

ORIGINAL

NO. 11-1677

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95750

STATE OF OHIO,

Plaintiff-Appellee

-vs-

DEREK WARNER,

Defendant-Appellant

APPELLEE'S MERIT BRIEF

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RECEIVED
APR 16 2012
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FILED
APR 16 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION AND SUMMARY OF ARGUMENT

This matter should be affirmed as the Eighth District Court of Appeals properly found that Warner, through counsel, waived his right to an amenability hearing. Warner was not amenable to the care and rehabilitation of the juvenile justice system. Warner, who was seventeen years old at the time, was tried as an adult after a discretionary bindover hearing in the juvenile court. He was then indicted, convicted, and sentenced for burglary, theft, vandalism, and criminal damaging. Warner appealed and argued that the juvenile court did not conduct an amenability hearing before relinquishing jurisdiction. The Eighth District ruled that an amenability hearing was not held because Warner, through his counsel, waived the hearing. *State v. Warner*, 8th Dist. No. 95750, 2011-Ohio-4096.

Warner argues that an amenability hearing cannot be waived. However, Juv.R. 3 allows a juvenile to waive any right, except the right to counsel, with the permission of the court. Waiver is also consistent with Juv.R. 30(C) and R.C. 2152.12. In this case, Warner was bound over to adult court only 41 days before the hearing at issue in this case. All of the same parties were involved in the prior hearing. Warner's juvenile counsel altered the court to the fact that Warner was previously bound over. After an off-the-record side bar discussion, the trial court found that Warner was not amenable in the instant case and relinquished jurisdiction. Warner did not object to the juvenile court's ruling.

Warner additionally argues that his waiver must be knowingly, intelligently, and voluntarily entered and that a waiver colloquy must appear in the record. This Court has never issued such a requirement. The facts and circumstances of this case demonstrate a valid waiver. Further, reversible error does not exist in this case even if this Court were to begin to require juvenile courts to use some kind of colloquy. Warner failed to object to the juvenile court's

findings. Warner was previously found not to be amenable to the juvenile justice system and he did not present any new or additional facts that would have changed the juvenile court's earlier determination. The factors weighed heavily in favor of a discretionary bindover in this case. Therefore, any error on the part of the juvenile court is harmless.

The State respectfully requests this Court affirm as Warner's propositions of law lack merit and do not warrant relief.

Statement of the Case and Relevant Facts

On the morning of November 18, 2009, Appellant Derek Warner and a co-defendant burglarized the home of Shanay Ball. Warner and his co-defendant damaged the Ball family's 42-inch, wall-mounted, Sony flat screen television as they ripped it off the living room wall.

As a result, Appellant Derek Warner was charged in Cuyahoga County juvenile court on November 20, 2009, in case number DL-09-121602 with one count each of burglary and theft. On May 10, 2010, the juvenile court conducted a bindover hearing. The juvenile court found probable cause, but as to the issue of amenability the following discussion was had on the record:

[Defense Counsel]: So the Court's aware he has been bound. He does have a prior bindover that the Court has just to refresh the Court's recollection.

The Court: Yes. He has a bindover pending, right?

[Defense Counsel]: He actually was bound over.

[Assistant Prosecutor]: And been indicted in adult court.

The Court: Right. Right. I mean, so he has a case pending that was transferred, but that hasn't been –

[Defense Counsel]: Resolved in any way, no.

The Court: -- resolved yet. Okay. All right. So we'll have to refer him to our clinic here at the Court for a full psychological.

[Assistant Prosecutor]: Your Honor, I believe we've had some preliminary discussions about waiving the 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.(Juvenile Tr. 29-31).

Warner's defense counsel did not object. The juvenile court ruled that Warner was not amenable to the juvenile justice system and ordered him to be bound over to adult criminal court. Subsequently, Warner was then indicted on May 28, 2010, by a Cuyahoga County grand jury in criminal case number CR-10-537503-A with one count each of burglary, aggravated theft, and criminal damaging. This particular case would eventually be dismissed at the State's request on August 24, 2010.

