

IN THE SUPREME COURT OF OHIO

IN RE: SHARDAI BURT,
a minor child

: Case No. 07-1751
:
:
: On Appeal from the
:
: Stark County Court of
:
: Appeals, Fifth Appellate
:
: District
:
:
: C.A. Case No. 2006-CA-00328

REPLY BRIEF OF SHARDAI BURT, A MINOR CHILD

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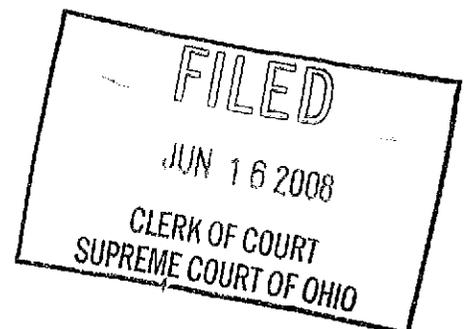


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STATEMENT OF THE CASE AND FACTS

Shardai Burt rests on the Statement of the Case and Facts as it was raised in her Merit Brief.

ARGUMENT

Introduction.

From the outset of its brief, Appellee argues how the “state must play its role as parent.” (Appellee’s Brief at 8). Without doubt, the State fails to appreciate the clear difference between the role and power of the juvenile court in delinquency matters as opposed to matters involving abused or neglected children.

Interestingly, this is not the first time this Court has seen Stark County regarding the VOPCO (Violation of Prior Court Order) issue. See *In re Cross*, 2002-Ohio-4183, 96 Ohio St.3d 328, 774 N.E.2d 258. In *Cross*, Stark County used a VOPCO to punish a youth long after probation was successfully completed. Rather than charge the youth’s unruly behavior as a status offense and the theft of a bike as a first-degree misdemeanor, Stark County used VOPCO (court order from a prior felony) to send him to the Department of Youth Services (DYS). This Court reversed and found that the successful completion of probation terminated the jurisdiction of the Stark County Juvenile Court. Indeed, at some point, court involvement in a youth’s life must end. Likewise, in Ms. Burt’s case, this Court must address the continued misuse of the VOPCO procedure.

FIRST PROPOSITION OF LAW

The State's "Violation of Prior Court Order" charge violated Ms. Burt's Fifth and Fourteenth Amendment rights to due process.

A violation of a prior court order pursuant to R.C. 2152.02 (F)(2) is not a crime. Therefore, charging an individual under this section with a criminal offense is a due process violation in and of itself. Further, there is no statutory authority for classifying a violation of a prior court order (VOPCO) as a first-degree misdemeanor (M-1).

The State goes to great lengths in its brief to justify charging VOPCO as a crime. Indeed, the State argues that in its "role as parent" it is permitted to charge any child (unruly or delinquent) that had a juvenile court order in the past with VOPCO, an M-1, and hold that child in detention for ninety days. The State then attempts to draw a parallel between its use of VOPCO and adult contempt proceedings.

As an initial matter, the State is incorrect in its argument that "when an adult violates a lawful court order, it is treated as a criminal offense under R.C. 2705.02." (Appellee's Brief at 10). Not all contempt in "adult court" is criminal. Contempt can be civil or criminal in nature and the same act may constitute both criminal and civil contempt. See *In re Contemnor Caron* (2000), 110 Ohio Misc.2d 58, 744 N.E.2d 787. The answer to the question, what does the court primarily seek to accomplish by imposing the sentence, will determine whether contempt is civil or criminal. *Id.* With civil contempt, the defendant gets an "opportunity to purge" and the goal is to coerce the contemnor to perform (i.e., the failure to pay child support). Contempt may be classified as "criminal" simply because the court is seeking a definite punitive sentence. *Id.* Therefore, an examination of the nature of the adult defendant's behavior is critical before characterizing the contempt as criminal.

Regardless, the existence of R.C. 2705.02, adult criminal contempt, does not automatically mean that VOPCO is being properly charged as a crime, specifically a first degree misdemeanor. If the State viewed Ms. Burt's failure to return home and violation of home rules as criminal contempt, it could have charged the conduct as such. Several Ohio Courts, however, have stated that contempt proceedings are inappropriate when the possibility of probation revocation exists or other alternatives are available. (See Appellant's Second Assignment of Error).

The intended use of VOPCO is to provide additional disposition options where the child is a status offender and the child repeatedly ignores the court's orders. *In re Trent* (1989), 43 Ohio St.3d 607, 539 N.E.2d 630 (Wright, J., dissenting). A child remains a status offender but delinquency dispositions not normally available could be used by the court. VOPCO is not an additional criminal offense to level against the child. Indeed, before resorting to VOPCO the following criteria must be met:

- (1) The juvenile should be given sufficient notice to comply with the order and understand its provisions;
- (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.

Id. at 609.

The facts of Ms. Burt's case do not meet the above criteria. In July 2005, Ms. Burt pleaded true to two delinquency charges that would constitute misdemeanors if committed by an adult. The two offenses were obstructing official business (M-2) and disorderly conduct (M-4). The court did not place Ms. Burt on probation but stated in its order that she was to attend

school, exhibit good behavior and complete counseling. (A-1). Almost five months later, Ms. Burt was charged with her first VOPCO (M-1) for staying out late and not returning home. It was at this point Ms. Burt was placed on probation. One year passed with no violations but then in September 2006 a second VOPCO was filed. This time the first degree misdemeanor charge was for leaving home without permission. (A-2).

Without doubt, Ms. Burt's behavior did not constitute the repeated, egregious behavior contemplated in *Trent*. Ms. Burt was not a status offender. Ms. Burt's first contact with the court involved two misdemeanors for which delinquency dispositions were available but not exercised by the court. Further, the less restrictive alternatives or special confinement conditions for her later "unruly" conduct were never considered, found to be ineffective or arranged. The VOPCO procedure applied in Ms. Burt's case was both contrary to law and a violation of due process.

SECOND PROPOSITION OF LAW

Filing a new charge against a juvenile for "violation of a prior court order," regardless of the original offense committed, is a violation of the juvenile's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

A. Ms. Burt should not have been charged with a second VOPCO.

In September 2006, Ms. Burt had already been on probation for 11 months for her first VOPCO.¹ This time, she was adjudicated delinquent on a second VOPCO for "being

¹ Ms. Burt's first VOPCO charge was in error because she was not on probation for her 2005 delinquency case or under the court's jurisdiction for that matter. Thus, the only available option at that point was to charge Ms. Burt's failure to follow the rules of home and school as unruly. Ms. Burt, however, pled true to this first VOPCO charge. Thereafter, Ms. Burt was adjudicated delinquent and placed on probation for committing an "offense" that would be a first degree misdemeanor if committed by an adult.

disrespectful and not cooperative.” (A-3). The final entry lists the offense level for this conduct as an “M-1.” (A-3).

Rather than simply charge Ms. Burt with a probation violation or as an unruly child, the State chose to pursue a separate criminal offense bringing with it a separate sentence. Now, Ms. Burt’s juvenile record contained a misdemeanor of the fourth degree, a misdemeanor of the second degree and two first degree misdemeanors (from the two VOPCOs). At most, Ms. Burt’s disrespectful behavior violated the terms of her probation and did not constitute a misdemeanor of the first degree if committed by an adult.

1. Even if VOPCO is treated as criminal contempt, it was not the appropriate procedure to follow when Ms. Burt was already on probation.

While Ms. Burt was never charged pursuant to R.C. 2705.02, the Fifth District Court of Appeals found that the VOPCO procedure was appropriate because it was similar to criminal contempt. *In re Burt*, Stark App. No. 2006-CA-00328, 2007-Ohio-4034. Contempt proceedings, however, are not always the appropriate remedy and have limited use in juvenile court.

The General Assembly took special care in drafting the relevant code sections to provide for abused, neglected and dependent children during their minority. Specifically, R.C. 2151.353(E)(1) provides that the juvenile court retains continuing jurisdiction over abused, neglected or dependent children until the child turns eighteen or is adopted. *Id.* One way the court maintains its oversight in these matters is to issue journalized case plans. Ohio Revised Code 2151.412(E)(1) specifically allows the court to proceed in contempt for the violation of a journalized case plan.

In delinquency cases, continuing jurisdiction via case plans and contempt proceedings is unnecessary. The court retains jurisdiction over a juvenile on probation or parole and can effectuate the juvenile’s rehabilitation while the juvenile is reporting to the court. If a juvenile is

not on probation or parole, the juvenile becomes subject to the court's jurisdiction if he commits a new offense.

The Eleventh District Court of Appeals has determined that the use of contempt proceedings should be limited to abuse, neglect and dependency proceedings due to the need for the court's continuing jurisdiction to monitor case plans. *In re Nowak* (1999), 133 Ohio App.3d 396. The use of contempt proceedings where probation revocation is available to the juvenile court is inappropriate. *Id.*

2. The case of *In re Cross* illustrates how the VOPCO procedure violates due process.

By repeatedly filing VOPCO complaints, the juvenile court can exercise never ending jurisdiction over a delinquent child. Rather than establishing time frames and review hearings while the child is on probation, the state can repeatedly punish violations of school or house rules as first degree misdemeanors. While probation can be extended for juveniles, the goal is successful completion and terminating the child's ties with the court. With VOPCO there is no end. The prior court order never terminates and every new infraction constitutes a new delinquency adjudication and with it a new delinquency disposition.

As noted in Ms. Burt's introduction, Stark County has used VOPCOs in the past to extend its jurisdiction over a child long after it should have terminated. See *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258. Notably, in *Cross*, the youth was not charged with a probation violation but with VOPCO and committed to DYS on that basis. *Id.* at 329. What made the difference for Defendant Cross was that he had successfully completed probation a year earlier. *Id.* at 333. Without this successful completion of probation, Cross would have still been subject to the juvenile court's jurisdiction pursuant to VOPCO.

B. All delinquency offenses are not the same in juvenile court.

At no point in its brief does the State cite the criminal statute that states VOPCO is a crime punishable as a misdemeanor of the first degree. Rather, the State claims that the offense level does not matter because all dispositional orders for delinquency adjudications are the same. (Appellee's Brief at 16). This response is incorrect.

"An offense level of a juvenile's conduct is relevant during the dispositional phase." *In re Kitzmiller*, 2007-Ohio-4565; 2007 Ohio App. LEXIS 4039 at ¶24 citing *In re Russell* (1984), 12 Ohio St.3d 304, 466 N.E.2d 553. "The language of R.C. 2152.16 (C) allows an Ohio juvenile court, during the dispositional phase, to treat prior adjudications as convictions for the purposes of determining the degree of offense a juvenile's current act would be if committed by an adult." *Id.* at ¶ 30. Thus, the offense level does matter in juvenile court.

There are several examples of when the offense level comes into play for a juvenile and can have great impact on his or her life. Felony enhancements may be applied to juveniles who previously had a delinquency adjudication for a misdemeanor offense. This is true in the case of domestic violence where a second or subsequent domestic violence adjudication can result in a felony domestic violence and commitment to DYS. *Id.* Fines may be increased for the juvenile depending on the level of the offense. R.C. 2152.20. Also, the ordering of restitution depends on the offense level associated with the crime. R.C. 2152.20.

In Ms. Burt's case, she now has two additional first degree misdemeanors on her juvenile record for what normally constitutes unruly behavior. She was also held in a detention center for 90 days (in addition to the time already served for the initial misdemeanor complaint in 2005) and eventually placed in a group home away from her family. The harm suffered by Ms. Burt through the VOPCO process is not inconsequential.

- C. The ability to charge a juvenile with a new offense and revoke probation does not mean that VOPCO was properly charged in Ms. Burt's case.**

The State concludes its brief by arguing that the ability to charge a new offense and also revoke probation for the same behavior proves that the State acted properly when it charged Ms. Burt with violating R.C. 2152.02(F)(2), a misdemeanor of the first degree. (Appellee's Brief at 25). This argument presumes that VOPCO is a crime and was properly charged when it was not. Indeed, the case cited by the State in support of its argument truly involves behavior that constitutes a criminal offense. See *In re Schreiber* (Sept. 30, 1999), Ohio App. 11 Dist. No. 98-A-0039, unreported, 2000 Ohio App. LEXIS 5773. The crime in *Schreiber* was importuning, a violation of R.C. 2907.07. Unlike VOPCO charged under R.C. 2152.02 (F)(2), the importuning charge under R.C. 2907.07 sets forth a criminal offense, offense level, and the elements of the offense and potential sentences. Thus, the comparison of Ms. Burt's case to *Schreiber* fails. Ms. Burt could not be charged with VOPCO, a misdemeanor of the first degree and a probation violation when VOPCO is not a crime and her behavior did not constitute a criminal offense.

CONCLUSION

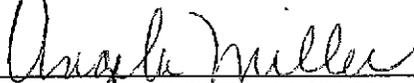
Ms. Burt's due process rights were violated when she was adjudicated delinquent for VOPCO, a misdemeanor of the first degree if committed by an adult. Ohio Revised Code R.C. 2152.02 (F)(2) does not set forth a crime or even a corresponding offense level.

The VOPCO procedure allows the juvenile court to have never ending jurisdiction outside of abuse, neglect and dependency cases. Rather than monitor Ms. Burt's probation, which can be reviewed and successfully completed at some point, the prior court order has no expiration. See *In re Cross*, 96 Ohio St.3d 328. This was not the intent of VOPCO, which was to provide access to delinquency dispositions in the cases of repeat status offenders.

The State's arguments to the contrary are without merit. The decision below finding Ms. Burt delinquent of VOPCO must be reversed.

Respectfully submitted,

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COUNSEL FOR SHARDAI BURT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF CLAYTON CROSS has been served by regular U.S. mail upon Ronald Mark Caldwell, Stark County Prosecuting Attorney, 110 Central Plaza South, Suite 510, Canton, OH 44702, this 16th day of June, 2008.



