

IN THE SUPREME COURT OF OHIO

2011-1677

STATE OF OHIO :
Appellee :
-vs- :
DEREK WARNER, :
Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 95750

APPELLANT DEREK WARNER'S MERIT BRIEF

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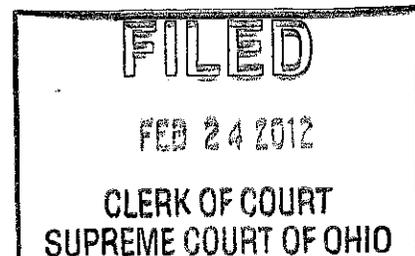


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SUMMARY OF APPELLANT'S ARGUMENT

On May 10, 2010 seventeen-year-old Derek Warner was charged with burglary in juvenile court. The juvenile court was required to adjudicate Derek's case unless it found that he was not amenable to rehabilitation in juvenile court.

But the juvenile court failed Derek. It dispensed with the amenability hearing and transferred jurisdiction to adult court.¹ There, Derek was convicted and sentenced to serve six years in adult prison.

To make matters worse, the Eighth District excused the juvenile court's error and affirmed its decision to transfer jurisdiction without conducting an amenability hearing. Moreover, the Eighth District affirmed based on a waiver theory that was *not* the basis of the juvenile court's decision.

The R.C. 2152.12(B) amenability hearing is the crossroads of the juvenile and adult justice system. The purpose of that hearing is to determine whether a child can still be rehabilitated through the juvenile system, as opposed to being subject to adult felony punishment if convicted. The outcome of the amenability hearing usually determines whether the child will face an adult conviction, sentence, and a criminal record. Amenability invokes the rehabilitative effort that is the primary goal of the juvenile justice system; non-amenability is the gateway to life as a felon. By requiring an amenability hearing, the law recognizes that the juvenile court has a duty—independent of the wishes of the child, parents, and the State—to determine whether rehabilitation in the juvenile justice system is appropriate before relinquishing jurisdiction over the child. In the instant case, Derek Warner never was given an amenability hearing.

¹ Transfer of jurisdiction from juvenile court to adult court is commonly known as “bindover.”

Strict adherence to the Ohio General Assembly's approach to the amenability determination is critical. The discretionary transfer procedure is set forth at R.C. 2152.12(B)-(E), as well as in Rule 30 of the Ohio Rules of Juvenile Procedure. Both the statute and the rule expressly require the juvenile court to conduct an amenability hearing, to consider enumerated factors concerning amenability, and to indicate on the record the factors considered and weighed in making the amenability decision. Although the statute and the rule provide for waiver of certain other requirements, neither provides for waiver of the amenability hearing itself, and neither permits the juvenile court to forgo the hearing based on an implicit waiver.

Additionally, the amenability hearing for transfer of jurisdiction from juvenile court well-illustrates the fundamental differences between the juvenile and adult court systems. It reflects "a focus on the state's role as *parens patriae* and the vision that the courts would protect the wayward child from 'evil influences,' 'save' him from criminal prosecution, and provide social and rehabilitative services." *In re C.S.*, 115 Ohio St.3d 267, 273, 2007-Ohio-4919, 874 N.E.2d 1177. In other words, the R.C. 2152.12(B) amenability hearing exemplifies the paternalistic role that distinguishes the juvenile court from adult court.

In the Opinion Below, the Eighth District adopted an approach that allows the juvenile court to short-circuit its independent statutory duty to consider amenability as a threshold to a discretionary transfer of jurisdiction. Specifically, the Eighth District Court of Appeals held "that Warner, through his counsel, waived the amenability hearing." *State v. Warner*, 8th Dist. No. 95750, 2011-Ohio-4096 ¶ 30 ("Opinion Below").

This decision is wrong for two reasons. First, the amenability hearing cannot be waived. The amenability hearing is not simply a defendant's right; it is part of the juvenile court's duty to ensure that only those children who cannot be rehabilitated in the juvenile system are subjected

to adult prosecution. The R.C. 2152.12(B) requirement to conduct an amenability hearing is a critical component of the juvenile court's paternalistic role in the rehabilitative goal of the juvenile justice system. It is not simply a formality that can be waived by the child. Derek's first proposition of law concisely clarifies this important rule.

Second, even if waiver is permissible under the statute, it must be explicit. There was no such waiver in this case. Indeed, neither Derek nor his counsel uttered the word "waiver", and the juvenile court (1) never raised the issue of waiver with Derek; (2) never told Derek he was waiving the amenability hearing; and (3) never found that a waiver had occurred. There is no authority for the proposition that an implicit waiver of any kind will suffice to dispense with the juvenile court's duty to conduct an amenability hearing before relinquishing jurisdiction over the child. Consequently, even if waiver is permissible, the Court must adopt Derek's second proposition of law to clarify when and how a child can knowingly, voluntarily, and intelligently waive the amenability hearing.

STATEMENT OF THE CASE AND FACTS

At the time of the incident at issue, Derek was seventeen years old. (Transcript of proceedings on May 10, 2010 in the Cuyahoga County Court of Common Pleas, Juvenile Division, hereinafter, "Juv. Tr.", at 4.) He was charged in the Cuyahoga County Court of Common Pleas, Juvenile Division, Case No. DL 09-121602, in connection with an alleged burglary on November 18, 2009. (Opinion Below ¶ 2.)

The juvenile court conducted a hearing on May 10, 2010 to determine whether jurisdiction should be transferred to adult court. (Juv. Tr. 4.) At the hearing, the juvenile court heard testimony and found probable cause. (Juv. Tr. 29.) Then, the juvenile court noted that transfer of jurisdiction would be discretionary pursuant to R.C. 2152.10. (Juv. Tr. 29.) The

juvenile court further noted that Derek had previously been bound over in another pending case,² and the State raised the issue of amenability pursuant to R.C. 2951.12(B)(3). (Juv. Tr. 29-30.)

Specifically, the following exchange occurred on the record of the hearing:

[ASSISTANT PROSECUTOR]: Your Honor, I believe we've had some preliminary discussions about waiving amenability. It has already been found. I don't even know that we need to waive amenability.

[DEFENSE COUNSEL]: If we could approach, your Honor.

THE COURT: Yes. Okay.

(Discussion held off the record.)

THE COURT: Okay. All right. Because this Court has already found this alleged delinquent to be not amenable to the juvenile justice system on a prior case in which the Court transferred jurisdiction to the adult court, the Court in this case then will, based on this probable cause finding will then – we will transfer this case over to the adult court, as well, without having another amenability hearing. And so we will not refer him to the Court Clinic at this time.

(Juv. Tr. 30-31.) Based on this reasoning and conclusion, the juvenile court granted discretionary transfer and transferred jurisdiction to the Cuyahoga County Court of Common Pleas, Criminal Division. (Juv. Tr. 31.)

Derek was then indicted by the Cuyahoga County Grand Jury on one count each of burglary, theft, vandalism, and criminal damaging, and two counts of bribery. (Opinion Below ¶ 2.) The case proceeded to trial on August 2, 2010. (Trial transcript, hereinafter, "Tr.", at 17.) The jury found Derek not guilty of the bribery counts, but guilty of the other charges. (Tr. 423.)

² The prior case that was bound over to adult court was Cuyahoga County Court of Common Pleas, Juvenile Division, Case No. DL 09-123216. After transfer, DL 09-123216 became CR-10-535961, and was ultimately dismissed pursuant to Ohio Crim. R. 29. (See Cuyahoga County Court of Common Pleas, General Division Case No. CR-10-535961, journal entry dated October 25, 2010.) Thus, ironically, Derek was not convicted in the case the juvenile court used to avoid conducting an amenability hearing in this case.

On August 24, 2010 the trial court sentenced Derek to six years in prison and imposed mandatory postrelease control. (Tr. 434.)

Derek filed a direct appeal on September 22, 2010. In his appeal, Derek raised four assignments of error: (1) sufficiency of the evidence; (2) manifest weight; (3) admissibility of other acts and character evidence; and (4) improper discretionary transfer from juvenile to adult court. The Eighth District Court of Appeals affirmed Derek's convictions on August 18, 2011 in the Opinion Below. (Opinion Below ¶ 1.) In overruling the fourth assignment of error, the Eighth District explained that, in order to exercise its discretion to transfer a case to adult court under R.C. 2152.12(B), the juvenile court must first conduct the amenability hearing required by R.C. 2152.12(B)(3). (Opinion Below at ¶ 29.) Although the Eighth District found that the juvenile court did not conduct the amenability hearing, it held that Derek waived the amenability hearing. (Opinion Below ¶ 30.)

Derek filed a timely notice of appeal in this Court on October 3, 2011. In his Memorandum in Support of Jurisdiction, Derek advanced the following two propositions of law:

Proposition of Law I: The R.C. 2152.12(B)(3) amenability hearing cannot be waived.

Proposition of Law II: Waiver of the R.C. 2152.12(B)(3) amenability hearing before the juvenile court is not valid unless it is expressly stated on the record by the juvenile through his or her counsel, and the trial court must determine through a colloquy with the juvenile that the waiver is voluntarily, knowingly, and intelligently made.

On December 21, 2011 this Court accepted jurisdiction over both propositions. The record was filed on January 5, 2012; Derek now files this brief on the merits.

LAW AND ARGUMENT

INTRODUCTION

Discretionary transfer of jurisdiction from juvenile to adult court implicates both the fundamental rights of the child and the essential purpose of juvenile courts. Indeed, the United States Supreme Court has long-recognized that transfer of jurisdiction to adult court is a critical phase of proceedings that triggers constitutional due process and fundamental fairness principles. *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) (“There is no place in our system of law for reaching a result of such tremendous consequence without ceremony-without hearing, without effective assistance of counsel, without a statement of reasons.”); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). A central purpose of juvenile courts has always been rehabilitation. *See, e.g., In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177 (discussing rehabilitation as the historically recognized primary purpose of juvenile courts); *see also In re Snitzky*, 73 Ohio Misc.2d 52, 657 N.E.2d 1379 (C.P. 1995). And, it is well-established that juvenile offenders should be treated differently than adults who commit the same crime. *See generally Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (discussing distinctions between juvenile and adult offenders and prohibiting execution of individuals who were under 18 at the time of their capital crime).

