

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: J.V.

11-0107

On Appeal from the Eighth District
Court of Appeals, Case No.
CA 94820

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: CULLEN SWEENEY, ESQ. (COUNSEL OF RECORD)
0077187
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX
csweeney@cuyahogacounty.us

COUNSEL FOR APPELLANT J.V.

WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
BY: KRISTEN L. SOBIESKI
Assistant Prosecuting Attorney
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND
AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST**

The instant appeal presents several important questions related to constitutionality of the Ohio's Serious Youthful Offender statute and the authority of juvenile courts to impose criminal punishment upon an individual over the age of 21. The SYO statute was a significant legislative reform to Ohio's juvenile criminal justice system and has been part of a national effort to balance the need for rehabilitation of juvenile offenders without entirely foregoing the possibility of an adult sentence. Lower courts are in need of this Court's guidance regarding the implementation and constitutionality of the SYO law.

The First Issue: Can an adult sentence be invoked for an SYO juvenile on the basis of judicial findings and a relaxed burden of proof?

Appellant's first proposition of law asks this Court to address the constitutional question that was previously accepted by this Court in *In re T.F.*, Sup Ct. Case No. 2008-1578 but voluntarily dismissed by the parties a month prior to oral argument because of a sentencing defect that caused the issue not to be ripe for review. Specifically, appellant's first proposition of law challenges the constitutionality of invoking the suspended adult portion of serious youthful offender sentence based on judicial fact-finding and a relaxed burden of proof. This issue was specifically reserved by this Court in *State v. D.H.* (2009), 120 Ohio St 3d. 540, 546 ("Since the adult portion of D.H.'s sentence has not been invoked, this opinion does not address the constitutional ramifications of invoking the adult sentence under R.C. 2152.14 in light of *Blakely* and *Foster*).

Before a juvenile can actually serve an adult prison sentence pursuant to an SYO sentence, a juvenile court must make certain findings at two separate stages of proceedings. First, pursuant to R.C. 2152.13, the juvenile court must impose a "blended sentence-a traditional

juvenile disposition coupled with the imposed of a stayed adult sentence.” *D.H.*, 120 Ohio St. 3d at 544-45. The adult sentence then remains stayed unless the juvenile court makes several necessary findings to “invoke” the adult sentence pursuant to R.C. 2152.14. In *D.H.*, this Court addressed the constitutionality of the first stage and held that the imposition of a stayed adult sentence pursuant to R.C. 2152.13 does not violated the Sixth Amendment or Article I, Sections 5 and 10 of the Ohio Constitution. *Id.* at paragraph one of the syllabus. This case provides this Court with the opportunity to address the constitutionality of the second stage in the SYO proceedings—the actual invocation of the adult sentence pursuant to R.C. 2152.14.

The Second Issue: Can juvenile court jurisdiction extend beyond age 21?

Appellant’s second proposition of law asks this Court to decide whether a juvenile court has jurisdiction over a delinquent child after the age of 21. In this case, the juvenile court sentenced J.V. after he turned 21 and imposed post-release control for the first time.

Ohio law establishes a bright-line rule regarding jurisdictional limits of juvenile court judges over delinquent children. As recently explained by this Court, “a juvenile court retains jurisdiction over a person adjudicated a delinquent child ‘until the person attains twenty-one years of age.’” i.e. a juvenile court’s jurisdiction over a delinquent child ceases when the child turns twenty-one. *In re Andrew* (2008), 119 Ohio St. 3d 466, 467 (citing R.C. 2152.02(C)(6)); *see also State v. Walls* (2002), 96 Ohio St. 3d 437, 442 (explaining that changes to the juvenile statute “effectively removed anyone over 21 years of age from juvenile-court jurisdiction, regardless of the date on which the person allegedly committed the offense.”); *State v. Warren* (2008), 118 Ohio St. 3d 200, 205-206; *In re J.F.* (2009), 121 Ohio St. 3d 76, 80 (explaining that juvenile dispositions terminate at the age of 21). The Eighth District muddies that bright-line by holding that a juvenile court’s jurisdiction over delinquent children can be extended beyond the

age of 21 to impose post-release control. This Court should accept the instant case to decide whether the Eighth District correctly extended juvenile court jurisdiction beyond a delinquent child's twenty-first birthday.