ANGELA MILLER #0064902
Assistant State Public Defender

#280881

IN THE SUPREME COURT OF OHIO

IN RE: SHARDAI BURT,
a minor child

: Case No. 07-1751
:
:
: On Appeal from the
: Stark County Court of
: Appeals, Fifth Appellate
: District
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:
: C.A. Case No. 2006-CA-00328

APPENDIX TO REPLY BRIEF OF SHARDAI BURT, A MINOR CHILD

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STATE OF OHIO

Tape No. 450-4082

Closed

COURT OF COMMON PLEAS, FAMILY COURT DIVISION, STARK COUNTY, OHIO

JUDGMENT ENTRY

In Re: Shardai Bert

MAGISTRATE ORDER/DECISION

PRECEPT: TO THE CLERK OF COURTS Pursuant to Civil Rule 54(B), you are hereby directed to serve all parties not in default for failure to appear and/or their attorney of record, notice of this judgment and its date of entry upon the journal in the manner prescribed by Civil Rule 5(B).
 Served in court

Appearances: Anna Reynolds
Marilyn Ann Blake
Mrs. Julie

CASE NO. J- 17265

Delinquent [] Unruly [] Traffic

This matter came before the court for hearing upon complaint(s) all pending:
Charge(s): Disobedience (M2)
Disobedience (M4)
offense/O.R.C.#/degree/attended to

Notification of Rights - Juv. R. 29: Waived [] Attorney Requested (Public Defender 330-451-7200)

Plea of Juvenile: Admits [] Denies

[] Juvenile is ORDERED Released to _____

[] Juvenile is REMANDED to the Multi-County Juvenile Attention Center pending a Pretrial/Trial which will be held: _____

Detention is based upon: [] child may abscond [] required to protect person and property of self or others
[] no available parent, guardian or custodian to assume custody

After taking sworn testimony:

The juvenile is found to be Delinquent [] Unruly [] Juvenile Traffic Offender
[] Matter is Dismissed upon motion of _____

2008 JUN 15 A 0:36
STARK COUNTY
COURT CLERK

Disposition:

- [] Hearing continued to: _____
- [] Pretrial Release Program ordered. Juvenile shall cooperate and obey all terms and conditions of the Pretrial Release Program.
- [] _____

[] Fine: _____ [] Fine Suspended [] Court Costs Assessed [] Costs waived (Incident)

ASSIGNED TO JUDGE HOWARD

X

Page 2

- Prior stay on Case No. J-_____ is ORDERED rescinded/continued:
- Juvenile is COMMITTED indefinitely to the custody of the Ohio Dept. of Youth Services.
 - for a minimum period of six (6) months for a minimum period of one (1) year
- _____
- Dept. of Youth Services Commitment stayed providing no violation of Court order, probation or any law.
- Remand to Attention Center for Court Placement.
- Remand to Attention Center for _____ days; Release on: _____
- Attention Center Remand Suspended providing no violation of Court order, probation or any law.

Court ordered conditions:

- Community Control ordered. Juvenile shall cooperate participate and obey all terms and conditions set forth by Community Control.
- Ohio Operator's License suspended effective _____ to _____.
- Restitution Orders through Restitution Work Program in amount of \$_____ by _____.
- House Arrest until _____ -Parent (guardian) to report any violation.
- Curfew _____
- Juvenile to undergo substance abuse evaluation -
 - screening assessment random urinalysis
 - and is ordered to follow any and all recommendations for treatment issued as a result of evaluation.
- Counseling Ordered Psychological Evaluation Ordered.
- Good Behavior in Home, School, and Community Ordered.
- Mandatory School Attendance Ordered - medical excuse required for absence/tardy.
- _____ hours of Community Service to be performed within _____ days.
- If not completed, penalties to continue*

All prior orders of the court shall remain in full force and effect

Date: 7/14/05 Magistrate/Judge: [Signature]

NOTICE: A party may, pursuant to Ohio Civil Rules 53 or Juvenile Rule 40, file a written motion to set aside a Magistrate Order within ten (10) days of the filing of the order. Objections to a Magistrate Decision may be filed within fourteen (14) days of the filing of the decision. A party shall not design as either an appeal or a writ the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as described herein. The Court, having made an independent analysis of the issues and applicable law hereby approves and adopts the Magistrate Decision and orders it to be entered as a matter of record.

Date: 7/15/05 Judge: [Signature]

ASSIGNED TO JUDGE HOWARD

COURT OF COMMON PLEAS, JUVENILE DIVISION, STARK COUNTY, OHIO

JUDGMENT ENTRY
Magistrate's Order / Decision

E: SHARDAI BURT

Record: CR9-59-1607

CASE NO. J-2006-JCR-3114 ADDITIONAL CASE NO. J-

Appearances:

Delinquent Unruly Traffic Child Support
 Dependent / Neglect / Abuse Paternity Custody

JUVENILE, ATTY ABNEY, MOTHER, PROS-MLINAR

L. COLE,

This matter came before the court for hearing upon complaint(s) alleging:
Violation of Prior Court Order (M1)

Findings of Fact:

Matter was set for a review hearing. The adjudication is on appeal with the 5th District; however, placement has become an issue. There are no beds available at court placement facility (RTC) until January 2007, and Juvenile has been in the AC since 9/18/2006.

After taking sworn testimony: admission / stipulation: motion:

The court finds: _____

Disposition:

Juvenile to remain placed at the Attention Center until her 90th day (12/17/2006), and she shall remain on the court placement list. Upon her 90th day, she may be released on EMHA (mother to pay) until court placement becomes available.

Date: 11-16-2006

Magistrate Priscilla J. Cunningham

NOTICE: A party may, pursuant to Ohio Juvenile Rule 40 file a written motion to set aside a Magistrate Order within ten (10) days of the order. Objections to a Magistrate Decision may be filed within fourteen (14) days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as described herein. The Court, having made an independent analysis of the issues and the applicable by law hereby approves and adopts the Magistrate Decision and orders it to be entered as a matter of record.

Date: _____ Judge _____

IN THE COURT OF COMMON PLEAS, FAMILY DIVISION
STARK COUNTY, OHIO

IN THE MATTER OF
SHARDAI BURT
ALLEGED

CLERK OF COURTS
STARK COUNTY, OHIO
2006 OCT 12 AM 11:52

CASE NO.: 2006JCR03114
TAPE NO.: CR8-74-0000
DATE: 10/11/2006 9:00 AM

DELINQUENT OFFENDER

MAGISTRATES DECISION

APPEARANCES

ATTY-ROBERT ABNEY, PROS-KRISTEN MLINAR, INTAKE-KITTY ZINDREN, PROBATION OFFICER-V. EARLY, QUEST RECOVERY, MOTHER

The pleas entered by the Juvenile and the findings of court are as follows. The Juvenile has entered a plea of True or No Contest and has waived her constitutional rights. The Juvenile was represented by attorney ROBERT ABNEY. The following parties have been served with a copy of this entry in court: ATTY-ROBERT ABNEY, PROS-KRISTEN MLINAR, INTAKE-KITTY ZINDREN, PROBATION-V. EARLY.

FINDINGS OF FACT

Rights waived reserving right to appeal.
7/14/05 obstructing DOC--Mediation; 11/20/05 VOPCO;
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.

2006JCR03114

Judge: Hon. Michael L. Howard

This matter came before the Court for Trial, upon the filing of a complaint alleging the above named person to be a Juvenile Delinquent Offender by reason of:

Count	Charge	ORC	Degree	Plea	Adjudication
1	VIOLATION OF A PRIOR COURT ORDER	2152.02F2	M1	True	Delinquent

- The Juvenile is remanded to the Juvenile Attention Center for placement until a group home is available, placement begins immediately.
- Submit to counseling and follow any and all recommendations for treatment issued as a result.
- **Other Orders:** Motion to Dismiss is denied. Court believes ORC 2152.02 (F)(2) permits the court to proceed with a violation of court order complaint. Court Placement ordered

TOTAL DISPOSITION

SHARDAI BURT, you are hereby ordered by the court to comply with the following orders:

1. Submit to counseling and follow any and all recommendations for treatment issued as a result.
2. **Other Orders on case 2006JCR03114:** Motion to Dismiss is denied. Court believes ORC 2152.02 (F)(2) permits the court to proceed with a violation of court order complaint. Court Placement ordered

10/11/2006

Date


Hon. Sally A. Efremoff, Magistrate

NOTICE: A party may, pursuant to Ohio Civil Rules 53 or Juvenile Rule 40, file a written motion to set aside a Magistrate Order with ten (10) days of the filing of the order. Objections to a Magistrate Decision may be filed within fourteen (14) days of the filing of the decision. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as described herein. The Court, having made an independent analysis of the issues and applicable law hereby approves and adopts the Magistrate Decision and orders it to be entered as a matter of record.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

LEXSEE 2007 OHIO 4034

IN RE SHARDAI BURT, JUVENILE

Case No. 2006-CA-00328

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

2007 Ohio 4034; 2007 Ohio App. LEXIS 3649

August 6, 2007, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal allowed by *In re Burt*, 2008 Ohio 153, 2008 Ohio LEXIS 83 (Ohio, Jan. 23, 2008)

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Juvenile Division, Case No. 2006-JCR-03114.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff-Appellee: JOHN D. FERRERO, PROSECUTORING ATTORNEY, BY: MARK CALDWELL, Assist. Prosecuting Attorney, Canton, OH.

For Defendant-Appellant: ROBERT G. ABNEY, Canton, OH.

JUDGES: Hon W. Scott Gwin, P.J., Hon John W. Wise, J., Hon Patricia A. Delaney, J. By Gwin, P.J., Wise, J., and Delaney, J., concur.

OPINION BY: W. Scott Gwin

OPINION

Gwin, P.J.

[*P1] Defendant-appellant Shardi Burt, a juvenile, appeals her adjudication in the Stark County Court of Common Pleas, Juvenile Division, finding her delinquent on the charge of violating a prior court order. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

[*P2] In 2003, Shardai Burt, age 13 at the time, was charged with delinquency as a result of committing the criminal offenses of obstructing official business, a

misdemeanor of the second degree if committed by an adult in violation of *R.C. 2921.31*, and disorderly conduct, a misdemeanor of the fourth degree if committed by an adult in violation of *R.C. 2917.11(A)*. [*In re Burt*, Stark County Court of Common Pleas, Case No. 2005 JCR 137265]. Appellant pleaded true to these allegations, [**2] and was adjudicated delinquent on each count by the Stark County Juvenile Court. Upon adjudicating her a delinquent child, the court ordered that appellant exhibit good behavior at home, school, and the community; to attend school (absent a medical excuse); and, to complete mediation (if not already completed).

[*P3] In October 2005, another juvenile complaint was filed against appellant, who had turned 14 by then, charging her with delinquency for violating a prior court order (VPCO), in violation of *R.C. 2152.02(F)(2)*. [*In re Burt*, Stark County Court of Common Pleas, Case No. 2005 JCR 139459]. The complaint alleged that appellant had been leaving home without permission, staying out all night, and that on one occasion she left for school and did not return home until two days later, with her whereabouts being known. On November 18, 2005 Appellant pleaded true to this charge, and was found delinquent by the magistrate based upon her plea and admission. The magistrate's disposition was approved by the trial judge. The disposition for the violation of the prior court order charge was community control; a curfew (home by 7:00 p.m. each night, unless accompanied by an adult), good behavior [**3] at home, school, and the community; mandatory school attendance (except for medical excuse); 10 hours of community service to be performed within 20 days; and, continued counseling at Quest.

[*P4] In September of 2006, another VPCO complaint was filed against appellant, charging her with violation of a prior court order in violation of *R.C. 2152.02(F)(2)* for violating the conditions of her probation. [*In re Burt*, Stark County Court of Common Pleas, Case No. 2006 JCR 3114]. Appellant was specifically

charged with leaving home without parental permission or with her probation officer's permission and staying away over the weekend. This complaint gives rise to the instant appeal.

[*P5] Prior to trial, appellant moved to dismiss the complaint on the ground that the complaint did not allege a valid delinquency claim. According to appellant, a VPCO allegation is not a delinquency charge provided by statute, and thus the court did not have jurisdiction to proceed. Appellant argued that the proper course of proceedings would have been to charge appellant with violation of her probation and to file a motion to revoke or modify her probation. The Magistrate took appellant's motion to dismiss under advisement [**4] (T. at 4). At the pretrial hearing, the Magistrate overruled appellant's motion to dismiss and appellant requested a court trial (T. at 7). In his ruling, Magistrate Nist specifically held:

[*P6] "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."

[*P7] Prior to the court trial, appellant filed an objection to the Magistrate's decision with the assigned judge and requested the Magistrate's denial of the motion to dismiss be set aside. The judge heard oral argument on October 10, 2006 and overruled appellant's objection (T. at 44). At the court trial, appellant pled true to Violation of Prior Court Order without waiving her right to appeal the jurisdictional and constitutional issues. (T. at 47-49). The [**5] magistrate imposed court placement, remanding appellant 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.

[*P8] Appellant filed another objection with the judge and stipulated to waiving oral argument, as the issues had already been argued before the judge. On October 27, 2006, the judge overruled appellant's objection. Ms. Burt filed her notice of appeal.

[*P9] It is from the trial court's denial of her motion to dismiss that appellant now appeals raising the following five assignments of error:

[*P10] "I. WHETHER THE STATE'S 'VIOLATION OF PRIOR COURT ORDER' CHARGE FOR VIOLATING A TERM OF PROBATION, ARISING FROM A DELINQUENCY ADJUDICATION, VIOLATED THE JUVENILE'S *FIFTH AND FOURTEENTH AMENDMENT* CONSTITUTIONAL RIGHT TO DUE PROCESS.

[*P11] "II. WHETHER FILING A NEW CHARGE AGAINST A JUVENILE FOR 'VIOLATION OF PRIOR COURT ORDER,' REGARDLESS OF THE ORIGINAL OFFENSE, IS A VIOLATION OF THE JUVENILE'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE *FIFTH AND FOURTEENTH AMENDMENT*.

[*P12] "III. WHETHER JUVENILES CHARGED WITH A 'VIOLATION OF PRIOR COURT ORDER' HAVE BEEN IMPROPERLY [**6] CHARGED IN VIOLATION OF THE *FIFTH AND FOURTEENTH AMENDMENT DOUBLE JEOPARDY CLAUSE AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION*.

[*P13] "IV. WHETHER FAILING TO INFORM JUVENILES, AT THE ORIGINAL DISPOSITION, OF THE POTENTIAL PUNISHMENT FOR VIOLATING CONDITIONS OF PROBATION VIOLATES JUVENILES' *FIFTH AND FOURTEENTH AMENDMENT* RIGHT TO DUE PROCESS AS WELL AS *ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION*.

[*P14] "V. WHETHER JUVENILES MAY BE ADJUDICATED DELINQUENT UNDER *O.R.C. 2152.02(F)(2)*, AS THE STATUTE IS UNCONSTITUTIONAL, IMPROPER, AND VOID FOR VAGUENESS, THEREFORE VIOLATES JUVENILES' *FIFTH AND FOURTEENTH AMENDMENT* RIGHT TO DUE PROCESS."

I. & II.

[*P15] Because we find the issues raised in appellant's first and second assignments of error are closely related for ease of discussion we shall address the assignments of error together.

[*P16] In her first assignment of error appellant argues 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. Appellant contends that an unruly charge is a status offense, i.e. an offense consisting of conduct that would not constitute an offense [**7] if engaged in by an adult.

[*P17] In her second assignment of error appellant argues that *R.C. 2152.02(F) (2)* which provides for delinquency adjudication for violation of a prior court order is only a definition section and thus any delinquency violation based upon that section violates due process. Appellant contends that the proper course of action is for the State to file a motion to revoke probation pursuant to *Juv. R. 35*.

