

IN THE SUPREME COURT OF OHIO

IN RE: SHARDAI BURT

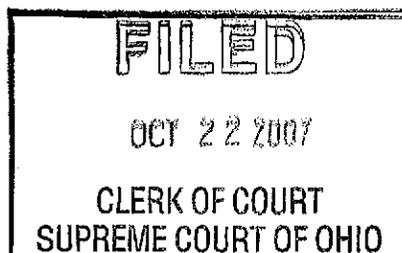
CASE NO. 2007 -1751

Juvenile Delinquent-Appellant

vs.

THE STATE OF OHIO,

Plaintiff-Appellee.



ON APPEAL FROM THE OHIO COURT OF APPEALS FOR
STARK COUNTY, OHIO
CASE NO. 2006CA00328

MEMORANDUM IN RESPONSE OF PLAINTIFF-
APPELLEE, THE STATE OF OHIO

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WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW

This case should not be accepted for review because it does not involve a substantial constitutional question, is not of public or great general interest and leave to appeal this juvenile case should not be granted. Burt argues the filing of a VOPCO charge against her for what she characterized as a status offense violates her state and federal rights to due process. Yet, handling her delinquent conduct as a VOPCO charge instead of a probation violation actually accorded her more due process rights. Given Burt's concern for her constitutional procedural due process rights, her arguments are incredulous. At a revocation proceeding, the State would have a lesser burden of proof, and rules of evidence are more lax for such proceedings. Because Burt's due process rights were not violated, this case involves no substantial constitutional question.

Nor is the treatment of Burt by the Stark County courts in conflict with other Ohio appellate courts. While courts may differ on the technical name for a violation of a court order, they do not differ on a juvenile's right to procedural due process. A juvenile is entitled to written notice of the charge, a hearing and an opportunity for legal representation. Burt was afforded those rights and more.

The court of appeals correctly applied the law and found that Burt's violation of the terms of the court's order were properly handled with the filing of a VOPCO charge with concomitant rights to notice, hearing and legal representation.

Accordingly, this Court should decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

In 2003, Shardai Burt, age 13 at the time, was charged with delinquency as a result of committing the criminal offenses of obstructing official business¹ and disorderly conduct.² Burt eventually pleaded true to these allegations, and was adjudicated delinquent on each count by the Stark County Juvenile Court.³ Upon adjudicating her a delinquent child, the court ordered Burt to exhibit good behavior at home, school, and the community; to attend school (absent a medical excuse); and, to complete mediation (if not already completed).

In October 2005, another juvenile complaint was filed against Burt, who had turned 14 by then, charging her with delinquency for violating a prior court order (VOPCO).⁴ The complaint alleged that Burt had been leaving her home without permission and staying out all night, and that on one occasion she left for school and did not return home until two days later, without her whereabouts being known. Burt pleaded true to this delinquency charge, admitting that she had done what was alleged in the complaint, and she was found delinquent by the magistrate based upon her plea and admission. In addition, the magistrate's disposition was approved by the trial judge.⁵ This disposition was community control; a curfew (home by 7:00 p.m. each night, unless accompanied by an adult), good behavior at home, school, and the

¹See R.C. 2921.31; the offense is a misdemeanor of the second degree.

²See R.C. 2917.11(A). The offense would have been a misdemeanor of the fourth degree if it had been committed by an adult.

³*In re Burt*, Stark County Court of Common Pleas (Family Court Division) Case No. J-137265 (Magistrate David Nist).

⁴See R.C. 2152.02(F)(2).