Transfer of jurisdiction in this case revolves around the R.C. 2152.12(B)(3) amenability hearing. Amenability is one component of discretionary transfer of jurisdiction from juvenile court to adult court. Here, it is undisputed that this case is governed by the discretionary transfer statutes. (Juv. Tr. 29.) Nonetheless, to understand the context in which Derek’s propositions of law arise, it is useful to review the source of juvenile court jurisdiction, and the discretionary transfer exception that allows a child under eighteen to be tried in adult court.

By statute, juvenile courts are divisions of the Ohio courts of common pleas. R.C. 2151.07. However, the Ohio Revised Code gives juvenile courts “exclusive original jurisdiction” over cases alleging delinquency of a “child.” R.C. 2151.23(A)(1). “Child” is defined, generally, as “a person who is under eighteen years of age * * *.” R.C. 2152.02(C)(1). At the time of the alleged offense conduct, Derek was seventeen years old. (Juv. Tr. 4.) Accordingly, at the time the juvenile court was conducting transfer proceedings in this case, Derek was a “child” as defined by R.C. 2152.02(C).

Nonetheless, the Revised Code provides that certain “children” are tried as adults. R.C. 2152.10; R.C. 2152.12. R.C. 2152.10 recognizes two types of transfer—mandatory and discretionary. There is no question that mandatory transfer—which applies to certain offenses as well as to offenders who have already been convicted as adults—is not applicable. *See* R.C. 2152.10(A). Sub-division (B) of R.C. 2152.10 describes discretionary transfer. It states that “[u]nless the child is subject to mandatory transfer, if a child is fourteen years of age or older at the time of the act charged and if the child is charged with an act that would be a felony if committed by an adult, the child is eligible for discretionary transfer to the appropriate court for criminal prosecution.” R.C. 2152.10(B).

It is undisputed that this case against Derek falls into the discretionary transfer scenario. (Juv. Tr. 29.) Derek was seventeen at the time of the alleged offense, and the complaint filed in juvenile court charged him with burglary, an act that would be a felony if committed by an adult. Therefore, the juvenile court was required to follow the discretionary bindover procedures set forth at R.C. 2152.12(B) in making its decision to relinquish jurisdiction over this case.

R.C. 2152.12(B) is the statutory source of the juvenile court’s duty to conduct an amenability hearing. It is supported by Juvenile Rule 30, which states that “an amenability

hearing shall be held to determine whether to transfer jurisdiction.” Juv. R. 30(C). The statute requires a hearing, at which the juvenile court must make three specific findings in order to exercise its discretion to transfer a case. First, the child-defendant must be at least fourteen years old. R.C. 2152.12(B)(1). Second, the juvenile court must find that there is probable cause to believe the child committed the act charged. R.C. 2152.12(B)(2). Third, and most importantly in this case, the juvenile court must find that the “child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions.” R.C. 2152.12(B)(3).

In making this third finding, the statute states that the juvenile court “shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred.” R.C. 2152.12(B)(3). Combined, divisions (D) and (E) list a total of seventeen factors for the juvenile court to consider. R.C. 2152.12(D)-(E). Furthermore, the juvenile court “shall indicate the specific factors that were applicable and that the court weighed.” R.C. 2152.12(B)(3).

Accordingly, the May 10, 2010 hearing in juvenile court was governed by R.C. 2152.12(B) and Juv. R. 30. The law entitled Derek to an amenability hearing and required the juvenile court to make specific statutory findings based on the enumerated factors before transferring jurisdiction. Instead, the juvenile court decided an amenability hearing was not necessary. It relinquished jurisdiction without making any findings or weighing the statutory factors, and sent Derek to adult court to face felony charges. (Juv. Tr. 30-31.) It is this error, as well as the Eighth District’s unfounded waiver analysis excusing the error, that gives rise to Derek’s propositions of law.

PROPOSITION OF LAW I: *The R.C. 2152.12(B)(3) amenability hearing cannot be waived.*

The Eighth District’s waiver holding was premised upon the erroneous belief that the amenability hearing could be waived. The Eighth District’s decision was (1) contrary to the plain language of the statute; (2) ignored the fact that the juvenile court has an independent duty to determine amenability (regardless of the child’s wishes); and (3) contrary to the principle that jurisdiction cannot be waived by a child.

A. The plain language of the juvenile court statutes and Juv. R. 30 state that the juvenile court has a mandatory duty to conduct an amenability hearing.

The starting point must be the language of the statute itself. *See State v. Cook*, 128 Ohio St.3d 120, 125, 942 N.E.2d 357 (2010). The Ohio General Assembly has expressly required the juvenile court to assess a juvenile defendant’s amenability to rehabilitation before transferring jurisdiction to adult court. Specifically, R.C. 2152.12(B)(3) makes non-amenability a prerequisite to transfer of jurisdiction. Similarly, Juv. R. 30 states that “an amenability hearing *shall* be held to determine whether to transfer jurisdiction.” Juv. R. 30(C) (emphasis added). As this Court has long held: “A basic rule of statutory construction is that ‘shall’ is ‘construed as mandatory unless there appears a clear and unequivocal legislative intent’ otherwise.” *Bergman v. Monarch Constr. Co.*, 124 Ohio St. 3d 534, 539, 2010-Ohio-622, 925 N.E.2d 116 (quoting *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus); *see also* R.C. 1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage”); *State v. Golphin*, 81 Ohio St.3d 543, 545-46, 1998-Ohio-336, 692 N.E.2d 608 (invoking the same rule in the context of interpreting juvenile bindover statutes and rules).

Importantly, there is nothing in the statute or the rule indicating that the juvenile defendant can waive the amenability hearing. On the other hand, while the statute and the rule

expressly require the juvenile court to order a mental examination of the child, both the statute and the rule also expressly permit the child to waive the mental examination. *See* R.C. 2152.12(C) (“The child may waive the examination required by this division if the court finds the waiver is competently and intelligently made.”); Juv. R. 30(F) (“The child may waive the mental examination required under division (C) of this rule.”). Therefore, as a matter of statutory interpretation, the principle of *inclusio unius est exclusio alterius* applies: the statute prohibits waiver of the amenability hearing.

B. The amenability determination is a duty of the juvenile court, not just a right of the child.

The statutorily required amenability determination is a *duty* imposed upon the juvenile court; it is not just a right of the child. It requires that a juvenile court decide, based on its expertise, whether the child’s case could be successfully handled in juvenile court, or whether jurisdiction must be transferred to adult court.

As this Court has stated, “[t]he purpose behind Juv. R. 30 and its statutory counterpart * * * is ‘the assessment of the probability of rehabilitating the child within the juvenile justice system.’ * * * In making this assessment, the juvenile court enjoys wide latitude to retain or relinquish jurisdiction, and the ultimate decision lies within its sound discretion.” *State v. Watson*, 47 Ohio St.3d 93, 95, 547 N.E.2d 1181 (1989) (omitting citations). Similarly, this Court has recognized that assessing the best interests of the child is the role of the juvenile court. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 59 (discussing the role of the juvenile court in the context of serious youthful offender status). The juvenile court “must assess the strengths and weaknesses of the juvenile system vis-à-vis a particular child to determine how this particular juvenile fits within the system and whether the system is equipped to deal with the child successfully.” *Id.*

To allow the child to waive the amenability hearing would be inconsistent with the juvenile court's fundamental role as *parens patriae*. See *In re C.S.*, 115 Ohio St.3d at 273. Just as society recognizes that parents have not only the right but the duty to make certain decisions for their children, the law requires the juvenile court to make the amenability determination for the child-defendant.

Ohio case law also supports the proposition that the statute imposes a duty upon the juvenile court that cannot be waived by the defendant. Specifically, the Sixth District has concluded that “the Juvenile Court erred in accepting ‘waiver’ of [the R.C. 2152.12(B)] procedures, which are mandatory **and cannot be waived.**” *State v. Newton*, 6th Dist. No. F-82-17, 1983 WL 6836, *3 (June 10, 1983) (emphasis added).³

Newton is consistent with the plain language of the statute and rule governing discretionary transfer, as well as the fundamental principles of the juvenile justice system. In *Newton*, the juvenile, acting on the advice of counsel, unequivocally waived the amenability hearing and “consented” to be tried as an adult. *Newton*, 1983 WL 6836 at *1. The Sixth District reversed, recognizing that Juv. R. 30 and the transfer statute expressly require an amenability hearing. *Id.* at *3. In holding that the amenability hearing cannot be waived, the *Newton* court also noted that “if such procedures were intended to be subject to waiver, both Juv. R. 30 and R.C. 2151.26 would so provide, as they do in fact provide for waiver of the examinations.” *Id.*

³ Although the Eighth District cited *State v. Soke*, 8th Dist. No. 62908, 1993 WL 266951 (July 15, 1993), in support of permitting waiver, *Soke* issued ten years after *Newton* without citing it. Furthermore, former R.C. 2151.26, cited in both *Soke* and *Newton*, was amended and recodified as R.C. 2152.12 by 2000 S 179, § 3, eff. 1-1-02.

Derek recognizes that the Second District Court of Appeals has reached a different conclusion on whether a juvenile defendant can waive the amenability hearing. *See State v. Brown*, 2d Dist. No. 2005-CA-96, 2006-Ohio-4393 ¶¶ 13-14. However, the Second District's decision hinges on a misapplication of Juvenile Rule 3. Juvenile Rule 3 does not apply because the amenability hearing is a *duty* of the juvenile court and not exclusively “a right of the child.” Juv. R. 3. In other words, the *Brown* court ignores the critical distinction between the rights of the child and a statutory prerequisite to transfer of jurisdiction. Indeed, as discussed above, although the juvenile transfer statute and Juv. R. 30 permit waiver of the child's right to a psychological exam, both the rule and statute state that the juvenile court has an affirmative duty to conduct the amenability hearing. R.C. 2152.12(B)(3); Juv. R. 30(C). Accordingly, *Brown* misses the issue and reaches the wrong conclusion regarding waiver.⁴

What *Brown* fails to recognize in citing Juv. R. 3 is that the amenability hearing is the responsibility of the juvenile court in its role as *parens patriae*. It cannot be waived by the child because it is a duty imposed upon the juvenile court by statute and rule; it is not just a right of the child. This Court should adopt Derek's first proposition of law: the R.C. 2152.12(B)(3) amenability hearing cannot be waived.

