

IN THE SUPREME COURT OF OHIO

In re : Case No. 2007-1451
A.J.S., :
appellant. : On Appeal from the
: Court of Appeals for
: Franklin County, Ohio
: Tenth Appellate District
: Case No. 06AP-597

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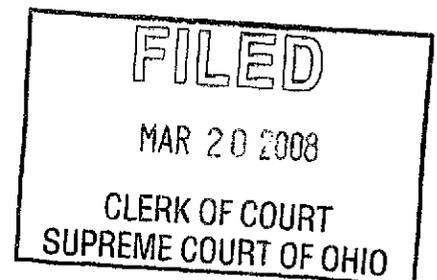


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STATEMENT OF FACTS

Appellant, who was 16 years of age at the time of the events giving rise to the complaint, was charged with two counts of felonious assault with gun specifications and one count of tampering with evidence for events occurring on March 22, 2006. Investigation continued and on April 6, 2006, appellant was charged with seven counts of attempted murder with gun specifications, category one offenses pursuant to R.C. 2152.02(BB)(2), as a result of the March 22 incident.

Appellee, the State of Ohio, voluntarily dismissed one count of attempted murder and filed bindover motions asking the juvenile court to relinquish jurisdiction on the remaining charges.

At the probable cause hearing, the State presented the testimony from two victims, Joseph Morgan and Michael Miracle, Whitehall Police Detective Steven Brown, and Antwan Smith, Markala Cooper, and Rochelle Farr, three of appellant's associates.

On March 22, 2006 at approximately 2:45 p.m. Joseph Morgan, Michael Miracle, Jamie Hickey, Dustin Hysel, and Cary Bowen were working at Body Language Productions, located in Whitehall, Ohio. A customer, Blake Kirkberg, was present as well. (T. 56, 68, 71-73) Appellant, Smith, and Cooper, then appellant's girlfriend, entered the shop but were asked to leave when Smith began to argue with Morgan about using the shop's restroom. (T. 56-57, 60) Appellant told Morgan that "they had heat" and "we're gonna peel a cap back" while reaching into his jacket. Morgan understood this to be slang for a shooting. (T. 61) The employees began ushering appellant and his friends toward the door when Smith punched Morgan and appellant punched the front door, causing the glass to shatter. (T. 61-62)

Morgan and the others followed appellant and his companions to get the license plate number from their car. (T.63) Miracle tried to pry the license plate off of the car as it was turning to leave the parking lot. (T.147)) Miracle and Morgan threw sticks at appellant's car, believing that it was moving in reverse. (T.148)

Appellant became angry, stopped the car, and got out. (T. 220) Smith exited the car with appellant and began to walk toward Mike Miracle. (T.151) Farr, appellant's companion, testified that appellant began to shoot a gun and that she believed that he was shooting toward the ground. Morgan testified, however, that, upon hearing the gun cock, he saw water begin to spray from the top of a grease trap that was about three feet high and about two feet away from where Morgan was standing. (T.221, 68) The other victims were equally close to the gunfire: Miracle was directly in front of Morgan, Hickey and Bowen were five to seven feet from them, and Hysell was ten feet behind the grease trap. When he heard the first shot, Miracle began to run and counted six gunshots. One bullet went through the leg of Miracle's pants. (T.152) Smith, who had approached Miracle when the shooting began, was stuck by a bullet in the leg. (T.187) Six shell casing were found lying in the parking lot and a spent projectile was discovered inside the grease trap. (T.12) Another bullet had perforated the grease trap near the top. (State's Exhibit One.)

Photographs of the grease trap with the bullet hole, the parking lot, and Miracle's bullet-torn blue jeans were admitted into evidence. (T.237)

The juvenile court denied the State's bindover motions regarding the six counts of attempted murder, finding no probable cause regarding those charges, but found that probable cause supported the charges of felonious assault. (T.271, 275) The State withdrew the bindover motion with regard to tampering with evidence. (T. 273)

Appellee, the State of Ohio, appealed the juvenile court's decision and on June 21, 2007 the Franklin County Court of Appeals reversed, finding that the charges of attempted murder were supported by probable cause and that the juvenile court was required to transfer the case to the court of common pleas for ultimate adjudication by a trier of fact.

Appellant requested that the lower court certify its decision to this Court, claiming that its decision was in conflict with *State v. Boddie* (December 28, 2001), Montgomery App. No. 18709. On August 14, 2007, the Franklin County Court of Appeals denied the motion, finding that the appellant judges in the majority disagreed with respect to the applicable standard of review and that, absent a decision setting forth a rule of law agreed upon by a majority of the judges, the standards set forth in *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594 were not satisfied and certification to this Court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution was inappropriate.