For these reasons, this Court's resources will be well spent on the issues presented in the instant case.

STATEMENT OF THE CASE

J.V., a minor child, was charged by complaint in juvenile court with multiple counts of felonious assault and aggravated robbery. The offenses also included firearm specifications and serious youthful offender specifications.

On June 17, 2005, J.V. and the State entered into a plea agreement whereby J.V. entered an admission to one count of felonious assault, one count of aggravated robbery, and the firearm and serious youthful offender specifications attendant to those two counts. The State dismissed the remaining counts. As a part of the agreement, the parties reached an agreed upon disposition regarding both the juvenile and the suspended adult portions of the blended sentence that resulted from the SYO specifications. As to the juvenile disposition, the parties agreed to two years of concurrent incarceration at ODYS. As to the suspended adult portion of the blended sentence, the parties agreed to recommend an aggregate potential adult sentence of six years. Based on J.V.'s admission, the trial court found him "delinquent and guilty" of counts five and six along with the firearm and SYO specifications. The trial court then imposed the juvenile disposition and the stayed adult sentence recommended by the parties. The trial court did not, however, impose a term of post-release control as part of the adult stayed sentence.

J.V. appealed the disposition to the Eighth District Court of Appeals, contending that the journal entry misstated his stayed adult sentence. The Eighth District agreed, vacated J.V.'s

sentence, and remanded the case to the juvenile court to ensure that journal entries correctly reflected J.V.'s "disposition articulated at the June 17, 2005 hearing." *In re J.V.*, Cuyahoga App. No. 86849, 2006 Ohio 2464, ¶ 14 ("*J.V. P*"). Upon remand, the juvenile court conducted a new dispositional hearing and imposed both the juvenile and stayed adult portions of J.V.'s sentence. Once again, the trial court did not impose post-release control as part of the stayed adult sentence.

In the meantime, J.V. began serving his juvenile sentence at Marion Juvenile Correctional Facility. J.V. was scheduled to be released from juvenile detention on September 24, 2008. He was not, however, released on that date.

On October 16, 2008, the State filed a motion to invoke the adult portion of J.V.'s SYO sentence, pursuant to R.C. 2152.14(A)(2)(a), on the basis that J.V. purportedly committed two acts while at ODYS that were violations of the rules of the institution and could be charged as felonies or first-degree misdemeanors. Specifically, the State alleged that J.V. assaulted a juvenile corrections officer on July 22, 2008 and a fellow inmate in September 2008, both in violation of R.C. 2903.13.

After a hearing, the trial court issued a journal entry which granted the State's motion to invoke the adult portion of J.V.'s sentence and ordered "adult portion of the disposition ordered on January 16, 2007" into effect. The trial court did not impose post-release control.

J.V. appealed the trial court's decision to invoke the adult portion of his SYO sentence to the Eighth District Court of Appeals. In that appeal, J.V. argued, among other things, that the juvenile court lacked the authority to invoke the suspended adult sentence because the suspended sentence was void due to the omission of post-release control. The Eighth District concluded that "J.V.'s fourth assignment of error has merit," held that his sentence was "void," and

remanded the case for a “new hearing.” *In re J.V.*, Cuyahoga App. No. 92869, 2010 Ohio 71, at ¶¶ 23-24 (“*J.V. II*”). The Eighth District concluded that J.V.’s remaining assignments of error were moot.

J.V. appealed the Eighth District’s decision in *J.V. II* to this Court, raising the following two propositions of law:

Proposition of Law I: A juvenile court does not have the authority to invoke the suspended adult portion of a serious youthful offender sentence after the delinquent child is twenty-one years old.

Proposition of Law II: When a delinquent child challenges the sufficiency of the evidence with respect to the findings necessary to invoke the appellant’s suspended adult sentence, the appellate court must address the sufficiency argument even if it vacates the adult sentence on other grounds.

This Court declined jurisdiction, though two Justices dissented on appellant’s first proposition of law. *In re J.V.*, Sup. Ct. Case No. 2010-451 (Lundberg Stratton and O’Connor, JJ., dissenting).