⁴ Moreover, after finding that it is possible to waive the amenability hearing, the *Brown* court *reversed* on the grounds that an incomplete record could not establish a knowing, voluntary, and intelligent waiver. *Brown*, 2006-Ohio-4393 ¶¶ 12-14. In *Brown*, the Second District considered an incomplete juvenile court record consisting of conclusory journal entry stating that the youth waived the probable cause and amenability hearings. *Id.* ¶ 12. Thus, as discussed below, regardless of the viability of the *Brown* holding *vis a vis* Derek's first proposition of law, *Brown* ultimately supports Derek's second proposition of law—i.e., it stands for the proposition that the juvenile court must take the necessary procedural steps to ensure that a juvenile's waiver of an amenability hearing is knowing, voluntary, and intelligent.

C. The amenability hearing, a prerequisite to discretionary transfer of jurisdiction, is a jurisdictional issue that is not subject to waiver.

Ultimately, as is concisely stated in *Newton*, the amenability hearing is a *mandatory* prerequisite to discretionary transfer of jurisdiction. This Court has also consistently acknowledged that discretionary transfer is a *jurisdictional* issue. See *State v. Wilson*, 73 Ohio St.3d 40, 652 N.E.2d 196 (1995). In *Wilson*, this Court held that “absent a proper bindover procedure pursuant to R.C. 2151.26, the juvenile court has the exclusive subject matter jurisdiction over any case concerning a child who is alleged to be a delinquent.” *Id.* at 44; see also *State v. Golphin*, 81 Ohio St.3d 543, 1998-Ohio-336, 692 N.E.2d 608 (citing *Wilson* for the proposition that transfer is a jurisdictional issue); *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 757 N.E.2d 1153 (2001) (holding that the allegation of an improper bindover proceeding raises a valid habeas claim and citing *Wilson* for the principle that, “[a]bsent a proper bindover procedure * * * the jurisdiction of a juvenile court is exclusive and cannot be waived”).

For example, in *Wilson*, this Court analyzed waiver in a case in which the juvenile defendant never appeared in juvenile court because of the mistaken belief that he was an adult. *Wilson* at 44. He was tried and convicted in adult court without ever raising the issue of jurisdiction. *Id.* Nonetheless, this Court held that “the exclusive subject matter jurisdiction of the juvenile court cannot be waived.” *Id.* In other words, a child cannot waive the jurisdiction of the juvenile court and choose to be prosecuted in adult court. *Id.*

The Ohio General Assembly enacted a statutory scheme for the courts to apply in determining whether the juvenile court or adult court has jurisdiction over a child-defendant. Thus, by statute, the jurisdiction of the juvenile court is a threshold issue that cannot be waived; it is not up to the parties to determine which court has jurisdiction. *Id.*; see also *Gonzalez v. Tafoya*, 515 F.3d 1097, 1112 (10th Cir. 2008) (discussing amenability and juvenile transfer as a

jurisdictional issue). Because an amenability hearing is a statutory prerequisite to discretionary transfer, and a duty of the court, it is itself jurisdictional and cannot be waived.

D. Prohibiting waiver of the amenability hearing is sound policy that properly requires the juvenile court to discharge its duty to act as *parens patriae*.

Finally, as a policy matter, prohibiting waiver is supported by the fundamental difference between jurisdiction over juvenile and adult defendants. The task of the adult court is to administer justice in society, in light of all of the rights and social responsibilities of adulthood. Juvenile courts must focus on rehabilitation, balancing society's interest in rehabilitating youthful offenders with the constant need to maintain safety. *See generally In re C.S.*, 115 Ohio St.3d 267; *see also* R.C. 2152.01(A) (stating generally the purposes of the juvenile court system). The R.C. 2152.12(B) scheme for determining jurisdiction is designed to facilitate the juvenile court's role "as *parens patriae* and the vision that the courts would protect the wayward child from 'evil influences,' 'save' him from criminal prosecution, and provide social and rehabilitative services." *In re C.S.* at 273. Hence, the Ohio General Assembly made transfer a jurisdictional issue and required juvenile courts to conduct an amenability hearing so that the juvenile court may determine that rehabilitation as a child is appropriate even if the child is willing to stand trial in adult court. *See Wilson*, 73 Ohio St.3d at 40.

For all of the foregoing reasons, Derek urges this Court to adopt his first proposition of law and hold that the R.C. 2152.12(B)(3) amenability hearing cannot be waived.

PROPOSITION OF LAW II: *Waiver of the R.C. 2152.12(B)(3) amenability hearing before the juvenile court is not valid unless it is expressly stated on the record by the juvenile through his or her counsel, and the trial court must determine through a colloquy with the juvenile that the waiver is voluntarily, knowingly, and intelligently made.*

Even if the amenability hearing is subject to waiver, Derek did not waive it here. Nor did not juvenile court discharge its duty to ensure that any waiver is valid. In sum, there is no support for the Eighth District's unprecedented holding that a child can implicitly waive an amenability hearing.

The Eighth District's finding of waiver is not supported by the record. The record consists of a sidebar conference that was not transcribed, after which the juvenile court: (1) noted that an amenability hearing had occurred in a pending case and (2) concluded that the finding of non-amenability in the pending case rendered an amenability hearing unnecessary in this case. (Juv. Tr. 29-31.) Thus, the juvenile court never proceeded under a waiver theory, but rather concluded that waiver was not necessary. Nonetheless, the Eight District specifically found waiver, apparently adopting a concept of implied waiver under which the juvenile court can forgo an amenability hearing if the juvenile has previously been found not amenable to rehabilitation within the juvenile justice system.

A. The Opinion Below erroneously found that Derek waived his right to an amenability hearing.

The record of juvenile proceedings establishes that Derek's counsel did not expressly indicate to the juvenile court that his client would waive the amenability hearing. (Juv. Tr. 29-31.) Indeed, the only person who uttered the word "waiver" on the record was the assistant prosecutor, who was dismissive of waiver stating: "I don't even know that we need to waive amenability." (Juv. Tr. 29-31.)

Consequently, Derek submits that, even if this Court does not adopt his first proposition of law, he should prevail on his second proposition of law because the record does not support a knowing, voluntary, and intelligent waiver of the right to an amenability hearing. *See Brown*, 2006-Ohio-4393 ¶ 14 (holding that the record did not support a knowing, voluntary, and intelligent waiver). Instead, the Eighth District's waiver analysis unconstitutionally dilutes the waiver standard by inferring waiver from silence.

It is well-established that waiver is the "intentional relinquishment or abandonment of a known right." *State v. Foster*, 109 Ohio St.3d 1, 11, 2006-Ohio-856, 845 N.E.2d 470, ¶¶ 30-31 (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Here, the record indicates that Derek did not intentionally relinquish or abandon his right to an amenability hearing. (Juv. Tr. 29-31.) In fact, the juvenile court did not even pursue the possibility of a waiver because it erroneously believed the amenability hearing was unnecessary for other reasons. (Juv. Tr. 30-31.) On this record, the Eighth District's holding creates waiver from silence, denying Derek due process of law in violation of the Fifth and Fourteenth Amendment to the U.S. Constitution, as well as Ohio Constitution, Article I, Section 10.

As discussed above in the first proposition of law, R.C. 2152.12(B) and Juv. R. 30 expressly require an amenability hearing, followed by on-the-record findings concerning the amenability factors considered and weighed. This Court has stated that the mandatory procedures expressly required by these statutes must be followed by juvenile courts. *Golphin*, 81 Ohio St.3d at 545-46, 1998-Ohio-336, 692 N.E.2d 608. While both the statute and the rule provide for an amenability hearing, neither provides for waiver of the hearing (let alone the implicit waiver applied in this case). This alone strongly supports a rule of law clarifying that, at

least, any waiver of an amenability hearing must be expressly stated on the record by the juvenile with counsel.

Furthermore, as discussed above, the policy considerations at the heart of the jurisdiction of juvenile courts favor, at least, an express waiver of the amenability hearing, with permission of the court. *See generally In re C.S.*, 115 Ohio St.3d 267; Juv. R. 3. In finding that waiver of counsel is permissible in a juvenile delinquency proceeding, this Court reiterated the importance of the juvenile court's role as *parens patriae*, and its duty to ensure that the waiver is knowing, voluntary, and intelligent. *In re C.S.*, at 281-86. This Court held that, "[i]n cases such as this one, in which a juvenile is charged with a serious offense, the waiver of the right to counsel must be made in open court, recorded, and in writing." *Id.* at 284. Again, the amenability hearing is the crossroads of the juvenile and adult justice system. It is the gateway to prosecution as an adult and the possibility of a permanent criminal record. Like the right to counsel in delinquency proceedings, the right to an amenability hearing is crucial to achieving the goals of the juvenile justice system. As such, the juvenile court has a duty to ensure that any waiver of an amenability hearing is undertaken with the effective assistance of counsel and ultimately reflects the juvenile's knowing, voluntary, intelligent act.

The Sixth District based its decision to reverse and remand in *Brown* on this reasoning. *Brown*, 2006-Ohio-4393. In *Brown*, the record consisted of journal entries stating that the "youth waiv[ed] probable cause and bindover hearing[.]" and "the court further finds that the youth further waived the probable cause hearing and the bindover/amenability hearing * * *." *Id.* ¶ 12. Although the *Brown* court concluded that it is possible to waive an amenability hearing, it reversed the juvenile court's transfer order on the grounds that the record did not reflect a knowing, voluntary, and intelligent waiver. *Id.* ¶ 14.

Here, the juvenile court made no attempt to ensure a valid waiver. It mistakenly believed an amenability hearing was unnecessary and proceeded to transfer the case based on that misunderstanding of the law. The Eighth District excused the juvenile court's misunderstanding of the law by finding that Derek waived the right to an amenability hearing, even though Derek never spoke and his counsel never said that Derek wished to waive the hearing. (Juv. Tr. 29-31.) Whether it is called waiver (as in the Opinion Below) or implied waiver, what happened here is in stark contrast to the thorough and methodical approach this Court has insisted upon in finding that a juvenile has waived an important right. *See In re C.S.* at 281-86.

Accordingly, this Court should adopt the second proposition of law to clarify that juvenile courts may not rely upon an implicit waiver of the amenability hearing expressly required under R.C. 2152.12(B) and Juv. R. 30.