On November 21, 2007 this Court accepted Appellant's discretionary appeal.

APPELLANT'S PROPOSITIONS OF LAW

Appellant's 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.

Appellant's 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.

FIRST PROPOSITION OF LAW

A COURT'S JURISDICTION IS A QUESTION OF LAW AND, ON APPEAL, IS REVIEWED *DE NOVO*. PURSUANT TO §§ 2152.10 AND 2152.12 OF THE REVISED CODE, THE JUVENILE COURT'S SUBJECT MATTER JURISDICTION IN A MANDATORY BINDOVER PROCEEDING IS LIMITED TO DETERMINING WHETHER THE JUVENILE DEFENDANT IS STATUTORILY ELIGIBLE FOR MANDATORY TRANSFER AND WHETHER THERE IS PROBABLE CAUSE TO BELIEVE THAT THE JUVENILE DEFENDANT COMMITTED A CATEGORY ONE OR CATEGORY TWO OFFENSE.

The general subject matter jurisdiction of Ohio courts of common pleas is defined entirely by statute pursuant to Section 4(B), Article IV of the Ohio Constitution: "the courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." See, *State v. Wilson* (1995), 73 Ohio St. 3d 40, 1995 Ohio 217.

R.C. § 2151.07 creates Ohio's juvenile courts, divisions of the courts of common pleas. R.C. § 2151.23 provides as follows:

(A) The juvenile court has exclusive original jurisdiction under the Revised Code as follows:

(1) Concerning any child who on or about the date specified in the complaint * * * is alleged * * * to be * * * a delinquent * * * child * * *.

Juvenile courts, existing as courts of limited subject matter jurisdiction, can operate only as conferred by the General Assembly. *Id.* See also, *State v. Neguse* (1991), 71 Ohio App. 3d 596, 1991 Ohio App. LEXIS 1363. The exclusive subject matter jurisdiction of the juvenile court is not subject to waiver. *State v. Wilson, supra.* "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley* (2004), 102 Ohio St. 3d 81, 83; 2004 Ohio 1980, citing *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781. See

also, *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275. The conduct of the parties, or, for that matter, the court, “cannot be used, in effect, to bestow jurisdiction on a court where there is none.” *State v. Wilson, supra*, 73 Ohio St. 3d at 46. See also, *In re Graham* (2002), 147 Ohio App. 3d 452, 2002 Ohio 2407.

In certain situations specified by statute, the juvenile court is required to transfer a case to the general division of the common pleas court for prosecution of the juvenile defendant as an adult. See, e.g., R.C. §§ 2152.03, 2152.10, 2152.12. These mandatory bindover provisions require transfer when the following applies:

§ 2152.12. Transfer of case; prosecution of child nullity in absence of transfer; juvenile court loses jurisdiction if child is not taken into custody or apprehended prior to attaining age twenty-one

(A) (1) (a) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or 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. * * *

R.C. § 2152.12(A)(1)(a) requires that the case be transferred from juvenile court when, as in this case, the complaint alleges that the juvenile defendant is delinquent by reason of committing attempted murder, a category one offense, the juvenile defendant was at least 16 years of age at the time of the act charged, and there is probable cause to believe that the juvenile defendant committed the act charged. A “mandatory transfer removes discretion from the judges in the transfer decisions * * * .” *State v. Hanning* (2000), 89 Ohio St. 3d 86, 90; 2000 Ohio 436. See also, *State v. Golphin* (1998), 81 Ohio St. 3d 543; 1998 Ohio 336. (“We have repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes the imposition of a

mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary.” [Citations omitted.])

A mandatory bindover proceeding, therefore, is a proceeding to determine whether the juvenile court has jurisdiction to proceed to a final adjudication on the merits. A court’s jurisdiction is determined as a matter of law. *Pratts v. Hurley* (2004), 102 Ohio St. 3d 81, 88, 2004 Ohio 1980. In general, questions of law are reviewed *de novo*. *Goodyear Tire & Rubber Co. et al., v. Aetna Casualty & Surety Co. et al.*, (2001), 95 Ohio St. 3d 512, 2002 Ohio 2842; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 521, 523.