Upon remand, the juvenile court proceeded to hold a *de novo* sentencing hearing to correct *both* the original disposition of a stayed adult sentence of six years *and* the actual imposition of that six year sentence. In other words, it imposed a blended SYO sentence that included a juvenile disposition and a stayed adult sentence and then invoked that newly imposed sentence on *the very same day*. The basis for invoking the February 12, 2010 stayed adult sentence was the conduct alleged by the State in its October 16, 2008 motion to invoke.

J.V. appealed the juvenile court’s second attempt to invoke his suspended adult sentence and argued that his adult sentence should be vacated for four reasons: 1) The State failed to present sufficient evidence to carry its burden of proof on the findings necessary to invoke the adult sentence; 2) The juvenile court lacked the authority to invoke the newly imposed and stayed SYO adult sentence based on conduct that occurred prior to the imposition of a valid suspended adult sentence; 3) The juvenile court lacked jurisdiction to invoke the adult sentence

because J.V. was over the age of twenty-one; and 4) R.C. 2152.14 is unconstitutional because it requires judicial fact-finding to invoke the adult sentence and because it imposes a relaxed burden of proof.

On November 10, 2010, the Eighth District Court of Appeals affirmed the juvenile court's invocation of J.V.'s suspended adult sentence. *In re J.V.*, Cuyahoga App. No. 94820, 2010 Ohio 5490 ("*J.V. III*").

J.V.'s timely appeal now follows.

STATEMENT OF FACTS

With this statement of facts, J.V. describes his progress at Marion which led to his approval for early release and then the two incidents which served as the basis for the State's motion to invoke his suspended adult sentence.

A. J.V. is approved for early release.

J.V. was first placed at Marion Juvenile Correctional Facility on July 27, 2005. While at Marion, he participated in numerous programs including "Think Before Change," anger management, substance abuse, and victim awareness. As of 2008, J.V. had completed all of the programs available at Marion. J.V. also attended school.

Based on his progress at Marion, J.V. was approved, in July 2008, for early release from Marion onto juvenile parole. J.V.'s early release was derailed, however, by the July 22, 2008 incident involving Unit Manager Lacey.

B. July 22, 2008 Incident: Alleged Assault on Unit Manager Lacey

Unit Manager Lacey testified that, on July 22, 2008, he participated in a search of J.V.'s cell. According to Lacey, Charles Harris, J.V.'s roommate, was upset about getting his cell searched and hit Lacey in the head twice. Lacey grabbed Harris' hand, and J.V. allegedly hit

Lacey as he tried to pull Lacey off his roommate. Both Harris and J.V. were quickly restrained and placed in handcuffs. Lacey testified that he did *not* suffer physical harm as a result of this incident. J.V. remembered the incident but denied ever touching Lacey. During an internal review hearing at Marion, J.V. was found *not guilty* of assault and cleared of any wrongdoing.

C. September 25, 2008 Incident: Participation in a Unit-Wide Mass Disturbance.

On September 25, 2008, Unit Manager Lacey received a call about a large fight going on in another unit. When he responded, he observed about 27 of the 30 youth in the unit, including J.V., participating in “mass chaos.” According to Lacey, J.V. kicked one youth on the ground and chased other youth around the unit. Lacey conceded, however, that he did not see how this fight started or who started it. He also testified that these kind of multiple youth fights occur about two to three times a month.

Regarding this incident, J.V. testified that the fight was started by an individual named Vladimir. J.V. testified that he only got involved in the fight once another individual hit him from behind. J.V. admitted to kicking the person who had hit him. Although there was video of this incident, the State did not present it as evidence in this case.

LAW AND ARGUMENT

Proposition of Law I:

The invocation of an adult prison sentence upon a juvenile, pursuant to R.C. 2152.14, violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

The trial court erred in invoking the adult portion of J.V.’s SYO sentence based on judicial fact-finding and a relaxed burden of proof in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. As discussed below, United States Supreme Court and Ohio Supreme Court jurisprudence make abundantly clear that the fact-finding required by R.C. 2152.14(E)(1) would

violate the Sixth Amendment if it were purely an adult sentencing provision. The question presented here is whether a juvenile's constitutional rights are likewise violated when such fact-finding is a necessary prerequisite for the imposition of an *adult* prison sentence. J.V. maintains that, by virtue of the Sixth and Fourteenth Amendments (and Ohio's constitutional counterparts), he cannot receive an *adult* prison sentence predicated on judicial fact-finding and based on a relaxed burden of proof. Moreover, if J.V. is denied a right to a jury on the findings required by R.C. 2152.14(E)(1), he is necessarily denied equal protection of the law because, unlike an adult, he could face an *adult* prison sentence based on judicial fact-finding.