B. The juvenile court's stated basis for forgoing the amenability hearing is contrary to law.

Derek understands that this Court may affirm the lower court's decision on any legitimate basis that applies under the circumstances. *Agee v. Russell*, 92 Ohio St.3d 540, 543, 751 N.E.2d 1043 (2001). Accordingly, it is necessary to address whether the juvenile court's stated basis for not conducting an amenability hearing was contrary to law. The juvenile court's decision to forgo an amenability hearing was *not* based on waiver. Instead, the juvenile court decided not to hold an amenability hearing because Derek had previously been found non-amenable in a pending case. (Juv. Tr. 29-31.) The record shows that defense counsel asked to approach the bench in response to the assistant prosecutor's suggestion that waiver of the amenability hearing was *not* necessary.

[ASSISTANT PROSECUTOR]: Your Honor, I believe we've had some preliminary discussions about waiving amenability. It has already been found. I don't even know that we need to waive amenability.

[DEFENSE COUNSEL]: If we could approach, your Honor.

THE COURT: Yes. Okay.

(Discussion held off the record.)

(Juv. Tr. 30.) Immediately thereafter, the juvenile court explained that it would not conduct an amenability hearing in this case but would, instead, transfer the case based on the amenability hearing conducted in the pending case. (Juv. Tr. 30-31.) Thus, the juvenile court based its decision not to conduct an amenability hearing on a rule of law; namely, that an amenability hearing is not necessary when jurisdiction over the child has been transferred to adult court after an amenability hearing in another case.

This rule conflicts with applicable law for two reasons:

1. An amenability hearing is mandatory pursuant to R.C. 2152.12(B) and there is no exception when an amenability hearing has been conducted in another pending case.

First, the rule implicitly relied upon by the juvenile court is inconsistent with the express requirements of the applicable statute. R.C. 2152.12(B) states that the juvenile court may transfer the case to adult court only if it conducts a hearing and finds that “[t]he child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions.” R.C. 2152.12(B)(3).

While the statute says nothing about dispensing with the amenability hearing in situations where the child has never been convicted in adult court, it does provide for mandatory transfer when a child *has previously been convicted* in adult court (under certain circumstances). See R.C. 2152.02(C); R.C. 2152.12(A)(2)(a). In other words, the statute requires a *conviction* in the prior case. *Id.* It is the outcome of the previous case that matters—the juvenile is *not* subject to mandatory transfer simply because a case was previously transferred to adult court.

The statutory distinction between a case that is transferred to adult court and a transferred case that results in a conviction is particularly noteworthy in Derek’s case. Here, the juvenile court referenced a prior case in which it had conducted an amenability hearing and then transferred jurisdiction over this case to adult court. (Juv. Tr. 29.) At the time of the juvenile court hearing in this case, however, the prior case was still pending. (Juv. Tr. 29-30.) Moreover, that case was ultimately dismissed by the adult court pursuant to Crim. R. 29. (See Cuyahoga County Court of Common Pleas, General Division Case No. CR-10-535961, journal entry dated October 25, 2010.)

In sum, the juvenile court’s stated rationale for transferring this case is inconsistent with the juvenile transfer statutes.

2. The General Assembly has expressly rejected the juvenile court’s rule.

Second, the Ohio General Assembly has expressly overruled a prior holding of this Court which had indicated that transfer of jurisdiction in a previous case would negate the juvenile court’s duty to conduct an amenability hearing in a subsequent case. See 1995 H.B. 1, eff. 1-1-96, legislative notes. Specifically, in the legislative notes to the 1995 amendments to the discretionary bindover statute,⁵ the General Assembly stated as follows:

The General Assembly hereby declares that its purpose in enacting the language in division (B) of section 2151.011 and divisions (B) and (C) of section 2151.26 of the Revised Code that exists on and after the effective date of this act is to overrule the holding in *State v. Adams* (1982), 69 Ohio St.2d 120, regarding the effect of binding a child over for trial as an adult. *Id.*

In *Adams*—the case overruled by statute—this Court had held that “[o]nce a juvenile is bound over in any county in Ohio pursuant to R.C. 2151.26 and Juv. R. 30, that juvenile is bound

⁵ As noted above, the statute governing discretionary transfer was formerly at R.C. 2151.26. R.C. 2151.26 was amended and recodified as R.C. 2152.12 by 2000 S 179, § 3, eff. 1-1-02.

over for all felonies committed in other counties of this state, as well as for future felonies he may commit.” *State v. Adams*, 69 Ohio St.2d 120, 431 N.E.2d 326 (1982), syllabus ¶ 1. In other words, under *Adams*, once jurisdiction has been transferred in one case, jurisdiction over the child is automatic for all future felonies. *Id.* The 1995 amendments to former R.C. 2151.26(B) and (C), however, clarified the circumstances in which transfer is mandatory. In particular, as amended in 1995, R.C. 2151.26(B)(1) stated that a child who pleaded guilty or was convicted in adult court after transfer of jurisdiction is subject to mandatory transfer for subsequent charges. The amendment clarified that automatic transfer of jurisdiction must be premised upon a prior conviction, not just a prior transfer. See *State v. Goins*, 7th Dist. No. 02 CA 68, 2005-Ohio-1439, 2005 WL 704865, ¶¶ 28-33 (explaining that the Ohio General Assembly intended to overrule paragraph 1 of the syllabus in *Adams* with the amendments to the transfer statute in 1995 H.B. 1, eff. 1-1-96), *rev’d in part on other grounds*, *In re Ohio Criminal Sentencing Statute Cases*, 109 Ohio St.3d 313, 847 N.E.2d 1174. Thus, the Ohio General Assembly has expressly overruled *Adams* on the point of law the juvenile court apparently relied upon in forgoing the amenability hearing.

Accordingly, the juvenile court erred when it transferred this case to adult court based solely on the fact that it had conducted an amenability hearing in a separate pending case against Derek. No applicable law supports the juvenile court’s stated rationale for forgoing an amenability hearing. Therefore, the juvenile court’s decision could not have been upheld on the grounds stated at the May 10, 2010 hearing.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Derek Warner respectfully requests that this Court adopt his first proposition of law and hold that the R.C. 2152.12(B)(3) amenability hearing cannot be waived. In the alternative, Derek asks this Court to adopt his second proposition of law.

Respectfully Submitted,


NATHANIEL J. MCDONALD, ESQ.

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant Derek Warner's Merit Brief was hand-delivered upon William D. Mason and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 24th day of February, 2012.


NATHANIEL J. MCDONALD, ESQ.
Assistant Public Defender

APPENDIX

IN THE SUPREME COURT OF OHIO

11-1677

STATE OF OHIO

Plaintiff-Appellee

vs

DEREK WARNER

Defendant-Appellant

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District CA 95750

NOTICE OF APPEAL OF APPELLANT DEREK WARNER

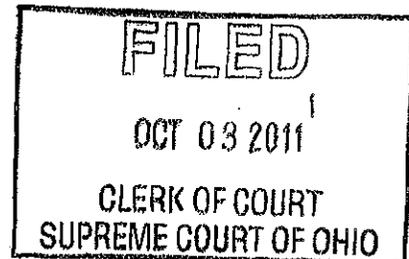
COUNSEL FOR APPELLEE:

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Cleveland, OH 44113
(216) 443-7730

COUNSEL FOR APPELLANT:

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender

BY: NATHANIEL J. MCDONALD
0080867
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
(216) 443-7583



NOTICE OF APPEAL OF APPELLANT

Appellant DEREK WARNER hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District opinion, entered in Court of Appeals case No. 95750 on August 18, 2011.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,


NATHANIEL J. MCDONALD, ESQ. 0052997
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this __ day of October, 2011.


NATHANIEL J. MCDONALD, ESQ. 0052997
Counsel for Appellant



64714363

11-1677

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO
Plaintiff

DEREK WARNER
Defendant

Case No: CR-10-539458-A

Judge: DAVID T MATIA

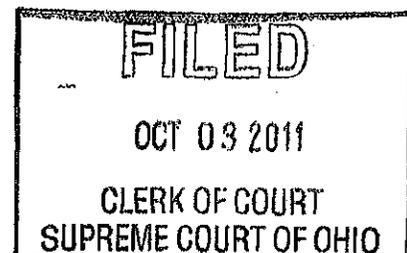
INDICT:2911.12 BURGLARY
2913.02 THEFT; AGGRAVATED THEFT
2909.05 VANDALISM
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL ANDUENA DOBROSHI PRESENT.
COURT REPORTER SHEILA WALTERS PRESENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF BURGLARY 2911.12 A(2) F2 AS CHARGED IN COUNT(S) 1 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF THEFT; AGGRAVATED THEFT 2913.02 A(1) F5 AS CHARGED IN COUNT(S) 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF VANDALISM 2909.05 A F5 AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF CRIMINAL DAMAGING 2909.06 A(1) M2 AS CHARGED IN COUNT(S) 4 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF BRIBERY 2921.02 C AS CHARGED IN COUNT(S) 5, 6 OF THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT, PROSECUTOR ADDRESSES THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 6 YEAR(S). 6 YEARS ON COUNT 1, 12 MONTHS ON COUNTS 2 AND 3. ALL TIME TO RUN CONCURRENT TO EACH OTHER. POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 3 YEARS MANDATORY FOR THE ABOVE FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF POST RELEASE CONTROL SUPERVISION IS IMPOSED FOLLOWING HIS/HER RELEASE FROM PRISON AND IF HE/SHE VIOLATES THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE OFFENDER.
JAIL CREDIT DAYS TO DATE TO BE CALCULATED BY THE SHERIFF.
AS TO COUNT 4, DEFENDANT IS SENTENCED TO COUNTY JAIL FOR A TERM OF 90 DAYS, TO RUN CONCURRENT WITH ALL OTHER COUNTS.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS MICHAEL P MALONEY AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
DEFENDANT IS TO PAY COURT COSTS.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT DEREK WARNER, DOB: 10/22/1992, GENDER: MALE, RACE: BLACK.

