

IN THE SUPREME COURT OF OHIO

IN RE: A.J.S.,  
A MINOR CHILD

**07-1451**

Case No.

On Appeal from the Franklin  
County Court of Appeals  
Tenth Appellate District

C.A. Case No. 06-AP-597

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT A.J.S.**

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

This case presents this Court with an opportunity to address two critical issues for the future of every juvenile facing mandatory bindover in Ohio: What is the proper standard of review to be employed by courts of appeals when reviewing a trial court's probable cause determination in mandatory bindover proceedings and when does a court of appeals have jurisdiction to review a trial court's probable cause determination in mandatory bindover proceedings?

Because this issue has not been addressed by this Court, this Court's guidance is necessary to preclude courts of appeals from applying inconsistent standards of review. This Court has repeatedly held that an abuse of discretion standard applies in reviewing discretionary bindover proceedings. See State v. Golphin, 81 Ohio St.3d 543, 546, 1998-Ohio-336; State v. Watson, (1989), 47 Ohio St. 3d 93, 96, 547 N.E. 2d 1181; State v. Douglas (1985), 20 Ohio St.3d 34, 36, 485 N.E.2d 711. What is not yet clear, is at issue in this case: does the abuse of discretion standard also apply to mandatory bindover proceedings?

Courts of appeals confusion on this issue is clear. Some courts of appeals have utilized an abuse of discretion standard in reviewing mandatory bindover proceedings. In re Stanley, 7th Dist. Nos. 05-MA-177, 05-MA-183, 2006-Ohio-1279, ¶18; In re D.T.F., 10th Dist. Nos. 05AP-03, 05AP-04, 2005-Ohio-5245, ¶11; In re Boddie, 2d Dist. No. 18709, 2001-Ohio-7089, 2; State v. Tukes, 10th Dist. No. 99AP-1046, 2000 Ohio App. LEXIS 2870, 11. But other courts have applied a de novo standard of review. State v. Cline, 2d Dist. No. 19082, 2002-Ohio-3280, ¶19; In the Matter of A.J.S., 10th Dist. No. 06AP-597, 2007-Ohio-3216, ¶32. And other courts have weighed the evidence that was presented during the probable cause hearing, but have not

specified which standard of review it applied. In re S.J., 8th Dist. No. 82106, 2005-Ohio-6353, ¶¶26, 31. State v. Carnes, 12th Dist. No. CA2001-02-018, 2002-Ohio-1311, 10-12.

It is not surprising, therefore, that the judges in the Tenth District Court of Appeals did not agree on the standard to be applied in the instant case. A.J.S., at ¶¶32, 50, 53. Both the concurrence and dissent found that the proper standard of review was an abuse of discretion, while the author of the opinion applied a de novo standard of review. *Id.* Also, the Tenth District's decision offered three varying opinions on the outcome of the case—the author of the opinion and concurring judge disagreed on the standard to be applied but agreed on the ultimate outcome; the concurring judge and dissenting judge agreed on the standard but disagreed on the outcome; and the author and the dissenting judge disagreed altogether. *Id.*

Further, the author of the Tenth District's opinion cited to this Court's opinion in State v. Iacona to support its conclusion that a de novo standard of review was proper. A.J.S., at ¶¶19-21, citing State v. Iacona, 93 Ohio St. 3d 83, 2001-Ohio-1292. But, in Iacona, this Court did not set forth the standard of review, rather it considered the state's burden and the procedures to be followed to determine if probable cause exists at the trial court level. Iacona at 93. The concurrence in this case recognized the author's error and noted, "the *Iacona* court did not expressly set forth the proper standard of review of a probable cause determination. Rather the juvenile court was directed to 'evaluate the quality of the evidence.' I do not believe the *Iacona* court signaled a change in appellate review of probable cause in juvenile bindover proceedings, which is an abuse of discretion." *Id.* at ¶50. (Internal citations omitted.)

The implications of the decision of the Tenth District will greatly affect the future of juveniles facing mandatory bindover in Ohio. This case provides this Court with an opportunity to stop the inconsistencies occurring amongst courts of appeals. If this Court does not accept

jurisdiction of this case, other courts of appeals may apply a de novo standard of review, and the probable cause hearing in mandatory bindover proceedings will be rendered meaningless. As this Court recognized in Iacona, a mandatory bindover hearing is a “critically important” stage in the juvenile proceedings, and as such, the hearing “must measure up to the essentials of due process and fair treatment.” Iacona at 91, citing Kent v. United States (1966), 383 U.S. 541, 562, 86 S.Ct. 1057.

This Court has found that the abuse of discretion standard applies to the review of discretionary bindover proceedings. But no such guidance has been issued regarding the standard of review for mandatory bindover hearings. Therefore, this Court’s pronouncement of a clear standard is urgently needed to ensure due process and fair treatment for Ohio’s youth. Because this issue has not been addressed by this Court and because uncertainty exists in the lower courts, this case is of public and great general interest, involves a substantial constitutional question, and warrants review by this Court. Further, this Court should accept jurisdiction of this case because the Tenth District’s opinion sets a dangerous precedent because it allows courts of appeals to review a trial court’s findings, absent a final appealable order. Such review cannot be countenanced by this Court.

## STATEMENT OF THE CASE AND FACTS

On March 23, 2006, A.J.S., aged sixteen, was charged with two counts of felonious assault, each enhanced with a firearm specification,<sup>1</sup> and one count of tampering with evidence,<sup>2</sup> for an incident alleged to have occurred on March 22, 2006, outside Body Language Productions tattoo parlor. On April 6, 2006, A.J.S. was charged with seven counts of attempted murder with firearm specifications,<sup>3</sup> for events arising out of the same incident. On March 23, 2006 and April 7, 2006, the state filed Motions to Relinquish Jurisdiction on each of the charges.<sup>4</sup> Prior to the probable cause hearing, the state dismissed one count of attempted murder.<sup>5</sup> The state proceeded to the probable cause hearing on the remaining six counts of attempted murder with firearm specifications, two counts of felonious assault with firearm specifications, and one count of tampering with evidence.

The trial court held the probable cause hearing on May 5, 2006. The state presented testimony from two of the employees of Body Language Productions tattoo shop, Joseph Morgan and Michael Miracle; Whitehall Police Detective Steven Brown; and three of A.J.S.'s friends – Antwan Smith, Markala Cooper, and Rochelle Farr – all of whom were present at the time of the incident.

On March 22, 2006, A.J.S. was with his friend, Antwan Smith (“Antwan”), Antwan’s sister, Markala Cooper (“Markala”), and Antwan’s girlfriend, Rochelle Farr (“Rochelle”). Markala wanted to purchase a lip ring so they decided to go to Body Language Productions

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<sup>1</sup> Case number 06 JU 4826.