A. Judicial Fact-Finding in R.C. 2152.14(E)(1) Would Clearly Violate an Adult's Sixth Amendment Right to a Jury Trial.

While R.C. 2152.14(E)(1) clearly applies only to juvenile offenders, J.V. begins his analysis by considering whether the judicial fact-finding in that section would pass constitutional muster if applied to an adult. Clearly it would not.

R.C. 2152.14(E)(1) authorizes a court to impose an adult prison term if it finds the certain facts by clear and convincing evidence, including:

1. The person is "serving the juvenile portion of a serious youthful offender dispositional sentence." R.C. 2152.14(E)(1)(a).
2. The person is at least fourteen years old and has been admitted to a DYS facility, or criminal charges are pending. R.C. 2152.14(E)(1)(b).
3. The "person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c).
4. And either of the following:
 - The person committed an act, while in custody or on parole, that is a violation of the rules of the institution or the conditions of supervision and could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).

- The person is engaging in conduct that “creates a substantial risk to the safety or security” of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).

In other words, judicial fact-finding is required to impose an adult prison sentence under R.C. 2152.14(E)(1).

If this were an adult sentencing provision, there is little question that it would be unconstitutional as it increases the penalty for a crime based on facts found by a judge by clear and convincing evidence. In *Apprendi v. New Jersey*, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (2000) 530 U.S. 466, 489. *Apprendi* creates a “bright-line rule” to which there is but one exception (existence of a prior conviction). *Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856, 868-69. In *Blakely v. Washington*, the United States Supreme Court explained that the “statutory maximum” referred to in *Apprendi* is the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (2004) 542 U.S. 296, 303-304 (emphasis in original). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.*; see also *Cunningham*, 127 S.Ct. at 860.

Here, R.C. 2152.14(E)(1) permits the imposition of an additional penalty (an adult prison sentence) based on judicial fact-finding made under a relaxed burden of proof. Such a sentencing provision, if applied to an adult, would violate *Apprendi*, *Blakely*, and this Court’s decision in *State v. Foster* (2006), 109 Ohio St.3d 1, paragraphs one, three, and five of the syllabus.

B. Judicial Fact-Finding in R.C. 2152.14(E)(1) Violates a Juvenile's Constitutional Rights to a Jury Trial, Due Process, and Equal Protection.

A juvenile may not receive an adult prison sentence when that sentence depends on judicial fact-finding and a relaxed burden of proof. The imposition of an adult prison sentence under such circumstances violates the juvenile's right to a jury trial as well as his or her due process and equal protection rights.

1. Due process and the right to trial by jury for juveniles facing the imposition of an adult prison sentence under R.C. 2152.14.

Whether flowing directly from the Sixth Amendment or conceived as a component of Fourteenth Amendment due process, a juvenile has the right to have a jury determine, beyond a reasonable doubt, all facts necessary for the imposition of an *adult* prison sentence.

Juvenile proceedings must “measure up to the essentials of due process and fair treatment.” *In re Gault* (1967), 387 U.S. 1, 31. While courts have recognized the “original laudable purpose of juvenile courts,” there have consistently been doubts as to whether their actual performance justifies treating juveniles differently in terms of the constitutional guarantees afforded adults. *Kent*, 383 U.S. at 555 (noting that there is evidence that “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children”). The United States Supreme Court has consistently made clear that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.” *In re Winship* (1970), 397 U.S. 358, 365-66. Accordingly, the Court has already afforded many of the same constitutional protections afforded adult criminal defendants to juveniles such as notice of the charges, right to counsel, right to confrontation, and a privilege against self-incrimination. *In re Gault*, 387 U.S. at 31. Moreover, juveniles, like adults, are constitutionally entitled to proof

beyond a reasonable doubt when they are charged with violation of a criminal law. *See In re Winship*, 397 U.S. at 365-68.

In light of *Winship*, it is clear that R.C. 2152.14(E)(1)'s clear and convincing burden cannot pass constitutional muster. Although a proceeding to invoke the adult portion of an SYO sentence is not technically a separate delinquency proceeding, it nonetheless charges the juvenile with violations of Ohio law and imposes the harsh sanction of *adult* imprisonment if those violations are proven. As such, due process requires that the State prove its allegations beyond a reasonable doubt.