⁵Judge David E. Stucki.

community; mandatory school attendance (except for medical excuse); 10 hours of community service to be performed within 20 days; and, continued counseling at Quest.⁶

In September of 2006, another VOPCO complaint was filed against Burt, charging her with violating the conditions of her probation. Burt was still 14, and was specifically charged with leaving home without parental permission or with her probation officer's permission, and stayed away during the weekend. This complaint gives rise to the appeal. Prior to trial, Burt moved to dismiss the complaint on the ground that the complaint did not allege a valid delinquency claim. According to Burt, a VOPCO allegation is not a delinquency charge provided by statute, and thus the court did not have jurisdiction to proceed. The proper course of proceedings, according to Burt, would have been to charge her with a violation of her probation and revocation proceedings to commence. After a hearing on the motion, the magistrate overruled the motion.⁷ Burt filed an objection to this ruling, which proceeded to review by the trial court.⁸ The trial court, however, overruled the objection.⁹ The matter then proceeded with the set trial date on the complaint. Burt, however, opted to renew her motion to dismiss and

⁶*In re Burt*, Stark County Court of Common Pleas (Family Court Division) Case No. J-139459.

⁷Magistrate David Nist.

⁸In his ruling, Magistrate Nist specifically held:

Motion to dismiss is denied. Court believes ORC 2152.02(F)(2) permits the court to proceed with a violation of court order complaint. This court does not agree with the reasoning set forth within the brief submitted by the juvenile. Court supports the state's position opposing the motion to dismiss.

⁹Judge Michael L. Howard.

plead true to the charge. The magistrate overruled the motion,¹⁰ and accepted Burt's true plea, adjudicating her delinquent. The magistrate imposed court placement, remanding Burt to the Juvenile Attention Center for placement until a group home is available, with placement in the home to be immediate; mandatory counseling and compliance with all recommendations for treatment. In imposing this disposition, the magistrate noted Burt's continued recalcitrant behavior:

Juvenile has been on Probation for 11 months; little improvement - still disrespectful; not cooperative; Reasonable efforts were made to prevent the need for placement. The juvenile's continued residence in or return to the home would be contrary to the juvenile's best interest and welfare.

Burt once again filed an objection to the magistrate's report and recommendation, which was overruled by the trial judge. Judge Howard noted succinctly by judgment entry this ruling:

The Court, having made an independent analysis of the law and issues, overrules the objection and approves and adopts the Magistrate's Decision.

Burt thereafter filed an appeal from the trial court's ruling. The Court of Appeals [Fifth District], in a 21 page opinion, overruled the appeal finding that appellant was not a status

¹⁰Magistrate Sally Efremoff, who specifically state by judgment entry:

Motion to Dismiss denied. Court believes ORC 2152.02(F)(2) permits the court to proceed with a violation of court order complaint. Court placement ordered.

offender and thus did not fall with the legislative concerns enunciated in R. C. 2151.354.¹¹ It is from this appellate decision that Burt now seeks appeal to this Court.

¹¹*In re Shardai Burt, Juvenile*, Stark App. No. 2006CA00328, 2007-Ohio-

ARGUMENT

PROPOSITION OF LAW NO. 1

**THE STATE’S “VIOLATION OF PRIOR COURT ORDER”
CHARGE (VOPCO) DID NOT VIOLATE MS. BURT’S
FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO
DUE PROCESS.**

Burt argues the filing of a VOPCO charge against her for what she characterizes as a status offense violates her state and federal right to due process. Burt’s argument is apparently that the “bootstrapping” of a status offense to a delinquency charge violated due process. Burt argues that she should have at most been found to have violated her probation instead. Burt’s argument is unclear as to whether she is arguing a procedural or a substantive due process violation. Regardless, handling her conduct as a VOPCO instead of a probation violation actually accorded Burt more due process rights than would have been accorded her otherwise.

Burt was found to be a delinquent juvenile by reason of violating a lawful order of the juvenile court in her prior delinquency adjudication. Burt does not concede the facts of the violation, or the legal consequences as a result of her true plea. She in fact fits the definition of a delinquent child as set forth by statute:

“Delinquent child” includes any of the following:

. . . .

(2) Any child who violates any lawful order of the court made under this chapter or under Chapter 2151. of the Revised Code other than an order issued under section 2151.87 of the Revised Code;

R.C. 2152.02(F)(2).