<sup>2</sup> Case number 06 JU 4838.

<sup>3</sup> Case number 06 JU 5932.

<sup>4</sup> Case numbers 06 JU 4826, 06 JU 4838, and 06 JU 5932.

<sup>5</sup> Case number 06 JU 5932

tattoo shop. (T.p. 200). Five employees were working at the tattoo shop, including Joseph Morgan (“Morgan”) and Michael Miracle (“Miracle”). (T.pp. 56, 68, 71-73).

Once inside, Antwan asked to use the store’s restroom. (Tr. V. I, p. 60). Morgan, an employee, told him that the restroom was only for paying customers. (T.p. 60). Antwan noted that his sister, Markala, was going to buy a lip ring, but Morgan still refused to let Antwan use the restroom. (T.p. 60). Morgan testified that Antwan and A.J.S. started using slang comments, which Morgan interpreted to mean that Antwan and A.J.S. had a gun, so they were told to leave the store. (T.p. 60).

A scuffle ensued as several employees of Body Language tried to push A.J.S. and his friends out the door. (T.p. 60). In the scuffle, part of the glass door to Body Language was broken. (T.p. 61). Morgan grabbed A.J.S. and told him, “you’re not going anywhere. [\* \* \*] You’re gonna wait here till the cops get here. You just broke our window, now you’re gonna pay for that.” (T.p. 62). Antwan punched Morgan, and A.J.S., Antwan, and Markala ran away from the shop and to their car. (T.p. 62). Meanwhile, one employee called the police and another grabbed the store’s gun. (T.pp. 109, 144).

All of the shop’s employees ran after A.J.S., Antwan, and Markala. (T.pp. 63, 162, 186, 201, 219). Some of the employees had sticks, boards, and metal poles, and at least one of them had a gun. (T.p. 109). A.J.S., Antwan, and Markala got into the car and tried to leave. (T.p. 220). Miracle approached the vehicle and grabbed the license plate on the back of the car in an attempt to rip it off of the vehicle. (T.pp. 111-112). A.J.S. revved the engine and Miracle thought A.J.S. was going to hit him. (T.pp. 64, 148). Miracle and Morgan threw the sticks and boards at A.J.S.’s vehicle and then turned their backs to walk away (T.pp. 64, 148).

Rochelle testified that A.J.S. then stopped and got out of the car. (T.p. 220). Antwan also exited the rear of the vehicle and started to walk away from the car. (T.p. 151). Morgan testified that he thought he heard the cock of a gun and then saw water spray from the top of a grease trap in the parking lot. (T.p. 68). Miracle indicated that he heard six shots. (T.p. 152). But none of the employees saw who shot the gun. (T.pp. 82, 116). In fact, one of the employees testified that he believed Antwan was the shooter. (T.pp. 116, 178).

The only individual who identified A.J.S. as the shooter was Rochelle. (T.p. 221). Rochelle testified that A.J.S. began shooting at the ground because he was scared and was trying to scare the employees away from the vehicle. (T.p. 228, 232). She also testified that her brother, Antwan, was shot in the leg. (T.p. 230). The entry point of the wound was lower than the exit point, indicating that the bullet ricocheted from the ground upward. (T.pp. 230-231).

Miracle testified that he fell as he was running and believed that he tore his jeans. (T.p. 153). But, he was told by the police that the damage to his pants was caused by a bullet that passed through his pant leg. (T.p. 154).

At the conclusion of the hearing, the trial court found that there was not probable cause to believe that A.J.S. committed six counts of attempted murder. The court did find probable cause as to the two counts of felonious assault. (T.pp. 271-273). The state moved the court to dismiss the tampering with evidence charge.<sup>6</sup> (T.p. 273). The court granted the state's motion. (T.p. 273). The state appealed the trial court's determination that there was no probable cause as to the six counts of attempted murder.<sup>7</sup>

On June 21, 2007, the Tenth District issued its opinion in this case. The court found that pursuant to this Court's holding in Iacona, there was probable cause:

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<sup>6</sup> Case number 06 JU 4838.

<sup>7</sup> Case number 06 JU 5932.

*Iacona* counsels that where, as here, both the prosecution and the defense present credible evidence at the probable cause hearing showing that there was or was not probable cause as to each element of the charged offense, the state satisfied the statutory requirements for mandatory bindover, and the juvenile court must relinquish jurisdiction to the court of common pleas for ultimate adjudication of guilt or innocence by a trier of fact. Therefore, the juvenile court in the present case erred in finding no probable cause and in refusing to relinquish jurisdiction.

A.J.S., at ¶47.

This appeal timely follows.

## ARGUMENT

### FIRST PROPOSITION OF LAW

Courts of appeals must apply an abuse of discretion standard when reviewing the trial court's probable cause determination in mandatory bindover proceedings.

Juvenile courts possess exclusive jurisdiction over children alleged to be delinquent for committing an act that would constitute a crime if committed by an adult. State v. Iacona, 93 Ohio St. 3d 83, 2001-Ohio-1292; State v. Watson, (1989), 47 Ohio St.3d 93, 95, 547 N.E.2d 1181; R.C. 2151.23(A)(1); R.C. 2152.10. Under certain circumstances, the juvenile court must determine whether a child will remain in the juvenile system or will be transferred to the adult system. R.C. 2152.10; R.C. 2152.12. This Court has found that “the juvenile court enjoys wide latitude to retain or relinquish jurisdiction, and the ultimate decision lies within its sound discretion.” State v. Watson, (1989), 47 Ohio St.3d 93, 95, 547 N.E.2d 1181, citing State v. Carmichael (1973), 35 Ohio St.2d 120, 123, 431 N.E.2d 326.

In 2002, the General Assembly amended R.C. 2151.26,<sup>8</sup> which sets forth the procedures to be followed by the juvenile court in mandatory bindover proceedings. Under Ohio's mandatory bindover provisions, after a complaint has been filed alleging that a child aged sixteen or seventeen has committed a “category one” offense -- including attempted murder -- the only finding that the juvenile court has to make before transferring a child to the adult system is probable cause. R.C. 2152.10; R.C. 2152.12. Consequently, if a trial court does not find probable cause, the child remains in the juvenile system and he cannot be incarcerated beyond the age of twenty-one. R.C. 2151.355(A). But, if a child is transferred to the court of common pleas and is tried as an adult, he faces a potential life sentence. R.C. 2929.02(B). Therefore, to

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<sup>8</sup> R.C. 2151.26 was renumbered as R.C. 2152.12, effective January 1, 2002.

children in the same position as A.J.S. in this case, the probable cause hearing is of utmost importance to their future.

This Court has recognized that “the issues determined at a mandatory bindover hearing are therefore a ‘critically important’ stage in juvenile proceedings [and as such,] the hearing ‘must measure up to the essentials of due process and fair treatment.’” Iacona at 91, citing Kent v. United States (1966), 383 U.S. 541, 562, 86 S.Ct. 1057. Further, the United States Supreme Court has held that the juvenile courts’ “admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness” and that proper procedures must be followed. In re Gault (1967), 387 U.S. 1, 30, 87 S.Ct. 1428.

This Court has held that, when determining whether probable cause exists, “the juvenile court must evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.” Iacona at 93. While Iacona addressed a trial court’s finding of probable cause, it did not address the standard of review of the trial court’s finding on appeal. But the issue in this case is not whether a proper bindover hearing was conducted; therefore, Iacona is not relevant to the determination of this issue in this Court.

The dissenting opinion below correctly found that abuse of discretion standard is proper on review because a probable cause finding requires a weighing of the evidence:

abuse of discretion is the proper standard of review of a trial court determination that probable cause exists when such a question is properly appealable to an appellate court. This is true because the determination of probable cause is based upon the evidence adduced and certain factual findings necessarily made by the trial court as to whether the prosecution has shown probable cause that the accused has committed the offense with which he or she is charged. This determination requires a limited weighing of the evidence as discussed *infra*.

A.J.S. at ¶54.

This Court has repeatedly held that an abuse of discretion standard applies in reviewing discretionary bindover proceedings. See State v. Golphin, 81 Ohio St.3d 543, 546, 1998-Ohio-336; State v. Watson, (1989), 47 Ohio St.3d 93, 96, 547 N.E.2d 1181; State v. Douglas (1985), 20 Ohio St.3d 34, 36, 485 N.E.2d 711. The standard should be no different for mandatory bindover proceedings.

As in discretionary bindover proceedings, in all mandatory bindover proceedings, the trial court must conduct a hearing and receive testimony on the issue of probable cause. As in discretionary bindover proceedings, in mandatory bindover proceedings, the trial court has the advantage of viewing the witnesses' demeanor, watching their facial expressions, listening to the intonation of their voices, and experiencing the time delays between each witnesses' responses. On review of discretionary bindover hearings, a court of appeals must defer to the trial court's conclusions, and will not disturb the trial court's findings absent a showing of abuse of discretion. An appellate court reviewing the trial court's findings in a mandatory bindover proceeding, is in the same position as a court of appeals reviewing the trial court's finding in a discretionary bindover proceedings; therefore, the same standard—abuse of discretion—should apply to review of both. Further, an appellate court only possesses second-hand knowledge of the hearing from reading the transcripts and reviewing the record which are certified from the trial court. It is illogical to think that an appellate court is in a better position than the trial court to assess the credibility of the witnesses and afford their testimony the weight that is due.

This Court has repeatedly held that an abuse of discretion standard applies in reviewing discretionary bindover proceedings, and the standard should be the same for review of mandatory bindover proceedings. But, because this issue has not been addressed by this Court,

Ohio's courts of appeals are uncertain about what standard to apply on review of mandatory bindover proceedings. Therefore, this Court should accept jurisdiction of this case.

## SECOND PROPOSITION OF LAW

An appellate court is without jurisdiction to review a trial court's finding of probable cause because it is not a final appealable order.

Ohio law provides courts of appeals with jurisdiction to review final orders or judgments. Ohio Const. Art IV, Section 3(B)(2); R.C. 2953.02. "R.C. 2505.03(A) states, in relevant part, that: "every *final order* \* \* \* may be reviewed on appeal \* \* \*." State v. Crago, (1985), 53 Ohio St.3d 243, 244, 559 N.E.2d 1353. A final order is one which provides a disposition of the case and which affects "a substantial right, and in effect, determines the action and prevents a judgment." R.C. 2505.02. "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed." In the Matter of: Brent McDonald, 5<sup>th</sup> Dist. No. 05 CAF 06 0039, 2006-Ohio-3128, ¶8. If the parties do not raise the jurisdictional issue, then appellate courts must raise the issue, sua sponte. See Whitaker-Merrell v. Geupel Co. (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

The Tenth District erred when it accepted this case for review because there was no final appealable order. The state appealed the trial court's determination on the issue of probable cause as it related to six counts of attempted murder. The court lacked a final appealable order because there was no final order or judgment, such as a finding of delinquency, on the six counts of attempted murder. See In re Becker, (1974), 39 Ohio St.2d 84, 86, 314 N.E.2d 158.

Although not specific to juvenile procedure in Ohio, this Court has found the rationale of an Illinois Supreme Court case instructive on this issue:

To permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile court or the criminal division, with the result that the prospect of a just disposition would be

jeopardized. In either proceeding the primary issue is the ascertainment of innocence or guilt of the person charged. To permit interlocutory review would subordinate that primary issue and defer its consideration while the question of the punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in reviewing courts. We are unwilling to sanction such a procedure.

People v. Jiles, (1969) 43 Ill. 2d 145, 150, 251 N.E. 2d 529.

Following Jiles, this Court held, “that a transfer order, pursuant to R.C. 2151.26,<sup>9</sup> absent a finding of delinquency, is not a final appealable order, and that any error complained of must be raised in an appeal from the judgment of the Court of Common Pleas.” In re Becker, (1974), 39 Ohio St. 2d 84, 86, 314 N.E. 2d 158. It follows then, that an order not to transfer jurisdiction to the Court of Common Pleas pursuant to R.C. 2152.12, is not a final appealable order, and that any error complained of, including the lack of probable cause, must be raised on appeal once a finding of delinquency has been made. See generally, In re S.J., 106 Ohio St.3d 11, 2005-Ohio-3215.

This Court recently held that a juvenile court’s sua sponte dismissal of criminal charges *after* a probable cause hearing, is the equivalent of a decision granting a motion to dismiss under R.C. 2945.67(A). S.J. at ¶13. (Emphasis added.) S.J. was originally charged with committing one count of murder in violation of R.C. 2903.02. Id. at ¶3. The state later amended the complaint to include a second charge of felony murder in violation of R.C. 2903.02(B). Id. After a mandatory bindover hearing, the juvenile court dismissed the murder charge against S.J. and amended the felony-murder charge to voluntary manslaughter. Id. at ¶4. The state appealed and S.J. filed a motion to dismiss. Id. at ¶5. The Eighth District granted S.J.’s motion to dismiss the appeal, finding that “[a]ny appeal of the probable cause findings made in the mandatory bind-

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<sup>9</sup> R.C. 2152.26 has been repealed and replaced by R.C. 2152.12.

over proceedings would now be moot[,]” because the juvenile court adjudicated S.J. delinquent for voluntary manslaughter. Thereafter, the state appealed to this Court.

After accepting a discretionary appeal in S.J., this Court reversed the Eighth District’s decision and held that a juvenile court’s dismissal of criminal charges, *after* a determination that probable cause did not exist, is the equivalent of a decision granting a motion to dismiss under R.C. 2945.67(A); therefore, it is a final appealable order. S.J. at ¶13. (Emphasis added.) This Court determined that the order was final because it affected a substantial right and prevented a judgment on the murder charges. *Id.* at ¶13, citing R.C. 2505.02.

In the case below, the state filed a motion to dismiss one count of attempted murder, under case number 06 JU 5932, *prior* to the probable cause hearing. The state proceeded to the probable cause hearing on the remaining six counts of attempted murder with firearm specifications, two counts of felonious assault with firearm specifications, and one count of tampering with evidence. At the conclusion of the probable cause hearing, the trial court found that there was not probable cause as to the six counts of attempted murder, but did find probable cause as to the two counts of felonious assault. (T.p. 271). The state moved to dismiss the tampering with evidence charge in case number 06 JU 4838, but did not move to dismiss any of the other charges in 06 JU 5932. (T.p. 273). The court granted the motion to dismiss the tampering with evidence charge. (T.p. 273). The state then appealed the court’s decision under case number 06 JU 5932.

The facts of S.J. are distinguishable from the case at bar. In S.J., the juvenile court dismissed two counts of murder after the probable cause hearing. S.J. at ¶4. The state appealed and this Court found that because the state was prevented from receiving a judgment on the murder charges—because the charges were dismissed after the probable cause hearing—a final

appealable order existed. Id. In this case, the state moved to dismiss one count of attempted murder, prior to the probable cause hearing. The State's appeal did not raise any issues relating to the dismissed charge, it only raised an issue regarding the trial court's finding that there was not probable cause on the remaining six counts of attempted murder, under case number 06 JU 5932. Thus, because there was no final order or judgment in case number 06 JU 5932, there was no final appealable order and the state was not entitled to appeal that decision.

### CONCLUSION

This case involves a substantial constitutional question, as well as questions of public or great general interest; therefore, this Court should grant jurisdiction of this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant A.J.S.** was forwarded by regular U.S. Mail this 6<sup>th</sup> day of August, 2007, to the office of Ron O'Brien, Franklin County Prosecutor, 14th Floor, Hall of Justice, 373 South High Street, Columbus, Ohio 43215.



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IN THE SUPREME COURT OF OHIO

IN RE: A.J.S.,  
A MINOR CHILD

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Case No.

On Appeal from the Franklin  
County Court of Appeals  
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C.A. Case No. 06-AP-597

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT A.J.S.**

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FILED  
COURT OF APPEALS  
FRANKLIN CO., OHIO

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

In the Matter of:

A.J.S.,

(State of Ohio,

Appellant),

No. 06AP-597  
(C.P.C. No. 06JU04-5932)

(REGULAR CALENDAR)

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O P I N I O N

Rendered on June 21, 2007

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*Ron O'Brien, Prosecuting Attorney, Zachary M. Swisher, and  
Katherine J. Press, for appellant State of Ohio.*

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations, Juvenile Branch.

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SADLER, P.J.

{¶1} Plaintiff-appellant, State of Ohio ("the state"), appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which that court found that there was not probable cause to believe that appellee, A.J.S., committed the offense of attempted murder, as charged in six counts of a criminal complaint filed against A.J.S., who was 16 years of age at the time of the events giving rise to the complaint. The court did, however, find probable cause as to two other counts charging A.J.S. with felonious assault, arising out of the same incident.

{¶2} The following facts are gleaned from the record of the probable cause hearing. At approximately 2:45 p.m. on March 22, 2006, A.J.S. entered the Body Language Productions tattoo shop in the city of Whitehall in Franklin County. Accompanying him were his friend, Antwan Smith ("Smith"), and his girlfriend, Markala Cooper ("Cooper"). Also present in the shop were five employees, including Joseph Morgan ("Morgan") and Michael Miracle ("Miracle").

{¶3} Morgan testified that A.J.S. and his friends started a disturbance and were asked to leave the shop, whereupon A.J.S. and Smith began making threatening statements to the shop's employees. Morgan testified that A.J.S. stated that the group "had heat" and were "gonna, peel our cap back[,]" which Morgan construed as slang for an intention to shoot the shop employees. (Tr. 61.) Morgan stated that as A.J.S. made these comments he moved his hand in and out of his jacket as if he were reaching for something. At this point, Morgan directed another employee to call the Whitehall police.

{¶4} As the shop's employees escorted A.J.S. and his group toward the front door, and the group resisted, A.J.S. broke the shop's glass door. Morgan grabbed A.J.S. and told him, "you're not going anywhere. \* \* \* You're gonna wait here till the cops get here. You just broke our window, you're gonna pay for that." (Tr. 62.) Then, Smith punched Morgan in the jaw, whereupon a physical scuffle ensued between the two. A.J.S.'s group left the store and ran toward the back of the building. The shop's employees followed them in order to record the license plate number of their vehicle.

{¶5} The car was parked in a lot next to the lot for Body Language Productions. The car was running and in its back seat sat A.J.S.'s friend, Rochelle Farr ("Farr"). A.J.S. and his companions got into the car and began to pull away. When Miracle attempted to

pry off the car's license plate, A.J.S., who was in the driver's seat, revved the engine while it was in neutral, then shifted into reverse. Miracle jumped out of the way, and he and Morgan each picked up a wooden stick or board and threw them at the car. At this point, A.J.S. began to pull away from the two men. Morgan and Miracle testified that they began to walk away at this point, believing the altercation to be at an end. Farr, on the other hand, testified that they and other shop employees continued to throw things at the vehicle. In any case, Miracle testified that nothing obstructed the vehicle from driving away.

{¶6} According to Farr, A.J.S. became angry and stopped and exited the vehicle. Miracle characterized it as a "sudden[,] "screeching" stop. (Tr. 150.) Smith also exited the vehicle and he and A.J.S. began to walk toward Miracle. Farr stated that A.J.S. then began shooting. From her vantage point in the back seat of the vehicle, she stated that A.J.S. was shooting toward the ground. Morgan testified that he heard the gun cock and, immediately thereafter, saw spray from water that had pooled on the surface of a grease trap located behind him in the parking lot.