After discovering that in April 2010 that Warner gave \$100 to Shanay's sister in an attempt to bribe the Ball family from testifying against him, the State made the decision to charge Warner with bribery in addition to the charges listed above. On July 30, 2010, Warner was re-indicted by a Cuyahoga County grand jury in criminal case number CR-10-539458-A on one count each of burglary, aggravated theft, criminal damaging, vandalism, and two counts of bribery.

On August 6, 2010, Warner was convicted by a jury of burglary, theft, vandalism, and criminal damaging, but Warner was found not guilty on the bribery counts. On August 24, 2010, Warner was sentenced to six years incarceration on the burglary count, one year for theft, and one year for vandalism at Lorain Correctional Institution. Additionally, he was sentenced to ninety days for the criminal damaging count at the Cuyahoga County Jail. All sentences were ordered to be served concurrently.

Warner filed a timely appeal in the Eighth District Court of Appeals and the Eighth District affirmed. *State v. Warner*, 8th Dist. No. 95750, 2011-Ohio-4096 (holding Warner waived his amenability hearing). Warner filed a Memorandum in Support of Jurisdiction with this Court on October 3, 2011. The State waived its response and on December 21, 2011, this Court granted a discretionary appeal on his two propositions of law.

The State respectfully requests this Court affirm the Eight District's ruling on the matter.

LAW AND ARGUMENT

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

The Eighth District correctly held that the amenability hearing during a discretionary bindover hearing could be waived. The holding is not contrary to law. It is consistent with precedent, all applicable rules and statutes, and the purpose and goals of the juvenile justice system.

A. The plain language of Juv.R. 3 permits waiver of an amenability hearing.

The Ohio Rules of Juvenile Procedure allow a juvenile to waive nearly all of his rights.

Juv.R. 3 states:

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.*

(Emphasis added.) The plain language of Juv.R. 3 allows a juvenile to waive an amenability with the permission of the juvenile court.

A juvenile rule adopted by this Court has the full force and effect as a state statute, to the extent that the rule controls procedure in a juvenile case. *See State v. Edgeworth* (Nov. 14, 1975), 6th Dist. App. No. 7947, 1975 WL 182372, *5 (Ohio Crim. R. are treated with the full force and effect of a state statute). Here, within the plain language of Juv.R. 3, it is clear that a juvenile defendant is permitted to waive any right, excluding his right to counsel, during a juvenile proceeding¹. Moreover, nothing in Juv.R. 30 contradicts a juvenile's ability to waive an amenability hearing. Juv.R. 30 states, in pertinent part, that:

(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.

Warner claims that the use of the word "shall" in the Juv. R. 30(C) means that the amenability hearing cannot be waived. (Appellant Merit Br., at 9.) However, Juv. R. 30(C) must be read in conjunction with Juv. R. 3. This Court requires that the plain language of a statute must be applied when it is clear and unambiguous. *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, at ¶ 14. Additionally, R.C. 1.51 instructs a court to construe conflicting statutory provisions, where possible, to give effect to both. Only when two provisions are

¹ In fact, a juvenile is even permitted to waive his right to counsel during a juvenile proceeding, subject to certain standards, so long as his parent, guardian, or custodian counsels him. *In re C.S.*, 115 Ohio St.3d 267, 875 N.E.2d 1177, 2007-Ohio-4919.

irreconcilable does R.C. 1.51 allow one provision to prevail over the other. This Court has recognized similar rules of statutory construction:

[A]ll statutes which relate to the same general subject matter must be read *in pari materia*. And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict. (Citations [and internal quotation marks] omitted.)

