IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	2006-2148
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
REGINALD WARREN Appellant	:	CA: 86854

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT REGINALD WARREN

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EXPLANATION OF WHY THIS CASE IS A FELONY CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents a grave and disturbing miscarriage of justice. Reginald Warren was tried, convicted, and sentenced to life imprisonment for rape and other sexual misconduct that allegedly occurred in 1988. Mr. Warren's accuser maintained the sexual misconduct occurred when she was nine years old and Mr. Warren was 15. She waited 16 years before bringing her allegations to the attention of authorities. By the time the case went to trial, the only adult witnesses had died and the scene of the alleged crimes was destroyed. Thus, the prosecution's case against Mr. Warren rested exclusively on the uncorroborated allegations of his accuser.

This prosecution was unconstitutional in many respects. Mr. Warren raises five propositions of law in support of his request to appeal in this Court. In his first proposition of law Mr. Warren argues that he was unfairly prejudiced due to lengthy pre-indictment delay, which rendered him unable to defend himself against the charges. His second proposition of law argues that the statute of limitations–amended in 1999 from six to 20 years–violates his rights to due process and a fair trial and its application to him is unconstitutional.

His third proposition of law is that the trial court admitted and considered hearsay and other inadmissible evidence that improperly bolstered the alleged victim's credibility. In his fourth proposition of law, Mr. Warren argues the kidnapping convictions should have merged with the other offenses, because any restraint of the victim was purely incidental to the other offenses and there was no prolonged restraint or aspiration in conjunction therewith. His fifth proposition of law charges that the statutory requirement that he be tried as an adult for crimes allegedly committed as a child because he was apprehended after age 21 and the mandatory life sentence for rape of a victim under thirteen combined to violate his right to have his age

considered in mitigation.

STATEMENT OF THE CASE AND FACTS

On November 9, 2004, a Cuyahoga County grand jury issued an indictment charging Reginald Warren with forty-eight counts of criminal conduct in connection with the alleged sexual molestation of Tiffany Youngblood in 1988. At the time that the alleged offenses occurred, Mr. Warren was fifteen years old and Ms. Youngblood was nine. These acts supposedly took place at the home of James Thomas and Mr. Murphy, two elderly men who babysat Ms. Youngblood and employed Mr. Warren. The offenses allegedly occurred at times when both men in the home. By the Ms. Youngblood made her allegations, both of these men had died and their house had been torn down, making it nearly impossible for Mr. Warren to defend himself.

Mr. Warren was charged with twelve counts of rape, twelve counts of felonious sexual penetration, twelve counts of gross sexual imposition and twelve counts of kidnapping. Mr. Warren waived his right to a jury trial and proceeded to a bench trial.

There was no physical evidence to suggest that the crimes were committed at all, much less by Mr. Warren. There was no DNA, no medical records and no physical findings. Because the only two adult witnesses to any events that occurred in the home all those years ago are deceased and the home has been destroyed, this case boiled down to Mr. Warren's word against Ms. Youngblood's. And Mr. Warren absolutely denies that these wrongful acts ever took place.

Ms. Youngblood testified that during the summer of 1988, when she was nine-years old, her mother left her and her younger sister, Alisa, at the home of James Thomas when she went to work. Mr. Thomas's cousin, Mr. Murphy, also lived in the home, and Mr. Thomas's eight-year-old granddaughter was also at the house each day that summer. A man named "Marvin" came to

the house to help with housework and Mr. Warren, who was then fifteen years old, helped with yard and housework. At all times the wrongful conduct was alleged to have taken place, Mr. Warren and Ms. Youngblood were in the house with Alicia, Mr. Thomas, his granddaughter, and Mr. Murphy. Mr. Thomas was crippled and usually sat in a chair downstairs facing the stairway.

Alicia Logan, Ms. Youngblood's younger sister, testified that she was six-years old in the summer of 1998. She saw lots of children at Mr. Thomas's house that summer and occasionally saw Reggie Warren there. She did not recall any incidents of inappropriate conduct involving him.

Mr. Warren's accuser, Tiffany Youngblood, testified that the first time anything happened, Mr. Warren came into the room and kissed her neck and her breasts. She testified that Mr. Warren then lay her on the floor, using one hand to cover her mouth, one hand to hold her hands over her head, and still *another* hand to pull her pants down and insert his finger in her vagina. She testified that after the fifth or sixth time "he'll try to stick his penis in me, in my vagina, but he wouldn't stick it all the way in there." She claimed that he would pull her panties down around her knees and lie between her legs with his own legs under her panties. When asked, "Did he insert his penis into you?" she responded "No." But after insistent prodding by the prosecutor, Ms. Youngblood eventually conceded that he put about an inch and a half of his penis inside of her vagina.

Regarding the sexual misconduct, Ms. Youngblood recalled that it occurred "several times," or "a good 11 or 12 times." When asked where these incidents occurred, she replied "It happened all the time in the dining room or upstairs in the [bed]room." She also recalled an episode when he tried to put his penis in her mouth but she kept her lips closed, and one time that he tried to insert the handle of a hairbrush into her vagina. On the latter occasion, the handle

penetrated "just a tiny bit," which she then estimated to be "about two inches."