Moreover, R.C. 2152.14(E)(1)'s requirement that a judge—and not a jury—decide facts that subject a juvenile to *adult* imprisonment violates a juvenile's right to a jury trial and to due process. “[T]rial by jury in criminal cases is fundamental to the American scheme of justice.” *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 540 (citing *Duncan v. Louisiana* (1968), 391 U.S. 145, 149; *Bloom v. Illinois* (1968), 391 U.S. 194, 210-211). Although the United States Supreme Court has held that a traditional juvenile court delinquency proceeding is not a “criminal prosecution” within the meaning of the Sixth Amendment, *McKeiver*, 403 U.S. at 541, the Court never considered whether the Sixth Amendment (or due process) would require a jury trial for juveniles who face the imposition of an *adult* prison sentence if the State proves its allegations under R.C. 2152.14.

SYO proceedings are not traditional juvenile court proceedings but rather are, in all meaningful respects, a criminal prosecution in which juveniles enjoy the right to a grand jury indictment, the right to a speedy trial, the right to bail as an adult, and a right to a jury trial on the underlying charges. R.C. 2152.13(C). Moreover, like all adults prosecuted in Ohio, the provisions of Chapter 29 of the Ohio Revised Code and the Criminal Rules apply to juveniles

prosecuted as serious youthful offenders. R.C. 2152.13(C). Finally, juveniles receive the same sentence as an adult under Chapter 2929 (with the exception of the death penalty and life without parole), though it is initially stayed. R.C. 2152.13(D). Because an SYO proceeding is a “criminal prosecution” within the meaning of the Sixth Amendment, J.V., like an adult, has a constitutional right to have a jury determine all the facts necessary to invoke an adult prison sentence pursuant to R.C. 2152.14. *See Apprendi, Blakely, and Foster, supra.*

Moreover, even if J.V. does not have a right to a jury determination of facts that increase his sentence by virtue of the Sixth Amendment, he has that right as matter of state and federal due process and fundamental fairness. When an adult sentence is invoked, any pretense of “civil labels” and the purported rehabilitative goals of the juvenile system have evaporated. The imposition of an adult sentence is criminal and fundamental fairness requires that the juvenile receive the same constitutional protections as an adult before that sentence is imposed.

Whether conceived as matter of the Sixth Amendment or due process, the United States Supreme Court’s analysis in *Apprendi* and *Blakely* and the Ohio Supreme Court’s analysis in *Foster* apply with equal force to the findings required before invoking an adult sentence under R.C. 2152.14. Because R.C. 2152.14(E) requires judicial fact-finding before a juvenile can be forced to serve an adult sentence, it is unconstitutional.

2. Equal protection requires that juveniles receive the same constitutional protections as adults when facing the imposition of an adult prison sentence.

J.V.’s equal protection rights were violated when he received an adult sentence predicated on judicial fact-finding under R.C. 2152.14 while bound-over juveniles and adults, in light of *Blakely* and *Foster*, cannot receive a harsher sentence based on judicial fact-finding.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in

the same place and under like circumstances. 14TH AMEND., U. S. CONST.; OHIO CONST. ART. I, SEC. 2. In order to be constitutional, a law must be applicable to all persons under like circumstances and must not subject individuals to an arbitrary exercise of power. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289.

SYO juveniles and bound-over juveniles are identically situated at the time an adult sentence is actually invoked or imposed. The fact that one juvenile receives an adult sentence from a common pleas court when another receives one from a juvenile court is a distinction without a difference. The juvenile court and the common pleas court are imposing identical sentences (with the exception of life without parole) based on Chapter 29 of the Ohio Revised Code. R.C. 2152.13(D). Moreover, while SYO juveniles and adults are obviously not identically situated in all respects, they are similarly situated in all *relevant* respects when facing the imposition of an *adult* prison sentence. When a state elects to pursue adult sanctions against a juvenile, the juvenile, whether bound-over or an SYO, must be afforded the same constitutional protections adult criminal defendants enjoy. Because there is no legitimate basis for denying SYO juveniles the equal protection of the laws when facing an adult sentence, R.C. 2152.14(E) is unconstitutional.