Appellant’s assertion that because a discretionary bindover proceeding “is similar” to a preliminary hearing in a mandatory bindover proceeding and, as such, should be subject to the same standard of review, ignores the distinct functions of the juvenile court in these dissimilar proceedings. R.C. §2152.12 (B) gives the juvenile court discretion in deciding whether to transfer a case in only specific circumstances:

(B) Except as provided in division (A) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following:

- (1) The child was fourteen years of age or older at the time of the act charged.
- (2) There is probable cause to believe that the child committed the act charged.
- (3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

When the juvenile court conducts a preliminary hearing to determine whether there is probable cause to believe that a juvenile has committed a category one or category two offense, the state is not required to establish that the minor child is, in fact, guilty of the offense charged but rather that there is probable cause to believe that the juvenile has committed the charged act. The State must provide credible evidence of every element of an offense to support a probable cause finding. *State v. Iacona* (2001), 93 Ohio St. 3d 83, 93, 2001 Ohio 1292.

As observed below, *In re A.J.S.*, 173 Ohio App. 3d at 177, review of a decision regarding probable cause at a bindover hearing is analogous to appellate review as to the existence of probable cause to search or stop in a suppression hearing:

The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: “The 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.) *Omelas v. United States* (1996), 517 U.S. 690, 696-697, 116 S.Ct. 1657.

Similarly, with a sufficiency of the evidence claim, the reviewing court examines the record to determine whether “the evidence is of sufficient probative force to support” the decision. *In re Jenks* (1991), 61 Ohio St. 3d 259, 1991 Ohio LEXIS 1914. As this Court explained in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, 1997 Ohio 52, appellate review of a sufficiency claim is,

[i]n essence * * * a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, 1997 Ohio 52, citing *State v. Robinson* (1955), 162 Ohio St. 486, 55.

Likewise, in a mandatory bindover proceeding, when the State produces sufficient probative evidence of each element of the offense demonstrating that there is probable cause to believe that the juvenile committed the charged offense, the juvenile court is required to transfer

the case even when additional credible evidence supports the theory of defense because a determination of the merits of the case, allocating the weight to be accorded the evidence presented, is a matter for “a factfinder at trial.” *State v. Iacona, supra*, 93 Ohio St. 3d at 96. The juvenile court is not permitted, as it did below, to act as the ultimate factfinder, choosing one reasonable interpretation of the evidence over another. *Id.*¹

On review, therefore, the appellate court, deferring to the juvenile court’s reasonable assessment of the witnesses’ credibility, reviews *de novo* whether the juvenile court’s conclusion of law with regard to probable cause was correct given the probative evidence presented. Appellant’s claim that the abuse of discretion standard employed in discretionary bindover proceedings pursuant to R.C. § 2152.12(B) is applicable in mandatory bindover proceedings pursuant to R.C. § 2152.12(A) ignores the inherent differences in these proceedings and the legislative intent to remove discretion from juvenile judges in specific situations. *State v. Hanning, supra*.

The juvenile court below heard the evidence and, accepting the credibility and veracity of the witnesses, went beyond the scope of the probable cause hearing and invaded the province of the ultimate trier of fact to access the weight to be accorded competing constructions of the evidence. See, *Prangle v. Joyce* (1996), 76 Ohio St. 3d 389, 1996 Ohio 381. Courtroom to courtroom, county to county, juvenile defendants subject to mandatory bindover must be subject to the same legal standards. As observed in *Omelas, supra*, 517 U.S. at 697, expressly deferring to the trial court’s ruling regarding probable cause would allow varied results based on the interpretation of similar facts by different judges:

¹ *Amicus Curiae*’s position, that juvenile courts’ retain broad discretion in mandatory bindover proceedings to weigh competing constructions of the evidence, is contrary to this Court’s decision in *Iacona, supra*: “Determination of the merits of the competing prosecution and defense theories, both of which were credible, ultimately was a matter for a factfinder at trial.”

We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. [Citations omitted.] A policy of sweeping deference would permit, "in the absence of any significant difference in the facts," "the [decision to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." [Citation omitted.] Such varied results would be inconsistent with the idea of a unitary system of law.

The juvenile court's jurisdiction is specified by statute. As such, the juvenile court does not have the discretion to ignore the mandate set forth by the General Assembly and the limits of its jurisdiction so conferred.

PROPOSITION OF LAW TWO

AN ORDER THAT DENIES A PROVISIONAL REMEDY AND, IN EFFECT, DETERMINES THE ACTION, IS A FINAL APPEALABLE ORDER.