Ms. Youngblood testified that she eventually told her mother about the abuse and after that did not see Mr. Warren again. She explained that she didn't know why she waited for sixteen years to say anything: Ms. Youngblood only called the police after seeing an article in the Cleveland Plain Dealer in April, 2004, which reported that Reggie Warren had just been sentenced for a charge of gross sexual imposition involving a nine-year-old girl.

After the close of the government's case, the court granted the Rule 29 dismissal motion on four of the twelve identical rape counts, all of the felonious sexual penetration counts and the violence specifications for the twelve identical gross sexual imposition counts. The defense rested without presenting a case. The court then found Mr. Warren guilty on all remaining counts: eight counts of rape, twelve counts of gross sexual imposition and twelve counts of kidnapping. Mr. Warren was then sentenced to multiple consecutive sentences along with multiple life terms for rape. Further, the judge found Mr. Warren to be a sexual predator and a habitual sexual offender, and ordered the sentence in this case to be served consecutively to a nine-year sentence imposed on another case.

Mr. Warren appealed to the Eighth District Court of Appeals, which journalized its decision affirming in part and reversing in part on August 10, 2006. The court upheld Mr. Warren's convictions and resulting sentences for one count of rape, four counts of gross sexual imposition, and five counts of kidnapping. On January 24, 2007, this Court granted his Motion for Delayed Appeal, ordering Mr. Warren to file his Memorandum in Support of Jurisdiction. Accordingly, having previously submitted his Notice of Appeal and an affidavit of indigency, Mr. Warren now submits his Memorandum in Support of Jurisdiction.

LAW AND ARGUMENT

Proposition of Law I:

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY A PRE INDICTMENT DELAY OF SIXTEEN YEARS, DURING WHICH TWO VITAL WITNESSES DIED AND THE ALLEGED SCENE WAS DESTROYED.

Mr. Warren was alleged to have committed numerous wrongful acts in 1988. He was not indicted for these crimes until 2004. During the sixteen years that intervened, his ability to defend himself has been greatly diminished. The only two adult witnesses who could have established that Mr. Warren did not commit these crimes both died. The house in which the acts were alleged to have occurred was demolished. Because of the extreme prejudice caused to Mr. Warren by this delay, and the complete lack of justification for waiting sixteen years to make such allegations, it was error for the trial court not to dismiss this case.

This Court has held that, "[a]n unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." *State v. Luck* (1984), 15 Ohio St.3d 150, paragraph two of the syllabus. Accordingly, this Court affirmed the dismissal of murder charges, because the "delay in prosecution against [defendant] 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.'"

In the *Luck* case, because the defendant was indicted for murder fifteen years after the offense was committed, this Court found "that this delay was unjustifiable, has resulted in actual prejudice to the defendant and will effectively deprive the defendant of her right to due process

of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution should this case proceed to trial." *Id.*

In the instant case, the statute of limitations was amended some eleven years after the incident so had not elapsed when prosecutors indicted Mr. Warren. The excessive pre-indictment delay still requires the charges' dismissal. The United States Supreme Court has held that although "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges'... the 'statute of limitations does not fully define [defendants'] rights with respect to the events occurring prior to indictment.' and that the Due Process Clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco*, *supra*, quoting *United States v. Marion* (1971) 404 U.S. 307, 322, 324, quoting *United States v. Ewell* (1966), 383 U.S. 116, 122, brackets original.

Accordingly, even in murder cases (where there is no statute of limitations), this Court has affirmed dismissals based on pre-indictment delay. See, *Whiting*, 84 Ohio St.3d 215; and *State v. Luck*, 14 Ohio St.3d 150. In *Luck*, supra the delay found to be prejudicial was fifteen years. In *Whiting*, the delay found to be prejudicial was fourteen years. Likewise, in *State v. Selvage*, this Court resolved that "statutory periods of limitations are not relevant to a determination of whether an individual's constitutional right to a speedy trial has been violated by an unjustified delay in prosecution." *State v. Selvage* (1997), 80 Ohio St.3d 465, 466.

In *Selvage* this Court relied on the defendant's poor memory of the claimed events surrounding the crime to affirm the dismissal of the indictment. There the alleged incident involving the sales of marijuana occurred 13 months before the indictment. This Court concluded that although the undercover purchases were part of an ongoing narcotics investigation and the

delay was justified to protect the anonymity of the undercover officers, this Court concluded that the delay in prosecution was constitutionally impermissible, and upheld the dismissal.

"To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *United States v. Marion* (1971), 404 U.S. 307, 325. The facts of Mr. Warren's case clearly require this Court to reverse his conviction and sentence. As a juvenile, Mr. Warren was alleged to have committed numerous acts of molestation against Ms. Youngblood in the home of Messrs. Thomas and Murphy, while they were in the house, along with Ms. Youngblood's sister, Alicia and another little girl. Notably, Alicia testified that she never noticed anything unusual take place between Mr. Warren and Ms. Youngblood. But her testimony was discounted by her having been only six years old at the time of the alleged conduct.