Proposition of Law II:

A juvenile court does not have the authority to impose criminal punishment (including post-release control) after the delinquent child turns 21.

In this case, the Eighth District concluded that the juvenile court had the authority to sentence J.V. and impose post-release control after J.V. was twenty-one years old. J.V. maintains that the juvenile court lacks jurisdiction to invoke the adult portion of an SYO sentence now that he is twenty-one.

Juvenile courts have exclusive original jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1). In delinquency proceedings, “‘child’ means a person who is under eighteen years of age, except as otherwise provided” in R.C. 2152.02(C)(2)-(6). R.C. 2152.02(C)(1); *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, 895 N.E.2d 166, ¶4.¹ Revised Code 2152.02(C)(2) provides, “Subject to division (C)(3) of this section, any person who violates [the law] 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.” R.C. 2152.02(C)(6) clearly states that a juvenile court’s jurisdiction ends on the juvenile’s twenty-first birthday: “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.*” *See also In re Mack*, Defiance App. No. 4-09-22, 2010 Ohio 2295, ¶¶ 11 and 18 (concluding that a juvenile court lacks jurisdiction to issue a sex offender classification order after the child turns twenty-one) (emphasis added). There are no exceptions to this jurisdictional age limit pertinent to this case.

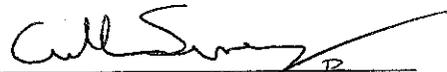
Here, the juvenile court’s jurisdiction over this case ceased when J.V. turned twenty-one on March 11, 2009. When J.V. returned to juvenile court in February 2010, he was almost 22 years old. At that time, the juvenile court lacked jurisdiction over the case. Accordingly, the juvenile court both lacked the authority to impose a de novo SYO sentence (which is what it did) and lacked the authority to just add post-release control (which is what the Eighth District concluded it could do).

¹ R.C. 2152.02(C)(3)-(5) are not relevant to this case as they address juvenile cases that are transferred for criminal prosecution pursuant to R.C. 2152.12, new cases filed after an SYO adult sentence has been invoked, or cases in which the individual was taken into custody after the age of 18 but prior to the age of 21.

CONCLUSION

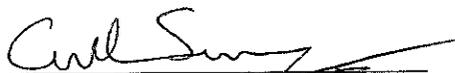
For the foregoing reasons, Defendant-Appellant respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions and issues of great general and public interest for review.

Respectfully submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to William Mason, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 4th day of January, 2011.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

APPENDIX

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

IN RE: J V

Appellant

COA NO
94820

LOWER COURT NO
DL 05103008

JUVENILE COURT DIVISION

MOTION NO. 439521

Date 12/03/2010

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED.

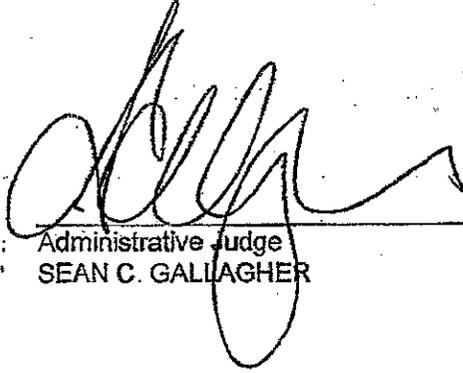
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DEC 03 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. Fuerst* DEP

Judge MARY EILEEN KILBANE, Concur

Judge LARRY A. JONES, Concur


Administrative Judge
SEAN C. GALLAGHER



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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94820

IN RE: J.V.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 05103008

BEFORE: Gallagher, A.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: November 10, 2010

ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE, STATE OF OHIO

William D. Mason
Cuyahoga County Prosecutor

BY: Kristen L. Sobieski
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Yvonne C. Billingsley
C.C.D.C.F.S.
3955 Euclid Avenue, Room 305E
Cleveland, OH 44115

FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 10 2010
GERALD H. FLEMING
CLERK OF THE COURT OF APPEALS
BY _____ DEP

SEAN C. GALLAGHER, A.J.:

Appellant, J.V.,¹ appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, that invoked the adult portion of a serious youthful offender sentence. For the reasons stated herein, we affirm the judgment of the juvenile court.