United Tel. Co. of Ohio v. Limbach (1994), 71 Ohio St.3d 369, 372, quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35. This Court has repeatedly accepted that the use of the term “shall” in a statute or rule connotes the imposition of a mandatory obligation unless other language is included that demonstrates a clear and unequivocal intent to the contrary. *See, e.g., State v. Pless* (1996), 74 Ohio St.3d 333, 658 N.E.2d 766; *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 4, 511 N.E.2d 1138; *Dorrian v. Scioto Conservancy Dist.*(1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus.

Juv. R. 3 and Juv. R. 30 are not in conflict, as Warner seems to suggest. While Juv. R. 30 and R.C. 2152.12 require an amenability hearing, Juv. R. 3 allows a juvenile to waive that hearing with the court’s permission. The juvenile rules do not specifically prohibit a juvenile from waiving an amenability hearing. Should this Court agree that the rules are in conflict, it is apparent that Juv.R. 3 and Juv.R.30 are capable of harmonization. As such, R.C. 1.51 applies as to give effect to both Juv.R. 3 and Juv.R. 30. Because the applicable Juvenile Rules and state statutes support waiver, the State asks this Court to overrule Appellant’s first proposition of law.

B. An amenability hearing is a right of a juvenile offender.

A juvenile has a right to an amenability hearing under R.C. 2152.12(B)(3) in discretionary bindover proceedings. And, as discussed above, it can be waived. *See Brookhart v. Janis* (1966), 384 U.S. 1, 4 (an individual may waive a constitutional right). The United States Supreme Court evaluated the constitutional rights of juvenile offenders in the seminal cases of *In re Gault* (1967), 387 U.S. 1, and *In re Kent* (1966), 383 U.S. 541. Together, these cases clarified that a juvenile is entitled to a hearing to determine if it is appropriate for the juvenile to be bound over to face criminal charges in adult court.

Waiver is not constitutionally prohibited. While the State does not dispute that Warner was entitled to a hearing pursuant to R.C. 2152.12(B), neither *Kent* nor *Gault* prohibit a juvenile from waiving his rights. The Eighth District originally addressed juvenile waiver in *State v. Soke*, 8th Dist. No. 62908, 1993 WL 266951. In *Soke*, the Eighth District noted the long history of precedent which holds that a juvenile may waive personal jurisdiction. *Id.* at *2 citing *State v. Klingenberger* (1925), 113 Ohio St. 418, 422-423; *Hemphill v. Johnson* (1972), 31 Ohio App.2d 241. The court went on to find that a bindover hearing is a mandatory, critical phase of the proceedings which may be knowingly, competently, and intelligently waived. *Id.* at *3. The court correctly noted that the applicable rules and statutes do not prohibit waiver. *Id.*

The Eighth District applied *Soke* more recently in *State v. Stubblefield*, 8th Dist. App. No. 78361, 2001 WL 587494. In *Stubblefield*, the defendant argued that the juvenile court erred when it failed to hold an amenability hearing. *Stubblefield* was previously the subject of a disputed mandatory bindover. The Eighth District found that, with respect to *Stubblefield*'s new case, "nothing in the record indicates that defendant did not knowingly, competently and intelligently waive the hearing in the instant matter. Further, because the defendant had already

been bound over in connection with the robbery charges, we are unable to conclude that the trial court erred in failing to hold an amenability hearing herein.” *Id.* at *3. The record in Warner, like *Stubblefield*, fails to indicate that Warner’s counsel did not enter a valid waiver. Warner’s counsel reminded the court of the prior bindover and the record indicates that Warner’s counsel and the prosecutor discussed waiving the amenability hearing. Warner also failed object to the juvenile court’s determination that Warner was not amenable to the juvenile system.

The Second District applied *Soke* in *State v. Brown*, 2nd Dist. No. 2005-CA-96, 2006-Ohio-4393. In *Brown*, the Second District ruled that “taking into account the purpose of the factors listed in R.C. 2152.12(D)-(E) and the mental examination, which is to assist the court in its determination of the defendant’s amenability, it reasonably follows that a waiver of the bindover/amenability hearing, effectually waives any reason for the court to list the factors in favor of transfer and the court’s requirement to proceed with a mental examination.” *Id.* at ¶ 13. In so holding, the *Brown* Court reaffirmed that the bindover hearing is a critical and mandatory phase of the proceedings and that while neither Juv.R. 30 nor R.C. 2152.12 provided any specific authority to waive a bindover hearing; it is nonetheless a critical phase capable of being waived. *Id.* Additionally, the Second District correctly recognized that Juv.R. 3 provides that all rights of a child, except counsel, may be waived with permission of the court. *Id.* Since an amenability hearing is part of a bindover hearing, and a bindover hearing is a critical stage under *Kent, supra*, it follows that the amenability hearing is a right that can be waived as well.

Warner argues that it is the duty of the juvenile court to conduct an amenability hearing as *parens patriae*. (Appellant Merit Br., at 10-11). He correctly notes that a juvenile court has broad discretion in determining whether or not a juvenile is amenable under the statute. *See, generally, State v. D.H.*, 120 Ohio St.3d 93 540, 901 N.E.2d 209, 2009-Ohio-9; *State v. Watson*,

47 Ohio St.3d 93, 547 N.E.2d 1181 (1989). Warner then theorizes that a juvenile is incapable of waiving an amenability hearing because it is also a duty of the court. In making this argument, he relies on *State v. Newton*, 6th Dist. No. F-82-17, 2528, 1983 WL 6836. In *Newton*, the Sixth District held that Juv.R. 30 allows only for the waiver of a mental and physical examination, not the amenability hearing. *Id.* at *3. Yet, as discussed above, this is an incorrect construction of the juvenile rules and the discretionary bindover statute because it fails to take into account Juv.R. 3 and the ability to waive any right, but counsel, during the proceedings. Undersigned counsel has been unable to find any court which has followed *Newton's* waiver analysis. This Court should find, consistent with *Soke*, *Stubblefield*, *Brown*, and Juv. R. 3, that a juvenile may waive an amenability hearing.

C. An amenability hearing is only one part of a discretionary bindover proceeding.

The issue presented here only deals with one part of the discretionary bindover proceeding, the amenability hearing. The question is not whether jurisdiction of the juvenile court can be waived, but only whether the amenability hearing can be waived. *Soke* and *Brown* support that parts of the bindover hearing can be waived. As previously discussed, this is consistent with Juv.R. 30 and R.C. 2152.12(C). This case is distinguishable from this Court's decision in *State v. Wilson* (1995), 73 Ohio St.3d 40, 652 N.E.2d 196. In *Wilson*, this Court found that the general division of the Hamilton County Common Pleas court lacked jurisdiction over the defendant as the defendant was a juvenile who was never bound over to the adult court. Unlike *Wilson*, Warner was bound over. Warner only argues that there was a defect with a portion of this bindover proceeding. Bindover proceedings contain a multiple steps to protect juveniles from being exposed to the adult criminal justice system. *See, In re C.S., supra* (discussing the purpose of the juvenile justice system). Because the applicable rules and statutes

do not prohibit waiver, this Court should find that a juvenile may waive part or parts of the bindover proceedings. Such a holding is consistent with *Gault* and *Kent*.