By the time this case was indicted, the only two adults present while the wrongful acts allegedly occurred were both deceased. Had either man been available to testify that they never noticed any inappropriate activity take place and that nothing inappropriate could have taken place without their knowing it, the result of the trial would certainly have been different. Mr. Thomas was responsible for babysitting Ms. Youngblood, and would have been aware if anything of this disturbing nature was taking place. Because the State waited 16 years to pursue charges in this case, the adults who could have provided the most reliable evidence about what really transpired, had already passed away.

Moreover, not only had critical witnesses died during the extraordinarily long delay, but the scene of the alleged crime was demolished. If the home was still standing, Mr. Warren could have shown that the house was too small for these acts to have taken place undetected, and that the house's layout rendered Ms. Youngblood's account of the incident impossible. For example,

she claimed that certain acts took place in the living room, while Mr. Thomas sat near the stairs. If this case had been brought before the house was torn down, Mr. Warren could have shown that her story is not credible and that either Mr. Thomas or Mr. Murphy would have seen or heard the activity described by Ms. Youngblood. Other acts allegedly occurred upstairs, while Mr. Thomas sat facing the bottom of the stairs, and Alicia was in another upstairs bedroom. A view of the house would have seriously undermined the credibility of these claims. Prosecuting this case after the house has been torn down and key corroborating witnesses had died deprived Mr. Warren of his right to defend himself.

Ms. Youngblood claimed she knew these acts were wrong when they occurred and that she told her mother that Mr. Warren was "messing with her." Her mother claims she told Mr. Thomas she did not want Mr. Warren to be at the house when Ms. Youngblood was there. If this case had been brought when Mr. Thomas was alive, he could have rebutted Youngblood's claim that this exchange actually occurred. Further, Mr. Thomas could have provided reliable information about the burglary of his home. Mr. Warren had nothing to do with this serious crime and was never investigated or prosecuted for it. Mr. Thomas and Mr. Murphy would both have known the full story about this incident but were no longer here to provide that information.

It is clear that the pre-indictment delay was unnecessary and unreasonable in this case. Because of the severe prejudice that it caused to Mr. Warren's defense, the trial court should have dismissed the charges. When the court required Mr. Warren to stand trial on 16-year-old allegations despite the intervening loss of the only adult witnesses and the entire crime scene, it violated Mr. Warren's right to due process of law under Sections 10 and 16, Article I of the Ohio Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because of this egregious violation of these fundamental rights, this Court should vacate Mr.

Warren's conviction and discharge him.

Proposition of Law II:

THE TWENTY-YEAR STATUTE OF LIMITATIONS PROVIDED IN R.C. 2901.13 IS UNCONSTITUTIONAL AS A MATTER OF LAW BECAUSE IT FAILS TO PROTECT INDIVIDUALS FROM HAVING TO DEFEND THEMSELVES AGAINST OVERLY STALE CHARGES FROM THE DISTANT PAST; BECAUSE APPELLANT WAS UNJUSTLY PROSECUTED UNDER THIS UNCONSTITUTIONAL STATUTE, HIS CONVICTION MUST BE VACATED.

R.C. 2901.13, the Ohio statute for limiting criminal prosecutions, was amended in 1999 to allow for the prosecution of many offenses, including rape, gross sexual imposition and kidnapping, for up to twenty years after their alleged commission. R.C. 2901.13(A)(3)(a). The statute was also amended to allow the period of limitations to be "tolled" and thereby extended, when the alleged victim was a minor at the time of the offense. R.C. 2901.13 (F) The result is that a defendant may be accused of having committed a crime many years, even decades, after its alleged commission. Such a result "fl[ies] in the face of the rationale for limiting criminal prosecutions as set forth in the Committee Comment [to R.C. 2901.13] and ... require[s] those accused to possibly defend against charges, the evidence for which is obscured by the passage of time." *State v. Wooldridge* (Oct. 8, 1999), Montgomery App. No. 17708. Ironically, even after amendment, the Committee Comment to R.C. 2901.13 provides that "The rationale for limiting criminal prosecutions is that they should be based on *reasonably fresh*, and therefore *more trustworthy* evidence."

The United States Supreme Court has written that

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. *Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.*

> Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

United States v. Marion, 404 U.S. at 322-323, emphasis added, quoting *Toussie v. United States* (1970), 397 U.S. 112, 114-115. Clearly, a statute of limitations is designed to protect the citizens of this State and this nation from unreasonable prosecution for extremely old charges.

The 1999 amendment of R.C. 2901.13 is unreasonable and unconstitutional, in that its design does not "protect individuals from having to defend themselves against charges" that are so old it is impossible to defend against them. This is especially evident in allegations of crimes against children. The statute of limitations as amended allows up to twenty years for many crimes, and in child-victim cases many years more because of tolling, before an action must be commenced. This allows the ridiculous result of forcing individuals to defend against crimes allegedly committed decades ago.