J.V. initially had three cases pending before the juvenile division: DL 01105053, DL 04102103, and DL 05103008. Pursuant to a negotiated agreement, J.V. entered an admission to felonious assault and aggravated robbery charges, as well as attendant firearm and serious youthful offender specifications. J.V. was found to have been 17 years of age at the time of the offenses. After accepting J.V.'s admissions, the juvenile court proceeded to disposition.

J.V. filed a direct appeal from the disposition and argued that the juvenile disposition as it was reflected in the journal entries differed from the disposition imposed at the recorded disposition hearing. *In re J.V.*, Cuyahoga App. Nos. 86849 and 86850, 2006-Ohio-2464. Finding merit to the appeal, we vacated his sentence and remanded the matter to the juvenile court to modify its journal entries to accurately reflect the disposition as articulated at the June 17, 2005,

¹ Appellant is referred to herein by his initials in accordance with this court's established policy regarding nondisclosure of identities in juvenile cases.

hearing. On January 5, 2007, the juvenile court imposed a sentence that included both juvenile and adult portions.

On October 16, 2008, while J.V. was serving the juvenile portion of his sentence, the state filed a motion to invoke the adult sentence because of J.V.'s conduct while he was in the custody of the Ohio Department of Youth Services. Following a hearing, the juvenile court found "by clear and convincing evidence that the child has been admitted to a Department of Youth Services facility, and the child's conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." On February 5, 2009, the court ordered the adult portion of J.V.'s sentence into execution.

J.V. filed his second appeal to this court challenging the juvenile court's decision to invoke the adult sentence. *In re J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71. We determined that the sentence was void on account of the juvenile court's failure to advise J.V. of the mandatory five years of postrelease control associated with the adult portion of his sentence and failure to include postrelease control in the journal entry. *Id.* The matter was remanded to the juvenile court for a new hearing.

On remand, the juvenile court found that its original findings would stand on the motion to invoke the adult portion of the sentence. The court proceeded to hold a sentencing hearing on February 12, 2010, at which the court included

the juvenile disposition and stayed adult sentence of six years, and properly advised J.V. of postrelease control. The court proceeded to impose the adult portion of the sentence, which included six years in prison and five years of postrelease control.

J.V. now appeals this ruling. He raises four assignments of error for our review. His first assignment of error provides as follows: "I: The state failed to present sufficient evidence with respect to the findings necessary to invoke the appellant's suspended adult sentence."

R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a serious youthful offender ("SYO") sentence. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 31. The statute provides that upon a proper motion and after a hearing has been held, the court may invoke the adult portion of the SYO sentence if certain factors are shown by clear and convincing evidence. R.C. 2152.14(E) states as follows:

"The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

"(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

"(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

“(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

“The conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. R.C. 2152.14(A)(2)(b) and (B)(2).” *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 36.

J.V. argues that the state failed to present sufficient evidence for the court to make several of the necessary findings by clear and convincing evidence. “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. * * * Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

J.V. first contends that he was not serving the juvenile portion of his SYO sentence at the time the juvenile court invoked his adult sentence. He erroneously attempts to rely upon the February 12, 2010, hearing as the date for which his adult sentence was invoked. However, as we discuss later, the February 12, 2010, hearing was held upon remand for the purpose of imposing postrelease control. The imposition of the adult portion of the SYO sentence occurred following a hearing held on January 13, 2009, and remained intact. At the time the court ordered the adult portion of J.V.'s sentence into execution, J.V. was serving the juvenile portion of his SYO sentence. Thus, there was sufficient evidence to support this finding.

J.V. next argues that there was insufficient evidence that he engaged in conduct or acts that can result in the enforcement of an adult sentence.

At the January 13, 2009, hearing, it was established that there was a culture of fighting at the Marion Juvenile Correctional Facility. The state presented evidence that J.V. engaged in fighting between July and September 2008, at the age of 20. Although the trial court found that some of the allegations were not supported by clear and convincing evidence, the court found there was sufficient evidence to show that J.V. was involved in an incident on September 25, 2008, in which he engaged in a large group fight and hit another individual, that he associated with the wrong individuals, that he had a

reputation of being a part of the problem, and that he did not have control of himself. With regard to the September 25, 2008, incident, J.V. admitted he was engaged in the fight. He claimed he was hit by another individual and his reaction was "to get up and fight back." He stated he "blanked out of the situation," that he "got to hitting," and that he was kicking another juvenile. Although he claimed he did not belong to a gang, he admitted that he associated with gang members.