[*P18] In Ohio, all crimes are statutory. *Municipal Court of Toledo v. State ex rel. Platter (1933)*, 126 Ohio

St. 103, 184 N.E. 1; Eastman v. State (1936), 131 Ohio St. 1, 1 N.E.2d 140, appeal dismissed 299 U.S. 505, 57 S. Ct. 21, 81 L. Ed. 374; State v. Fremont Lodge, Loyal Order of Moose (1949), 151 Ohio St. 19, 84 N.E.2d 498; State v. Cimpritz (1953), 158 Ohio St. 490, 492, 110 N.E.2d 416, 417-18. The elements necessary to constitute the crime must be gathered wholly from the statute and the crime must be described within the terms of the statute. *Davis v. State (1876), 32 Ohio St. 24, 28 State v. Cimpritz, supra.* Moreover, no act is a crime except an act done in violation of the express provisions of a statute or ordinance legally enacted. *Toledo Disposal Co. v. State (1914), 89 Ohio St. 230, 106 N.E. 6.*

[*P19] [**8] Defining crimes and fixing penalties are legislative, and not judicial, functions. *United States v. Evans (1948), 333 U.S. 483, 486, 68 S. Ct. 634, 636, 92 L. Ed. 823.* "[W]here Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose. This is as true of penalty provisions as it is of others". *United States v. Brown (1948), 333 U.S. 18, 68 S. Ct. 376, 92 L. Ed. 442; United States v. Evans, supra 333 U.S. at 486, 68 S. Ct. at 636.*

[*P20] *R.C. 2152.02* provides in relevant part:

[*P21] "(F) 'Delinquent child' includes any of the following:

[*P22] "(1) Any 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;

[*P23] "(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*;

[*P24] "(3) Any child who violates division (C) of section 2907.39 [**9] or division (A) of section 2923.211 or division (C) (1) or (D) of section 2925.55 of the Revised Code;

[*P25] "(4) Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant;

[*P26] "(5) Any child who is a chronic truant".

[*P27] *Juv. R. 2 (I)* provides "'Delinquent child' has the same meaning as in *section 2152.02 of the Revised Code.*"

[*P28] In the case at bar, appellant was charged with violating a prior court order pursuant to *R.C. 2152.02(F) (2)*. In the adult context, violation of a court

order is treated as contempt of court. *R.C. 2705.02* states in relevant part:

[*P29] "A person guilty of any of the following acts may be punished as for a

[*P30] "(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer. . . ."

[*P31] In order to be found guilty of contempt it must be shown that the alleged contemtor had actual notice of the court's order and that the alleged contemtor intended to defy the court. *Midland Steel Products Co. v. U.A.W. Local 486 (1991), 61 Ohio St.3d 121, 127, 573 N.E.2d 98, 103.* In its simplest terms, contempt of court is disobedience of an order of a court. Sentences for criminal contempt [**10] are punitive in nature and are designed to vindicate the authority of the court. Accordingly it is the doing of the act which he has been commanded not to do that the contemtor is punished, not the act itself. In the case at bar, the juvenile was not simply disobeying her parent, custodian or guardian by running away from home; rather her actions were a direct affront to the juvenile court's previous orders.

[*P32] In the case at bar, *R.C. 2152.02(F) (2)* defines a delinquent child as a child who disobeys a court order. Accordingly, the elements of the offense are the same as for contempt pursuant to *R.C. 2705.02*, i.e., actual notice of the order and intent to defy the order. The penalties for a violation of *R.C. 2152.02(F) (2)* are the dispositions available for delinquent children pursuant to *R.C. 2152.19*. The dispositions for a delinquent-misdemeanant and an unruly child are similar. See, *R.C. 2152.19* and *R.C. 2151.354*. We would further note that a court of common pleas has inherent power to punish a contemptuous refusal to comply with its order by imposing appropriate sanctions without regard to any statutory grant of such power. *Harris v. Harris (1979), 58 Ohio St.2d 303, 307, 390 N.E.2d 789, 792; [**11] In re Cox (Nov. 8, 1993), 5th Dist. No. CA-9238, 1993 Ohio App. LEXIS 5461.* In other words a juvenile court has the inherent power to punish a juvenile for disobedience of its lawful orders without regard to *R.C. 2152.02*.

[*P33] Accordingly, appellant's contention that *R.C. 2152.02* is insufficient to charge an offense is rejected. However, the real issue raised by appellant is whether the juvenile court can punish a violation of a condition of probation as a violation of a prior court order.

[*P34] Again, using contempt of court as an analogy, "Ohio appellate courts appear to have divided on the issue. Some courts have assumed that probation revocation proceedings are the sole remedy. See, e.g., *State v. Smith, Mahoning App. No. 01 CA 187, 2002 Ohio 6710*

("The municipal court treated Smith's alleged failure to attend the counseling sessions as an act of contempt rather than a violation of probation. This was an error by the trial court."); *City of Shaker Heights v. Hairston* (Dec. 10, 1998), *Cuyahoga App. No. 74435*, 1998 Ohio App. LEXIS 5955. Other courts have assumed that contempt proceedings could be used in such cases. See, e.g. *State v. Daugherty* (2006), 165 Ohio App.3d 115, 2006 Ohio 240, 844 N.E.2d 1236 ("While Daugherty claims that the appropriate [**12] course of action for the court was to consider revocation of probation under *Crim.R.* 32.3, we do not understand him to argue that this was the only course open to the court. In other words, indirect contempt proceedings, if conducted properly, may have been appropriate."); *State v. Deeds* (Apr. 30, 1998), *Coshocton App. No. 97 CA 21*, 1998 Ohio App. LEXIS 2513". *State v. Patton*, 10th Dist. No. 06AP-665, 2007 Ohio 1296 at P 11.

[*P35] Jurisdictions other than Ohio that have considered this issue "have come to three different conclusions. If a defendant violates a condition of his probation, Illinois case law states that he may be charged with contempt of court. *People v. Boucher*, 179 Ill. App.3d 832, 834, 128 Ill. Dec. 842, 844, 535 N.E.2d 56, 58 (1989); *People v. Patrick*, 83 Ill. App.3d 951, 953, 39 Ill. Dec. 451, 453, 404 N.E.2d 1042, 1044 (1980); *People v. Cook*, 53 Ill. App.2d 454, 202 N.E.2d 674, 675 (1964). An explanation for this rule may be that prior to 1963, the effective date of Illinois' current Code of Criminal Procedure, 'contempt of court was the only sanction permissible' for violations of conditions of probation. *Patrick*, 39 Ill. Dec. at 453, 404 N.E.2d at 1044. Maryland case law is directly in opposition [**13] to that of Illinois. In Maryland the defendant can be charged only with violation of his probation order, not contempt. *Williams v. State*, 72 Md. App. 233, 528 A.2d 507, 508 (1987). Tennessee has taken a middle ground, allowing the sentencing judge to choose either punishment, *State v. Williamson*, 619 S.W.2d 145, 147 (Tenn.Crim.App.1981), and Alaska allows a court to use its contempt power in such a situation only if the defendant had notice, prior to violating the probation condition, that such a violation could result in a contempt of court charge. *Alfred v. State*, 758 P.2d 130, 132 (Alaska Ct.App.1988).

[*P36] "In *Williams [v. State]*, the Maryland court reviewed Maryland authority stating the foundations for the probation order and then explained:

[*P37] "[w]hen a probationer violates a condition of his probation, he is not subject to an additional punishment for that violation; but rather to the forfeiture of his conditional exemption from punishment for the original crime. Because probation involves a conditional exemption from punishment, rather than a part of the pen-

alty, a court may condition probation upon acts or omissions which it otherwise lacks the authority to impose. [528 A.2d at 508; [**14] footnote and citations omitted]". *State v. Williams* (1989), 234 N.J. Super. 84, 92, 560 A.2d 100, 104.

[*P38] In *State v. Williams, supra*, the court drew "a distinction between an order directed to a defendant or another to do or refrain from doing a particular act (the violation of which could be the basis of a contempt of court citation by a judge or indictment by a grand jury), and a conditional order which either states the ramifications of its violation or has such consequences established by law. This distinction was recognized in an analogous bail-bond case. In *United States v. Hall*, 198 F.2d 726 (2d Cir.1952), cert. den. 345 U.S. 905, 73 S. Ct. 641, 97 L. Ed. 1341 (1953), the defendant was charged with criminal contempt of court for being outside the jurisdiction of the court, and for violating an order requiring him to surrender. The court ruled that the defendant could not be held in contempt for violating the order to remain in the jurisdiction (a condition of the bond which provided its own remedy), but could be held in contempt for not surrendering. 198 F.2d at 731.

[*P39] "Contempt of court should not be superimposed as an additional remedy in a probation violation setting if the act [**15] that occasions the violation itself is not otherwise criminal". *Williams supra*, 234 N.J. Super. at 91 560 A.2d at 103-104.

[*P40] We agree that the more logical approach is that the courts should not use the inherent contempt power to punish a violation of a condition of probation that would not otherwise constitute an offense. We do not believe that when the Legislature expressly provided that the sanction for a violation of probation (other than for the inherent criminality of the act) would be a revocation of probation, it intended that a defendant would be subject to a new indictment for contempt in addition to the punishment for the original offense. That being said, we must now recognize that a debate has arisen among the courts as to whether that principal should be applied in the context of a juvenile proceeding.

[*P41] The Supreme Court of Kentucky has noted:

[*P42] "The Juvenile Code simply does not allow a court to give up on the rehabilitation of a juvenile who refuses to perform the terms of probation. Thus, the contempt power exists for the purpose of compelling the juvenile to comply with the court's orders and to enable the court to help the juvenile become a productive citizen. 'KRS Chapter 635 [**16] shall be interpreted to promote the best interests of the child through providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen. . . .' KRS 600.010(2) (e). Nor can it be said that the imposition of

contempt sanctions for violations of specific conditions of probation, violates the Appellant's due process rights of fair treatment and/or double jeopardy. See, *Butts v. Commonwealth*, 953 S.W.2d 943, 44 10 Ky. L. Summary 12 (Ky.1997), and *Commonwealth v. Burge*, 947 S.W.2d 805, 43 9 Ky. L. Summary 12 (Ky.1997)". *A.W. v. Kentucky* (2005), 163 S.W.3d 4, 6-7. See, also *G.S. v. State (Fla. Dist. Ct. App. 1998)*, 709 So.2d 122, 123 (denying habeas petition and holding that courts have the authority to issue a contempt sanction against a juvenile for violating a community control order); *In the Interest of Doe* (2001), 96 Hawaii 73, 26 P.3d 562, 571 (affirming adjudication of delinquency for criminal contempt where chronic truancy had placed the juvenile under protective supervision and juvenile subsequently violated conditions of court order of supervision); *State ex rel. L.E.A. v. Hammergren* (Minn. 1980), 294 N.W.2d 705, 707-08 (affirming dismissal of habeas petition, recognizing juvenile court's [**17] authority to find a juvenile in contempt of court, but cautioning that status offender normally should be placed in a shelter care facility, and only egregious circumstances warranted confinement of status offender in secure detention facility).

[*P43] The Court of Appeals for the Eleventh District has taken the opposite approach:

[*P44] "This court finds no authority for the juvenile court to proceed in contempt when the issue is a probation violation allegation. *R.C. 2151.412 (E) (1)* allows the court to proceed in contempt for a violation of a journalized case plan. However, that section specifically applies only to the parties involved in cases of abuse, neglect or dependency, temporary or permanent custody, protective supervision, or long-term foster care.

[*P45] "Further, in the prosecution of the violation of probation terms, the only remedy referred to under *R.C. 2151.355* is that of a probation revocation". *In re Norwalk* (1999), 133 Ohio App. 3d 396, 398-99, 728 N.E.2d 411, 412-13. (Footnotes omitted). See, also, *A.W. v. Kentucky*, *supra* 163 S.W.3d at 7-11. (Cooper, J. dissenting). ["a trial court's contempt powers should be narrowly defined and employed only when no other remedy is available. . . [**18] ."].

[*P46] Unquestionably, the preferred method for dealing with actions such as those taken by appellant would be the institution of revocation proceedings. However, in the unique context of delinquency dispositions, the dispositions available to the juvenile court would be the same when, as in the case at bar, the juvenile is originally adjudicated as a delinquent child. However, we agree with the concern expressed by the Tenth Appellate District: "[w]e emphasize that the use of contempt proceedings is not without limitations, and thus should be used sparingly in situations where probation revocation

or other sentencing provisions are available. In particular, we would closely consider any situation in which it appeared that a trial court was using contempt proceedings in an attempt to increase the maximum period of incarceration applicable for the offense in the underlying case. However, since in this case, the 30-days imposed for contempt is less than the maximum penalty of 90-days to which appellant could be sentenced for his underlying offense, that issue is not before us. Nor do we address the issue of whether any time served on a contempt citation in this situation would act to reduce [**19] the amount of time that could be imposed on the underlying sentence". *State v. Patton*, *supra* 2007 Ohio 1296 at P 15.

[*P47] The issue of whether the juvenile court was using the violation of a prior court order proceedings in an attempt to increase the maximum period of incarceration applicable for the offense in the underlying case is not an issue before us in the case at bar. Nor do we address the issue of whether any time served on a violation of a prior court order citation in this situation would act to reduce the amount of time that could be imposed on the underlying sentence. In the case at bar, appellant was subject to the same dispositional alternatives whether the action was filed as a revocation of probation or as a violation of a prior court order. Detention was permissible because either charge was classified as a delinquency, not as a status offense.

[*P48] Because delinquency proceedings are fundamentally different from adult criminal proceedings, not all constitutional protections afforded to adult criminals have been extended to juveniles. *Schall v. Martin* (1984), 467 U.S. 253, 263, 104 S. Ct. 2403, 2409, 81 L. Ed. 2d 207. Because a juvenile has a liberty interest in freedom from institutional restraints, [**20] the *due process clause of the Fifth Amendment to the United States Constitution*, applicable to the several states pursuant to the *Fourteenth Amendment* thereto, is applicable to juvenile detention proceedings. *Schall*, 467 U.S. at 263, 104 S. Ct. at 2409; *In re Gault* (1967), 387 U.S. 1, 13-14, 87 S. Ct. 1428, 1436-37, 18 L. Ed. 2d 527. Pretrial detainment of juveniles is thus measured by the "fundamental fairness" due process standard established in *In re Gault*, 387 U.S. at 29-30, 87 S. Ct. at 1444-45, and *In re Winship* (1970), 397 U.S. 358, 365-68, 90 S. Ct. 1068, 1073-75, 25 L. Ed. 2d 368. *Schall*, 467 U.S. at 263, 104 S. Ct. at 2409. Decisions articulating due process standards for evaluating the circumstances wherein a juvenile may be detained have sought to accommodate the goals and philosophies of the juvenile system within the due process framework of fundamental fairness.

[*P49] The conclusion that liberty interests possessed by juveniles are not fundamental rights is based in part on the fact that unlike an adult, a juvenile is always

subject to some measure of custodial supervision. *Flores*, 507 U.S. at 292, 301-303, 113 S. Ct. at 1447-48; *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410. Juveniles "are assumed to be subject [**21] to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410; see *New Jersey v. T.L.O.* (1985), 469 U.S. 325, 336, 105 S. Ct. 733, 739-40, 83 L. Ed. 2d 720. In addition, juveniles are not assumed to have the capacity to provide independently for themselves. *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410; see *Flores*, 507 U.S. at 301-303, 113 S. Ct. at 1447-48.