Mr. Warren, now in his thirties, has been accused of committing extraordinarily serious crimes during the summer he was fifteen years old. He had to face trial on these terrible charges with no witnesses. Now Mr. Warren faces the rest of his life in prison unless this Court intervenes. R.C. 2901.13 is unconstitutional as amended, and its application in this case and under these circumstances was unconstitutional and constitutes a deprivation of Mr. Warren's due process rights under Sections 10 and 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Proposition of Law III:

> ***MR. WARREN WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN THE COURT ERRED IN ALLOWING AND CONSIDERING HEARSAY AND OTHER PREJUDICIAL AND INADMISSIBLE TESTIMONY WHICH IMPROPERLY BOLSTERED MS. YOUNGBLOOD'S CREDIBILITY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT.***

At trial, there were numerous instances when the court considered improper hearsay and other extremely prejudicial and inadmissible evidence. Although this was a bench trial, the court obviously did not limit its consideration of evidence to that which was relevant and admissible. For instance, the court overruled the defense objection to the statements made by Ms. Youngblood suggesting that Mr. Warren committed a burglary and vandalized Mr. Thomas' house to retaliate for being asked not to return. The record reflects that the trial court considered that statement for the truth, referencing it when it found Mr. Warren guilty and later when it imposed this lengthy sentence. This information was absolutely inadmissible as both irrelevant and unreliable hearsay, the resulting inferences the Court drew from the evidence were highly prejudicial to Mr. Warren. Nevertheless, it is well settled that "[e]vidence which is not relevant is not admissible." Ohio Rule of Evidence 402

The trial court also erred by considering the testimony of Louis Williams and Detective McPike, both of which were introduced to buttress Ms. Youngblood's dubious credibility. Mr. Williams was allowed to testify that Ms. Youngblood became upset during a sexual encounter and told him about the alleged rape. Detective McPike then offered that he can tell when interview subjects are telling the truth, because detectives are trained to detect when they're being lied to. The detective then testified that he had determined that Ms. Youngblood was telling the truth and Mr. Warren was lying. He did not speak with Alicia, who denied these incidents took place, because Ms.Youngblood told him not to contact her. The detective also testified that Mr. Warren's denials were not credible.

Such determinations are entirely improper and they violated Ohio Rules of Evidence and Mr. Warren's rights under the Sixth Amendment's Confrontation Clause. Determining a witness's credibility is solely the province of the jury, who did not need

the testimony of either witness in this regard. *State v. Boston* (1989), 46 Ohio St.3d 108. The finder of fact must be permitted to evaluate the credibility of witnesses on its own, without unnecessary and prejudicial opinions on credibility being made by others. When a police officer or other witness improperly expresses an opinion on the credibility of a victim, the case must be reversed for a new trial. *State v. Travis*, 165 Ohio App.3d 626, 635-36. This concern about witness bolstering is particularly acute where, as here, there exists a lack of incriminating evidence.

Because this harmful and unfairly prejudicial testimony was admitted in error and was improperly considered by the court, Mr. Warren suffered prejudice and a denial of his right to due process of law.

Proposition of Law IV:

THE TRIAL COURT ERRED IN FAILING TO MERGE THE SENTENCES FOR KIDNAPPING AND THE OTHER OFFENSES, WHICH WERE COMMITTED WITH A SINGLE ANIMUS.

R.C. 2941.25(A) provides that "where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In this case, the offense of kidnapping should have been merged for sentencing into the other convictions because the restraint of the victim was incidental to the crime alleged. Because the trial court failed to merge these offenses, the twelve convictions for kidnapping must be vacated.

This Court has held that:

> In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> (a) where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain

> separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

State v. Logan (1979), 68 Ohio St.2d 126, syllabus. In *Logan*, the defendant forced the victim at knifepoint into an alley, around a corner, and down a flight of stairs, where he raped her. Recognizing that implicit within every forcible rape is a kidnapping, and finding that the asportation and restraint of the victim was not substantial enough to support separate convictions, the court set aside the defendant's conviction for kidnapping. *Id.* at 130. Other courts have also held that a kidnapping sentence must be deleted when the kidnapping was incidental to the sexual offense. *State v. Parker* (May 24, 1990), Franklin App. No. 89AP–1217.

In this case, Ms. Youngblood testified that she was restrained for purposes of facilitating the sexual conduct, and she was never transported to another location. Further, the record is clear that, according Ms. Youngblood, to the extent that she was restrained at all it was only for a limited time during the offense. Nor was she restrained in such a way as to subject her to a greater or different risk of harm. Because the alleged restraint was purely incidental to the alleged sexual molestation, Mr. Warren's kidnapping convictions and sentences must be vacated.