{¶7} Morgan testified that he was standing five to seven feet from the car at the time he heard the first shot, and the grease trap was located about two feet from him. He stated that there was no more than 12 feet between A.J.S.'s car and the grease trap. The evidence indicated that the grease trap was three feet high. Morgan further testified that his co-workers, Jamie Hickey and Carey Bowen, were standing five to seven feet behind him and off to his side. Another co-worker, Dustin Hysell, was standing ten feet behind the grease trap. Morgan stated that Miracle was standing directly in front of him, between him and A.J.S.'s vehicle. When the vehicle stopped, Miracle saw Smith get out of the car

and walk toward him yelling, " 'what then, nigga.' ' " (Tr. 150.) Miracle began to walk backwards away from the vehicle when the shooting began.

{¶8} Miracle began to run when he heard the first shot and counted a total of six shots. Miracle testified that one of the shots went through his pants leg, although he told the court that he initially thought that the hole in his pants was caused when he fell on the pavement in his attempt to escape, but a police officer later informed him that a bullet caused the hole. Smith was struck in the leg by one of the bullets. Farr testified that she viewed the wound and saw that the bullet entered Smith's leg at a point lower than the point at which it exited his leg. Whitehall Police Detective Steven Brown testified that he recovered six shell casings from the parking lot, and one spent projectile from the inside of the grease trap. He also testified that he observed a bullet hole in the top of the grease trap.

{¶9} The state advances a single assignment of error on appeal, as follows:

THE JUVENILE COURT ABUSED ITS DISCRETION WHEN  
IT FAILED TO FIND PROBABLE CAUSE ON THE CHARGE  
OF ATTEMPTED MURDER.

{¶10} We must initially discuss the proper standard to be applied in reviewing a juvenile court's probable cause determination in a mandatory bindover. In their briefs and at oral argument, both parties argued that we should apply an abuse of discretion standard. For support of this proposition, A.J.S. cites in his brief cases that involve amenability determinations in *discretionary* bindovers, proceedings in which trial courts are statutorily vested with discretion to determine whether allegedly delinquent juveniles are amenable to rehabilitation in the juvenile justice system.

{¶11} The state takes a different tack and argues that the trial court abused its discretion in wholly refusing to consider certain circumstantial evidence of purpose to kill, such as the short distances between A.J.S. and the tattoo shop employees at the time that A.J.S. fired his weapon, and the evidence that one bullet struck an object at a height of three feet, located just beyond the victims, and that two other bullets struck Smith and Miracle.

{¶12} Because of the diversity of arguments and authorities directed to us by the parties, it is necessary to set forth in detail the authorities guiding the review in this case.

{¶13} Our standard of review is determined by whether the trial court's ruling upon the state's motion to relinquish jurisdiction required an exercise of discretion or a decision on a question of law. See *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896; see, also, *Ranson v. Sheridan* (Oct. 3, 1990), Hamilton App. No. C-890455, jurisdictional motion overruled (1991), 58 Ohio St. 3d 703, 569 N.E.2d 511. Though "a review of the evidence is more often than not vital to the resolution of a question of law[,] \* \* \* the fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact. Nor does that consideration involve the court in weighing the evidence or passing upon its credibility." *O'Day, supra*, at 219.

{¶14} The Supreme Court of Ohio has explained:

Two types of transfer exist under Ohio's juvenile justice system: discretionary and mandatory. Discretionary transfer, as its name implies, allows judges the discretion to transfer or bind over to adult court certain juveniles who do not appear to be amenable to care or rehabilitation within the juvenile system or appear to be a threat to public safety. See R.C. 2151.26(C) [now R.C. 2152.12(B)].

Mandatory transfer removes discretion from judges in the transfer decision in certain situations. \* \* \*

*State v. Hanning* (2000), 89 Ohio St.3d 86, 90, 728 N.E.2d 1059.

{¶15} One such mandatory transfer situation enumerated in the juvenile bindover statute, R.C. 2152.12, is where, as in the present case, the juvenile is 16 years of age at the time of the alleged offense, and is alleged to have committed an act that, if committed by an adult, would constitute attempted murder. R.C. 2152.12(A)(1)(a) provides, in relevant part:

After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be \* \* \* attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged. \* \* \*

{¶16} Congruently, Juv.R. 30 provides:

(A) *Preliminary hearing.* In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult. The hearing may be upon motion of the court, the prosecuting attorney, or the child.

(B) *Mandatory transfer.* In any proceeding in which transfer of a case for criminal prosecution is required by statute upon a finding of probable cause, the order of transfer shall be entered upon a finding of probable cause.

{¶17} Ohio courts have consistently held that the preliminary hearing to determine the existence of probable cause is not adjudicatory in that the juvenile's factual guilt or

innocence is not at issue. See, e.g., *State v. Yoss* (1967), 10 Ohio App.2d 47, 48 ("[t]he issue is one of jurisdiction \* \* \* rather than one of a determination of guilt of a crime").<sup>1</sup>

{¶18} The Supreme Court of Ohio has held that precisely because a probable cause finding does not involve factual adjudication of delinquency, such an order is not immediately appealable. *In re Becker* (1974), 39 Ohio St.2d 84, 68 O.O.2d 50, 314 N.E.2d 158. It has also been held that, because there is no adjudication of factual guilt or innocence at the probable cause hearing, jeopardy does not attach at that stage. See, e.g., *State v. Payne* (1997), 118 Ohio App.3d 699, 693 N.E.2d 1159; *In re A.M.* (2000), 139 Ohio App.3d 303, 308, 743 N.E.2d 937, discretionary appeal not allowed (2001), 91 Ohio St.3d 1431, 741 N.E.2d 895; *State v. Sims* (1977), 55 Ohio App.2d 285, 380 N.E.2d 1350, paragraphs one and two of the syllabus.

{¶19} In the case of *State v. Iacona* (2001), 93 Ohio St.3d 83, 752 N.E.2d 937, the Supreme Court of Ohio set forth the state's burden of proof and the manner in which the juvenile court must evaluate the evidence, in a mandatory bindover case, to determine whether the state has met its burden of demonstrating probable cause. The *Iacona* court held, "the state must provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction pursuant to R.C. 2151.26(B) [now renumbered as R.C. 2152.12(A)]." *Id.* at 93.

{¶20} The court went on to hold:

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<sup>1</sup> See, also, *State v. Whisenant* (1998), 127 Ohio App.3d 75, 85, 711 N.E.2d 1016; *State v. Pruitt*, Trumbull App. No. 2001-T-0121, 2002-Ohio-7164, ¶48; *In re A.M.* (2000), 139 Ohio App.3d 303, 308, 743 N.E.2d 937; *State v. Revels* (June 30, 1986), Butler App. No. CA85-06-069.

In meeting this standard the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt.

Accordingly, in determining the existence of probable cause the juvenile court must evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.