[*P50] In the case at bar, appellant, prior to entering her admission to the charge, was never remanded to the detention center as a result of any dispositional order of the juvenile court. Rather, any detention of appellant was pre-adjudicatory and pre-dispositional. We note that the juvenile court conducted a detention hearing in accordance with *Juv. R. 7* on September 19, 2006. At that time the juvenile court remanded appellant to the juvenile attention center pending a pre-trial hearing scheduled for October 4, 2006. The juvenile court found pursuant to *Juv. R. 7 (A) (2) and (3)* that detention of appellant was necessary because she may abscond and further that appellant had no parent, guardian, custodian, or other person able to provide supervision and care [**22] for her and to return her to court when required. The trial court continued the detention after the pre-trial hearing finding that detention was necessary to protect the appellant and because she may abscond. (Magistrates Order, October 4, 2006). Trial was scheduled for October 11, 2006. On that date appellant entered an admission to the charge.

[*P51] In the case at bar, it does not appear that the appellant filed a motion for release pursuant to *Juv. R. 7(G)* alleging that she had been held in excess of ninety days in violation of *R.C. 2151.34* at any time prior to entering her admission to the charge. The juvenile court specifically noted that it would review the detention order if appellant's circumstances were to change. (T. at 6). At all times, appellant was represented by appointed counsel. Appellant was notified in writing of the conduct that was alleged to be in violation of the prior court order by the complaint filed September 18, 2006. (T. at 10). The juvenile court informed appellant of her right to a trial in which the State would have to prove the allegations beyond a reasonable doubt. (T. at 11). The court further explained to appellant her right to remain silent or to testify; [**23] to subpoena witnesses; and to cross-examination of the State's witnesses. (Id.). The juvenile court further explained the possible dispositions should appellant admit the violation or be found guilty after trial. (Id.). Accordingly, appellant's due process rights were not violated.

[*P52] Appellant's main disagreement with the use of delinquency adjudication for violation of a prior court order concerns the balance between the legislative policy of discouraging the incarceration of status offenders and the assurance of sufficient authority for courts to enforce orders. This view was espoused by Justices Sweeney, Wright and Herbert R. Brown in a case that the Ohio Supreme Court declined to decide:

[*P53] "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)*. However, the contempt powers of a court should not be invoked quickly in this context and a status offender who has departed a shelter on one occasion should not be given the 'taint' of criminality and adjudicated or treated as a juvenile delinquent. Under *R.C. 2151.354* an unruly child may be left in the status of an unruly child but treated [**24] as a delinquent and incarcerated in a detention facility because of failure of 'treatment or rehabilitation'. . . 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:

[*P54] "(1) The juvenile should be given sufficient notice to comply with the order and understand its provision;

[*P55] "(2) violation of a court order must be egregious;

[*P56] "(3) less restrictive alternatives must be considered and found to be ineffective; and

[*P57] "(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". *In re Trent* (1989), 43 Ohio St. 3d 607, 609, 539 N.E.2d 630, 632.

[*P58] In the case at bar, it must first be observed that appellant was initially detained on the basis of allegations that she committed the offenses of obstructing official business, a misdemeanor of the second degree if committed by an adult and disorderly conduct, a misdemeanor of the fourth degree if committed by an adult. These offenses are not status offenses. To the extent [**25] the juvenile's analysis is focused exclusively on the assumption that appellant was detained on the basis of an alleged status offense, the analysis is fundamentally flawed. Had the State pursued a motion to revoke probation as appellant suggests was the proper course of action, the sentence imposed on appellant would be as a reinstatement of her original sentence as punishment for the offenses of obstructing official business and disorderly conduct --not for running away from home. An

initial sentence of probation is deemed to be conditional and not final. *In re Kelly* (Nov. 7, 1995), *Franklin App. No. 95-APP05-613*, 1995 Ohio App. LEXIS 4961. (Citations omitted). Thus, where probation is conditioned on certain terms, the sentence can be modified for noncompliance with those terms. *Id.* Upon revocation of probation a court may impose any sentence that it could have originally imposed. *In re Herring* (July 10, 1996), *Summit App. No. 17553*, 1996 Ohio App. LEXIS 3017; *In the Matter of: Cordale R.* (Jan. 10, 1997), *Erie App. No. E-96-019*, 1997 Ohio App. LEXIS 18. In the case at bar, upon revocation of appellant's probation the juvenile court would be free to impose any of the dispositions available for a delinquent-misdemeanant pursuant to *R.C. 2152.19*. Having previously [**26] been adjudicated as a delinquent child at the original adjudicatory hearing, the subsequent adjudication for violation of a prior court order did not transform a status offender into a delinquent. The legislative policy, and the related procedures, to discourage incarceration of status offenders are not invoked with delinquent juveniles. The legislature intended to treat status offenders differently than delinquents. The legislature's intent was demonstrated by requiring application of distinct criteria before a status offender may be incarcerated. Appellant is not a status offender, and thus does not fall within the legislative concerns regarding the dispositions available for status offenders codified in *R.C. 2151.354*.

[*P59] Accordingly, appellant's first and second assignments of error are overruled.

III.

[*P60] In her third assignment of error appellant claims that the trial court's actions in prosecuting her for violating a prior court order constitute multiple punishments in violation of his right to freedom from double jeopardy under the *Fifth and Fourteenth Amendments to the United States Constitution* and *Section 16, Article I, of the Ohio Constitution*.

[*P61] Application of the *Double Jeopardy Clause* [**27] depends upon the legitimacy of a defendant's expectation of finality in the judgment. *In re Kelly* (Nov. 7, 1995), *Franklin App. No. 95APP05-613*. In the instant case, as in *Kelly*, appellant did not have a legitimate expectation that her sentence of community control sanctions was complete at the time the court prosecuted the second violation of a prior court order charge because her sentence placing her under community control sanctions was conditioned upon his compliance with the terms and conditions of the community control sanctions and the orders of the court.

[*P62] In addressing the authority of a court to commit a juvenile to DYS for a probation violation, it

has been held that a court may properly commit a delinquent minor to DYS for a probation violation, even though the minor was originally given only probation and a suspended commitment was not imposed at the time of the initial disposition. *In re Herring* (July 10, 1996), *Summit App. No. 17553*, 1996 Ohio App. LEXIS 3017, at *6-7. Further, committing a juvenile to a detention center after a probation violation does not punish that juvenile twice for the same offense. *In re Kelly, supra*, 1995 Ohio App. LEXIS 4961, at *10-11. A violation of a prior court order is a separate and distinct [**28] act for which punishment can be imposed. Such punishment does not constitute multiple punishments for the same offense.

[*P63] Appellant's third assignment of error is overruled.

IV.

[*P64] The appellant's contention in her fourth assignment of error that her due process rights were violated because the juvenile court failed to inform her at the time of her original disposition of the consequences of a violation of court's order is not properly before this court. Appellant has failed to provide a transcript of the original dispositional hearing and the 2005 dispositional hearing for appellant's first violation of a prior court order charge. "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163, 372 N.E.2d 1355. This requirement is set forth in *App.R. 9(B)*, which provides, in pertinent part, as follows: " * * * the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he [**29] deems necessary for inclusion in the record * * *." Further, "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp at 199*.

[*P65] In the case sub judice, appellant did not meet her burden, under *App.R. 9(B)*, and supply this Court with a transcripts of the proceedings from her original admission and the original disposition. Nor were transcripts provided from the 2005 adjudication for appellant's first violation of a prior court order charge. If such transcripts were unavailable other options were available to appellant in order to supply this Court with a transcript for purposes of review. Specifically, under *App.R. 9(C)*, appellant could have submitted a narrative

transcript of the proceedings, subject to objections from appellee and approval from the trial court. Also, under *App.R. 9(D)*, the parties could have submitted an agreed statement of the case in lieu of the record. The record in this matter indicates appellant did not attempt to avail herself [**30] of either *App.R. 9(C)* or *9(D)*.

[*P66] We further note that appellant was previously charged with violation of a prior court order on October 24, 2005 and plead true to that charge on November 18, 2005. Appellant did not appeal this sentence, which she could have, and challenged the trial court's failure to inform her of the potential punishment for violating the terms of her probation or of any of the court's orders. The filing of a timely notice of appeal is a prerequisite to establishing jurisdiction in a court of appeals. Therefore, while in the general sense, this court has jurisdiction to hear appeals in juvenile cases, that jurisdiction must be invoked by the timely filing of a notice of appeal. The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored. *State v. Alexander, 10th Dist. Nos. 05AP-129, 05AP-245, 2005 Ohio 5997 at P17.*

[*P67] Having previously been adjudicated a delinquent for violating a prior court order the appellant was keenly aware that her disregard for the terms of her probation or any court order would result in additional sanctions.

[*P68] Finally we would note that failure of the trial court to notify an offender of the potential prison [**31] sentence that may be imposed for a violation of community control sanctions only prohibits the court from sentencing the offender to prison; it does not prohibit the trial court from any other dispositional alternative in response to a defendant's violation of the terms of his or her community control sanctions. In the case at bar, appellant was not remanded to a term of detention in either the juvenile attention center or the Department of Youth Services.

[*P69] Accordingly, appellant's fourth assignment of error is overruled.

V.

[*P70] Appellant's argument in her fifth assignment of error that *R.C. 2152.02* is void for vagueness must also fail. It is not unreasonable to expect persons of ordinary intelligence to realize that disobedience of an order of the court will result in sanctions. As we have noted the State must prove that the individual had actual

notice of the court's order, and further that the individual intended to defy the order. Criminal contempt must be proved beyond a reasonable doubt. *Brown v. Executive 200, Inc. (1980), 64 Ohio St.2d 250, 416 N.E.2d 610 at syllabus.* No where does the record reflect that appellant ever raised the defense that she did not know about the court's orders [**32] or that she was required to abide by the orders. The filing of a timely notice of appeal is a prerequisite to establishing jurisdiction in a court of appeals. Therefore, while in the general sense, this court has jurisdiction to hear appeals in juvenile cases, that jurisdiction must be invoked by the timely filing of a notice of appeal. The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored. *State v. Alexander, 10th Dist. Nos. 05AP-129, 05AP-245, 2005 Ohio 5997 at P17.*

[*P71] No appeal having been taken by appellant from the original delinquency adjudication and disposition or the prior adjudication for violation of a prior court order, appellant can not now challenge the juvenile court's orders in those respective cases. *Boggs v. Boggs (1997), 118 Ohio App.3d 293, 692 N.E.2d 674.*

[*P72] Accordingly, appellant's fifth assignment of error is overruled.

[*P73] The judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By Gwin, P.J.,
Wise, J., and
Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County [**33] Court of Common Pleas, Juvenile Division, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

LEXSEE 2007 OHIO 4565

IN RE: KURTIS KITZMILLER

Case No. 2006-CA-00147

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, LICKING COUNTY

2007 Ohio 4565; 2007 Ohio App. LEXIS 4093

September 4, 2007, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *In re Kitzmiller*, 2008 Ohio 381, 2008 Ohio LEXIS 340 (Ohio, Feb. 6, 2008)

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. A2006-0663.

DISPOSITION: Affirmed.

COUNSEL: For State of Ohio: ROBERT L. BECKER, Licking County Prosecutor, Newark, OH.

For Kurtis Kitzmiller: DAVID H. BODIKER, MOLLY J. BRUNS, Office of Public Defender.

JUDGES: Hon: W. Scott Gwin, P.J., Hon: John W. Wise, J., Hon: Julie A. Edwards, J. Edwards, J., concur; Wise, J., concurs separately.

OPINION BY: W. Scott Gwin

OPINION

Gwin, P.J.

[*P1] Kurtis Kitzmiller, a minor, appeals a felony domestic violence adjudication and commitment. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

[*P2] On August 25, 2006 appellant was charged by complaint in the Licking County Juvenile Court with domestic violence, a felony of the fourth degree if committed by an adult. The case was charged as a felony-level offense under R.C. 2919.25 because appellant has two prior domestic violence adjudications in his juvenile

court history. The complaint filed against appellant stated:

[*P3] "On or about August 25, 2006, in the County of Licking, State of Ohio, Kurtis Kitzmiller knowingly caused or attempted to cause physical harm to a family or household member, to wit: Kurtis shoved his mother [Lori Cartt] in the [**2] chest and caused her to fall backwards over a chair. Kurtis Kitzmiller has previously been adjudicated a delinquent child for commission of a Domestic Violence offense in Hocking County Juvenile Court Case Nos. 20220470 and 20220471. The above behavior is in violation of Section 2919.25(A) of the Ohio Revised Code as applied to adults, and in violation of Section 2152.02(F) of the Ohio Revised Code as made applicable to juvenile".

[*P4] On August 25, 2006 the appellant was arraigned on the charge. The court appointed counsel for appellant and continued the arraignment. During the arraignment appellant admitted that if he were given a drug test it would test positive for marijuana. On September 12, 2006 appellant appeared with counsel and entered a plea of "not true" to the charge. Appellant was released from detention and returned to the custody of his mother pending trial.

[*P5] On October 18, 2006 appellant returned to court on the State's motion to modify temporary orders. The State alleged that appellant had tested positive for THC upon his first drug test since being released from detention. The trial court ordered appellant to remain in detention pending the adjudicatory hearing.

[*P6] On October [**3] 25, 2006 the trial court granted the State's motion to continue the adjudicatory hearing due to the unavailability of one of the State's witnesses. The court ordered appellant remain in detention pending the adjudicatory hearing.

[*P7] On October 31, 2006 the adjudicatory hearing commenced, and the following evidence was presented.

[*P8] Two days prior to Ms. Cartt, alleging appellant assaulted her, Ms. Cartt was in a life threatening car accident. (Adj.T., October 31, 2006 at 13-16). Because Ms. Cartt received heavy doses of medication while in the hospital and after returning home from the hospital, Ms. Cartt had almost no recollection of what occurred on August 25, 2006 and for two weeks following her accident. (Id. at 16-19). Ms. Cartt has no independent recollection of appellant shoving her or causing her to fall. (Id. at 8-19). Because of Ms. Cartt's limited memory of what occurred on August 25, 2006, and in order to prove the elements of domestic violence against appellant, the State had Ms. Cartt read her written statement to police into the record. In her written statement, Ms. Cartt stated, "He [Kurtis] pushed me in my chest and knocked me backwards. I fell over the chair and table." [**4] (Adj.T. at 10). Reading the statement she wrote for the police did not refresh Ms. Cartt's recollection of what occurred on August 25, 2006. (Adj.T. at 17-19). The deputy sheriff testified that upon his arrival at her residence on August 25, 2006, Ms. Cartt told him that Kurtis shoved her down. (Adj.T. at 23).

[*P9] During appellant's testimony, appellant stated that when he and his mother were arguing he was at the top of the stairs and he started to slide, so he reached out and grabbed his mom's arms to keep from falling down the stairs. (Adj.T. at 35).

[*P10] On October 31, 2006, appellant was adjudicated delinquent of one count of domestic violence. On that same date, appellant was committed to the Ohio Department of Youth Services for a minimum period of six months and a maximum period until age twenty-one.

[*P11] It is from the trial court's October 31, 2006 Judgment Entry that appellant appeals raising the following five assignments of error:

[*P12] "I. THE LICKING COUNTY JUVENILE COURT VIOLATED *R.C. 2919.25*, *R.C. 2901.08*, AND KURTIS KITZMILLER'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE *FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, AND *SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION*, [**5] WHEN IT ADJUDICATED HIM DELINQUENT FOR DOMESTIC VIOLENCE, A FELONY OF THE FOURTH DEGREE IF COMMITTED BY AN ADULT.