Proposition of Law V:

> ***R.C. 2907.02 AND R.C. 2151.02(C)(3) WERE UNCONSTITUTIONALLY APPLIED TO APPELLANT, WHO WAS A MINOR AT THE TIME OF THE ALLEGED CRIME; THUS APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS DENIED WHEN HE WAS SENTENCED AS AN ADULT FOR CRIMES ALLEGED TO HAVE BEEN COMMITTED WHEN HE WAS ONLY FIFTEEN YEARS OLD.***

In this case, Mr. Warren was sentenced to mandatory life-in-prison terms for rape

because the victim was under thirteen years old. He was also sentenced to maximum terms of imprisonment on the remaining counts, many of them also imposed consecutively. In so sentencing Mr. Warren, the trial court wholly overlooked the fact that, Mr. Warren was only a fifteen-year-old child at the time of the offenses. Because the mandatory life sentence required by R.C. 2907.02 does not allow an offender's minority status to be considered in mitigation of his sentence, that section and R.C. 2151.02(C)(3), which provides that a child apprehended after age 21 must be prosecuted as an adult are unconstitutional in their application to him.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" *Thompson v. Oklahoma* (1988), 487 U.S. 815, 834, quoting *California v. Brown* (1987), 479 U.S. 538, 545 (O'Connor, J., concurring). "There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults." *Thompson, supra,* at 834.

The United States Supreme Court has written much on this issue in recent years, noting,

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.
>
> Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson, supra, at 834-835, quoting *Eddings v. Oklahoma* (1982), 455 U.S. 104, 115, n.11,

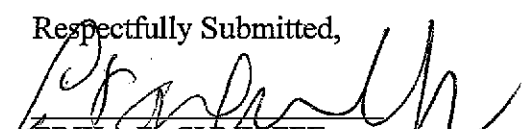
quoting the 1978 Report of the Twentieth Century Fund Task Force of Sentencing Policy Toward Young Offenders. Not only are juvenile offenders less culpable, but even the worst conduct by a juvenile does not necessarily indicate that the offender is, or will remain, of the worst character. "The reality that juveniles still struggle to define their identity meant it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper v. Simmons* (2005), 543 U.S. 551, 570. "Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" *Id.*

It is essential to an offender's due process rights that when he has been accused of committing an offense as a child, his minority status be taken into account in mitigation of his sentence. The provisions of R.C. 2907.02 and R.C. 2151.02 combine to prevent this result. Because the application of these statutes constituted a substantial violation of Mr. Warren's right to due process of law and a fair sentencing hearing under Sections 10 and 16, Article I of the Ohio Constitution and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, his sentence must be vacated and this matter remanded.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Reginald Warren respectfully asks this Court to accept jurisdiction over this matter because it presents several substantial questions of constitutional magnitude and general public interest for review.

Respectfully Submitted,



ERIKA B. CUNLIFFE
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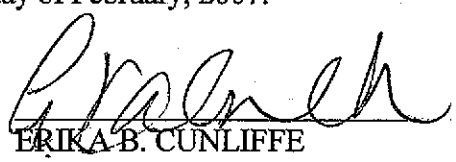
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 14th day of February, 2007.



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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

v.

Reginald Warren

Case No. 2006-2148

ENTRY

This cause is pending before the Court as a discretionary appeal and claimed appeal of right. Upon consideration of appellant's motion for delayed appeal,

It is ordered by the Court that the motion is granted.

It is further ordered by the Court that appellant shall file a memorandum in support of jurisdiction within thirty days from the date of this entry.

(Cuyahoga County Court of Appeals; No. 86854)

THOMAS J. MOYER
Chief Justice

34988646

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

REGINALD WARREN
Defendant

Case No: CR-04-458468-A

Judge: PETER J CORRIGAN

INDICT: 2907.02 RAPE /VS
2907.02 RAPE /VS
2907.02 RAPE /VS
ADDITIONAL COUNTS...

JOURNAL ENTRY

NUNC PRO TUNC ENTRY AS OF AND FOR 07/08/2005.
APPELLATE RIGHTS EXPLAINED. DEFENDANT INDIGENT, COURT APPOINTS MARGARET ROBEY AS APPELLATE COUNSEL.

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Judge Signature 8/3/05
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Judge P. Corrigan

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

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NO. 86854

GERALD E. FUERST
CLERK OF COURTS
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STATE OF OHIO :

Plaintiff-appellee :

vs. :

REGINALD WARREN :

A463-766 Defendant-appellant :

JOURNAL ENTRY
and
OPINION

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DATE OF ANNOUNCEMENT OF DECISION : AUGUST 10, 2006

CHARACTER OF PROCEEDING : Criminal appeal from Cuyahoga County Common Pleas Court Case No. CR-458468

JUDGMENT : AFFIRMED IN PART; REVERSED IN PART.

DATE OF JOURNALIZATION : AUG 21 2006

APPEARANCES:

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KENNETH A. ROCCO, J.:

Defendant-appellant, Reginald Warren, appeals from his convictions for eight counts of rape with violence specifications, eight counts of gross sexual imposition, four counts of gross sexual imposition with violence specifications, and twelve counts of kidnaping with violence specifications. He contends that the sixteen-year delay from the time the crimes were committed until he was indicted and the twenty-year statute of limitations for these offenses violated his due process rights. He also asserts that the indictment containing twelve identical counts for each of four different offenses did not provide him with adequate notice of the individual charges. He argues that the court erroneously considered inadmissible evidence, and used "uncharged and untested" allegations against him in sentencing. He claims the kidnaping convictions should have been merged with the other offenses because the restraint of the victim was incidental to the other crimes. He urges that he has a right to have the court consider his age at the time he committed the offenses in deciding what punishment to impose, and that the court erred by imposing maximum consecutive sentences.