*Ibid.* The state's evidence must be credible, but need not be unassailable. *Id.* at 96. "Determination of the merits of the competing prosecution and defense theories, both of which [are] credible, ultimately [is] a matter for a factfinder at trial." *Ibid.*

{¶21} The foregoing language from *Iacona* suggests that the juvenile court does not act as a factfinder at the preliminary hearing; rather, it evaluates the quality of the evidence and then decides whether the credible evidence adduced justifies a belief that the juvenile committed a particular offense. "In this context, probable cause is a reasonable ground or probability for belief that an act has been committed which, although requiring more than a mere suspicion, requires less than a prima facie showing." *Revels, supra*, 1986 Ohio App. LEXIS 7388, at \*9.

{¶22} In performing this function, *Iacona* counsels, the juvenile court does not find facts, choosing one party's evidence over the other when the credible evidence is contradictory as to a fact or element of an offense. Instead, the juvenile court acts as a gatekeeper, charged with evaluating whether sufficient credible evidence exists to warrant going forward with a prosecution on a charge that the legislature has determined triggers a mandatory transfer of jurisdiction to adult court.

{¶23} In this way, the determination made at the probable cause hearing is akin to a determination as to the existence of probable cause to search or stop in a suppression hearing, which the United States Supreme Court has described thusly:

The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

(Citation omitted; emphasis added.) *Ornelas v. United States* (1996), 517 U.S. 690, 696-697, 116 S.Ct. 1657, 134 L.Ed.2d 911.

{¶24} Thus, the juvenile court's decision as to the existence or non-existence of probable cause is not a weighing of evidence and an exercise of discretionary fact finding; rather, it is a decision whether the credible evidence adduced satisfies the statutory standard for the particular offense charged. An appellate court must defer to the trial court's credibility determinations, but the appellate court must determine de novo whether the juvenile court's conclusion of law (the conclusion that probable cause does or does not exist) was correct, given the credible evidence adduced. See *In re Cline*, Montgomery App. No. 19082, 2002-Ohio-3280, ¶19.

{¶25} The Eighth Appellate District performed its review in this manner, relying on *Iacona*, in the case of *In re S.J.*, Cuyahoga App. No. 82106, 2005-Ohio-6353. In *S.J.*, the juvenile was the subject of a delinquency complaint alleging that she committed an act that would constitute the crime of murder if committed by an adult. The complaint arose out of the fatal stabbing of another minor. The alleged delinquent was 17 years old at the time of the offense; thus, pursuant to R.C. 2152.12(A)(1), if the court determined that

probable cause existed to believe that she committed the act alleged, then the court would have been required to relinquish jurisdiction to the court of common pleas.

{¶26} Following the preliminary hearing the trial court ruled that the state had failed to establish probable cause for murder because it had not established probable cause to believe that the juvenile could have formed the requisite intent for that crime. The court of appeals stated that the issue before it was whether the state made "the necessary showing of probable cause that the juvenile committed the crime of murder -- i.e. the purposeful killing of another?" *Id.* at ¶22. The court of appeals went on to state that, in making this determination, it relied upon *Iacona's* holding that the state must provide credible evidence of every element of an offense to support a finding of probable cause and that, in meeting this standard, the state must produce evidence that raises more than a suspicion of guilt, but need not prove guilt beyond a reasonable doubt. *Iacona* also directs, the *S.J.* court noted, that the juvenile court evaluate the quality of the evidence of both parties and that the state's evidence must be credible, but need not be unassailable.

{¶27} The record in *S.J.* contained eyewitness testimony about the circumstances surrounding the altercation between the alleged delinquent and the victim that supported the belief that the killing was purposeful. On the other hand, the defense had presented testimony from a social worker and a psychologist that the alleged delinquent was incapable of forming the requisite intent for the crime of murder because she had a low I.Q., was mildly retarded, had been sexually abused as a child, and suffered from post-traumatic stress disorder.

{¶28} The court of appeals recognized that "the defense did present some compelling evidence challenging the intent element of the crime of murder, [but] \* \* \* such evidence is not sufficient to negate the state's showing of probable cause in this case." *Id.* at ¶30. The appellate court went on to quote *Iacona's* admonition that "[d]etermination of the merits of the competing prosecution and defense theories, both of which were credible, ultimately [is] a matter for a factfinder at trial." *Id.* at ¶31, quoting *Iacona* at 96. The court of appeals then determined, "[a]lthough the testimony presented by the defense may support the contention that appellee lacked the capability of a 'purposeful' killing, the fact that she took the affirmative action to take a knife outside to what she knew would be an altercation alone provides credible evidence to sufficiently compete on the question of whether she did act 'purposefully.' This case, in the end, should be decided by a fact finder at trial." *Ibid.*

{¶29} On that basis, the appellate court reversed. The court of appeals accepted the trial court's evaluation of the credibility of witnesses and the quality of the evidence, but independently considered whether the credible evidence presented at the preliminary hearing warranted a belief that the juvenile acted with the requisite mental state for murder.

{¶30} In the present case, we, too, must independently consider whether the credible evidence demonstrates probable cause to believe that appellant purposely engaged in conduct that, if successful, would have caused the deaths of the alleged victims.

{¶31} Cited in the concurrence are the cases of *In re Stanley*, 165 Ohio App.3d 726, 2006-Ohio-1279, 848 N.E.2d 540, and *State v. Boddie* (Dec. 28, 2001), Montgomery

App. No. 18709, for the proposition that the proper standard of review of a juvenile court probable cause determination is abuse of discretion. Post at ¶50. *Stanley* is inapplicable to the present case because in that case neither party assigned error in the trial court's probable cause determination. In *Boddie*, the Second Appellate District applied an abuse of discretion standard to review of a probable cause determination. However, though that case was decided after *Iacona*, it contains no discussion of the standard set forth therein for the trial court's evaluation of the question of probable cause.

{¶32} As noted earlier, our standard of review is determined by whether the trial court exercised discretion or applied statutory standards to the evidence adduced. Because the trial court's probable cause determination required the latter and did not involve discretionary fact finding, we must independently, and without deference to the trial court, determine whether the credible evidence demonstrates probable cause to believe that appellant acted purposely.<sup>2</sup>

{¶33} Therefore, we must now decide the correctness of the trial court's determination that the state failed to meet its burden of demonstrating probable cause under R.C. 2152.12(A).

{¶34} A.J.S. was charged with committing an act that would be attempted murder if committed by an adult. The crime of murder, as relevant here, is set forth in R.C.

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<sup>2</sup> Additional briefing was not ordered because both parties have thoroughly and adeptly explored the issue before this court; that is, whether the state met its burden of demonstrating probable cause as to the element of intent, which is clearly the element upon which the juvenile court found the evidence was insufficient. Moreover, the parties do not dispute the admissibility or credibility of any piece of testimony; rather, they dispute whether the evidence, taken together, demonstrates probable cause to believe that A.J.S. harbored the mens rea required for the charged offenses. Additional briefing would not shed additional light on these issues, nor could counsel have more capably argued their respective positions, even under the standard of review employed herein.

2903.02(A), which provides, "[n]o person shall purposely cause the death of another \* \* \*." The attempt statute provides, in pertinent part, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). Thus, in order to obtain a finding of probable cause and an order of transfer, the state was required to present credible evidence that A.J.S. purposely engaged in conduct that, if successful, would have caused the death of another.

{¶35} The record reveals that Farr testified that she saw A.J.S. wield a gun and shoot it. She testified that she could not remember how many shots she heard, but when pressed by the trial court to recall how many she had heard "for sure" even though that "may not have been all that was shot" she stated that she recalled hearing at least three shots for sure. (Tr. 235.) Miracle testified that he counted the shots and the number of shots that he heard was six. Accordingly, the state demonstrated probable cause to believe that A.J.S. fired six shots from a gun at the time and place in question.

{¶36} The remaining element of the charge is the culpable mental state of "purposely." The juvenile court made no findings in its judgment entry denying the state's motion to relinquish jurisdiction. However, review of the transcript of the probable cause hearing provides insight into the reasons for the court's decision. The trial court was concerned with whether there was sufficient evidence of the requisite mental state for attempted murder. The court stated, "there is no evidence I know of that says there [sic] was everyone at the time this happened, how close were they to one another." (Tr. 262.) The court further stated, "you're saying it's not possible for the - - the bul - - the shots to

fired into the ground. Well, it's the ca - - it's the burden of the State to make that case if it's possible or not and \* \* \* I don't see any evidence that would lead the Court to be able to agree that it was impossible he shot 'em all in the ground." (Tr. 262-263.)

{¶37} The court went on to state:

\* \* \* I still am not clear who was where at what time; how far they were from one another. Why is it that all those folk, almost 12 people, some - - some 11 some say testified they were 12, whatever, that no one could see the various - - from various vantage points. But that again, is the burden of the state to establish all that. \* \* \* [S]how me where everyone was and why you're saying it's impossible for the shots to all have been fired into the ground and why it's impossible for them have ricocheted \* \* \*. So my question is, what evidence is the State relying upon to establish that there was any intention on the part of the alleged de - - delinquent to support probable cause for aggravated [sic] murder[?] \* \* \*

(Tr. 263-264.)

{¶38} On appeal, the state argues that it presented credible evidence supporting a belief stronger than mere suspicion as to the element of a purposeful mental state. It directs our attention to the fact that A.J.S. made threatening statements and movements, while still in the tattoo shop, referencing an intention to shoot the shop's employees; and to Farr's testimony that, when A.J.S. exited the vehicle and brandished the gun, he was angry. Additionally, A.J.S. fired six shots, from a weapon capable of inflicting fatal wounds, toward numerous people located as little as seven feet and no more than 20 feet away from him. The state argues that this evidence establishes probable cause to believe that A.J.S. purposely attempted to cause the death of the six victims named in the complaint.

{¶39} In response, A.J.S. points to Farr's testimony that she saw A.J.S. aiming toward the ground. He further contends that the location of the damage to Miracle's pants corroborates Farr's testimony in this regard and demonstrates that he was not aiming at any individual person. He also argues that the trajectory of the bullet that wounded Smith indicates that it ricocheted off of the ground before striking Smith. A.J.S. argues that all of this demonstrates that he was indeed shooting at the ground and not at any person, and thus lacked the requisite mental state of "purposely" sufficient for a charge of attempted murder.

{¶40} The state counters by pointing out that its evidence demonstrated that the first bullet fired after the gun was cocked struck the top of the grease trap located behind several of the alleged victims. Given that the grease trap was three feet high, the state argues, the evidence establishes probable cause to believe that A.J.S. was aiming for vital areas of the shop employees' bodies, thus evidencing a purposeful attempt to kill.

{¶41} "Purposely" is defined in R.C. 2901.22(A) as follows:

A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶42} An intent to kill may be inferred "where the natural and probable consequence of a wrongful act is to produce death[.]" *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E.2d 517, paragraph five of the syllabus. "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson* (1978), 56 Ohio St.2d 35, 39, 10 O.O.3d 78, 381 N.E.2d 637. "[A] firearm is an inherently dangerous

instrumentality, the use of which is reasonably likely to produce death[.]” *State v. Widner* (1982), 69 Ohio St.2d 267, 270, 23 O.O.3d 265, 431 N.E.2d 1025.

{¶43} Intent need not be proven by direct testimony. *State v. Burke* (1995), 73 Ohio St.3d 399, 404, 653 N.E.2d 242. Instead, an intent to kill may be deduced from the surrounding circumstances, including the nature of the instrument used, its tendency to end life if designed for that purpose, and the manner in which any wounds were inflicted. *State v. Eley* (1996), 77 Ohio St.3d 174, 180, 672 N.E.2d 640.

{¶44} The evidence in the record shows that A.J.S. pointed a gun toward a group of individuals who were located as little as five to seven feet and no more than 20 feet away, and then fired six shots, with the first shot hitting the top of a grease trap, the height of which corresponds roughly with waist-height of the full-grown male victims. These acts, together with his words and gestures minutes before the shooting, strongly indicate that A.J.S. attempted to cause the death of these persons and did so purposely. *State v. Smith* (1993), 89 Ohio App.3d 497, 501, 624 N.E.2d 1114 (pointing a nine millimeter pistol at a group of people less than twenty feet away and firing at least one shot is strong evidence of an intention to kill such that conviction for murder was supported by sufficient evidence); *State v. Turner* (Dec. 30, 1997), Franklin App. No. 97APA05-709 (“[t]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence”); *State v. Waddell* (Aug. 15, 2000), Franklin App. No. 99AP-1130 (the act of reinitiating an argument, waving a gun in the air and firing a shot between two individuals who are three feet away from the shooter is sufficient evidence of an intent to kill).

{¶45} The mere fact that the shots that wounded Smith and tore Miracle's pants hit non-vital areas of the body does not mean that a jury could not properly infer an intent to kill. *State v. Brust* (Mar. 28, 2000), Franklin App. No. 99AP-509. "The attempt statute \* \* \* speaks to 'conduct that, if successful, would constitute or result in the offense.' There is no requirement that the victim sustain any injury, let alone a potentially mortal wound, from the attempted act of murder." *State v. Talley* (Sept. 25, 1998), Lake App. No. 97-L-169, 1998 Ohio App. LEXIS, at \*13. It is not a defense to a charge of attempted murder even if no harm results to a potential victim. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 220, 15 OBR 311, 473 N.E.2d 264.