[*P13] "II. KURTIS KITZMILLER'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE TESTIMONIAL HEARSAY STATEMENTS IN

VIOLATION OF THE *FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, *ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION*, AND *CRAWFORD V. WASHINGTON (2004)*, *541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177*.

[*P14] "III. THE TRIAL COURT VIOLATED KURTIS KITZMILLER'S RIGHT TO DUE PROCESS UNDER THE *FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, *ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION*, AND *JUV. R. 29(E) (4)* WHEN IT ADJUDICATED HIM DELINQUENT OF DOMESTIC VIOLENCE ABSENT PROOF OF EVERY ELEMENT OF THE CHARGE AGAINST HIM BY SUFFICIENT, COMPETENT, AND CREDIBLE EVIDENCE.

[*P15] "IV. THE TRIAL COURT VIOLATED KURTIS KITZMILLER'S RIGHT TO DUE PROCESS UNDER THE *FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION* WHEN IT ADJUDICATED HIM DELINQUENT OF DOMESTIC VIOLENCE, WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[*P16] "V. KURTIS KITZMILLER WAS DENIED HIS CONSTITUTIONAL [**6] RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE *SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION*."

I.

[*P17] Under this assignment of error, appellant contends that the juvenile court erred by applying the felony enhancement provisions in *R.C. 2919.25* to a juvenile charged with domestic violence in juvenile court. In this regard, *R.C. 2919.25* provides that:

[*P18] "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

[*P19] ** * *

[*P20] "(3) Except as otherwise provided in division (D) (4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, *** a violation of division (A) or (B) of this section is a felony of the fourth degree***

[*P21] "(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses

of the type described in division (D) (3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree * * *."

[*P22] Appellant [**7] argues that juveniles should not be subject to felony enhancement based on a prior adjudication of delinquency because juveniles are not charged with "crimes," are not "convicted," and do not face "sentences."

[*P23] At the outset we note that it is not necessarily important, in the context of the delinquency adjudication itself, whether the juvenile's conduct would be a felony or a misdemeanor if his acts were committed by an adult. The Revised Code defines a "delinquent child" to include "[a]ny child * * * who violates *any law* of this state * * * that would be an offense if committed by an adult." *R.C. 2152.02(F) (1)* (emphasis added); see also *R.C. § 2151.011(B) (12)*. "Therefore, it is not relevant to the finding of delinquency whether the actions of [a juvenile] would have constituted a felony or a misdemeanor if committed by an adult." *In re Russell (1984), 12 Ohio St.3d 304, 12 Ohio B. 377, 466 N.E.2d 553*. Because appellant's violation of "any law" allowed the trial court to adjudicate him delinquent, we find no prejudice resulting from the trial court designating his conduct a fourth-degree felony during the adjudicatory phase. Regardless of whether appellant's actions constituted felony or misdemeanor-level domestic [**8] violence, the trial court did not err in adjudicating him delinquent. *In re M.A.L., Miami App. No. 06-CA-36, 2007 Ohio 2426 at P11*.

[*P24] The Ohio Supreme Court recognized in *Russell*, however, that the offense level of a juvenile's conduct is relevant during the dispositional phase. *Id. at 304*. One of the statutes discussed in *Russell* was then-existing *R.C. 2151.355(A) (4)*, which authorized commitment "[i]f the child was adjudicated delinquent by reason of having committed an act that would be a felony of the third or fourth degree if committed by an adult[.]" This statute is much like the current *R.C. 2152.16(A)*, which authorizes commitment if a juvenile is adjudicated delinquent for committing an act that would be a felony if committed by an adult. *In re M.A.L., supra at P 16*. The Court in *Russell* explained:

[*P25] "It is logical to presume that the legislature intended the juvenile court to have a greater number of choices regarding dispositions for juveniles with continuing difficulties with the law. The construction urged by appellant, that a prior theft adjudication is not a prior theft conviction, would relegate the court to the use of the same dispositions which had been inadequate in addressing [**9] previous adjudications of delinquency

for theft offenses. This would be inconsistent with the express goal of rehabilitating juveniles. *R.C. 2151.01(B)*.

[*P26] "Accordingly, we conclude that a prior adjudication of delinquency predicated on a theft offense constitutes a previous conviction of a theft offense under *R.C. 2913.02* for the purpose of determining disposition". *12 Ohio St.3d at 305, 466 N.E.2d at 554*.

[*P27] *In re Fogle, Stark App. No.2006CA00131, 2007 Ohio 553*, this Court held that *R.C. 2901.08(A)* applies to juveniles and adults. *R.C. 2901.08(A)*, provides:

[*P28] "If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child * * * for a violation of a law or ordinance, the adjudication as a delinquent child * * * is a conviction for a violation of the law or ordinance for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person[.]"

[*P29] In the lead opinion, Judge Boggins determined that the statute allows a court to enhance a juvenile's current offense level by treating prior adjudications as convictions. Judge [**10] Hoffman filed a dissent in which he opined that *R.C. 2901.08(A)* only allows prior juvenile adjudications to be considered when determining the proper charge for an adult. Based on the terminology in the statute, Judge Hoffman reasoned that it does not apply to juveniles who have prior delinquency adjudications. We are now persuaded by Judge Hoffman's view that *R.C. 2901.08(A)* has no applicability in juvenile court. However, in deference to Judge Boggins, we would note that the Revised Code does provide a juvenile counter-part to *R.C. 2901.08*. *R.C. 2152.16(C)* provides:

[*P30] "If a child is adjudicated a delinquent child, at the dispositional hearing and prior to making any disposition pursuant to this section, the court shall determine whether the delinquent child previously has been adjudicated a delinquent child for a violation of a law or ordinance. *If the delinquent child previously has been adjudicated a delinquent child for a violation of a law or ordinance, the court, for purposes of entering an order of disposition of the delinquent child under this section, shall consider the previous delinquent child adjudication as a conviction of a violation of the law or ordinance in determining [**11] the degree of the offense the current act would be had it been committed by an adult. * * **" (Emphasis added).

[*P31] The foregoing language allows a juvenile court, during the dispositional phase, to treat prior adjudications as convictions for purposes of determining the

degree of offense the juvenile's current act would be if committed by an adult. *In re M.A.L.*, *supra* at P 13-14.

[*P32] In the present case, the State introduced into evidence before the trial court a certified copy of a Judgment Entry from the Hocking County, Ohio, Court of Common Pleas, Juvenile Division, *In the Matter of Kurtis Kitzmiller*, Case No. DL20220470, in which the appellant was adjudicated delinquent on two (2) counts of Domestic Violence.¹

1 We would note that pursuant to R.C. 2919.25(D) (4) the present offense would be elevated to a felony of the third degree. However, the Complaint in the case at bar classified the offense in appellant's case as a felony of the fourth degree. The trial court adjudicated appellant delinquent of a felony of the fourth degree. Accordingly, we will not disturb the trial court's finding concerning the level of the offense as the dispositional alternatives are the same for either level [**12] of felony. See, R.C. 2151.62(A) (1) (e).

[*P33] That Judgment Entry contains the following finding by the Hocking County Court of Common Pleas:

[*P34] "Withdraws former plea and enters a plea of ADMIT, Court accepts said plea.

[*P35] "Admit allegations. Upon being advised of their right to counsel and of the potential consequences in the event the allegations set forth in the complaint were established, the juvenile and parent waived counsel voluntarily, knowingly and intelligently by the alleged child. The Court accepted the admission and found the child to be a (n) DELINQENT CHILD * * *" [State's Exhibit 2]. Appellant was placed on probation. *Id.* As no appeal was taken from the Hocking County case, appellant cannot collaterally attack the findings of the Hocking County Court of Common Pleas in the case at bar.

[*P36] R.C. 2152.16(C) authorized the trial court to treat those adjudications as convictions during the dispositional phase for purposes of applying the domestic violence statute's felony-enhancement provision. The disposition transcript and appellant's commitment to the Ohio Department of Youth Services make clear that the trial court in fact did treat the prior adjudications as convictions and determined [**13] that his current conduct would constitute a fourth-degree felony if committed by an adult. Because R.C. 2152.16(C) expressly authorized the trial court to make this determination, we find no error.

[*P37] Appellant's first assignment of error is overruled.

II.

[*P38] In his second assignment of error, appellant argues the trial court allowance of testimony concerning the out-of-court statements of appellant's mother, Lori Cartt, who was the victim of the domestic violence deprived appellant of his constitutional right to confront witnesses guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution*. *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. We disagree.

[*P39] In the case at bar, two days prior to Ms. Cartt alleging appellant assaulted her, Ms. Cartt was in a life threatening car accident. (Adj.T., October 31, 2006 at 13-16). Because Ms. Cartt received heavy doses of medication while in the hospital and after returning home from the hospital, Ms. Cartt had almost no recollection of what occurred on August 25, 2006 and for two weeks following her accident. (*Id.* at 16-19). Ms. Cartt has no independent recollection of appellant shoving her or causing [**14] her to fall. (*Id.* at 8-19). Because of Ms. Cartt's limited memory of what occurred on August 25, 2006, and in order to prove the elements of domestic violence against appellant, the State had Ms. Cartt read her written statement to police into the record. In her written statement, Ms. Cartt stated, "He [Kurtis] pushed me in my chest and knocked me backwards. I fell over the chair and table." (Adj.T. at 10). Reading the statement she wrote for the police did not refresh Ms. Cartt's recollection of what occurred on August 25, 2006. (Adj.T. at 17-19). The deputy sheriff testified that Ms. Cartt told him that Kurtis shoved her down. (Adj.T. at 23). Furthermore, the State elicited testimony from the sheriff's deputy as to what Ms. Cartt told him upon his arrival at her residence on August 25, 2006.

[*P40] In *Crawford*, the United States Supreme Court held that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify, and the defendant has had a prior opportunity for cross-examination. *Crawford* thus involved the admissibility under the *Confrontation Clause* of recorded testimonial statements [**15] of a person who did not testify at the trial. The holding in *Crawford* was that such statements, regardless of their reliability, are not admissible unless the defendant was able to cross-examine their maker. In the present case Ms. Cartt did testify and was cross-examined. Appellant argues, however, that because Ms. Cartt was unable to recall the incident or making the statement to the police, she should be viewed as an "unavailable" witness, whom the appellant could not effectively cross-examine. In substance, this is an argument that the witness should be treated as if she had not, in fact, testified or been cross-examined. However, the Court's decision in *Crawford* neither overruled nor called into question its two earlier

decisions that addressed and resolved this issue: *Delaware v. Fensterer* (1985), 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 and *United States v. Owens* (1988), 484 U.S. 554, 108 S.Ct. 838, 98 L. Ed. 2d 951.

[*P41] *Owens* involved an adult victim of a severe beating, who suffered memory loss stemming from his head injuries and testified at trial. While hospitalized, he had identified Owens as his assailant, which identification was admitted into evidence. During the victim's cross-examination, [**16] he was unable to recall details of the attack and the identification. *Id.* at 556, 108 S.Ct. 838. The Ninth Circuit held that, under the circumstances, the introduction of the victim's testimony violated the *Confrontation Clause*. The Supreme Court reversed, ruling that "the *Confrontation Clause* guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 559, 108 S.Ct. 838 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) and *Delaware v. Fensterer*, 474 U.S. 15, 19-20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)) (emphasis in original). In *Fensterer* the Court held that the *Confrontation Clause* was not violated where an expert witness who testified as to his opinion could not recollect the basis upon which he had formed that opinion. In *Fensterer*, the Court explained that:

[*P42] "The *Confrontation Clause* includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the *Confrontation Clause* is generally satisfied when the defense is given [**17] a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony". 474 U.S. at 21-22, 106 S.Ct. 292.

[*P43] It is true that in *Owens* the witness at least recalled having identified the defendant. 484 U.S. at 556, 108 S.Ct. at 840. But the Court did not restrict its reasoning to such situations. Instead, the Court "agree[d] with the answer suggested" in "Justice Harlan's scholarly concurrence" in *California v. Green* (1970), 399 U.S. 149, 188, 90 S.Ct. 1930, 1950, 26 L.Ed.2d 489 that "a witness' inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have *Sixth Amendment* consequence." 484 U.S. at 558, 108 S.Ct. at 841. The accused has been "confronted with the witnesses against him," as the *Sixth Amendment* demands, so long as the prosecution produces the witnesses and the witnesses answer defense questions. "[S]uccessful cross-examination is not the constitutional guarantee." 484

U.S. at 560, 108 S.Ct. at 843. [**18] When a witness has forgotten the basis for and the giving of testimony under oath in an earlier proceeding and that testimony is then introduced into evidence, defense questioning, though impaired, is not futile for the reasons given in *Owens*. It is still possible to bring out on cross-examination the "witness' bias, his lack of care and attentiveness ... and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory." *Id.* at 559, 108 S.Ct. at 842 (citation omitted). *United States v. Milton* (DC Cir., 1993), 303 U.S. App. D.C. 386, 8 F.3d 39, 47.

[*P44] We conclude that a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the *confrontation clause* under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination. In the case at bar, appellant had the opportunity to cross-examine the forgetful witness. The trier of fact was able to assess both the forgetful witness and the testifying officer's demeanor and credibility. Appellant brought out on cross-examination the "witness' bias, [her] lack of [**19] care and attentiveness ... and even (what is often a prime objective of cross-examination) the very fact that [she] has a bad memory." *California v. Green*, *supra* at 559, 108 S.Ct. at 842 (citation omitted).

[*P45] Appellant's second assignment of error is overruled.

III. & IV.

[*P46] In his third assignment of error, appellant maintains that his adjudication is against the sufficiency of the evidence. In his fourth assignment of error appellant argues that his adjudication is against the manifest weight of the evidence. We disagree.

[*P47] Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492.

[*P48] The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question [**20] for the trial court to determine whether the State has met its burden to produce evidence on each

element of the crime charged, sufficient for the matter to be submitted to the jury.

[*P49] Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass (1967)*, 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

[*P50] In *State v. Thompkins (1997)*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." *Id.*, paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." *Id.*, paragraph four of the syllabus; *State v. Miller (2002)*, 96 Ohio St.3d 384, 2002 Ohio 4931 at P38, 775 N.E.2d 498.

[*P51] In the case at bar, appellant was adjudicated delinquent [**21] on the basis of domestic violence. In this regard, *R.C. 2919.25* provides that:

[*P52] "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

[*P53] *R.C. 2901.01* states, in relevant part: "(A). As used in the Revised Code:

[*P54] "(3) 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration".