Procedural History

On November 12, 2004, appellant was charged in a forty-eight count indictment concerning events that occurred from June to August 1988, when he was fifteen years old. Counts 1-12 charged

him with rape of a child under the age of 13. Counts 13-24 alleged that he committed felonious sexual penetration. Counts 25-36 charged appellant with gross sexual imposition. Counts 37-48 charged appellant with kidnaping. Each of the forty-eight charges carried a violence specification.

Appellant moved the court to dismiss the charges against him because of excessive pre-indictment delay. The court orally overruled this motion prior to trial, as well as appellant's oral motion to dismiss for lack of jurisdiction because of his age at the time the offenses occurred.

Appellant waived his right to a jury trial and the matter then proceeded to trial before the court. At trial, the court heard the testimony of Cleveland Police Detective Daniel Ross; the victim, Tiffany Logan Youngblood; the victim's mother, Edith Logan Gaffney; the victim's sister, Alisa Marie Logan; the victim's former husband, Louis Williams; and Cleveland Police Officer James McPike.

The victim testified that during the summer when she was nine years old, she and her younger sister stayed at the home of James Thomas while their mother was at work. Thomas lived two or three houses away from their home with his cousin, Mr. Murphy. Another girl, Thomas's granddaughter, was also at Thomas's house every day, and the girls played together. Thomas was "crippled," and would sit in a chair at the base of the stairs in the front room of the house.

Appellant came to Thomas's house to help with yard work and housework. The first time anything happened, appellant entered an upstairs bedroom where the victim was playing with dolls. He started kissing her and "playing with my breasts." The next time, appellant had her lay down on the dining room floor. He held her hands over her head, then pulled down her shorts and inserted his finger approximately 1½ inches into her vagina. He did this on 11 or 12 occasions. He would tell her to be quiet or he would hurt her and her mother and sister and Mr. Thomas.

On another eight or nine occasions, the victim testified that appellant rubbed his penis against her vagina and attempted to insert it. On another occasion, he tried to force her to perform fellatio sex on him. He tried to insert a brush handle into her vagina on another occasion, but Mr. Murphy called him away before he could do so.

The victim said these events occurred every other day for a period of approximately two months, and appellant threatened her every time. At her mother's prompting, the victim told her mother that appellant was "messing with me." Her mother then spoke with Mr. Thomas and the victim did not see appellant again.

At the conclusion of the state's case, appellant moved the court for a judgment of acquittal pursuant to Crim.R. 29. The court granted this motion as to four of the rape charges and all twelve of the charges of felonious sexual penetration. The court

further dismissed the violence specifications with respect to eight of the charges of gross sexual imposition. Appellant presented no evidence at trial. The court found appellant guilty of each of the remaining charges and specifications. It subsequently sentenced appellant to life imprisonment on each of the eight rape charges, to be served concurrently with one another but consecutively to the other sentences; four to ten years' imprisonment on each of the four gross sexual imposition charges with violence specifications, to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to three of the gross sexual imposition charges to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to the remaining five gross sexual imposition charges, to be served concurrently with one another but consecutively to the other sentences; and fifteen to twenty-five years' imprisonment on the kidnaping charges with violence specifications, to be served concurrently with the other sentences.

Law and Analysis

Appellant first contends that his due process rights were violated by the sixteen year delay between the criminal acts and the indictment against him. The United States Supreme Court has acknowledged that "the Due Process Clause has a limited role to play in protecting against oppressive [preindictment] delay." *United States v. Lovasco* (1977), 431 U.S. 783, 789. "[P]roof of

prejudice is generally a necessary but not sufficient element of a due process claim *** [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Id. at 790.

In *Lovasco*, the court held that due process is not violated by an "investigative delay" in prosecution, even if the defendant is "somewhat prejudiced" by this delay. The court distinguished investigative delay from delay undertaken for the purpose of gaining a tactical advantage, noting that an investigative delay is "not so one sided. Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed.'" Id., quoting *Smith v. United States* (1959), 360 U.S. 1, 10.

In this case, the delay was not caused by government action or inaction. See, e.g., *United States v. Cruikshank* (1876), 92 U.S. 542, 554 ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights

which belong to every citizen as a member of society"). The victim did not report the crime to the police until April 2004. Her delay in reporting the crime cannot be ascribed to the state for purposes of finding a violation of appellant's due process rights. Therefore, we overrule the first assignment of error.

Second, appellant argues that the amendment of the statute of limitations effective March 9, 1999 violated his rights to due process. R.C. 2901.13 formerly provided for a six-year limitations period for all felonies except murder and aggravated murder. In 1999, the statute was amended to increase the limitations period to twenty years for certain crimes, including rape, gross sexual imposition and kidnaping. 1997 Ohio H.B. 49. House Bill 49 provided that the amended statute of limitations "applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act."

