.

As previously stated, this Court has held that the trial court must consider “the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent.” *In re B.P.*, __ N.C. App. __, __, 809 S.E.2d 914, 920 (2018). The trial court must look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent.

The only current evidence before the court does not support a finding that Respondent-mother was unable to care for Finley. OCDSS records indicate that all of her recent drug screens had been negative, that she had provided proof of her regular attendance at NA/AA meetings and had obtained a mental health assessment, and had begun cooperating with OCDSS as required by her plan.

We hold no clear and convincing evidence supports the trial court’s finding of dependency because Respondent-mother was incapable of providing appropriate care and supervision for Finley.

V. Conclusion

Admission of the statements purportedly made by Finley to Berson and Byrd under the residual hearsay exception was error and prejudiced Respondent-mother. No properly admitted clear and convincing evidence supports the trial court’s conclusion that Finley was neglected or dependent. The order appealed from is reversed. *It is so ordered.*

REVERSED.

IN RE: F.S.

Opinion of the Court

Judges DIETZ and YOUNG concur.