[*P55] This court has previously held that "no showing of actual trauma or injury is needed to satisfy the 'physical harm' element of assault. The qualification of the physical contact as 'physical harm' is a matter to be determined by the trier of fact". *State v. Robinson (Sept. 30, 1985)*, 5th Dist. No. CA-6649, 1985 Ohio App. LEXIS 7172; *Uricksville v. Dansby (June 15, 1988)*, 5th Dist. No. 87AP090068, 1988 Ohio App. LEXIS 2580. See, also *State v. Perkins (March 27, 1998)*, 11th District No. 96-P-0221, 1998 Ohio App. LEXIS 1213 ("When there is no tangible, physical injury such as a bruise or cut, it becomes the province of the jury to determine whether, under the circumstances, the victim was physically injured, after reviewing all of the evidence surrounding the event"); *State v. Bowers, 11th Dist. No. 2002-A-0010, 2002 Ohio 6913 at P15* ("In the instant case, the victim attested that appellant [**22] tackled him without his permission causing him to fall to the ground. The victim stated that he was not injured or bruised as a result of the incident; however, he attested

that he experienced pain in his stomach and side when he was tackled. Reviewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that appellant inflicted physical harm on Boggs, as provided in *R.C. 2901.22*, and knowingly caused Boggs physical harm, as provided in *R.C. 2901.01(A)(3)*").

[*P56] In the case at bar the trial court received into evidence the written statement of appellant's mother. In her written statement, Ms. Cartt stated, "He [Kurtis] pushed me in my chest and knocked me backwards. I fell over the chair and table." (Adj.T. at 10). The trial court also heard testimony from Deputy Daniel Loper of the Licking County Sheriff's Office that upon his arrival at the scene Ms. Cartt informed him that the appellant had "shoved her down and spit on her..." (Adj. T. at 23).

[*P57] Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had caused physical [**23] harm to a family or household member.

[*P58] We hold, therefore, that the state met its burden of production regarding cause, or attempt to cause physical harm to a family or household member as required by *R.C. 2919.25* and, accordingly, there was sufficient evidence to support appellant's adjudication.

[*P59] Although appellant cross-examined the witnesses and argued that he grabbed his mother to prevent himself from falling down the stairs, and further that his mother was unable to recall at the time of trial the circumstances surrounding her encounter with appellant, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison (1990)*, 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S. Ct. 228, 112 L. Ed. 2d 183.

[*P60] Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed to us through the written record. *Miller v. Miller (1988)*, 37 Ohio St. 3d 71, 523 N.E.2d 846.

[*P61] In *Seasons Coal Co. v. Cleveland (1984)*, 10 Ohio St.3d 77, 81, 10 Ohio B. 408, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse [**24] a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass (1967)*, 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

[*P62] The trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness' credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), *Franklin App. No. 99AP-739*, 2000 Ohio App. LEXIS 1138, citing *State v. Nivens* (May 28, 1996), *Franklin App. No. 95APA09-1236*, 1996 Ohio App. LEXIS 2245. Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, *Franklin App. No. 02AP-604*, 2003 Ohio 958, at P 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548; *State v. Burke*, *Franklin App. No. 02AP-1238*, 2003 Ohio 2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

[**25] Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

[*P63] We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant had committed acts which if committed by an adult would be of the crime of domestic violence.

[*P64] Accordingly, appellant's adjudication is not against the sufficiency or the manifest weight of the evidence.

[*P65] Appellant's third and fourth assignments of error are overruled.

V.

[*P66] In his fifth assignment of error, appellant argues he was denied effective assistance of counsel. We disagree.

[*P67] A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry in whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second [**26] prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

[*P68] In determining whether counsel's representation fell below an objective standard of reasonableness,

judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St. 3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

[*P69] In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, *supra* at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[*P70] The United States Supreme Court and the Ohio Supreme Court [**27] have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

[*P71] Essentially, appellant argues that his trial attorney's failures to raise in the trial court the same issues and arguments that he now presents on appeal rendered his performance ineffective. Appellant offers no additional grounds not addressed in the previous assignments of error.

[*P72] Since we have found no grounds for reversal of his convictions in any of appellant's assignments of error, we obviously do not consider his counsel ineffective in this regard.

[*P73] Accordingly, we find no prejudice to appellant as a result of trial counsel's actions in this case.

[*P74] Appellant's fifth assignment of error is overruled.

[*P75] The judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By Gwin, P.J., and

Edwards, J., concur;

Wise, J., concurs

separately

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, [**28] the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

CONCUR BY: JOHN W. WISE

CONCUR

Wise, J., Concurring

[*P76] Wise, J. I concur with the majority opinion without reversing my prior position in this Court's decision in *In re Fogle, Stark App. No. 2006CA00131, 2007 Ohio 553*. I do not find said holdings to be inconsistent. In *Fogle* this Court held that pursuant to *R.C. 2901.08*, the trial court could consider a juvenile's prior juvenile adjudications for purposes of determining the degree of an offense. In *Fogle* the "enhancement" occurred at the adjudication phase with the trial court charging the juvenile with delinquency by reason of the commission of a felony. In the instant case, this Court is holding that the trial court can consider prior juvenile adjudications as convictions during the dispositional phase pursuant to *R.C. § 2152.16(C)*.

JUDGE JOHN W. WISE

LEXSEE 2000 OHIO APP LEXIS 5773

IN RE SCHREIBER CHILDREN.

CASE NO. CA2000-04-068

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER
COUNTY

2000 Ohio App. LEXIS 5773

December 11, 2000, Decided

DISPOSITION: [*1] Judgment affirmed.**COUNSEL:** Mary K. Dudley, Hamilton, Ohio, for appellee, Debbie Darling.

Fred Miller, Hamilton, Ohio, for appellant, Tom Schreiber.

Michelle Nickel, Hamilton, Ohio, guardian ad litem.

JUDGES: POWELL, P.J. YOUNG and VALEN, JJ., concur.**OPINION BY:** POWELL**OPINION**

POWELL, P.J. Defendant-appellant, Thomas Schreiber, appeals a decision of the Butler County Court of Common Pleas, Juvenile Division, modifying his child support obligation. The judgment of the trial court is affirmed.

Appellant and Debbie Darling were divorced in Hamilton County in 1998. Debbie was awarded custody of four of the parties' children and appellant was granted custody of one child, Joshua. Appellant was ordered to pay guideline child support of \$ 692.03 per month to Debbie.

Not long thereafter, the parties' five children were adjudicated dependent, and Joshua was adjudicated dependent and abused. Joshua was placed in the temporary custody of Butler County Children Services Board ("BCCSB") while Debbie retained custody of the other four children. Appellant was ordered to pay child support of \$ 250.00 per month to BCCSB for Joshua. Debbie subsequently filed a motion requesting that appellant's [*2] child support obligation be reviewed.

A hearing on the child support issue was held on January 3, 2000. The trial court found that a change of circumstances had occurred which warranted a modification of appellant's child support obligation. The trial court ordered that appellant pay \$ 192.63 per month, the guideline support amount, for the support of Joshua. The trial court then made an upward deviation from the child support guidelines and ordered appellant to pay \$ 1,100 per month for the support of the four children in Debbie's care. Appellant appeals raising a single assignment of error.

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ORDERED AN UPWARD DEVIATION FROM THE CHILD SUPPORT GUIDELINES.

A trial court's modification of a child support order will not be reversed absent an abuse of discretion. *Fallang v. Fallang* (1996), 109 Ohio App. 3d 543, 547, 672 N.E.2d 730, citing *Booth v. Booth* (1989), 44 Ohio St. 3d 142, 541 N.E.2d 1028. More than an error in law or judgment, an abuse of discretion implies that the trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

[*3] *R.C. 3113.215(B)(1)* requires that a trial court calculate the amount of an obligor's child support obligation in accordance with the child support guidelines set forth in *R.C. 3113.215*. The amount calculated using the guidelines is rebuttably presumed to be the correct amount of child support. *R.C. 3113.215(B)(1)*. A trial court cannot deviate from the child support guidelines unless (1) the court makes a factual determination, after considering the statutory criteria in *R.C. 3113.215(B)(3)*, that the amount calculated according to the guidelines would be unjust or inappropriate and not in the best interest of the child; and (2) the court makes an actual en-

try in the journal of factual findings that support the determination. *R.C. 3113.215(B)(1)*; *Marker v. Grimm (1992)*, 65 Ohio St. 3d 139, 601 N.E.2d 496, paragraph three of the syllabus.

The parties stipulated that Debbie earns \$ 7,000 yearly, and that appellant earns \$ 39,700 yearly and incurs a yearly expense of \$ 1,716 for health insurance. Using these figures, the parties stipulated [*4] that appellant's guideline child support obligation is \$ 196.83 per month per child, or \$ 787.32 per month for the four children in Debbie's custody.

The trial court properly completed a child support worksheet which was incorporated into its decision. However, the trial court determined that appellant's guideline support obligation was unjust, inappropriate, and not in the best interests of the children. The trial court made specific findings of fact regarding the factors of *R.C. 3113.215(B)* which it found supported an upward deviation in appellant's child support obligation.

The trial court first considered that the four children in Debbie's custody have special needs as a result of the emotional and physical abuse they have endured. See *R.C. 3113.215(B)(3)(a)*. The children now require weekly counseling sessions. The appointments limit Debbie's ability to earn a greater income as she must have a flexible work schedule. However, Debbie is able to limit her childcare expense since she works for a day-

care facility which allows her children to attend free of charge.

The trial court next noted the disparity in income [*5] between the parties which remains even after the payment of guideline child support. See *R.C. 3113.215(B)(3)(g)*. Without a deviation, Debbie's gross household income would be \$ 18,670.05 per year for herself and four children, while appellant's gross household income would be \$ 27,095.95 for himself alone.

The trial court noted that appellant benefits from lowered living expenses by living with his parents. See *R.C. 3113.215(B)(3)(h)*. Finally, the trial court examined the relative financial resources and assets of the parties and found that appellant receives yearly bonuses and stock options. See *R.C. 3113.215(B)(3)(k)*. All of the trial court's findings were based upon the uncontroverted testimony of the parties.

The trial court made findings of fact as required by *R.C. 3113.215(B)* to support its deviation from the guideline amount. These findings are supported by the record. Accordingly, we find no abuse of discretion by the trial court and overrule the assignment of error.

Judgment affirmed.

YOUNG and VALEN, JJ., concur.

LEXSTAT ORC 2151.353

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JUNE 9, 2008 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 12, 2008 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT
DISTRICT DETENTION HOMES

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ORC Ann. 2151.353 (2008)

§ 2151.353. Disposition of abused, neglected or dependent child

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(1) Place the child in protective supervision;

(2) Commit the child to the temporary custody of a public children services agency, a private child placing agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home, or in any other home approved by the court;

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings. A person identified in a complaint or motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person identified signs a statement of understanding for legal custody that contains at least the following provisions:

(a) That it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child;

(b) That the person understands that legal custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian for the child until the child reaches the age of majority. Responsibility as custodian for the child shall continue beyond the age of majority if, at the time the child reaches the age of majority, the child is pursuing a diploma granted by the board of education or other governing authority, successful completion of the curriculum of any high school, successful completion of an individualized education program developed for the student by any high school, or an age and schooling certificate. Responsibility beyond the age of majority shall terminate when the child ceases to continuously pursue such an education, completes such an education, or is excused from such an education under standards adopted by the state board of education, whichever occurs first.

(c) That the parents of the child have residual parental rights, privileges, and responsibilities, including, but not limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support;

(d) That the person understands that the person must be present in court for the dispositional hearing in order to affirm the person's intention to become legal custodian, to affirm that the person understands the effect of the custodianship before the court, and to answer any questions that the court or any parties to the case may have.

(4) Commit the child to the permanent custody of a public children services agency or private child placing agency, if the court determines in accordance with division (E) of *section 2151.414 [2151.41.4] of the Revised Code* that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of *section 2151.414 [2151.41.4] of the Revised Code* that the permanent commitment is in the best interest of the child. If the court grants permanent custody under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding.

(5) Place the child in a planned permanent living arrangement with a public children services agency or private child placing agency, if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child and that one of the following exists:

(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care.

(b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child, as determined in accordance with division (D) of *section 2151.414 [2151.41.4] of the Revised Code*, and the child retains a significant and positive relationship with a parent or relative.

(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available to the child, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing the child for independent living.

(6) Order the removal from the child's home until further order of the court of the person who committed abuse as described in *section 2151.031 [2151.03.1] of the Revised Code* against the child, who caused or allowed the child to suffer neglect as described in *section 2151.03 of the Revised Code*, or who is the parent, guardian, or custodian of a child who is adjudicated a dependent child and order any person not to have contact with the child or the child's siblings.

(B) No order for permanent custody or temporary custody of a child or the placement of a child in a planned permanent living arrangement shall be made pursuant to this section unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting permanent custody, temporary custody, or the placement of the child in a planned permanent living arrangement as desired, the summons served on the parents of the child contains as is appropriate a full explanation that the granting of an order for permanent custody permanently divests them of their parental rights, a full explanation that an adjudication that the child is an abused, neglected, or dependent child may result in an order of temporary custody that will cause the removal of the child from their legal custody until the court terminates the order of temporary custody or permanently divests the parents of their parental rights, or a full explanation that the granting of an order for a planned permanent living arrangement will result in the removal of the child from their legal custody if any of the conditions listed in divisions (A)(5)(a) to (c) of this section are found to exist, and the summons served on the parents contains a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent.

If after making disposition as authorized by division (A)(2) of this section, a motion is filed that requests permanent custody of the child, the court may grant permanent custody of the child to the movant in accordance with *section 2151.414 [2151.41.4] of the Revised Code*.

(C) If the court issues an order for protective supervision pursuant to division (A)(1) of this section, the court may place any reasonable restrictions upon the child, the child's parents, guardian, or custodian, or any other person, including, but not limited to, any of the following:

(1) Order a party, within forty-eight hours after the issuance of the order, to vacate the child's home indefinitely or for a specified period of time;

(2) Order a party, a parent of the child, or a physical custodian of the child to prevent any particular person from having contact with the child;

(3) Issue an order restraining or otherwise controlling the conduct of any person which conduct would not be in the best interest of the child.

(D) As part of its dispositional order, the court shall journalize a case plan for the child. The journalized case plan shall not be changed except as provided in *section 2151.412 [2151.41.2] of the Revised Code*.

(E) (1) The court shall retain jurisdiction over any child for whom the court issues an order of disposition pursuant to division (A) of this section or pursuant to *section 2151.414 [2151.41.4] or 2151.415 [2151.41.5] of the Revised Code* until the child attains the age of eighteen years if the child is not mentally retarded, developmentally disabled, or physically impaired, the child attains the age of twenty-one years if the child is mentally retarded, developmentally disabled, or physically impaired, or the child is adopted and a final decree of adoption is issued, except that the court may retain jurisdiction over the child and continue any order of disposition under division (A) of this section or under *section 2151.414 [2151.41.4] or 2151.415 [2151.41.5] of the Revised Code* for a specified period of time to enable the child to graduate from high school or vocational school. The court shall make an entry continuing its jurisdiction under this division in the journal.

(2) Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or *section 2151.414 [2151.41.4] or 2151.415 [2151.41.5] of the Revised Code*. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with *section 2151.42 of the Revised Code*.

(F) Any temporary custody order issued pursuant to division (A) of this section shall terminate one year after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care, except that, upon the filing of a motion pursuant to *section 2151.415 [2151.41.5] of the Revised Code*, the temporary custody order shall continue and not terminate until the court issues a dispositional order under that section.