Appellant's prosecution for these 1988 offenses was not barred before the effective date of House Bill 49, because the statute of limitations was tolled because of the victim's age. Pursuant to R.C. 2901.13(F), "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered." When the victim of a sex offense is a child, the corpus delicti generally is deemed to be discovered when the child reaches the age of majority.

See *State v. Elsass* (1995), 105 Ohio App.3d 277, 280, and cases cited therein. However, when the child tells a "responsible person" who is required by law to report the events to a peace officer or children's services agency pursuant to R.C. 2151.421(A)(1), the statute of limitations begins to run as of that time, even if the child has not attained the age of majority. *State v. Hensley* (1991), 59 Ohio St.3d 136. In this case, there is no evidence that the victim reported these crimes to a "responsible person" before she attained the age of eighteen in 1997. Thus, the statute of limitations did not begin to run until then, and had not expired as of March 9, 1999, when the statute was amended.

We have recently held that the extension of an unexpired statute of limitations is not an invalid ex post facto law. *State v. Diaz*, Cuyahoga App. No. 81857, 2004-Ohio-3954, at ¶12; also see *State v. Bentley*, Ashtabula App. No. 2005-A-0026, 2006-Ohio-2503. Apparently, however, appellant is arguing that a twenty-year statute of limitations is unreasonable and therefore unconstitutional. He has cited no support for this proposition, and we find none. Therefore, we overrule the second assignment of error.

Third, appellant argues that the indictment was insufficient to inform him of the charges because it did not distinguish the multiple allegations of the same type of wrongful conduct.

Furthermore, appellant claims the actual testimony at trial also did not distinguish the incidents of which appellant was accused and convicted.

Appellant requested and received a bill of particulars. "Ambiguity, if any, in the indictment which was not cured by the bill of particulars should have been brought to the attention of the court. Since defendant made no such request or motion it is presumed he possessed sufficient notice of the charges; any error in this regard is waived." *State v. Haberek* (1988), 47 Ohio App.3d 35, 43, quoted with approval in *State v. Endsley*, Columbiana App. No. 04-CO-46, 2005-Ohio-5631, ¶24.

To the extent that appellant challenges the sufficiency of the evidence to support his convictions, we must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

A rational trier of fact could have found the essential elements of gross sexual imposition from the first incident involved here, where appellant touched the victim's chest and threatened her with physical harm. Likewise, a rational trier of fact could also have found the essential elements of gross sexual

imposition[1] from the following events: (1) the incident in which appellant held the victim on the dining room floor and digitally penetrated her, (2) the incident in which appellant inserted a brush handle into her vagina, and (3)the incident in which appellant attempted to force her to perform fellatio on him. A rational trier of fact could find appellant raped the victim by his attempt to insert his penis into her vagina, causing her to suffer a burning sensation in her vagina for an hour or two afterward. A rational trier of fact could find that appellant kidnapped the victim by restraining her for the purpose of engaging in sexual activity with her against her will on each of these occasions.

However, we are constrained to agree that the victim's testimony that appellant inserted his penis into her vagina "eight, nine times" and that he inserted his finger into her vagina "a good 11 or 12 times" is not sufficient to support appellant's convictions of additional charges of rape and gross sexual imposition. "[W]e cannot accept the numerical estimate which is unconnected to individual, distinguishable incidents." *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, ¶88. *Valentine v. Konteh* (6th Cir. 2005), 395 F.3d 626. Accordingly, we will affirm the judgment with respect to the charges as to which we have

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[1]This conduct would constitute rape under the current statute. However, sexual conduct was more narrowly defined at the time this offense was committed, and did not include digital penetration. Cf. *State v. Polk* (May 17, 1979), Cuyahoga App. Nos. 38832 & 38833 (digital penetration may constitute gross sexual imposition).

found sufficient evidence, specifically, four of the counts of gross sexual imposition, one count of rape, and five counts of kidnapping. The other convictions are reversed.

Appellant's fourth assignment of error urges that the court erred by allowing hearsay and other inadmissible evidence to be introduced at trial, and further erred by relying on it. "[I]n a bench trial, the court must be presumed to have 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Richey* (1992), 64 Ohio St.3d 353, 357-358, 1992 Ohio 44, 595 N.E.2d 915, quoting *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759. First, appellant complains that the victim's testimony suggested that appellant vandalized Mr. Thomas's house. Neither the victim nor the court suggested that the vandalism was committed by appellant; the court mentioned the vandalism in rendering its verdicts only to show why the victim perceived that her safety was still in danger if she told anyone about what had happened. This testimony has no relevance to the charges. There is no evidence that the court relied upon it to convict appellant.