{¶46} Although the evidence supports the conclusion that A.J.S. was merely trying to scare the tattoo shop employees by firing his gun, it also supports the conclusion that he acted purposely under the attempt and murder statutes. Under *Iacona*, then, it is for a factfinder at trial to decide whether A.J.S. had no intent to kill and was shooting for some other reason (such as to scare the victims or to inflict non-life-threatening injuries), or whether he did act with the purpose to kill and was simply a poor marksman. The evidence is sufficient to demonstrate more than a mere suspicion that he harbored a purpose to kill, and that is an adequate showing for probable cause. As the *Iacona* court instructed, the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide "unassailable" evidence proving each element beyond a reasonable doubt.

{¶47} *Iacona* counsels that where, as here, both the prosecution and the defense present credible evidence at the probable cause hearing showing that there was or was not probable cause as to each element of the charged offense, the state has satisfied the

statutory requirements for mandatory bindover, and the juvenile court must relinquish jurisdiction to the court of common pleas for ultimate adjudication of guilt or innocence by a trier of fact. Therefore, the juvenile court in the present case erred in finding no probable cause and in refusing to relinquish jurisdiction.

{¶48} For this reason, the state's single assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is reversed, and, pursuant to App.R. 12(B), this cause is remanded to the juvenile court with instructions to enter appropriate findings and take other actions in accordance with this opinion.

*Judgment reversed and  
cause remanded with instructions.*

BROWN, J., concurs in judgment only.  
WHITESIDE, J., dissents.

WHITESIDE, J., retired of the Tenth Appellate District,  
assigned to active duty under authority of Section 6(C), Article  
IV, Ohio Constitution.

BROWN, J., concurring in judgment only.

{¶49} In *State v. Iacona* (2001), 93 Ohio St.3d 83, 93, the Ohio Supreme Court set forth the standard for determining probable cause at a bindover hearing. Our court has cited *Iacona* in reviewing the case of *In the Matter of: D.T.F.*, Franklin App. No. 05AP-03, 2005-Ohio-5245, at ¶12, stating:

\* \* \* In meeting this standard, the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt. \* \* \* The state must provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the child committed the offense. \* \* \* To determine whether probable cause

exists, the juvenile court "must evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause." [*Iacona*], citing *Kent v. United States* (1966), 383 U.S. 541, 563, 86 S.Ct. 1045, 1058, 16 L.Ed.2d 84.

{¶50} The issue in *Iacona* was not whether the juvenile court erred in finding probable cause. The issue was, had a blood culture report been disclosed prior to the probable cause hearing, whether the juvenile court would have reached a different conclusion regarding probable cause. Therefore, the *Iacona* court did not expressly set forth the proper standard of appellate review of a probable cause determination. Rather, the juvenile court was directed to "evaluate the quality of the evidence." *Id.* I do not believe, in setting forth the standard for the trial court, the *Iacona* court signaled a change in appellate review of probable cause in juvenile bindover proceedings, which is abuse of discretion. See, e.g., *In re Stanley*, 165 Ohio App.3d 726, 2006-Ohio-1279, at ¶18, 33 (using the abuse of discretion standard to review a trial court's decision pursuant to the mandatory bindover provisions and its subsequent failure to apply the discretionary bindover provisions); *State v. Boddie* (Dec. 28, 2001), Montgomery App. No. 18709 (using the abuse of discretion standard to review a juvenile court's determination of probable cause in a mandatory bindover hearing).

{¶51} Upon review of the present case, I concur in judgment only. Using the abuse of discretion standard, I would still find that the juvenile court erred in finding no probable cause as to attempted murder.

WHITESIDE, J., dissenting.

{¶52} Being unable to concur in the conclusions reached in the main or the concurring opinions, I must respectfully dissent.

{¶53} While R.C. 2152.12 has been amended to require that a delinquent child who is 16 or 17 years of age, who is charged with committing an act that would be attempted murder if committed by an adult, must be transferred for trial as an adult provided that there is probable cause to believe that the child committed the act charged. Nevertheless, the proper standard of review in this case is abuse of discretion rather than purely a question of law for two reasons: (1) abuse of discretion is the only error alleged by appellant, the prosecution, for reversal of the trial court; and (2) that is the proper standard of review of a trial court determination of probable cause, assuming the prosecution has the right to appeal the trial court's probable cause determination. Furthermore, the amendment to R.C. 2152.12 eliminated the discretion of the juvenile court to determine not to transfer the case where the juvenile was amenable to juvenile treatment.

{¶54} The single assignment of error raised by appellant is that "THE JUVENILE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FIND PROBABLE CAUSE ON THE CHARGE OF ATTEMPTED MURDER." No other error is asserted by appellant. Secondly, abuse of discretion is the proper standard of review of a trial court determination that probable cause exists when such question is properly appealable to an appellate court. This is true because the determination of probable cause is based upon the evidence adduced and certain factual findings necessarily made by the trial court as to whether the prosecution has shown probable cause that the accused has committed

the offense with which he or she is charged. This determination requires a limited weighing of the evidence as is discussed *infra*.

{¶55} When the standard of review is abuse of discretion, a reviewing court must accept the trial court's determination unless the trial court acts in an unreasonable, arbitrary or an unconscionable manner. See *State v. Finnerty* (1989), 45 Ohio St.3d 104, 543 N.E.2d 1233. In *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413, 575 N.E.2d 167, the Ohio Supreme Court, quoting from *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144, stated: "The term 'abuse of discretion' \* \* \* connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."

{¶56} In this case, there was no direct evidence as to defendant's intent, as is rarely the case, but there was evidence from which the trial court could have inferred that appellee had the requisite intent. However, whether to make an inference from the evidence is a question for determination by the trial court, not this court. There is also evidence before the trial court suggesting that appellee did not have the requisite intent, but instead was shooting into the ground in order to scare the alleged attackers and the bullet that struck one of the attackers could have ricocheted. In light of the totality of the evidence, I am unable to find that the trial court's attitude was unreasonable, arbitrary or unconscionable. Because there was an evidentiary basis for the trial court's determination, even though there also is an evidentiary basis for the determination that the appellant seeks, this court is not permitted to substitute its judgment for that of the trial court since the standard of review is abuse of discretion. Accordingly, being unable to find an abuse of discretion on the part of the trial court, I would overrule appellant's

assignment of error and affirm the judgment of the trial court from which this appeal is taken.

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