Since her running away from home for a weekend was charged as VOPCO, Burt was entitled to all the procedural due process accorded any juvenile charged as a delinquent offender, which significantly included requiring the State to prove the allegation by proof beyond a reasonable doubt. Thus, Burt was actually afforded more due process in this case than if she had been charged with a probation violation (which would have imposed a lesser burden of proof on the State).

Burt attempts to take comfort in the opinion of Justice Craig Wright in his dissenting opinion from the dismissal of an appeal as improvidently allowed. In the *Trent* case,¹² the Ohio Supreme Court dismissed the appeal, which was accepted to review the delinquency adjudication of a juvenile for escape for a shelter home. The juvenile had been committed to the shelter home as a result of being unruly for running away from home. Justice Wright dissented from the dismissal, and wrote an opinion, joined by two other justices, explaining his dissent. Justice Wright took issue with the so-called “bootstrapping” of an unruly offense into a delinquency charge as a result of the child’s placement in the shelter home. As Justice Wright noted, “Bootstrapping of a status offender into a juvenile delinquent has been rightly termed a ‘vicious practice.’ We have tacitly approved a result that seems to allow such ‘bootstrapping.’”¹³ Justice Wright opined that what the juvenile in that case was guilty of was either a probation violation or

¹²*In re Trent* (1989), 43 Ohio St.3d 607, 539 N.E.2d 630. See also *In the Matter of Trent* (March 30, 1988), Ross App. No. 1380, unreported, 1988 WL 36361 (upholding delinquency adjudication for crime of escape after being committed to a shelter home after being adjudged an unruly child for running away from home).

¹³*Trent*, 43 Ohio St.3d at 609, 539 N.E.2d at 632 (footnote omitted) (Wright, J., dissenting from dismissal of appeal).

contempt.¹⁴ The dissent cautioned, significantly for purposes of the instant case, that a juvenile cannot ignore and disobey a court order, and such a violation may be the basis of a delinquency adjudication.

Court orders should not be ignored with impunity by children, and violation of a court order may be the basis for a finding of delinquency. R.C. 2151.02(B).

Trent, 43 Ohio St.3d at 609, 539 N.E.2d at 632 (Wright, J., dissenting from dismissal of appeal).

Justice Wright then suggested some procedural safeguards for this kind of so-called bootstrapping:

Before such a detention placement of an unruly child or the bootstrapping of status from unruly to delinquent occurs for violation of a court order, the following criteria should be met:

- (1) The juvenile should be given sufficient notice to comply with the order and understand its provision;
- (2) violation of a court order must be egregious;
- (3) less restrictive alternatives must be considered and found to be ineffective; and
- (4) special confinement conditions should be arranged so that the status offender is not put with underage criminals. See Juv.R. 7(H) and *In Interest of D.L.D.* (1983), 110 Wis.2d 168, 182, 327 N.W.2d 682, 689. The facts in this case obviously do not meet the above criteria.

¹⁴“What Tina was found guilty of is in some measure akin to a probation violation or even contempt when she did not “subject herself to the reasonable control of the staff” of the shelter. This was required under the first condition listed in the court's entry placing her in the shelter after she was adjudicated as ‘unruly.’” *Trent*, 43 Ohio St.3d at 609, 539 N.E.2d at 632.

Trent, 43 Ohio St.3d at 609, 539 N.E.2d at 632 (Wright, J., dissenting from dismissal of appeal).

Clearly, Justice Wright's dissent does not have precedential value upon which Burt can rely. Nonetheless, his dissent did not excuse or immunize an unruly child from being adjudicated a delinquent for violating a court order. In addition, he suggested that such a juvenile be accorded certain procedural due process. Burt was certainly accorded these protections in this case. Finally, Burt was originally adjudicated a delinquent child by reason of committing criminal offenses and was not originally adjudicated an unruly child. She subsequently violated the terms of her disposition not once, but twice, which resulted in two subsequent VOPCO delinquency adjudications.¹⁵

Burt's due process rights were not violated in this case as found by the court of appeals.

¹⁵Burt never appealed her first VOPCO delinquency adjudication.

PROPOSITION OF LAW NO. II

FILING A NEW CRIMINAL CHARGE AGAINST A JUVENILE FOR VIOLATION OF A PRIOR COURT ORDER, REGARDLESS OF THE ORIGINAL OFFENSE, IS NOT A VIOLATION OF THE JUVENILE'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The crux of Burt's second proposition of law is that charging a juvenile with being delinquent by reason of violating a prior court order is improper, especially if the basis of the violation would otherwise result in an unruly charge. Burt argues that the code provision that provides for the delinquency adjudication is only a definition section, and thus any delinquency adjudication violates due process. She also renews her argument that the proper avenue of remedy for the State in this case was to revoke her probation as opposed to seeking a new delinquency adjudication. Burt's argument, however, is without merit. The definition section of the juvenile code has legal force and is not mere window dressing. A child cannot violate court orders with impunity. Furthermore, this avenue actually provides Burt with greater procedural due process protections than a probation revocation would.

As noted above, the definition of a delinquent child includes "[a]ny child who violates any lawful order of the court made under this chapter [R.C. Chapter 2152]."¹⁶ A delinquency adjudication is not limited to juveniles who commit criminal offenses.¹⁷ In addition, chronically

¹⁶R.C. 2152.02(F)(2).

¹⁷R.C. 2152.02(F)(1) (defines "delinquent child" to include "[a]ny child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult.").

truant children, as well as certain habitually truant children, qualify as delinquent children.¹⁸

Thus, Burt's implicit argument that a juvenile must commit a criminal offense in order to qualify as a delinquent child is wholly without merit. There is no requirement that an offense be listed in the complaint. The complaint is a notice requirement, putting the juvenile on notice as to the basis for the adjudication charge. As such, a complaint that alleges a juvenile's delinquency status under R.C. 2152.02(F)(2) for violating a prior lawful order of the juvenile court is sufficient to satisfy this procedural due process requirement. As such, the code's provision for such a delinquency charge comports with procedural due process.

Burt argues that the proper constitutional course in this case was to pursue this case as a violation of probation. Given Burt's concern for her constitutional procedural due process rights, such an argument seems incredulous. At a revocation proceeding, the State would have a lesser burden of proof, and the rules of evidence are more lax for such proceedings. Burt would be accorded less procedural due process in such a case than she was accorded in the instant case, pursued as a VOPCO delinquency adjudication.

In addition, a probation revocation proceeding would certainly trigger the argument that the proper course would have been to pursue a VOPCO delinquency proceeding in order to accord the juvenile more procedural rights, and that this is what the legislature intended by enacting R.C. 2152.02(F)(2). The scope of that statute is clear, given its broad language. A juvenile who violates a prior lawful court order, issued by the juvenile court pursuant to R.C.

¹⁸See R.C. 2152.02(F)(4) ("Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant.") and R.C. 2152.02(F)(5) ("Any child who is a chronic truant.")..

Chapter 2152, is a delinquent child, entitled to all the protections and procedural rights as any other juvenile charged with delinquency.

This court should decline to accept jurisdiction on the merits of Burt's second proposition of law.

CONCLUSION

This Court should not allow appeal in this juvenile case. The court of appeals in a well reasoned 21 page opinion, correctly concluded that Burt's adjudication for violating a court order was proper. Accordingly, this Court should decline to accept jurisdiction.

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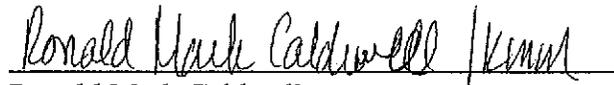
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, the State of Ohio, was sent by ordinary U.S. mail, postage prepaid, this 18th day of October, 2007, to Angela Miller, counsel for defendant-appellant, at The State Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



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