Appellant also argues that the victim's former husband and the police detective who interviewed her improperly buttressed the victim's testimony. The victim's former husband testified that, long before she went to the police, the victim "went berserk" when he pinned her hands down either at her side or over her head when

they were having sexual intercourse. The court viewed this behavior as corroborating the victim's testimony about the details of appellant's modus operandi. Appellant did not object to the testimony of Detective McPike, and there is no indication that the court relied on his testimony in finding appellant guilty.[2] Therefore, we overrule the fourth assignment of error.

Fifth, appellant contends that the court erred by failing to merge the sentences for kidnaping with the other charges. The defense did not raise this issue at trial, and therefore waived all but plain error. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶139. For this purpose, we consider only those charges we have found to be supported by sufficient evidence.

The question whether two offenses are of similar import is determined by objectively analyzing the statutory provisions at issue to determine whether the elements of the charged offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. This statutory analysis is performed in the abstract, focusing solely on the elements of the offenses charged without reference to the facts of the particular

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[2]In finding appellant guilty, the court did rely upon the testimony of Detective Ross, whom the court incorrectly identified as Detective McPike. Detective Ross testified that, although the victim's sister did not allege that appellant committed any crime against her, in questioning appellant, he was careful to refer to both the victim and her sister. Appellant's responses referred only to "Tiffany," suggesting guilty knowledge.

case. *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph one of the syllabus.

As charged in this case, gross sexual imposition and kidnaping are not allied offenses of similar import. The indictment charged appellant with sexual conduct with a child under the age of thirteen years. The commission of this form of gross sexual imposition will not necessarily result in kidnaping because no restraint or removal is involved. Therefore, these offenses are not allied offenses of similar import, and R.C. 2941.25 does not apply. *State v. Hay*, Union App. No. 14-2000-24, 2000-Ohio-1938; *State v. Moralevitz* (1980), 70 Ohio App.2d 20, 27-28. Nor are the charges of rape and kidnaping allied offenses as charged in this case. Appellant was charged with engaging in sexual conduct with a child under the age of thirteen. R.C. 2907.02(A)(1)(b). Again, no restraint or removal was required to commit this crime. Therefore, the form of rape charged in this case does not necessarily result in kidnaping. Cf. *State v. Logan* (1979), 60 Ohio St.2d 126, 130 ("implicit within every forcible rape (R.C. 2907.02[A][1]) is a kidnapping"). We overrule the fifth assignment of error.

Sixth, appellant asserts that the court erred by basing its sentence "on the speculative allegation that [appellant] vandalized the Thomas house." The court did not cite the vandalism incident

as a factor in sentencing, much less accuse appellant of that crime. Therefore, we overrule the sixth assignment of error.

Seventh, appellant claims that the mandatory life sentence required by R.C. 2907.02 is unconstitutional as applied to him because it does not allow for consideration of his juvenile status at the time he committed the offense. Although appellant does not explain the constitutional basis for his argument, we presume from his citations to *Roper v. Simmons* (2005), 543 U.S. 551, and *Thompson v. Oklahoma* (1988), 487 U.S. 815, that he intends to argue that life imprisonment is "cruel and unusual punishment" for a fifteen-year-old offender.

The life sentence imposed here was mandated by statute. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan* (1991), 501 U.S. 957, 994-95. Consideration of mitigating factors in sentencing (including the defendant's chronological age) is not constitutionally required except when the death penalty is imposed. Id.; *Rice v. Cooper* (7th Cir. 1998), 148 F.3d 747, 752.

Outside the death penalty context, the "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id . at 1001. We cannot say that a sentence of life imprisonment (with possibility of parole) is grossly

disproportionate to the crime of rape of a child under the age of 13. Therefore, we overrule the seventh assignment of error.

Finally, appellant claims the court abused its discretion by sentencing him to consecutive terms of imprisonment. He argues that the consecutive sentences imposed violated the limitation set forth in R.C. 2929.41(E)(2) at the time these offenses were committed. R.C. 2929.41(E)(2) formerly provided that "[c]onsecutive terms of imprisonment imposed shall not exceed: *** (2) An aggregate minimum term of fifteen years, *** when the consecutive terms imposed are for felonies other than aggravated murder or murder[.]" The absence of a minimum term of imprisonment for the charge of rape takes this case out of the ambit of R.C. 2929.41(E)(2). *McMeans v. State Adult Parole Auth.* (Oct. 27, 1998), Franklin App. No. 98AP-42; *State v. Gregory* (1982), 8 Ohio App.3d 184. In any event, this statute is self-executing, automatically operating to limit the minimum term of imprisonment. *State v. White* (1985), 18 Ohio St.3d 340. It is not a basis for reversal. Accordingly, we overrule the eighth assignment of error.

For the foregoing reasons, we affirm appellant's convictions and the resultant sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. We reverse his convictions for the remaining charges.

Affirmed in part, reversed in part.

This cause is affirmed with respect to appellant's convictions and sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. The convictions and sentences imposed for all remaining charges are reversed.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
KENNETH A. ROCCO

SEAN C. GALLAGHER, P.J. and

MARY EILEEN KILBANE, J. CONCUR

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED
AUG 10 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

FILED AND JOURNALIZED
PER APP. R. 22(E)
AUG 21 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED