

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: H.V.,
adjudicated delinquent child

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Case No. _____

On Appeal from the Lorain
County Court of Appeals
Ninth Appellate District

C.A. Case Nos. 11CA010139
11CA010140

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT H.V.**

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IN RE: H.V., Lorain County Court of Appeals Case Nos. 11CA010139 & 11CA010140 (August 21, 2012), Decision and Journal Entry A-1

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial constitutional question and is of great general interest because juvenile courts are committing children to the Department of Youth Services (DYS) for longer periods than are authorized by law. And, the Ninth District Court of Appeals is in conflict with the Second District Court of Appeals regarding a juvenile court's power to specify the length of commitment for a violation of supervised release ("parole"). This Court should accept this case to resolve unsettled law, and hold juvenile courts to the plain language of the Revised Code.

STATEMENT OF THE CASE AND FACTS

In December 2010, the Lorain County Juvenile Court found H.V. ("Henry") delinquent of attempted domestic violence, a fourth-degree felony if committed by an adult. The court committed Henry to DYS for a minimum period of six months, maximum of his twenty-first birthday. Henry completed his minimum sentence, and was released to parole. While still on parole, the juvenile court found Henry delinquent for the offense of felonious assault, a second-degree felony if committed by an adult. For the new offense, the court committed Henry to DYS for a minimum period of one year, maximum of his twenty-first birthday. The court also revoked Henry's parole in the attempted domestic violence case, and committed him to DYS for a minimum period of ninety days, to be served consecutively to the commitment for felonious assault.

Henry timely appealed, and argued that the juvenile court erred by committing him to DYS for the parole violation for a minimum period that was longer than the statutory minimum of thirty days, and erred by ordering the parole revocation to be served consecutively to the new

commitment. The Ninth District Court of Appeals affirmed the juvenile court's decision. *In re H.V.*, 9th Dist. Nos. 11CA010139 & 11CA010140, 2012-Ohio-3742.

ARGUMENT

FIRST PROPOSITION OF LAW: When a juvenile court revokes a child's supervised release, the court is limited to determining whether the child should be returned to the Department of Youth Services, and may not commit a child for a prescribed period of time.

Juvenile courts, while rehabilitative in purpose, must operate within statutory limits. R.C. 2152.01. The Revised Code grants juvenile courts the authority to revoke a child's parole and commit the child to DYS for committing a serious violation of supervision. But the juvenile court's power to do so is limited by statute. 5139.52(F). R.C. 5139.52(F) governs the revocation procedures applicable to youth who served their entire minimum sentence prior to being released from DYS and placed on parole. When a child commits a serious violation, a juvenile court may either revoke the supervised release, or impose "another authorized disposition," such as an impatient program, house arrest, or confinement in juvenile detention. *In re I.M.*, 2d Dist. No. 12 CA 20, 2012-Ohio-3847, ¶ 25. If the child is returned to DYS, "the child shall remain institutionalized for a minimum period of thirty days," and "the release authority, in its discretion, may require the child to remain in institutionalization for longer than the minimum thirty-day period, and the child is not eligible for judicial release or early release * * *." *Id.*

As the court reasoned in *I.M.*, the thirty-day minimum period is a "limitation on DYS's authority," and not *carte blanche* to the juvenile court to choose any length of minimum commitment. "We disagree with the Eighth, Ninth, and Eleventh Districts, which have held that R.C. 5139.52(F) establishes a minimum, not an exact, amount of time for which *the trial court* must recommit the juvenile." *Id.* at ¶ 28. (Emphasis in original). *In re A.N.*, 11th Dist. Nos.

2011-A-57 and 2011-A-58, 2012-Ohio-1789, ¶ 12; *In re T.K.*, 9th Dist. No. 26076, 2012-Ohio-906; *In re D.B.*, 8th Dist. No. 97445, 2012-Ohio-2505. Unlike the initial disposition, in which the juvenile court imposes a minimum and maximum period, and has control of the commitment period, “R.C. 5139.52(F) expressly limits the juvenile court’s discretion to the determination of whether to return the juvenile to DYS, and that statute grants DYS more authority to determine a release date * * *.” *Id.* at ¶30.

The Second District Court of Appeals applied the plain meaning of R.C. 5139.52(F), which does not provide for the juvenile court to impose a prescribed minimum period of institutionalization. Compare the instant case, in which the Ninth District Court of Appeals reasoned that “R.C. 5139.52(F) prohibits a child from being released from DYS in less than 30 days, but does not limit the court from imposing a sentence longer than 30 days.” *H.V.* at ¶7. The Ninth District extends the plain meaning of the statute to give juvenile courts discretion to choose however long a commitment it wishes for a parole violation, including a commitment that may be longer than the original DYS commitment for the underlying felony.

“Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion [to] resort to rules of statutory interpretation.” *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980). *See, also, State v. Merriweather*, 64 Ohio St.2d 57, 59, 413 N.E.2d 790 (1980) (sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused); *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, 868 N.E.2d 969, ¶10 (“R.C. 2901.04 requires that statutes defining offenses or penalties shall be strictly construed against the state and liberally in favor of the defendant. Therefore, this section of the law is subject to strict

interpretation against the state, and must be liberally interpreted in favor of the accused.”). Thus, “[a]n unambiguous statute is to be applied, not interpreted.” *Meeks* at 190.