Appellant claims for the first time that the Franklin County Court of Appeals was without jurisdiction to review the juvenile court's decision refusing to relinquish jurisdiction pursuant to R.C. § 2152.12, citing *In re Becker* (1974), 39 Ohio St. 2d 84, which held that an order by a juvenile court transferring a child to the court of common pleas for criminal prosecution is not a final appealable order. Unlike *Becker*, this case does not involve the juvenile court transferring jurisdiction; rather, this case is one in which the juvenile court refused to do so.

R.C. § 2505.02 provides in pertinent part,

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

The juvenile court's decision finding that probable cause did not support the charge of attempted murder, thereby denying the State's request to bind appellant over to the adult criminal division of the court of common pleas, in effect determined the action with respect to the juvenile court's jurisdiction in the proceeding below. Absent immediate appellate review, this decision precludes the State a meaningful remedy by an appeal because, after delinquency proceedings in juvenile court, prosecution of the juvenile as an adult would be barred on the basis of double jeopardy. *Breed v. Jones* (1975), 421 U.S.519, 95 S.Ct. 1779. See also, *In re S.J.* (2005), 106 Ohio St. 3d 11, 2005 Ohio 3215; *In re Bennett* (1999), 134 Ohio App. 3d 699, 1999 Ohio App. LEXIS 4353; *In re Cline* (January 14, 2002), Montgomery App. No. 19082, 2002 Ohio 271, unreported.

In re S.J., *supra*, involves a case in which the juvenile court, after the State filed a notice of appeal from an order of that court denying a bindover motion, proceeded to adjudicate the child as a juvenile after *sua sponte* dismissing one count and amending another. Observing that the lower court was without jurisdiction to proceed during the pendency of the appeal, this

Court declared the subsequent adjudication void. *Id.*, syllabus paragraphs one and two.

Similarly, the juvenile court below denied the State's bindover motion, thereby mandating, absent an appeal, that the State prosecute appellant for the offense of attempted murder as a juvenile. The juvenile court's decision is, therefore, the functional equivalent of a dismissal because the State is precluded from prosecuting appellant as an adult under these circumstances as was intended by the General Assembly. Absent a right to appeal, the State cannot challenge the court's assertion of jurisdiction contrary to law. Parties have a right to appeal when a court has asserted jurisdiction in error. See, **Nat'l City Commer. Capital Corp. v. AAAA at Your Serv., Inc.** (2007), 114 Ohio St. 3d 82, 2007 Ohio 2942.

Appellant's argument that the State does not have a right to appeal absent a dismissal, either voluntarily by the State or *sua sponte* by the juvenile court, obfuscates this issue. There is no basis upon which to appeal when a case is dismissed voluntarily by the State. *In re Stanley* (2006), 165 Ohio App. 3d 726, 2006 Ohio 1279. Moreover, if the juvenile court declines to dismiss the underlying case upon finding no probable cause, the State, absent a right to appeal, would be denied a remedy in spite of the court's erroneous decision.

The juvenile court's decision denying the State's bindover request is, therefore, a final appealable order subject to review by the appellate courts. The State has a right to appeal the functional equivalent of a dismissal of charges which would otherwise permit the criminal prosecution of a juvenile as an adult.

CONCLUSION

When reviewing a juvenile court's decision regarding the existence of probable cause in a mandatory bindover proceeding, appellate courts must consider the evidence *de novo* and determine whether sufficient evidence was presented to meet the required legal standard. Any lesser standard of review would allow different judges to reach different conclusions with analogous facts and, more significantly, would circumvent the clear intent of the General Assembly to divest the juvenile court of jurisdiction in these situations. The State of Ohio has the right to appeal when the juvenile court fails to transfer a juvenile defendant for criminal prosecution in accordance with §2152.12 of the Revised Code. For the foregoing reasons, appellee, the State of Ohio, respectfully requests that the decision of the Franklin County Court of Appeals be affirmed.

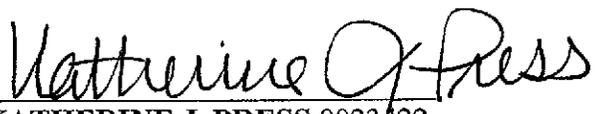
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CERTIFICATE OF SERVICE

This is to certify that on March 20, 2008 a copy of the foregoing was mailed by Ordinary United States mail to **ELIZABETH R. MILLER** 0077362, counsel for Appellant, Office of the Ohio Public Defender, 8 E. Long Street, 11th floor, Columbus, Ohio 43215 and **KATHERINE HUNT FEDERLE** 0069334, counsel for *Amicus Curiae* The Justice for Children Project, The Ohio State University College of Law, 55 W. 12th Avenue, Columbus, Ohio 43210.


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