SENT
08/24/2010

RECEIVED FOR FILING
08/26/2010 07:51:07
By: CLIDB
GERALD E. FUERST, CLERK





64714363

08/24/2010
CPEDB 08/25/2010 09:56:44

David J. Kroll

Judge Signature

08/25/2010

SENT
08/24/2010

RECEIVED FOR FILING
08/26/2010 07:51:07
By: CL1DB
GERALD E. FUERST, CLERK



COURT OF COMMON PLEAS, JUVENILE COURT DIV
CUYAHOGA COUNTY, OHIO

A-5

CASE NO: DL09121602

JUDGE: PATRICK F. CORRIGAN

JOURNAL ENTRY
DISCRETIONARY TRANSFER

537503

IN THE MATTER OF: DEREK A. WARNER, JR.

FILED
MAY 14 2010
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

This matter came on for hearing this 10th day of May, 2010 before Judge Patrick F. Corrigan.

The Court finds that notice requirements have been met.

The following persons were present for the hearing: Derek Warner, Jr. Child, Carolyn Harris, Guardian; Attorney Thomas Kozel, Counsel for Derek A. Warner, Jr. and Assistant County Prosecutor Ms. Foy.

Whereupon Both parties stipulate to the child's date-of-birth being October 22, 1992.

The Court explained legal rights, procedures, and consequences of the hearing pursuant to Ohio Juvenile Rule 29 and R. C. 2152.12. The Court further finds that the Child is represented by Counsel.

Upon the conclusion of all evidence presented relating to the matter herein and the arguments of counsel, the Court finds that the child was 17 years of age at the time of the conduct charged and that there is probable cause to believe that the child committed an act that would be the crime of Burglary, in violation of Section 2911.12(A)(2) of the Revised Code and classified as a felony of the second degree if committed by an adult.

IT IS THEREFORE ORDERED, pursuant to R. C. 2152.12(B), that the matter herein is transferred to the General Trial Division of the Cuyahoga County Common Pleas Court for further proceedings pursuant to law.

IT IS FURTHER ORDERED that the Child is remanded to the County Jail for Detention pending further proceedings. IT IS FURTHER ORDERED that the Child herein may be released pending Trial upon entering into a recognizance bond with good and sufficient surety in the sum of \$50, 000.00 to assure his appearance before the said General Trial Division, at such time as may be fixed by the Court. IT IS FURTHER ORDERED that should such recognizance bond be filed, it is to be transferred to the said General Trial Division.

IT IS FURTHER ORDERED that Child shall have NO CONTACT with any Witness or victim in this case.

Judge Patrick F. Corrigan
May 11, 2010

1688AF

Notice to the Parties: Pursuant to Rule 34(J) of the Rules of Juvenile Procedure and Rules 3 and 4 of the Ohio Rules of Appellate Procedure, an appeal of the order herein may be taken to the Eighth District Court of Appeals by filing a Notice of Appeal with the Clerk of the trial court within thirty days of the entry of the judgment or final

order. Failure to file a timely Notice of Appeal may result in the dismissal of the appeal.

A-6

**Filed with the clerk and journalized by Cuyahoga County Juvenile Court Clerks Office,
Volume 28, Page 5328, May 12, 2010, cjyet**

**COURT OF COMMON PLEAS
JUVENILE COURT DIVISION
CUYAHOGA COUNTY, OHIO**

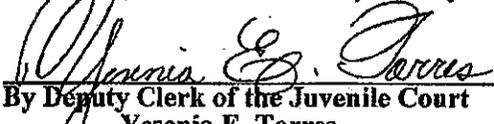
IN THE MATTER OF: Derek Warner

CASE NO: DL09121602

CERTIFIED COPY

I, Thomas O'Malley, Administrative Judge and Ex Officio Clerk of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, within and for said county, and in whose custody the files, journals and records of said court are required to be kept, hereby certify that the attached is taken from the file in case number DL09121602 of the proceedings of the Juvenile Court of Cuyahoga County, within and for said Cuyahoga County and that the attached copy/copies has/have been compared by me with the original entry(s) in said file, and that the same are true and correct copies thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cleveland, Ohio, this 12th day of May 2010.


By Deputy Clerk of the Juvenile Court
Yesenia E. Torres

AUG 18 2011

Judge Matia

A-8

Court of Appeals of O

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA



JOURNAL ENTRY AND OPINION
No. 95750

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FILED

2011 AUG 22 A 10:03

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEREK WARNER

A592912

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-539458

BEFORE: Boyle, P.J., S. Gallagher, J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: August 18, 2011



MARY J. BOYLE, P.J.:

Defendant-appellant, Derek Warner, appeals his conviction, arguing that there was insufficient evidence and that his conviction was against the manifest weight of the evidence. He also argues that the trial court erred in admitting other acts evidence and further challenges the juvenile court's decision binding him over to common pleas court. We affirm.

Procedural History and Facts

Warner, who was 17 years of age at the time of the offenses, was charged in juvenile court but subsequently bound over to common pleas court. The grand jury then returned a six-count indictment against Warner for the following charges: (1) burglary, in violation of R.C. 2911.12(A)(2), a second degree felony; (2) theft, in violation of R.C. 2913.02(A)(1), a fifth degree felony; (3) vandalism, in violation of R.C. 2909.05, a fifth degree felony; (4) criminal damaging, in violation of R.C. 2909.06, a misdemeanor of the second degree; and (5) two counts of bribery, in violation of R.C. 2921.02(C), third degree felonies. Warner pleaded not guilty to the charges, and the matter proceeded to a jury trial. The following evidence was presented:

On November 18, 2009, around 8:30 in the morning, two individuals broke into a home located on Kildeer Avenue in Cleveland. Shanay Ball was

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downstairs in the basement working on her computer at the time of the break-in. Ball testified that she heard a loud bang and went upstairs to investigate. The perpetrators had broken into the side door of the house, leaving it open and blocking the basement door from fully opening. Ball "started banging on the door to get out" and apparently startled the two perpetrators, who dropped the flat screen television that was located in the living room and ran out of the house. Through the six-to-eight-inch opening in the doorway, Ball, however, was able to see the two perpetrators, whom she recognized from the neighborhood. Although she knew the two perpetrators by their "street names"— "Li'D" and "Mookie," she did not know their proper names in order to tell the police.

The day following the incident, on November 19, Shanay positively identified Warner in a photo array as one of the perpetrators. She likewise identified Warner at trial.

The state also offered the testimony of Shanay's younger sister, Shaneice Ball (age 17), and Shanay's niece, Tahjay King (age 15), both of whom lived at the Kildeer residence and were friends with Warner. Both girls testified that Warner admitted to being involved in the burglary, albeit, solely as a "lookout," and had attempted to apologize following the incident.

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-3-

Shaneice further testified that Warner gave her \$100, which she perceived to be part of his apology. Tahjay corroborated Shaneice's testimony, indicating that Warner had told her that he gave Shaneice \$100 and further told her that he wanted to give money to Tahjay's mother as well. According to Tahjay, Warner also instructed Tahjay to tell her mother not to appear in court because the burglary was not his fault. He stated that he would never have pursued the burglary if he knew someone was going to be home.

Through the testimony of the city of Cleveland and the city of Euclid police detectives and police officers, the state further established that Warner was spotted on November 18, 2009, hours after the burglary, driving a minivan that had been reported as being involved in a Cleveland burglary. Upon being flagged to pull over, Warner fled the vehicle and was later found hiding in a Euclid resident's garage. Upon Warner's being arrested, the police confiscated his cell phone. The police subsequently obtained a search warrant to go through the cell phone and retrieved photographs and texts sent from the phone, which included a picture of Warner with stacks of cash and the text "Lil'D."

Warner offered one witness in support of his defense—Cleveland police officer Francisco Cruz. Cruz testified that he was the first officer to respond to the scene of the burglary on Kildeer. According to Cruz, Shanay told him that two young, light-skinned males burglarized her home but did not indicate that she knew the two perpetrators.

The jury found Warner not guilty of the two counts of bribery but guilty of the remaining charges. The trial court subsequently sentenced Warner to six years in prison and notified him that he would be subject to a mandatory three-year period of postrelease control upon completion of his sentence.

Warner appeals, raising the following four assignments of error:

“[I.] The trial court erred in denying appellant’s criminal rule 29 motion for acquittal where there was insufficient evidence to prove identification of appellant.

“[II.] The appellant’s conviction for burglary under O.R.C. 2911.12(A)(2) was against the manifest weight of the evidence.

“[III.] The trial court erred in admitting prejudicial other acts and character type evidence.

“[IV.] The juvenile court erred in finding that appellant was not amenable to care and rehabilitation in the juvenile justice system, improperly

transferring/binding over appellant to the criminal division, common pleas court.”

Sufficiency and Weight of the Evidence

In his first assignment of error, Warner contends the state's evidence was not sufficient to convict him of any of the offenses because the identification evidence tying Warner to the offenses was simply unreliable. In his second assignment of error, he maintains that the jury lost its way in convicting him of the charges because “his identity was not established.” We disagree.

When an appellate court reviews a record upon a sufficiency challenge, “the relevant inquiry is whether, after viewing the evidence in a 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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In reviewing a claim challenging the manifest weight of the evidence, “[t]he question to be answered is whether there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we

must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at ¶ 81.

The gravamen of Warner's first two assignments of error is that the state failed to present reliable identification evidence to establish that he was one of the perpetrators. Specifically, he contends that the victim had insufficient time and a limited view of the perpetrators to make a reliable identification and that the victim failed to provide the names of either perpetrator to the responding officer on the scene, despite her knowing Warner and the other alleged burglar. We find Warner's argument, however, misplaced. Here, the state presented the testimony of Shanay, who positively identified Warner as one of the perpetrators. Her testimony alone was enough to establish identification to survive a Crim.R. 29 motion for acquittal.

To the extent that Warner attacks Shanay's credibility in identifying him as one of the perpetrators, the jury heard and considered these arguments at trial. Notably, contrary to the defense's sole witness at trial,

Shanay testified that she did tell the street names of the perpetrators to the reporting officer on the scene. We cannot say that the jury "lost its way" simply because it found Shanay's testimony credible. Moreover, aside from Shanay's testimony, the state offered testimony of two other witnesses who established that Warner admitted to being involved in the burglary. Based on the record before us, again, we cannot say that this is the exceptional case where the jury clearly lost its way.

The first two assignments of error are overruled.

Other Acts Evidence

In his third assignment of error, Warner argues that the trial court erred in allowing the admission of text messages and photos taken from his cell phone. He contends that the evidence served no purpose other than to attack his character because the texts "strongly implied gangster or criminal conduct."

The standard of review regarding the admissibility of any such evidence is abuse of discretion. *State v. Sanford*, 8th Dist. No. 84478, 2005-Ohio-1009, ¶10, citing *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167.

Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The listed exceptions within Evid.R. 404(B) are not exclusive, and other acts evidence not fitting within the enumerated categories may be admissible so long as the evidence is admitted for any proper purpose other than proving the defendant's propensity to act and conformity with a particular trait of his character. *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190.

Additionally, before allowing the admission of any relevant evidence, a trial court must comply with Evid.R. 403(A), which expressly requires the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Warner specifically contends that the trial court should not have allowed the admission of the photographs retrieved from his cell phone wherein he is holding stacks of money, and there are various phrases stated below the photographs, including "Money TalkZ" and "Li'D." The trial court allowed the admission of these exhibits, finding that they were admissible for the purpose of proving Warner's identity, i.e., that Warner was Li'D. The

trial court further agreed with the state that the stacks of money were relevant and admissible for showing that Warner, despite being only 17 years of age, had the means to bribe the victims. Under these circumstances, we fail to find an abuse of discretion.

Even assuming that the trial court should have excluded the photographs and texts retrieved from the telephone, we find that their admission was harmless error. "An error in the admission or exclusion of evidence is properly considered harmless error if it does not affect a substantial right of the accused." *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶80, citing Crim.R. 52(A). As discussed above, aside from the eyewitness identification testimony wherein Warner was positively identified by someone who knew him, the state further offered Warner's own admissions made to other witnesses wherein he expressly acknowledged being involved in the burglary. Therefore, even if these exhibits had been excluded, we find that the record contains substantial evidence to support the convictions.

The third assignment of error is overruled.

Bindover Proceedings

In his final assignment of error, Warner argues that the juvenile court erred in determining that he was not amenable to care and rehabilitation in the juvenile justice system and therefore improperly transferred him over to common pleas court to be tried as an adult. We disagree.

A juvenile court's relinquishment of jurisdiction in a discretionary transfer proceeding pursuant to R.C. 2152.12(B) is reviewed under an abuse of discretion standard. *State v. Flagg*, Cuyahoga App. Nos. 93248 and 93249, 2010-Ohio-4247, ¶26, citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629.

"In a discretionary transfer proceeding, the juvenile court must first determine the age of the juvenile and whether probable cause exists to believe that he committed the alleged act. R.C. 2152.12(B)(1) and (2). The court must then determine whether the juvenile is amenable to rehabilitation within the juvenile justice system and whether the juvenile should be subject to adult sanctions in order to protect the community. R.C. 2152.12(B)(3). See, also *Juv.R. 30.*" *State v. Grimes*, 2d Dist. No. 2009-CA-30, 2010-Ohio-5385, ¶15.

Here, the record reveals that the juvenile court first held a probable cause hearing but then never held an amenability hearing. We find, however,

that Warner, through his counsel, waived the amenability hearing. See *State v. Soke* (July 15, 1993), 8th Dist. No. 62908 (recognizing that the amenability hearing may be waived). We therefore cannot say that the juvenile court abused its discretion in transferring the case to the common pleas division.

The final assignment of error is overruled.

Judgment affirmed.

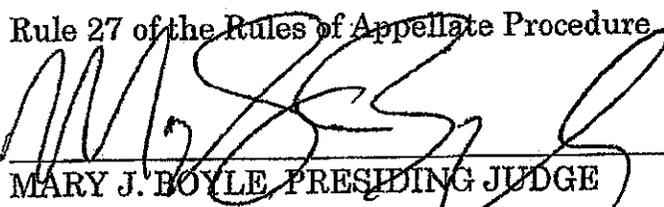
It is ordered that appellee recover of appellant costs herein taxed.

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 to carry this judgment into execution. The defendant's conviction having been affirmed, any bail 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



MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
EILEEN A. GALLAGHER, J., CONCUR

1.42 Common, technical or particular terms.

A-21

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

2151.07 Powers and jurisdiction of juvenile court.

The juvenile court is a court of record within the court of common pleas. The juvenile court has and shall exercise the powers and jurisdiction conferred in Chapters 2151. and 2152. of the Revised Code.

Whenever the juvenile judge of the juvenile court is sick, is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, upon the request of the administrative juvenile judge, the presiding judge of the court of common pleas pursuant to division (EE) of section 2301.03 of the Revised Code shall assign a judge of any division of the court of common pleas of the county to act in the juvenile judge's place or in conjunction with the juvenile judge. If no judge of the court of common pleas is available for that purpose, the chief justice of the supreme court shall assign a judge of the court of common pleas, a juvenile judge, or a probate judge from a different county to act in the place of that juvenile judge or in conjunction with that juvenile judge. The assigned judge shall receive the compensation and expenses for so serving that is provided by law for judges assigned to hold court in courts of common pleas.

Effective Date: 11-13-2003; 2007 HB155 12-21-2007

R.C. § 2151.26
BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXI COURTS--PROBATE--JUVENILE
CHAPTER 2151 JUVENILE COURT
PRACTICE AND PROCEDURE

2151.26 RELINQUISHMENT OF JURISDICTION FOR PURPOSE OF CRIMINAL PROSECUTION

<Note: See also following version of this section, eff. 7-1-96>

(A) As used in this section:

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

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

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

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

(a) A violation of section 2903.03, 2905.01, 2907.02, 2907.12, 2909.02, 2911.01, or 2911.11 of the Revised Code;

(b) A violation of section 2903.04 of the Revised Code that is an aggravated felony of the first degree.

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

(B) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be an offense if committed by an adult, the court at a hearing shall transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense if the child was fourteen years of age or older at the time of the act charged, if there is probable cause to believe that the child committed the act charged, and if one or more of the following applies to the child:

(1) A complaint previously was filed in a juvenile court alleging that the child was a delinquent child for committing an act that would be an offense if committed by an adult, the juvenile court transferred the case pursuant to division (B) or (C) of this section for criminal prosecution to the appropriate court having jurisdiction of the offense, and the child pleaded guilty to or was convicted of a felony in that case.

(2) The child is domiciled in another state, and, if the act charged had been committed in that other state, the child would be subject to criminal prosecution as an adult under the law of that other state without the need for a transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court.

(3) The child is charged with an act that is a category one offense, and either or both of the following apply to the child:

(a) The child was sixteen years of age or older at the time of the act charged.

(b) The child previously was adjudicated a delinquent child for committing an act that is a category one offense or a category two offense and was committed to the legal custody of the department of youth services upon the basis of that adjudication.

(4) The child is charged with an act, other than a violation of section 2905.01 of the Revised Code, that is a category two offense and was sixteen years of age or older at the time of the commission of the act charged, and either or both of the following apply to the child:

(a) The child previously was adjudicated a delinquent child for committing an act that is a category one offense or a category two offense and was committed to the legal custody of the department of youth services upon the basis of that adjudication.

(b) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.

(C)(1) Except as provided in division (B) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after considering the factors specified in division (C)(2) of this section and after making all of the following determinations:

(a) The child was fourteen years of age or older at the time of the act charged.

(b) There is probable cause to believe that the child committed the act charged.

(c) After an investigation, including a mental examination of the child made by a public or private professional, and after consideration of all relevant information and factors, including any factor required to be considered under division (C)(2) of this section, that there are reasonable grounds to believe that both of the following criteria are satisfied:

(i) The child is not amenable to care or rehabilitation or further care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children.

(ii) The safety of the community may require that the child be placed under legal restraint, including, if necessary, for the period extending beyond the child's majority.

(2) When determining whether to order the transfer of a case for criminal prosecution to the appropriate court having jurisdiction of the offense pursuant to division (C)(1) of this section, the court shall consider all of the following factors in favor of ordering the transfer of the case:

(a) A victim of the act charged was five years of age or younger, regardless of whether the child who is alleged to have committed that act knew the age of that victim;

(b) A victim of the act charged sustained physical harm to the victim's person during the commission of or otherwise as a result of the act charged.

(c) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged, other than a violation of section 2923.12 of the Revised Code.

(d) The child who is alleged to have committed the act charged has a history indicating a failure to be rehabilitated following one or more commitments pursuant to division (A)(3), (4), (5), (6), or (7) of section 2151.355 of the Revised Code.

(e) A victim of the act charged was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act charged, regardless of whether the child who is alleged to have committed that act knew the age of that victim.

(3) A child whose case is being considered for possible transfer for criminal prosecution to the appropriate court having jurisdiction of the offense under division (C)(1) of this section may waive the examination required by division (C)(1)(c) of this section, if the court finds the waiver is competently and intelligently made. Refusal to submit to a mental and physical examination by the child constitutes a waiver of the examination.

(D) The court shall give notice in writing of the time, place, and purpose of any hearing held pursuant to division (B) or (C) of this section to the child's parents, guardian, or other custodian and to the child's counsel at least three days prior to the hearing.

(E) No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been transferred as provided in division (B) or (C) of this section. Any prosecution that is had in a criminal court on the mistaken belief that the person who is the subject of the case was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity, and the person shall not be considered to have been in jeopardy on the offense.

(F) Upon the transfer of a case for criminal prosecution to the appropriate court having jurisdiction of the offense under division (B) or (C) of this section, the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for the child's appearance before the appropriate court for any disposition that the court is authorized to make for a similar act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint, and, upon the transfer, all further proceedings pertaining to the act charged shall be discontinued in the juvenile court, and the case then shall be within the jurisdiction of the court to which it is transferred as described in division (H) of section 2151.23 of the Revised Code.

RELATED TERMS

CREDIT(S)

(1995 H 1, eff. 1-1-96; 1991 H 27, eff. 10-10-91; 1986 H 499; 1983 S 210; 1981 H 440; 1978 S 119; 1971 S 325; 1969 H 320)

<Note: See also following version of this section, eff. 7-1-96>

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2152.01 Purpose of juvenile dispositions.

A-26

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

(B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.

(C) To the extent they do not conflict with this chapter, the provisions of Chapter 2151. of the Revised Code apply to the proceedings under this chapter.

Effective Date: 01-01-2002

2152.02 Delinquent children - juvenile traf definitions.

A-27

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 (7) 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) Except as otherwise provided in division (C)(5) of this section, 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, unless a serious youthful offender dispositional sentence is imposed on the child for that offense under division (B)(2) or (3) of section 2152.121 of the Revised Code and the adult portion of that sentence is not invoked pursuant to section 2152.14 of the Revised Code, 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, except as otherwise provided in this division, 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. If a person is so adjudicated a delinquent child or juvenile traffic offender and the court makes a disposition of the person under this chapter, at any time after the person attains eighteen years of age, the places at which the person

may be held under that disposition are not limited to places authorized
confinement of children, and the person may be confined under that di
division (F)(2) of section 2152.26 of the Revised Code, in places other than
chapter solely for confinement of children.

(7) Any person who, while eighteen years of age, violates division (A)(1) or (2) of section 2919.27 of the Revised Code by violating a protection order issued or consent agreement approved under section 2151.34 or 3113.31 of the Revised Code shall be considered a child for the purposes of that violation of section 2919.27 of the Revised Code.

(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, 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.

A-29

(L) "Economic loss" means any economic detriment suffered by a victim of 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 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 and also includes, for purposes of imposition of a mandatory serious youthful dispositional sentence under section 2152.13 of the Revised Code, a person upon whom a juvenile court is required to impose such a sentence under division (B)(3) of section 2152.121 of the Revised Code.

(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 and also includes, for purposes of imposition of a mandatory serious youthful dispositional sentence under section 2152.13 of the Revised Code, a person upon whom a juvenile court is required to impose such a sentence under division (B)(3) of section 2152.121 of the Revised Code.

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

A-30

(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.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Amended by 128th General Assembly File No. 21, HB 10, § 1, eff. 6/17/2010.

Effective Date: 01-01-2004; 06-01-2004; 05-17-2006; 08-17-2006; 2007 SB10 01-01-2008

See 128th General Assembly File No. 21, HB 10, §3.

2152.10 Mandatory and discretionary transfers.

A-31

(A) A child who is alleged to be a delinquent child is eligible for mandatory transfer and shall be transferred as provided in section 2152.12 of the Revised Code in any of the following circumstances:

(1) The child is charged with a category one offense and either of the following apply:

(a) The child was sixteen years of age or older at the time of the act charged.

(b) The child was fourteen or fifteen years of age at the time of the act charged and previously was adjudicated a delinquent child for committing an act that is a category one or category two offense and was committed to the legal custody of the department of youth services upon the basis of that adjudication.

(2) The child is charged with a category two offense, other than a violation of section 2905.01 of the Revised Code, the child was sixteen years of age or older at the time of the commission of the act charged, and either or both of the following apply:

(a) The child previously was adjudicated a delinquent child for committing an act that is a category one or a category two offense and was committed to the legal custody of the department of youth services on the basis of that adjudication.

(b) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.

(3) Division (A)(2) of section 2152.12 of the Revised Code applies.

(B) Unless the child is subject to mandatory transfer, if a child is fourteen years of age or older at the time of the act charged and if the child is charged with an act that would be a felony if committed by an adult, the child is eligible for discretionary transfer to the appropriate court for criminal prosecution. In determining whether to transfer the child for criminal prosecution, the juvenile court shall follow the procedures in section 2152.12 of the Revised Code. If the court does not transfer the child and if the court adjudicates the child to be a delinquent child for the act charged, the court shall issue an order of disposition in accordance with section 2152.11 of the Revised Code.

Effective Date: 07-05-2002

2152.12 Transfer of cases.

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(A)(1)(a) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if either of the following applies:

(i) The child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged.

(ii) The child was fourteen or fifteen years of age at the time of the act charged, section 2152.10 of the Revised Code provides that the child is eligible for mandatory transfer, and there is probable cause to believe that the child committed the act charged.

(b) After a complaint has been filed alleging that a child is a delinquent child by reason of committing a category two offense, the juvenile court at a hearing shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and either of the following applies:

(i) Division (A)(2)(a) of section 2152.10 of the Revised Code requires the mandatory transfer of the case, and there is probable cause to believe that the child committed the act charged.

(ii) Division (A)(2)(b) of section 2152.10 of the Revised Code requires the mandatory transfer of the case, and there is probable cause to believe that the child committed the act charged.

(2) The juvenile court also shall transfer a case in the circumstances described in division (C)(5) of section 2152.02 of the Revised Code or if either of the following applies:

(a) A complaint is filed against a child who is eligible for a discretionary transfer under section 2152.10 of the Revised Code and who previously was convicted of or pleaded guilty to a felony in a case that was transferred to a criminal court.

(b) A complaint is filed against a child who is domiciled in another state alleging that the child is a delinquent child for committing an act that would be a felony if committed by an adult, and, if the act charged had been committed in that other state, the child would be subject to criminal prosecution as an adult under the law of that other state without the need for a transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court.

(3) If a complaint is filed against a child alleging that the child is a delinquent child and the case is transferred pursuant to division (A)(1)(a)(i) or (A)(1)(b)(ii) of this section and if the child subsequently is convicted of or pleads guilty to an offense in that case, the sentence to be imposed or disposition to be made of the child shall be determined in accordance with section 2152.121 of the Revised Code.

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

(1) The child was fourteen years of age or older at the time of the act charged.

(2) There is probable cause to believe that the child committed the act charged.

(3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

(C) Before considering a transfer under division (B) of this section, the juvenile court shall order an investigation, including a mental examination of the child by a public or private agency or a person qualified to make the examination. The child may waive the examination required by this division if the court finds that the waiver is competently and intelligently made. Refusal to submit to a mental examination by the child constitutes a waiver of the examination.

(D) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child's relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

(E) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that

division:

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- (1) The victim induced or facilitated the act charged.
- (2) The child acted under provocation in allegedly committing the act charged.
- (3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.
- (4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.
- (5) The child previously has not been adjudicated a delinquent child.
- (6) The child is not emotionally, physically, or psychologically mature enough for the transfer.
- (7) The child has a mental illness or is a mentally retarded person.
- (8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

(F) If one or more complaints are filed alleging that a child is a delinquent child for committing two or more acts that would be offenses if committed by an adult, if a motion is made alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred for, and if a motion also is made requesting that the case or cases involving one or more of the acts charged be transferred pursuant to division (B) of this section, the juvenile court, in deciding the motions, shall proceed in the following manner:

- (1) Initially, the court shall decide the motion alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred.
- (2) If the court determines that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred, the court shall transfer the case or cases in accordance with that division. After the transfer pursuant to division (A) of this section, the court shall decide, in accordance with division (B) of this section, whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division. Notwithstanding division (B) of this section, prior to transferring a case pursuant to division (A) of this section, the court is not required to consider any factor specified in division (D) or (E) of this section or to conduct an investigation under division (C) of this section.
- (3) If the court determines that division (A) of this section does not require that the case or cases involving one or more of the acts charged be transferred, the court shall decide in accordance with division (B) of this section whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division.

(G) The court shall give notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) or (B) of this section to the child's parents, guardian, or other custodian and to the child's counsel at least three days prior to the hearing.

(H) No person, either before or after reaching eighteen years of age, shall be prosecuted for an offense committed prior to becoming eighteen years of age, unless the person transferred as provided in division (A) or (B) of this section or unless division (J) of this section applies. Any prosecution that is had in a criminal court on the mistaken belief that the person who is the subject of the case was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity, and the person shall not be considered to have been in jeopardy on the offense.

(I) Upon the transfer of a case under division (A) or (B) of this section, the juvenile court shall state the reasons for the transfer on the record, and shall order the child to enter into a recognizance with good and sufficient surety for the child's appearance before the appropriate court for any disposition that the court is authorized to make for a similar act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint, and, upon the transfer, all further proceedings pertaining to the act charged shall be discontinued in the juvenile court, and the case then shall be within the jurisdiction of the court to which it is transferred as described in division (H) of section 2151.23 of the Revised Code.

(J) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of this section do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Effective Date: 01-01-2002

Baldwin's Ohio Revised Code Annotated

Title XXI. Courts--Probate--Juvenile (Refs & Annos)

Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)

Administration, Officials, and Jurisdiction

R.C. § 2151.23

2151.23 Jurisdiction of juvenile court; orders for child support

Currentness

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

(1) Concerning any child who on or about the date specified in the complaint, indictment, or information is alleged to have violated section 2151.87 of the Revised Code or an order issued under that section or to be a juvenile traffic offender or a delinquent, unruly, abused, neglected, or dependent child and, based on and in relation to the allegation pertaining to the child, concerning the parent, guardian, or other person having care of a child who is alleged to be an unruly or delinquent child for being an habitual or chronic truant;

(2) Subject to divisions (G), (K), and (V) of section 2301.03 of the Revised Code, to determine the custody of any child not a ward of another court of this state;

(3) To hear and determine any application for a writ of habeas corpus involving the custody of a child;

(4) To exercise the powers and jurisdiction given the probate division of the court of common pleas in Chapter 5122. of the Revised Code, if the court has probable cause to believe that a child otherwise within the jurisdiction of the court is a mentally ill person subject to hospitalization by court order, as defined in section 5122.01 of the Revised Code;

(5) To hear and determine all criminal cases charging adults with the violation of any section of this chapter;

(6) To hear and determine all criminal cases in which an adult is charged with a violation of division (C) of section 2919.21, division (B)(1) of section 2919.22, section 2919.222, division (B) of section 2919.23, or section 2919.24 of the Revised Code, provided the charge is not included in an indictment that also charges the alleged adult offender with the commission of a felony arising out of the same actions that are the basis of the alleged violation of division (C) of section 2919.21, division (B)(1) of section 2919.22, section 2919.222, division (B) of section 2919.23, or section 2919.24 of the Revised Code;

(7) Under the interstate compact on juveniles in section 2151.56 of the Revised Code;

(8) Concerning any child who is to be taken into custody pursuant to section 2151.31 of the Revised Code, upon being notified of the intent to take the child into custody and the reasons for taking the child into custody;

(9) To hear and determine requests for the extension of temporary custody agreements, and requests for court approval of permanent custody agreements, that are filed pursuant to section 5103.15 of the Revised Code;

(10) To hear and determine applications for consent to marry pursuant to section 3101.04 of the Revised Code;

(11) Subject to divisions (G), (K), and (V) of section 2301.03 of the Revised Code, to hear and determine a request for an order for the support of any child if the request is not ancillary to an action for divorce, dissolution of marriage, annulment, or

legal separation, a criminal or civil action involving an allegation of domestic violence, or a Chapter 3115. of the Revised Code;

(12) Concerning an action commenced under section 121.38 of the Revised Code;

(13) To hear and determine violations of section 3321.38 of the Revised Code;

(14) To exercise jurisdiction and authority over the parent, guardian, or other person having care of a child alleged to be a delinquent child, unruly child, or juvenile traffic offender, based on and in relation to the allegation pertaining to the child;

(15) To conduct the hearings, and to make the determinations, adjudications, and orders authorized or required under sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code regarding a child who has been adjudicated a delinquent child and to refer the duties conferred upon the juvenile court judge under sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code to magistrates appointed by the juvenile court judge in accordance with Juvenile Rule 40;

(16) To hear and determine a petition for a protection order against a child under section 2151.34 or 3113.31 of the Revised Code and to enforce a protection order issued or a consent agreement approved under either section against a child until a date certain but not later than the date the child attains nineteen years of age.