There is no ambiguous language in R.C. 5139.52(F) as to the dispositions available to a court when a juvenile is found to have violated the terms of parole. The court may either order the youth returned to DYS, or may make any other disposition authorized by law. The child’s term of institutionalization is to be determined by the DYS release authority. R.C. 5139.52(F); *I.M.*, 2d Dist. No. 12 CA 20, 2012-Ohio-3847, ¶ 25. This Court should accept this proposition of law, and hold juvenile courts to the plain meaning of R.C. 5139.52(F).

SECOND PROPOSITION OF LAW: A juvenile court may not order a revocation of supervised release to be served consecutively to a new commitment to the Department of Youth Services.

A juvenile court’s authority to impose consecutive DYS commitments is found in R.C. 2152.17. Revised Code 2152.17(A)-(E) applies to consecutive commitments for various specifications and underlying offenses. Revised Code Section 2152.17(F) provides:

If a child is adjudicated a delinquent child for committing **two or more acts that would be felonies if committed by an adult** and if the court entering the delinquent child adjudication orders the commitment of the child for two or more of those acts to the legal custody of the department of youth services for institutionalization in a secure facility **pursuant to section 2152.13 or 2152.16 of the Revised Code**, the court may order that all of the periods of commitment imposed under those sections for those acts be served consecutively in the legal custody of the department of youth services[...]

R.C. 2152.17(F). (Emphasis added).

There is no ambiguous language in R.C. 2152.17(F) as to when a court may impose consecutive commitments—after adjudication for two or more acts that would be felonies if committed by an adult, when the court commits the child to DYS “for those acts” pursuant to

R.C. 2152.13 (imposes a SYO dispositional sentence) or 2152.16 (DYS commitment for a new felony disposition). R.C. 2152.17(F).

Here, the juvenile court committed Henry to DYS for a new felony commitment, pursuant to R.C. 2152.16, and ordered his parole revocation pursuant to R.C. 5139.52(F). Revised Code Section 2152.17 does not provide for consecutive commitments for a parole revocation under R.C. 5139.52(F). And, R.C. 5139.52(F) does not address commitment for a parole revocation in addition to a new commitment. The only statutory authority for a juvenile court to impose consecutive commitments to DYS is found in R.C. 2152.17, and it does not apply to revocation commitments.

The court of appeals relied on *State ex. rel. Young v. Ohio Adult Parole Authority*, 24 Ohio St.2d 67, 263 N.E.2d 399 (1970), to support its decision that the juvenile court has “inherent power to run parole violations consecutive to sentences for new crimes.” *H.V.* at ¶ 10. However, *Young* is inapplicable to this case. In *Young*, the relator brought an action in mandamus, and claimed that he had served his maximum sentences, arguing that the time he served on his subsequent one-to-seven year conviction should have been credited against his one-to-fifteen year sentence for which he was on parole. At the time of the *Young* decision, concurrent sentences required an order by the court, and unless otherwise specified those indefinite sentences ran consecutively to each other. That does not apply here.

The court of appeals also reasoned that even though the Revised Code did not provide for consecutive commitments in this case, the commitments were proper because “[A] juvenile court has broad discretion to craft an appropriate disposition for a child adjudicated delinquent.” *In re H.V.*, 9th Dist. Nos. 11CA010139 & 11CA010140, 2012-Ohio-3742.at ¶ 10, citing *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, ¶ 6. However, a juvenile court’s authority is not

unlimited. The General Assembly intended and specified—in direct and express terms—when, and under what specific circumstances, a court can impose consecutive DYS commitments. See *Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 24 and R.C. 2152.17. The specific statutory provisions are limiting. The direct and express terms indicate that a juvenile court may only order DYS commitments to run consecutively to each other when those commitments are for specifications, or felony adjudications that the court ordered under R.C. 2152.13 or 2152.16. R.C. 2152.17.

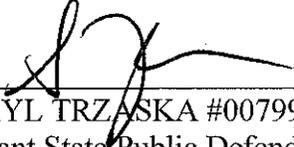
When the juvenile court adjudicated Henry delinquent for felonious assault, and for violating the terms of his supervised release, the court was limited to imposing a commitment for felonious assault under R.C. 2152.16, and an order that Henry’s supervised release be revoked. The court did not have the statutory authority to order the revocation to run consecutively to the new commitment. A parole revocation ordered at the time of a new DYS commitment for a new offense must run concurrently with that commitment.

CONCLUSION

This Court should accept H.V.’s appeal because it raises a substantial constitutional question, and would resolve unsettled law among the appellate districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Minor Child-Appellant H.V.** was served by ordinary U.S. Mail, postage-prepaid, this 5th day of October, 2012, to the office of Dennis P. Will, Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035.



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IN THE SUPREME COURT OF OHIO

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Case No. _____

On Appeal from the Lorain
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Ninth Appellate District

C.A. Case Nos. 11CA010139
11CA010140

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT H.V.