(G) (1) No later than one year after the earlier of the date the complaint in the case was filed or the child was first placed in shelter care, a party may ask the court to extend an order for protective supervision for six months or to terminate the order. A party requesting extension or termination of the order shall file a written request for the extension or termination with the court and give notice of the proposed extension or termination in writing before the end of the day after the day of filing it to all parties and the child's guardian ad litem. If a public children services agency or private child placing agency requests termination of the order, the agency shall file a written status report setting out the facts supporting termination of the order at the time it files the request with the court. If no party requests extension or termination of the order, the court shall notify the parties that the court will extend the order for six months or terminate it and that it may do so without a hearing unless one of the parties requests a hearing. All parties and the guardian ad litem shall have seven days from the date a notice is sent pursuant to this division to object to and request a hearing on the proposed extension or termination.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. At the hearing, the court shall determine whether extension or termination of the order is in the child's best interest. If termination is in the child's best interest, the court shall terminate the order. If extension is in the child's best interest, the court shall extend the order for six months.

(b) If it does not receive a timely request for a hearing, the court may extend the order for six months or terminate it without a hearing and shall journalize the order of extension or termination not later than fourteen days after receiving the request for extension or termination or after the date the court notifies the parties that it will extend or terminate the order. If the court does not extend or terminate the order, it shall schedule a hearing to be held no later than thirty days after the expiration of the applicable fourteen-day time period and give notice of the date, time, and location of the hearing to all parties and the child's guardian ad litem. At the hearing, the court shall determine whether extension or termination of the order is in the child's best interest. If termination is in the child's best interest, the court shall terminate the order. If extension is in the child's best interest, the court shall issue an order extending the order for protective supervision six months.

(2) If the court grants an extension of the order for protective supervision pursuant to division (G)(1) of this section, a party may, prior to termination of the extension, file with the court a request for an additional extension of six months or for termination of the order. The court and the parties shall comply with division (G)(1) of this section with respect to extending or terminating the order.

(3) If a court grants an extension pursuant to division (G)(2) of this section, the court shall terminate the order for protective supervision at the end of the extension.

(H) The court shall not issue a dispositional order pursuant to division (A) of this section that removes a child from the child's home unless the court complies with *section 2151.419 [2151.41.9] of the Revised Code* and includes in the dispositional order the findings of fact required by that section.

(I) If a motion or application for an order described in division (A)(6) of this section is made, the court shall not issue the order unless, prior to the issuance of the order, it provides to the person all of the following:

- (1) Notice and a copy of the motion or application;
- (2) The grounds for the motion or application;
- (3) An opportunity to present evidence and witnesses at a hearing regarding the motion or application;
- (4) An opportunity to be represented by counsel at the hearing.

(J) The jurisdiction of the court shall terminate one year after the date of the award or, if the court takes any further action in the matter subsequent to the award, the date of the latest further action subsequent to the award, if the court awards legal custody of a child to either of the following:

(1) A legal custodian who, at the time of the award of legal custody, resides in a county of this state other than the county in which the court is located;

(2) A legal custodian who resides in the county in which the court is located at the time of the award of legal custody, but moves to a different county of this state prior to one year after the date of the award or, if the court takes any further action in the matter subsequent to the award, one year after the date of the latest further action subsequent to the award.

The court in the county in which the legal custodian resides then shall have jurisdiction in the matter.*

HISTORY:

133 v H 320 (Eff 11-19-69); 136 v H 85 (Eff 11-28-75); 138 v H 695 (Eff 10-24-80); 139 v H 440 (Eff 11-23-81); 141 v H 428 (Eff 12-23-86); 142 v S 89 (Eff 1-1-89); 145 v H 152 (Eff 7-1-93); 146 v H 274 (Eff 8-8-96); 146 v H 419 (Eff 9-18-96); 146 v H 265 (Eff 3-3-97); 147 v H 484 (Eff 3-18-99); 148 v H 471 (Eff 7-1-2000); 148 v H 448 (Eff 10-5-2000); 148 v H 332. Eff 1-1-2001; 150 v S 185, § 1, eff. 4-11-05; 151 v S 238, § 1, eff. 9-21-06.

LEXSTAT ORC ANN. 2151.412

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT
DESERTION OF CHILD UNDER 72 HOURS OLD

Go to the Ohio Code Archive Directory

ORC Ann. 2151.412 (2008)

§ 2151.412. Case plan for each child; changes; priorities

(A) Each public children services agency and private child placing agency shall prepare and maintain a case plan for any child to whom the agency is providing services and to whom any of the following applies:

- (1) The agency filed a complaint pursuant to *section 2151.27 of the Revised Code* alleging that the child is an abused, neglected, or dependent child;
- (2) The agency has temporary or permanent custody of the child;
- (3) The child is living at home subject to an order for protective supervision;
- (4) The child is in a planned permanent living arrangement.

Except as provided by division (A)(2) of *section 5103.153 [5103.15.3] of the Revised Code*, a private child placing agency providing services to a child who is the subject of a voluntary permanent custody surrender agreement entered into under division (B)(2) of *section 5103.15 of the Revised Code* is not required to prepare and maintain a case plan for that child.

(B) (1) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code setting forth the content and format of case plans required by division (A) of this section and establishing procedures for developing, implementing, and changing the case plans. The rules shall at a minimum comply with the requirements of Title IV-E of the "Social Security Act," *94 Stat. 501, 42 U.S.C. 671 (1980)*, as amended.

(2) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code requiring public children services agencies and private child placing agencies to maintain case plans for children and their families who are receiving services in their homes from the agencies and for whom case plans are not required by division (A) of this section. The agencies shall maintain case plans as required by those rules; however, the case plans shall not be subject to any other provision of this section except as specifically required by the rules.

(C) Each public children services agency and private child placing agency that is required by division (A) of this section to maintain a case plan shall file the case plan with the court prior to the child's adjudicatory hearing but no later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care. If the agency does not have sufficient information prior to the adjudicatory hearing to complete any part of the case plan, the agency shall specify in the case plan the additional information necessary to complete each part of the

case plan and the steps that will be taken to obtain that information. All parts of the case plan shall be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child.

(D) Any agency that is required by division (A) of this section to prepare a case plan shall attempt to obtain an agreement among all parties, including, but not limited to, the parents, guardian, or custodian of the child and the guardian ad litem of the child regarding the content of the case plan. If all parties agree to the content of the case plan and the court approves it, the court shall journalize it as part of its dispositional order. If the agency cannot obtain an agreement upon the contents of the case plan or the court does not approve it, the parties shall present evidence on the contents of the case plan at the dispositional hearing. The court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child.

(E) (1) All parties, including the parents, guardian, or custodian of the child, are bound by the terms of the journalized case plan. A party that fails to comply with the terms of the journalized case plan may be held in contempt of court.

(2) Any party may propose a change to a substantive part of the case plan, including, but not limited to, the child's placement and the visitation rights of any party. A party proposing a change to the case plan shall file the proposed change with the court and give notice of the proposed change in writing before the end of the day after the day of filing it to all parties and the child's guardian ad litem. All parties and the guardian ad litem shall have seven days from the date the notice is sent to object to and request a hearing on the proposed change.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing pursuant to *section 2151.417 [2151.41.7] of the Revised Code* to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. The agency may implement the proposed change after the hearing, if the court approves it. The agency shall not implement the proposed change unless it is approved by the court.

(b) If it does not receive a timely request for a hearing, the court may approve the proposed change without a hearing. If the court approves the proposed change without a hearing, it shall journalize the case plan with the change not later than fourteen days after the change is filed with the court. If the court does not approve the proposed change to the case plan, it shall schedule a hearing to be held pursuant to *section 2151.417 [2151.41.7] of the Revised Code* no later than thirty days after the expiration of the fourteen-day time period and give notice of the date, time, and location of the hearing to all parties and the guardian ad litem of the child. If, despite the requirements of division (E)(2) of this section, the court neither approves and journalizes the proposed change nor conducts a hearing, the agency may implement the proposed change not earlier than fifteen days after it is submitted to the court.

(3) If an agency has reasonable cause to believe that a child is suffering from illness or injury and is not receiving proper care and that an appropriate change in the child's case plan is necessary to prevent immediate or threatened physical or emotional harm, to believe that a child is in immediate danger from the child's surroundings and that an immediate change in the child's case plan is necessary to prevent immediate or threatened physical or emotional harm to the child, or to believe that a parent, guardian, custodian, or other member of the child's household has abused or neglected the child and that the child is in danger of immediate or threatened physical or emotional harm from that person unless the agency makes an appropriate change in the child's case plan, it may implement the change without prior agreement or a court hearing and, before the end of the next day after the change is made, give all parties, the guardian ad litem of the child, and the court notice of the change. Before the end of the third day after implementing the change in the case plan, the agency shall file a statement of the change with the court and give notice of the filing accompanied by a copy of the statement to all parties and the guardian ad litem. All parties and the guardian ad litem shall have ten days from the date the notice is sent to object to and request a hearing on the change.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing pursuant to *section 2151.417 [2151.41.7] of the Revised Code* to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. The agency shall continue to administer the case plan with the change after the hearing, if the court approves the change. If the court does not approve the change, the court shall make appropriate changes to the case plan and shall journalize the case plan.

(b) If it does not receive a timely request for a hearing, the court may approve the change without a hearing. If the court approves the change without a hearing, it shall journalize the case plan with the change within fourteen days after receipt of the change. If the court does not approve the change to the case plan, it shall schedule a hearing under *section 2151.417 [2151.41.7] of the Revised Code* to be held no later than thirty days after the expiration of the four-

teen-day time period and give notice of the date, time, and location of the hearing to all parties and the guardian ad litem of the child.

(F) (1) All case plans for children in temporary custody shall have the following general goals:

(a) Consistent with the best interest and special needs of the child, to achieve a safe out-of-home placement in the least restrictive, most family-like setting available and in close proximity to the home from which the child was removed or the home in which the child will be permanently placed;

(b) To eliminate with all due speed the need for the out-of-home placement so that the child can safely return home.

(2) The director of job and family services shall adopt rules pursuant to Chapter 119. of the Revised Code setting forth the general goals of case plans for children subject to dispositional orders for protective supervision, a planned permanent living arrangement, or permanent custody.

(G) In the agency's development of a case plan and the court's review of the case plan, the child's health and safety shall be the paramount concern. The agency and the court shall be guided by the following general priorities:

(1) A child who is residing with or can be placed with the child's parents within a reasonable time should remain in their legal custody even if an order of protective supervision is required for a reasonable period of time;

(2) If both parents of the child have abandoned the child, have relinquished custody of the child, have become incapable of supporting or caring for the child even with reasonable assistance, or have a detrimental effect on the health, safety, and best interest of the child, the child should be placed in the legal custody of a suitable member of the child's extended family;

(3) If a child described in division (G)(2) of this section has no suitable member of the child's extended family to accept legal custody, the child should be placed in the legal custody of a suitable nonrelative who shall be made a party to the proceedings after being given legal custody of the child;

(4) If the child has no suitable member of the child's extended family to accept legal custody of the child and no suitable nonrelative is available to accept legal custody of the child and, if the child temporarily cannot or should not be placed with the child's parents, guardian, or custodian, the child should be placed in the temporary custody of a public children services agency or a private child placing agency;

(5) If the child cannot be placed with either of the child's parents within a reasonable period of time or should not be placed with either, if no suitable member of the child's extended family or suitable nonrelative is available to accept legal custody of the child, and if the agency has a reasonable expectation of placing the child for adoption, the child should be committed to the permanent custody of the public children services agency or private child placing agency;

(6) If the child is to be placed for adoption or foster care, the placement shall not be delayed or denied on the basis of the child's or adoptive or foster family's race, color, or national origin.

(H) The case plan for a child in temporary custody shall include at a minimum the following requirements if the child is or has been the victim of abuse or neglect or if the child witnessed the commission in the child's household of abuse or neglect against a sibling of the child, a parent of the child, or any other person in the child's household:

(1) A requirement that the child's parents, guardian, or custodian participate in mandatory counseling;

(2) A requirement that the child's parents, guardian, or custodian participate in any supportive services that are required by or provided pursuant to the child's case plan.

(I) A case plan may include, as a supplement, a plan for locating a permanent family placement. The supplement shall not be considered part of the case plan for purposes of division (D) of this section.

HISTORY:

142 v H 403 (Eff 1-1-89); 146 v H 274 (Eff 8-8-96); 146 v H 419 (Eff 9-18-96); 147 v H 484 (Eff 3-18-99); 148 v H 471. Eff 7-1-2000.

LEXSTAT ORC ANN. 2152.02

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.02 (2008)

§ 2152.02. Definitions

As used in this chapter:

(A) "Act charged" means the act that is identified in a complaint, indictment, or information alleging that a child is a delinquent child.

(B) "Admitted to a department of youth services facility" includes admission to a facility operated, or contracted for, by the department and admission to a comparable facility outside this state by another state or the United States.

(C) (1) "Child" means a person who is under eighteen years of age, except as otherwise provided in divisions (C)(2) to (6) of this section.

(2) Subject to division (C)(3) of this section, any person who violates a federal or state law or a municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of that person's age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held.

(3) Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.

(4) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* shall be deemed after the transfer not to be a child in the transferred case.

(5) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* and who subsequently is convicted of or pleads guilty to a felony in that case, and any person who is adjudicated a delinquent child for the commission of an act, who has a serious youthful offender dispositional sentence imposed for the act pursuant to *section 2152.13 of the Revised Code*, and whose adult portion of the dispositional sentence is invoked pursuant to *section 2152.14 of the Revised Code*, shall be deemed after the transfer or invocation not to be a child in any case in which a complaint is filed against the person.

(6) The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a "child" until the person attains twenty-one years of age.

(D) "Chronic truant" means any child of compulsory school age who is absent without legitimate excuse for absence from the public school the child is supposed to attend for seven or more consecutive school days, ten or more school days in one school month, or fifteen or more school days in a school year.

(E) "Community corrections facility," "public safety beds," "release authority," and "supervised release" have the same meanings as in *section 5139.01 of the Revised Code*.

(F) "Delinquent child" includes any of the following:

(1) Any 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;

(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*;

(3) Any child who violates division (C) of section 2907.39, division (A) of section 2923.211 [2923.21.1], or division (C)(1) or (D) of *section 2925.55 of the Revised Code*;

(4) Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant;

(5) Any child who is a chronic truant.

(G) "Discretionary serious youthful offender" means a person who is eligible for a discretionary SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(H) "Discretionary SYO" means a case in which the juvenile court, in the juvenile court's discretion, may impose a serious youthful offender disposition under *section 2152.13 of the Revised Code*.

(I) "Discretionary transfer" means that the juvenile court has discretion to transfer a case for criminal prosecution under division (B) of *section 2152.12 of the Revised Code*.

(J) "Drug abuse offense," "felony drug abuse offense," and "minor drug possession offense" have the same meanings as in *section 2925.01 of the Revised Code*.

(K) "Electronic monitoring" and "electronic monitoring device" have the same meanings as in *section 2929.01 of the Revised Code*.

(L) "Economic loss" means any economic detriment suffered by a victim of a delinquent act or juvenile traffic offense as a direct and proximate result of the delinquent act or juvenile traffic offense and includes any loss of income due to lost time at work because of any injury caused to the victim and any property loss, medical cost, or funeral expense incurred as a result of the delinquent act or juvenile traffic offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(M) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(N) "Juvenile traffic offender" means any child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or any political subdivision of this state, other than a resolution, ordinance, or regulation of a political subdivision of this state the violation of which is required to be handled by a parking violations bureau or a joint parking violations bureau pursuant to Chapter 4521. of the Revised Code.

(O) A "legitimate excuse for absence from the public school the child is supposed to attend" has the same meaning as in *section 2151.011 [2151.01.1] of the Revised Code*.

(P) "Mandatory serious youthful offender" means a person who is eligible for a mandatory SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(Q) "Mandatory SYO" means a case in which the juvenile court is required to impose a mandatory serious youthful offender disposition under *section 2152.13 of the Revised Code*.

(R) "Mandatory transfer" means that a case is required to be transferred for criminal prosecution under division (A) of *section 2152.12 of the Revised Code*.

(S) "Mental illness" has the same meaning as in *section 5122.01 of the Revised Code*.

(T) "Mentally retarded person" has the same meaning as in *section 5123.01 of the Revised Code*.

(U) "Monitored time" and "repeat violent offender" have the same meanings as in *section 2929.01 of the Revised Code*.

(V) "Of compulsory school age" has the same meaning as in *section 3321.01 of the Revised Code*.

(W) "Public record" has the same meaning as in *section 149.43 of the Revised Code*.

(X) "Serious youthful offender" means a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to adult court under a mandatory or discretionary transfer.

(Y) "Sexually oriented offense," "juvenile offender registrant," "child-victim oriented offense," "tier I sex offender/child-victim offender," "tier II sex offender/child-victim offender," "tier III sex offender/child-victim offender," and "public registry-qualified juvenile offender registrant" have the same meanings as in *section 2950.01 of the Revised Code*.

(Z) "Traditional juvenile" means a case that is not transferred to adult court under a mandatory or discretionary transfer, that is eligible for a disposition under *sections 2152.16, 2152.17, 2152.19, and 2152.20 of the Revised Code*, and that is not eligible for a disposition under *section 2152.13 of the Revised Code*.

(AA) "Transfer" means the transfer for criminal prosecution of a case involving the alleged commission by a child of an act that would be an offense if committed by an adult from the juvenile court to the appropriate court that has jurisdiction of the offense.

(BB) "Category one offense" means any of the following:

(1) A violation of *section 2903.01 or 2903.02 of the Revised Code*;

(2) A violation of *section 2923.02 of the Revised Code* involving an attempt to commit aggravated murder or murder.

(CC) "Category two offense" means any of the following:

(1) A violation of *section 2903.03, 2905.01, 2907.02, 2909.02, 2911.01, or 2911.11 of the Revised Code*;

(2) A violation of *section 2903.04 of the Revised Code* that is a felony of the first degree;

(3) A violation of *section 2907.12 of the Revised Code* as it existed prior to September 3, 1996.

(DD) "Non-economic loss" means nonpecuniary harm suffered by a victim of a delinquent act or juvenile traffic offense as a result of or related to the delinquent act or juvenile traffic offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v S 3 (Eff 1-1-2002); 149 v H 400. Eff 4-3-2003; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v S 53, § 1, eff. 5-17-06; 151 v H 23, § 1, eff. 8-17-06; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC ANN. 2152.16

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.16 (2008)

§ 2152.16. Commitment to youth services department for secure confinement; release by department; effect of prior delinquency adjudication

(A) (1) If a child is adjudicated a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court may commit the child to the legal custody of the department of youth services for secure confinement as follows:

(a) For an act that would be aggravated murder or murder if committed by an adult, until the offender attains twenty-one years of age;

(b) For a violation of *section 2923.02 of the Revised Code* that involves an attempt to commit an act that would be aggravated murder or murder if committed by an adult, a minimum period of six to seven years as prescribed by the court and a maximum period not to exceed the child's attainment of twenty-one years of age;

(c) For a violation of *section 2903.03, 2905.01, 2909.02, or 2911.01* or division (A) of *section 2903.04 of the Revised Code* or for a violation of any provision of *section 2907.02 of the Revised Code* other than division (A)(1)(b) of that section when the sexual conduct or insertion involved was consensual and when the victim of the violation of division (A)(1)(b) of that section was older than the delinquent child, was the same age as the delinquent child, or was less than three years younger than the delinquent child, for an indefinite term consisting of a minimum period of one to three years, as prescribed by the court, and a maximum period not to exceed the child's attainment of twenty-one years of age;

(d) If the child is adjudicated a delinquent child for committing an act that is not described in division (A)(1)(b) or (c) of this section and that would be a felony of the first or second degree if committed by an adult, for an indefinite term consisting of a minimum period of one year and a maximum period not to exceed the child's attainment of twenty-one years of age.

(e) For committing an act that would be a felony of the third, fourth, or fifth degree if committed by an adult or for a violation of division (A) of *section 2923.211 [2923.21.1] of the Revised Code*, for an indefinite term consisting of a minimum period of six months and a maximum period not to exceed the child's attainment of twenty-one years of age.

(2) In each case in which a court makes a disposition under this section, the court retains control over the commitment for the minimum period specified by the court in divisions (A)(1)(a) to (e) of this section. During the minimum period, the department of youth services shall not move the child to a nonsecure setting without the permission of the court that imposed the disposition.

(B) (1) Subject to division (B)(2) of this section, if a delinquent child is committed to the department of youth services under this section, the department may release the child at any time after the minimum period specified by the court in division (A)(1) of this section ends.

(2) A commitment under this section is subject to a supervised release or to a discharge of the child from the custody of the department for medical reasons pursuant to *section 5139.54 of the Revised Code*, but, during the minimum period specified by the court in division (A)(1) of this section, the department shall obtain court approval of a supervised release or discharge under that section.

(C) If a child is adjudicated a delinquent child, at the dispositional hearing and prior to making any disposition pursuant to this section, the court shall determine whether the delinquent child previously has been adjudicated a delinquent child for a violation of a law or ordinance. If the delinquent child previously has been adjudicated a delinquent child for a violation of a law or ordinance, the court, for purposes of entering an order of disposition of the delinquent child under this section, shall consider the previous delinquent child adjudication as a conviction of a violation of the law or ordinance in determining the degree of the offense the current act would be had it been committed by an adult. This division also shall apply in relation to the imposition of any financial sanction under *section 2152.19 of the Revised Code*.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v H 393. Eff 7-5-2002.

LEXSTAT ORC ANN. 2152.20

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TITLE 21. COURTS -- PROBATE -- JUVENILE
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ORC Ann. 2152.20 (2008)

§ 2152.20. Fines; costs; restitution; order of criminal forfeiture; community service

(A) If a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order any of the following dispositions, in addition to any other disposition authorized or required by this chapter:

(1) Impose a fine in accordance with the following schedule:

(a) For an act that would be a minor misdemeanor or an unclassified misdemeanor if committed by an adult, a fine not to exceed fifty dollars;

(b) For an act that would be a misdemeanor of the fourth degree if committed by an adult, a fine not to exceed one hundred dollars;

(c) For an act that would be a misdemeanor of the third degree if committed by an adult, a fine not to exceed one hundred fifty dollars;

(d) For an act that would be a misdemeanor of the second degree if committed by an adult, a fine not to exceed two hundred dollars;

(e) For an act that would be a misdemeanor of the first degree if committed by an adult, a fine not to exceed two hundred fifty dollars;

(f) For an act that would be a felony of the fifth degree or an unclassified felony if committed by an adult, a fine not to exceed three hundred dollars;

(g) For an act that would be a felony of the fourth degree if committed by an adult, a fine not to exceed four hundred dollars;

(h) For an act that would be a felony of the third degree if committed by an adult, a fine not to exceed seven hundred fifty dollars;

(i) For an act that would be a felony of the second degree if committed by an adult, a fine not to exceed one thousand dollars;

(j) For an act that would be a felony of the first degree if committed by an adult, a fine not to exceed one thousand five hundred dollars;

(k) For an act that would be aggravated murder or murder if committed by an adult, a fine not to exceed two thousand dollars.

(2) Require the child to pay costs;

(3) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau, require the child to make restitution to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. The court may not require a child to make restitution pursuant to this division if the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that serves the jurisdiction or the clerk of courts on behalf of the victim.

If the court requires restitution under this division, the restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim or survivor of the victim, the performance of community service work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

If the court requires restitution under this division, the court may base the restitution order on an amount recommended by the victim or survivor of the victim, the delinquent child, the juvenile traffic offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act or juvenile traffic offense. If the court decides to order restitution under this division and the amount of the restitution is disputed by the victim or survivor or by the delinquent child or juvenile traffic offender, the court shall hold a hearing on the restitution. If the court requires restitution under this division, the court shall determine, or order the determination of, the amount of restitution to be paid by the delinquent child or juvenile traffic offender. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by or on behalf of the victim against the delinquent child or juvenile traffic offender or the delinquent child's or juvenile traffic offender's parent, guardian, or other custodian.

If the court requires restitution under this division, the court may order that the delinquent child or juvenile traffic offender pay a surcharge, in an amount not exceeding five per cent of the amount of restitution otherwise ordered under this division, to the entity responsible for collecting and processing the restitution payments.

The victim or the survivor of the victim may request that the prosecuting authority file a motion, or the delinquent child or juvenile traffic offender may file a motion, for modification of the payment terms of any restitution ordered under this division. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(4) Require the child to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, the following:

(a) All or part of the costs of implementing any community control imposed as a disposition under *section 2152.19 of the Revised Code*, including a supervision fee;

(b) All or part of the costs of confinement in a residential facility described in *section 2152.19 of the Revised Code* or in a department of youth services institution, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment provided, and the costs of repairing property the delinquent child damaged while so confined. The amount of reimbursement ordered for a child under this division shall not exceed the total amount of reimbursement the child is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement. The court may collect any reimbursement ordered under this division. If the court does not order reimbursement under this division, confinement costs may be assessed pursuant to a repayment policy adopted under *section 2929.37 of the Revised Code* and division (D) of *section 307.93*, division (A) of *section 341.19*, division (C) of *section 341.23* or *753.16*, division (C) of *section 2301.56*, or division (B) of *section 341.14*, *753.02*, *753.04*, or *2947.19 of the Revised Code*.

(B) Chapter 2981. of the Revised Code applies to a child who is adjudicated a delinquent child for violating *section 2923.32* or *2923.42 of the Revised Code* or for committing an act that, if committed by an adult, would be a felony drug abuse offense.

ORC Ann. 2152.20

(C) The court may hold a hearing if necessary to determine whether a child is able to pay a sanction under this section.

(D) If a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of *section 2152.19 of the Revised Code* in lieu of imposing a financial sanction under this section. If a child who is adjudicated a delinquent child is not indigent, the court may impose a term of community service under that division in lieu of, or in addition to, imposing a financial sanction under this section. The court may order community service for an act that if committed by an adult would be a minor misdemeanor.

If a child fails to pay a financial sanction imposed under this section, the court may impose a term of community service in lieu of the sanction.

(E) The clerk of the court, or another person authorized by law or by the court to collect a financial sanction imposed under this section, may do any of the following:

(1) Enter into contracts with one or more public agencies or private vendors for the collection of the amounts due under the financial sanction, which amounts may include interest from the date of imposition of the financial sanction;

(2) Permit payment of all, or any portion of, the financial sanction in installments, by credit or debit card, by another type of electronic transfer, or by any other reasonable method, within any period of time, and on any terms that the court considers just, except that the maximum time permitted for payment shall not exceed five years. The clerk may pay any fee associated with processing an electronic transfer out of public money and may charge the fee to the delinquent child.

(3) To defray administrative costs, charge a reasonable fee to a child who elects a payment plan rather than a lump sum payment of a financial sanction.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v H 170, Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 162, § 1, eff. 10-12-06; 151 v H 241, § 1, eff. 7-1-07; 152 v H 120, § 1, eff. 7-1-07.

LEXSTAT ORC ANN. 2705.02

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JUNE 9, 2008 ***

*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 12, 2008 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2705. CONTEMPT OF COURT
INDIRECT

Go to the Ohio Code Archive Directory

ORC Ann. 2705.02 (2008)

§ 2705.02. Acts in contempt of court

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer;

(B) Misbehavior of an officer of the court in the performance of official duties, or in official transactions;

(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;

(D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by the officer;

(E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of the person's recognizance;

(F) A failure to comply with an order issued pursuant to *section 3109.19 or 3111.81 of the Revised Code*;

(G) A failure to obey a subpoena issued by the department of job and family services or a child support enforcement agency pursuant to *section 5101.37 of the Revised Code*;

(H) A willful failure to submit to genetic testing, or a willful failure to submit a child to genetic testing, as required by an order for genetic testing issued under *section 3111.41 of the Revised Code*.

HISTORY:

RS § 5640; S&S 97; S&C 258; 32 v 17; 59 v 31; GC § 12137; Bureau of Code Revision, 10-1-53; 146 v H 167 (Eff 6-11-96);* 147 v H 352 (Eff 1-1-98); 148 v H 470 (Eff 7-1-2000); 148 v S 180. Eff 3-22-2001.

LEXSTAT ORC ANN. 2907.07

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2907. SEX OFFENSES
SEXUAL ASSAULTS

Go to the Ohio Code Archive Directory

ORC Ann. 2907.07 (2008)

Legislative Alert: LEXSEE 2007 Ohio SB 183 -- See sections 1 and 2.

§ 2907.07. Importuning

(A) No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.

(B) No person shall solicit another, not the spouse of the offender, to engage in sexual conduct with the offender, when the offender is eighteen years of age or older and four or more years older than the other person, and the other person is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of the other person.

(C) No person shall solicit another by means of a telecommunications device, as defined in *section 2913.01 of the Revised Code*, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

(1) The other person is less than thirteen years of age, and the offender knows that the other person is less than thirteen years of age or is reckless in that regard.

(2) The other person is a law enforcement officer posing as a person who is less than thirteen years of age, and the offender believes that the other person is less than thirteen years of age or is reckless in that regard.

(D) No person shall solicit another by means of a telecommunications device, as defined in *section 2913.01 of the Revised Code*, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person.

(2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.

(E) Divisions (C) and (D) of this section apply to any solicitation that is contained in a transmission via a telecommunications device that either originates in this state or is received in this state.

(F) Whoever violates this section is guilty of importuning. A violation of division (A) or (C) of this section is a felony of the third degree on a first offense and a felony of the second degree on each subsequent offense. Notwithstanding division (C) of *section 2929.13 of the Revised Code*, there is a presumption that a prison term shall be imposed for a violation of division (A) or (C) of this section as described in division (D) of *section 2929.13 of the Revised Code*. A violation of division (B) or (D) of this section is a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v H 724 (Eff 3-22-2001); 149 v S 175, Eff 5-7-2002; 150 v S 5, § 1, eff. 7-31-03; 151 v S 260, § 1, eff. 1-2-07.