D. Continuous amenability hearings for repeat juvenile offenders unnecessarily overburden the juvenile justice system.

While a juvenile has a right to an amenability hearing, public policy does not support requiring multiple extensive hearings for a juvenile who has multiple pending charges. It is impractical to prevent a juvenile from waiving an amenability hearing once he has already been found not to be amenable to the juvenile justice system. A juvenile bound over for one crime related to a particular set of facts is not automatically bound over to face future charges in adult criminal court related to different sets of facts. *See State v. Freyerson*, 8th Dist. No. 71638, 2000 WL 14657, at *4-5. But, a juvenile court is not prevented from taking into account all of a juvenile's other prior juvenile adjudications, proceedings, and interactions before the court in determining whether or not a juvenile is amenable to the care and treatment of the juvenile justice system. R.C. 2152.12(D)(7)&(E)(5). A prior discretionary bindover hearing is a valid factor in a juvenile court's decision to bind a juvenile over to adult criminal court. It would be impractical to conduct an entirely new amenability hearing for each new offense after the court has already taken the proper steps to find the same juvenile not amendable to care and treatment of the juvenile justice system. Continuous amenability hearings for repeat juvenile offenders would unnecessarily overburden juvenile courts.

Warner was previously subject to a discretionary bindover in DL-09-123216 a mere forty-one days before the hearing in the instant case. (Docket for DL-09-123216)². He was properly found not amenable under R.C. 2152.12(B) in that case on March 29, 2010. (Journal

² The State has asked this Court to supplement the record in this case to include the docket of Warner's prior bindover in DL-09-123216.

entry of discretionary bindover, DL-09-123216)³. It is also important to note that the judge, prosecutor, and defense counsel were the same in both DL-09-123216 bindover and the bindover proceeding in the instant case. These same individuals were well aware of the reasons that Warner was previously found not amenable. In circumstances such as those in the instant case, it makes sense for a juvenile to have the opportunity to waive an amenability hearing should he so desire. In this case, the Eighth District found that Warner waived his hearing through counsel. Warner's waiver was not unreasonable given the facts of this case. Contrary to Warner's current allegation, allowing a juvenile the opportunity to decide whether or not to waive an amenability hearing does not amount to a failure to protect the juvenile's constitutional rights; it merely gives a juvenile an opportunity to take control of his proceedings. Waiver is consistent with the purposes of the juvenile justice system and with Ohio law. Therefore, the State respectfully requests this Honorable Court overrule Warner's first proposition of law.

WARNER'S 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.

There is no requirement that a juvenile court engage in a specific colloquy before a juvenile may waive an amenability hearing. *Brown, supra*. The Eighth District properly held that Warner waived his right to an amenability hearing. The record indicates that all parties were aware of Warner's background, including his recent bindover. Warner's counsel altered the juvenile court to the fact that Warner was previously bound over, the record indicates that Warner's counsel discussed waiver with the prosecutor, and Warner failed to object to the

³ The State has asked this Court to supplement the record in this case to include the juvenile court's entry issuing a discretionary bindover in Warner's prior case, DL-09-123216.

juvenile court's finding that Warner was not amenable. The Eighth District's holding is consistent with all applicable rules and statutes, and the court's determination does not constitute reversible error.

A. Precedent does not require juvenile courts to engage in a specific colloquy before finding that a juvenile has waived an amenability hearing.

The Eighth District correctly held that Warner waived his amenability hearing. Warner argues that his waiver is invalid because the juvenile court failed to engage in a recorded colloquy to ensure that the waiver was knowingly, voluntarily, and intelligently entered. However, there is no precedent, statute, or rule that requires what Warner suggests. The Eighth District's decision was consistent with *Soke*, *Stubblefield*, and *Brown*. Warner heavily relies on *Brown* for the proposition that a waiver must be knowingly, voluntarily, intelligently entered. (Appellant Merit Br., at 16.) Yet, *Brown* notes that nothing in the juvenile rules or relevant statutes give guidance as to how this waiver is to occur. *Brown*, 2006-Ohio-4393 at ¶ 13. It is also important to note that *Brown* was reversed, with the State's concession, on the issue of waiver because there was no transcript or record available to see whether or not the waiver was made voluntarily, knowingly, and intelligently. *Id.* at ¶ 14. Unlike *Brown*, the record in this case supports the Eighth District's ruling.

Warner was previously found not to be amenable to juvenile court and bound over in a different matter a mere 41 days before his hearing in the instant case. The juvenile judge, the prosecutor, and the defense counsel were all involved in the prior bindover proceeding. After the juvenile court found probable cause that Warner committed burglary, defense counsel altered the court to the fact that Warner was previously bound over. The record also demonstrates that counsel had discussed waiving the amenability hearing with the prosecutor. After an off-the-record sidebar conversation, the juvenile court found that Warner was not amenable to the

juvenile justice system. Warner did not object to the proceedings nor did he object to the juvenile court's findings. Because the record supports the Eighth District's holding, Warner's second proposition of law should be overruled.

B. The record demonstrates an implied waiver.

As discussed in *Brown, supra*, the law is unclear as to what a juvenile court must do to before finding that a juvenile has waived an amenability hearing. Is it necessary for there to be a lengthy colloquy on the record? Is an implied waiver based upon sufficient evidence inferred from the record valid to demonstrate that an amenability hearing has been waived? Courts have recognized an implied waiver is sufficient in certain cases. See *State v. Murphy*, 91 Ohio St.3d 516, 518, 2001-Ohio-5141 (*Miranda* rights need not be expressly waived); *State v. Henley* (2000), 138 Ohio App.3d 209, 216-17 (waiver of right to counsel may be express or implied after sufficient inquiry).

The record in this case could be read to at least contain an implied waiver. After the court found probable cause, the defense counsel reminded the juvenile judge that Warner was recently bound over to adult criminal court in a separate aggravated robbery case. The prosecutor then addressed the juvenile judge that she and the defense counsel had discussed waiving the amenability hearing. The two attorneys' approached the bench and proceeded to have an off-the-record sidebar discussion with the judge. After the sidebar, the judge stated that because Warner was bound over in a prior amenability hearing there was no need for another hearing. Warner did not object to the proceedings or to the judge's ruling. The same prosecutor, defense attorney, and judge were present during the bindover proceedings for both cases. The defense counsel proffered no new evidence the judge had not heard during the first amenability hearing. The record supports that Warner's amenability hearing was implicitly waived.

C. The juvenile court did not commit either plain error or abuse its discretion when it relinquished jurisdiction over Warner's case.

The adequacy of juvenile court bindover orders are generally subject to an abuse of discretion standard of review. *State v. Douglas* (1985), 20 Ohio St.3d 34, 485 N.E.2d 711. However, the Eighth District found that Warner waived his right to an amenability hearing. This Court has recognized the difference between waiver and forfeiture. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23. In *Payne*, this Court stated

“Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right “cannot form the basis of any claimed error under Crim.R. 52(B).” *State v. McKee* (2001), 91 Ohio St.3d 292, 299, 744 N.E.2d 737, fn. 3 (Cook, J., dissenting); see, also, *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508. On the other hand, forfeiture is a failure to preserve an objection[.] *** [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B).” (Internal citations and quotations omitted.)

Because Warner waived his right, he cannot claim error on review. At a minimum, Warner's failure to object below acts as a forfeiture and waives all but plain error. The record and facts of the case demonstrate that any error was, at most, harmless. The Eighth District properly applied the facts of this case to prior case law and found that Warner, through counsel, waived an amenability hearing. The juvenile court was not required to engage in any specific colloquy with Warner. Therefore, no reversible error occurred.

Even if this Court were to find Warner's waiver invalid, an appellate court can affirm a trial court's judgment that is legally correct on other grounds, because such an error is not prejudicial. *Reynolds v. Budzik*, 134 Ohio App.3d 844 (1999), at fn. 3, citing *Newcomb v. Dredge*, 105 Ohio App. 417, 424 (1957); *State v. Payton*, 124 Ohio App.3d 552, 557 (1997). “It has long been the law in Ohio that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the

basis thereof.” *Budzik*, at fn. 3 quoting *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284.

The record indicates that the R.C. 2152.12 weigh heavily against amenability in this case. This Court has previously stated a juvenile court is not required to “make written findings as to the five factors listed in Juv. R. 30(E). The rule simply requires the court to consider these factors in making its determination of the amenability issue.” *Douglas, supra*, at 36. There is no abuse of discretion when the juvenile court considers the appropriate statutory factors and there is some rational basis in the record to support its findings when applying those factors during a discretionary bindover. *See* R.C. 2152.12(B); *Watson*, 47 Ohio St.3d, at 95-96; *Douglas, supra*, at 36-37; *State v. Hopfer*, 112 Ohio App.3d 521, 535-36 (1996), certiorari denied, 77 Ohio St.3d 1488 (1996). Further, to bind a juvenile over as an adult, it is not necessary the juvenile court resolve each of the pertinent statute’s factors against the juvenile. *State v. Lopez* (1996), 112 Ohio App.3d 659, 679.

Even if Warner did not waive the amenability hearing, there was still sufficient evidence before the juvenile court during Warner’s probable cause hearing to order a discretionary bindover. While the juvenile court in this case did not specifically make findings, other than the prior bindover, the record does not reflect that the trial court erred when it determined that Warner was not amenable to the juvenile system. Warner’s prior bindover in DL-09-123216 certainly weighed against amenability and in favor of transfer. R.C. 2152.12(D)(7). Warner also had other encounters with the juvenile system prior to the current case, which the juvenile court could properly consider in making its ruling.

Additionally, a review the record shows several other factors contained in R.C. 2152.12(D) weighed against amenability and in favor of transferring Warner to the adult court. First, while no physical harm occurred to Shanay or her family there was economic harm as a result of Warner kicking in the side door of her home and dropping and damaging her television during the burglary. (Juvenile Tr. 7, 11). Second, there was a relationship between Shanay and Warner because they knew each other from school. (Juvenile Tr. 10-11). Third, it appears from the State's supplement to this Court's record that Warner was awaiting adjudication or disposition as a delinquent child for a drug possession charge at the time of the burglary. (Juvenile Tr. 34-35).

The Eighth District properly applied precedent and applicable rules in holding that Warner, through counsel, waived his right to an amenability hearing. There is no requirement that the trial court must engage a juvenile in a specific colloquy before allowing him to waive an amenability hearing. Warner's counsel, who was familiar with Warner's recent bindover, discussed waiver with the prosecutor, engaged in an off-the-record sidebar discussion with the judge, and failed to object to the juvenile court's findings. This action is indicative of waiver. Even if the waiver was insufficient, the amenability factors weighed heavily in favor of transferring jurisdiction to the adult court. Therefore, no reversible error occurred. The State respectfully requests this Honorable Court overrule both of Warner's propositions of law as his arguments lack merit and do not warrant relief.

Conclusion

The State respectfully requests this Honorable Court affirm the Eighth District Court of Appeals decision in this case.

Respectfully submitted,

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Service

A copy of the foregoing Merit Brief of Appellee has been mailed this 13th day of April, 2012 to:

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C

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Juvenile Procedure (Refs & Annos)

→→ **Juv R 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.

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(Adopted eff. 7-1-72; amended eff. 7-1-94)

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C

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Juvenile Procedure (Refs & Annos)

→→ **Juv R 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.

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(Adopted eff. 7-1-72; amended eff. 7-1-76, 7-1-94, 7-1-97)

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C

Baldwin's Ohio Revised Code Annotated Currentness

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

Chapter 2152. Juvenile Courts--Criminal Provisions (Refs & Annos)

Dispositional Orders

→→ 2152.12 Transfer of cases from juvenile court

(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:

(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 as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been 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.

CREDIT(S)

(2011 H 86, eff. 9-30-11; 2000 S 179, § 3, eff. 1-1-02)

Current through all 2011 laws and statewide issues and 2012 File 80 of the 129th GA (2011-2012).

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