STATE OF OHIO)
)
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: H.V.

2012 AUG 21 P 12:36

C.A. Nos. 11CA010139
11CA010140

9th APPELLATE DISTRICT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 10 JV 30861 & 11 JV 34396

DECISION AND JOURNAL ENTRY

Dated: August 20, 2012

WHITMORE, Presiding Judge.

{¶1} Appellant, H.V., appeals from judgments of the Lorain County Court of Common Pleas, Juvenile Division. This Court affirms.

I

{¶2} In December 2010, in case number 10JV30861, the trial court found H.V. to be a delinquent child for committing the offense of attempted domestic violence, a felony of the fourth degree. The court sentenced H.V. to the custody of the Ohio Department of Youth Services ("DYS") for an indefinite period of six months to twenty-one years of age. H.V. was released on parole approximately three months later.

{¶3} While still on parole, the trial court found H.V. to be a delinquent child in case number 11JV34396, for committing the offense of felonious assault, a felony of the second degree. The court sentenced H.V. to the custody of DYS for an indefinite period of one year up until the age of twenty-one. The court also revoked H.V.'s parole for the domestic violence case,

2505, ¶18-19; *In re A.N.*, 11th Dist. Nos. 2011-A-0057 & 2011-A-0058, 2012-Ohio 1789, ¶10-13. Accordingly, H.V.'s first assignment of error is overruled.

Assignment of Error Number Two

THE JUVENILE COURT ERRED IN COMMITTING THE YOUTH TO A
CONSECUTIVE SENTENCE.

{¶8} In his second assignment of error, H.V. argues that the court erred when it ran his sentences consecutively. Specifically, H.V. argues that R.C. 2152.17(F) does not allow his parole violation to be run consecutively to the felonious assault because the parole violation would not be a felony if committed by an adult. H.V. argues that (1) the parole violation is not a new felony, but instead is an administrative rule violation, and therefore, does not implicate R.C. 2152.17(F) and (2) without R.C. 2152.17(F) the court was not permitted to run his sentences consecutively. We agree that R.C. 2152.17(F) is not applicable, but disagree that the court lacked authority to run H.V.'s sentence for his parole violation consecutively.

{¶9} R.C. 2152.17(F) states, in relevant part:

[i]f a child is adjudicated a delinquent child for committing two or more acts that would be felonies if committed by an adult and if the court entering the delinquent child adjudication orders the commitment of the child for two or more of those acts to the legal custody of the department of youth services for institutionalization * * *, the court may order that all of the periods of commitment imposed under those sections for those acts be served consecutively in the legal custody of the department of youth services * * *.

R.C. 2152.17(F) only applies when the child has been adjudicated delinquent for the commission of two or more acts that would be felonies. H.V. was adjudicated delinquent in 2010 for an act that constituted attempted domestic violence. H.V. was subsequently released on parole and committed another act which constituted felonious assault. The court adjudicated him delinquent for that single act of felonious assault. Because the court was not, at that time, adjudicating H.V. delinquent for two or more acts, R.C. 2152.17(F) does not apply. However, just because R.C.

violation of parole, the court had the inherent authority to run his sentence consecutive to his sentence for the new offense of felonious assault.

{¶13} At the dispositional hearing, the probation department, DYS, and H.V.'s mother all expressed concern for H.V.'s safety and requested the court commit H.V. to the custody of DYS. After reviewing the record, we cannot conclude that the court abused its discretion in its order of disposition. Accordingly, H.V.'s second assignment of error is overruled.

Assignment of Error Number Three

PLAIN ERROR WAS COMMITTED WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE JUVENILE COURT'S IMPROPER SENTENCE.

{¶14} In his third assignment of error, H.V. argues that his counsel committed plain error when he failed to object to his sentence of more than 30 days for his parole violation, and when it ran his sentences consecutively. Because of the reasons set forth above in assignments of error one and two, we conclude the court did not err, and therefore, cannot find plain error. H.V.'s third assignment of error is overruled.

Assignment of Error Number Four

APPELLANT WAS NOT AFFORDED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE CONSTITUTION AND OHIO CONSTITUTION.

{¶15} In his fourth assignment of error, H.V. argues that his counsel was ineffective for failing to object to the alleged sentencing errors. Because we have concluded that the court did not err in sentencing, we cannot conclude that counsel was ineffective for failing to object. H.V.'s fourth assignment of error is overruled.

BELFANCE, J.
CONCURRING IN JUDGMENT ONLY.

{¶17} With respect to H.V.'s second assignment of error, I concur that R.C. 2152.17(F) does not apply for the reasons stated in the main opinion. I note that H.V. has based his argument entirely on the notion that R.C. 2152.17(F) does not apply, without considering the possibility that other authority would allow such a result. Because I believe there is authority which would support the trial court's decision to impose consecutive sentences, I concur in the majority's judgment. See *In re Caldwell*, 76 Ohio St.3d 156 (1996); R.C. 2152.19(A)(8); R.C. 5139.52(F); R.C. 2152.22(E).

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