(B) Except as provided in divisions (G) and (I) of section 2301.03 of the Revised Code, the juvenile court has original jurisdiction under the Revised Code:

(1) To hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance;

(2) To determine the paternity of any child alleged to have been born out of wedlock pursuant to sections 3111.01 to 3111.18 of the Revised Code;

(3) Under the uniform interstate family support act in Chapter 3115. of the Revised Code;

(4) To hear and determine an application for an order for the support of any child, if the child is not a ward of another court of this state;

(5) To hear and determine an action commenced under section 3111.28 of the Revised Code;

(6) To hear and determine a motion filed under section 3119.961 of the Revised Code;

(7) To receive filings under section 3109.74 of the Revised Code, and to hear and determine actions arising under sections 3109.51 to 3109.80 of the Revised Code.

(8) To enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction pursuant to section 3127.32 of the Revised Code;

(9) To grant any relief normally available under the laws of this state to enforce a child custody determination made by a court of another state and registered in accordance with section 3127.35 of the Revised Code.

(C) The juvenile court, except as to juvenile courts that are a separate division of the court of common pleas or a separate and independent juvenile court, has jurisdiction to hear, determine, and make a record of any action for divorce or legal separation that involves the custody or care of children and that is filed in the court of common pleas and certified by the court of common pleas with all the papers filed in the action to the juvenile court for trial, provided that no certification of that nature shall be made to any juvenile court unless the consent of the juvenile judge first is obtained. After a certification of that nature is made and consent is obtained, the juvenile court shall proceed as if the action originally had been begun in that court, except as to awards for spousal support or support due and unpaid at the time of certification, over which the juvenile court has no jurisdiction.

(D) The juvenile court, except as provided in divisions (G) and (I) of section 2301.03 of the Revised Code, has jurisdiction to hear and determine all matters as to custody and support of children duly certified by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the court of common pleas as the same relate to the custody and support of children.

(E) The juvenile court, except as provided in divisions (G) and (I) of section 2301.03 of the Revised Code, has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction if the child comes within the jurisdiction of the juvenile court as defined by this section.

(F)(1) The juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04 and 3127.01 to 3127.53 of the Revised Code and, as applicable, sections 5103.20 to 5103.22 or 5103.23 to 5103.237 of the Revised Code.

(2) The juvenile court shall exercise its jurisdiction in child support matters in accordance with section 3109.05 of the Revised Code.

(G) Any juvenile court that makes or modifies an order for child support shall comply with Chapters 3119., 3121., 3123., and 3125. of the Revised Code. If any person required to pay child support under an order made by a juvenile court on or after April 15, 1985, or modified on or after December 1, 1986, is found in contempt of court for failure to make support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

(H) If a child who is charged with an act that would be an offense if committed by an adult was fourteen years of age or older and under eighteen years of age at the time of the alleged act and if the case is transferred for criminal prosecution pursuant to section 2152.12 of the Revised Code, except as provided in section 2152.121 of the Revised Code, the juvenile court does not have jurisdiction to hear or determine the case subsequent to the transfer. The court to which the case is transferred for criminal prosecution pursuant to that section has jurisdiction subsequent to the transfer to hear and determine the case in the same manner as if the case originally had been commenced in that court, subject to section 2152.121 of the Revised Code, including, but not limited to, jurisdiction to accept a plea of guilty or another plea authorized by Criminal Rule 11 or another section of the Revised Code and jurisdiction to accept a verdict and to enter a judgment of conviction pursuant to the Rules of Criminal Procedure against the child for the commission of the offense that was the basis of the transfer of the case for criminal prosecution, whether the conviction is for the same degree or a lesser degree of the offense charged, for the commission of a lesser-included offense, or for the commission of another offense that is different from the offense charged.

(I) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of section 2152.12 of the Revised Code do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case that it has in other criminal cases in that court.

(J) In exercising its exclusive original jurisdiction under division (A)(16) of this section with respect to any proceedings brought under section 2151.34 or 3113.31 of the Revised Code in which the respondent is a child, the juvenile court retains all dispositional powers consistent with existing rules of juvenile procedure and may also exercise its discretion to adjudicate proceedings as provided in sections 2151.34 and 3113.31 of the Revised Code, including the issuance of protection orders or the approval of consent agreements under those sections.

Credits

(2011 H 86, eff. 9-30-11; 2010 H 10, eff. 6-17-10; 2008 H 214 §5, eff. 5-14-08; 2007 S 10, eff. 1-1-08; 2006 S 238, eff. 9-21-06; 2004 S 185, eff. 4-11-05; 2004 H 38, eff. 6-17-04; 2001 S 3, eff. 1-1-02; 2000 S 179, § 3, eff. 1-1-02; 2000 S 180, eff. 3-22-01; 2000 S 218, eff. 3-15-01; 2000 H 583, eff. 6-14-00; 2000 S 181, eff. 9-4-00; 1997 H 352, eff. 1-1-98; 1997 H 215, eff. 6-30-97; 1996 H 124, eff. 3-31-97; 1996 H 377, eff. 10-17-96; 1996 S 269, eff. 7-1-96; 1996 H 274, eff. 8-8-96; 1995 H 1, eff. 1-1-96; 1993 H 173, eff. 12-31-93; 1993 S 21; 1992 S 10; 1990 S 3, H 514, S 258, H 591; 1988 S 89; 1986 H 428, H 509, H 476; 1984 H 614; 1983 H 93; 1982 H 515; 1981 H 1; 1977 S 135; 1976 H 244; 1975 H 85; 1970 H 931; 1969 H 320)

Notes of Decisions (351)

Current through all 2011 laws and statewide issues and 2012 File 74 of the 129th GA (2011-2012).

End of Document

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1995 Ohio Laws File 48 (H.B. 1)
OHIO 1995 SESSION LAW SERVICE
121st GENERAL ASSEMBLY

Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.
Vetoed provisions within tabular material are not displayed.

File 48

H.B. No. 1

JUVENILE DELINQUENCY—PROCEEDINGS—
TRANSFER;DISPOSITION;FORFEITURE

* * *

JUVENILE DELINQUENCY—PROCEEDINGS—
TRANSFER;DISPOSITION;FORFEITURE, 1995 Ohio Laws File 48 (H.B. 1)

<< Note: OH ST §§ 2151.18, 2151.355, 2151.011, 2151.358 >>

Section 3. (A) The General Assembly hereby declares that its purpose in enacting the language of division (A)(2) of section 2151.18 and division (D)(2) of section 2151.355 of the Revised Code that exists on and after the effective date of this act is to recognize the holding of the Supreme Court in *In re Russell* (1984), 12 Ohio St.3d 304.

(B) The General Assembly hereby declares that its purpose in enacting the language in division (B) of section 2151.011 and divisions (B) and (C) of section 2151.26 of the Revised Code that exists on and after the effective date of this act is to overrule the holding in *State v. Adams* (1982), 69 Ohio St.2d 120, regarding the effect of binding a child over for trial as an adult.

(C) The amendments made by this act to section 2151.358 of the Revised Code apply to persons who were adjudicated juvenile traffic offenders or charged with being juvenile traffic offenders prior to the effective date of this act, regardless of their age on that date. A person who was adjudicated a juvenile traffic offender or charged with being a juvenile traffic offender prior to the effective date of this act may file an application in accordance with division (D) or (F) of section 2151.358 of the Revised Code on or after the effective date of this act for the sealing of the record of the person's adjudication as a juvenile traffic offender or the expungement of the record of the case in which the person was adjudicated not guilty of being a juvenile traffic offender or the charges of being a juvenile traffic offender were dismissed, and the juvenile court involved shall proceed with a hearing on the application in accordance with division (D) or (F) of that section. A juvenile court is not required to send the notice described in division (C)(1)(b) of section 2151.358 of the Revised Code to a person who was adjudicated a juvenile traffic offender prior to the effective date of this act if, on the effective date of this act, more than ninety days has expired after the expiration of the two-year period described in division (C)(1) of section 2151.358 of the Revised Code.

RULE 3. Waiver of Rights

A child's right to be represented by counsel at a hearing conducted pursuant to Juv. R. 30 may not be waived. Other rights of a child may be waived with the permission of the court.

[Effective: July 1, 1972; amended effective July 1, 1994.]

RULE 30. Relinquishment of Jurisdiction for Purposes of Criminal Prosecution

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

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

(C) Discretionary transfer. In any proceeding in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute.

(D) Notice. Notice in writing of the time, place, and purpose of any hearing held pursuant to this rule shall be given to the state, the child's parents, guardian, or other custodian and the child's counsel at least three days prior to the hearing, unless written notice has been waived on the record.

(E) Retention of jurisdiction. If the court retains jurisdiction, it shall set the proceedings for hearing on the merits.

(F) Waiver of mental examination. The child may waive the mental examination required under division (C) of this rule. Refusal by the child to submit to a mental examination or any part of the examination shall constitute a waiver of the examination.

(G) Order of transfer. The order of transfer shall state the reasons for transfer.

(H) Release of child. With respect to the transferred case, the juvenile court shall set the terms and conditions for release of the child in accordance with Crim. R. 46.

[Effective: July 1, 1972; amended effective July 1, 1976; July 1, 1994; July 1, 1997.]