The trial court found by clear and convincing evidence that J.V. had engaged in either of the following misconduct: "1) The child committed an act that is a violation of the rules of the institution and that could be charged as a felony or as a first degree misdemeanor offense of violence if committed by an adult; 2) the child engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim." The court further found by clear and convincing evidence that "the child's conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." We find there was sufficient evidence to support these findings as well as the other required factors under R.C. 2152.14. Accordingly, J.V.'s first assignment of error is overruled.

J.V.'s second and third assignments of error provide as follows:

"II: The juvenile court lacked the authority to invoke the suspended portion of a serious youthful offender sentence based on conduct that occurred before the suspended sentence was actually imposed."

"III: The juvenile court lacked the authority to impose and invoke the stayed adult portion of a serious youthful offender sentence because J.V. was over the age of 21."

Under these assignments of error, J.V. claims that the trial court did not issue a valid SYO sentence until February 12, 2010, which was the sentencing hearing held on remand to properly include postrelease control. At that time, the trial court recognized that the state's motion to invoke the adult portion of the SYO sentence was heard and submitted on January 13, 2009, and that the court ordered the adult portion of the sentence into execution on February 5, 2009.

Although this court previously determined that the failure of the juvenile court to properly include postrelease control resulted in a void sentence, *In re J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, the effect of this decision on the juvenile court's judgment was governed by the Ohio Supreme Court case of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. At the time this court remanded the case for a proper sentencing that included the mandatory postrelease control, the Ohio Supreme Court had held that for

“sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *Id.* at paragraph two of the syllabus. Notably, in *Singleton*, the court specifically recognized that R.C. 2929.191 does not afford a defendant a de novo sentencing hearing: “The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” *Id.* at ¶ 24.

Consistent with this authority, the determination by the juvenile court to invoke the adult portion of the SYO sentence on February 5, 2009, was not impacted by the subsequent decision from this court to remand the case for a new hearing to properly incorporate postrelease control in J.V.’s dispositional sentence. Therefore, we overrule J.V.’s second and third assignments of error.

J.V.’s fourth assignment of error provides as follows: “IV: The trial court erred in invoking the adult portion of appellant’s SYO sentence based on judicial fact-finding and based on a relaxed burden of proof * * * .”

J.V. asserts that the imposition of an adult prison sentence predicated on judicial fact-finding and based on a relaxed burden of proof violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Ohio's constitutional counterparts. He argues that R.C. 2152.14 is unconstitutional insofar as it does not afford SYO juveniles the same constitutional protections as adults facing the imposition of an adult prison sentence. He further argues that a juvenile should have the right to have a jury determine, beyond a reasonable doubt, all the facts necessary for the imposition of an adult prison sentence.

In *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, paragraph two of the syllabus, the Ohio Supreme Court held that “[c]onstitutional jury trial rights do not apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio’s adult felony sentencing statutes when the juvenile court imposes the stayed adult portion of a serious-youthful-offender dispositional sentence pursuant to R.C. 2152.13.” Because the adult portion of D.H.’s sentence was not being invoked, the court did not address the constitutional ramifications of invoking the adult sentence under R.C. 2152.14. *Id.* at ¶ 37. However, the court recognized: “We need not transform juvenile proceedings into full-blown adult trials and dispositions to preserve a juvenile’s due process rights. * * * If the formalities of the criminal

adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.” (Citation omitted.) Id. at ¶ 60.

Until the Ohio Supreme Court declares otherwise, we find no constitutional violation. See *In re D.F.*, Summit App. No. 25026, 2010-Ohio-2999. J.V.’s fourth assignment of error is overruled.

Judgment affirmed.

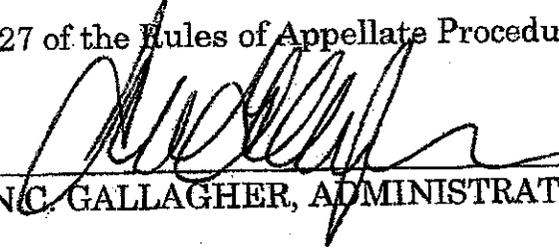
It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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


SEANC GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR