

ORIGINAL

IN THE SUPREME COURT OF OHIO

In Re: H.V.

: Case No. 2012-1688
:
:
: On Appeal from the Lorain
:
: County Court of Appeals
:
: Ninth Appellate District
:
:
: C.A. Case Nos. 11CA010139
:
: 11CA010140

REPLY BRIEF OF APPELLANT H.V.

DENNIS P. WILL #0038129
Lorain County Prosecutor

Office of the Ohio Public Defender

CHRIS A. PYANOWSKI #0084985
Assistant Prosecuting Attorney
(Counsel of Record)

SHERYL TRZASKA #0079915
Assistant State Public Defender
(Counsel of Record)

225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389
(440) 329-5430 (Fax)
Chris.Pyanowski@LCProsecutor.org

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
sheryl.trzaska@opd.ohio.gov

COUNSEL FOR THE STATE OF OHIO

COUNSEL FOR H.V.

FILED
MAY 15 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS1

ARGUMENT1

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.1

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.1

CONCLUSION5

CERTIFICATE OF SERVICE6

APPENDIX:

R.C. 2929.141 A-1

TABLE OF AUTHORITIES

Page No.

CASES:

In re T.J., Clark App. No. 2005-CA-123, 2006-Ohio-44062
In re Caldwell, 76 Ohio St.3d 156, 1996-Ohio-410, 666 N.E.2d 13673, 4
In the Matter of: Williams, Franklin App. No. 04AP-624, 2005-Ohio-5842
Jordan v. Maxwell, 1 Ohio St.2d 76, 204 N.E.2d 61 (1965)4
Montgomery Cty. Bd. of Commr's v. Public Utilities Comm., 28 Ohio St.3d
171, 503 N.E.2d 167 (1986).....3
State v. Black, 2d. Dist. No. 24005, 2011-Ohio-12735
State v. Williams, 114 Ohio St.3d 103, 2007-Ohio-3268, 868 N.E.2d 9693

STATUTES:

Former R.C. 2151.3553
R.C. 2152.162
R.C. 2152.173, 4, 5
R.C. 2929.1414
R.C. 5139.512
R.C. 5139.52 *passim*

STATEMENT OF THE CASE AND FACTS

H.V. ("Henry") relies on the Statement of the Case and Facts as set forth in his Merit

Brief.

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.

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. **R.C. 5139.52(F) clearly and unambiguously vests the DYS Release Authority with the discretion to determine a child's release date after a juvenile court returns the child to DYS for a violation of supervised release.**

Appellee unnecessarily emphasizes the role of the juvenile court concerning a DYS commitment for a violation of supervised release ("parole"). (Appellee's Brief, p. 4). R.C. 5139.52(F) permits a juvenile court to revoke a child's parole, and return the child to DYS, but the statute clearly states that the child "shall remain institutionalized for a minimum period of thirty days," and that "the release authority, in its discretion, may require the child to remain in institutionalization for longer than the minimum thirty-day period." R.C. 5139.52(F).

Appellee suggests that the legislature "could have simply added the word 'sole'" to make it clearer that the release authority had the "sole" discretion to extend the period of institutionalization beyond the statutory minimum of thirty days. (*Appellee's Brief* p. 5). However, adding the word "sole" would make no difference to the meaning of this statute. This is because R.C. 5139.52(F) vests the juvenile court with the authority to revoke supervised release, sets the minimum period of institutionalization at thirty days, and vests with the release authority the discretion to extend the period, if necessary.

Appellee also argues that the provision, “the child is not eligible for judicial release * * * during the minimum thirty-day period of institutionalization or any period of institutionalization in excess of the minimum thirty-day period” indicates that the juvenile court may order a longer minimum commitment than thirty days. (*Appellee’s Brief* p. 6-7). However, the statutory prohibition regarding judicial release supports Henry’s argument that once the juvenile court revokes a child’s supervision, only the Release Authority has the discretion to order the child’s release—upon the expiration of the minimum thirty-day period, or after an extended period it determines is appropriate. R.C. 5139.52(F).

B. A juvenile court’s broad discretion to impose delinquency dispositions is limited by the express terms of the Revised Code.

Juvenile courts impose indefinite commitments for felony adjudications, but do not have the discretion to impose a minimum commitment of any length of time. For example, for an offense that would be a second-degree felony if committed by an adult, a juvenile court may commit a child to DYS for a minimum period of one year and a maximum period not to exceed the child’s twenty-first birthday. R.C. 2152.16.

Juvenile courts have attempted to impose minimum commitments of greater than one year, reasoning that the one year term is the “minimum” minimum commitment they may impose. But, the Second and Tenth District Courts of Appeals have reversed those commitments, holding that the statutory requirement is clear—a minimum period of one year means one year. *In the Matter of: Williams*, Franklin App. No. 04AP-624, 2005-Ohio-584, ¶ 4; *In re T.J.*, Clark App. No. 2005-CA-123, 2006-Ohio-4406, ¶ 10-11. After the child serves the minimum period in DYS, it is the province of the Release Authority to set a release date for the child. R.C. 5139.51. It defies logic that a juvenile court may only impose the minimum period

for the original felony commitment, but may choose a minimum period of any length for a revocation commitment.

Appellee's reliance on *In re Caldwell*, 76 Ohio St.3d 156, 1996-Ohio-410, 666 N.E.2d 1367 to support its argument that the juvenile court has the discretion to impose a revocation commitment of any length, is also misplaced. (*Appellee's Brief* p. 7). In *Caldwell*, the child committed multiple delinquency offenses before the juvenile code specifically authorized consecutive commitments. Because there was no statutory provision to guide the juvenile court, this Court relied on the purpose clause of Chapter 2151 and the statutory catch-all provision, which authorized the juvenile court to "[m]ake any further disposition that the court considers proper...." and held that the juvenile court could order consecutive DYS commitments. *Former* R.C. 2151.355(A)(11). Subsequently, the General Assembly enacted the statutory provisions setting forth the specific circumstances in which a juvenile court may impose consecutive commitments. R.C. 2152.17, effective January 1, 2002. *Caldwell* is inapplicable here because a specific statutory provision now controls consecutive commitments, and a juvenile court could not rely on the catch-all.

Statutes must be interpreted against the State, and liberally in H.V.'s favor. *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, 868 N.E.2d 969, ¶ 10. This Court cannot allow the specific, limiting provision of the statute to be ignored in favor of the broad, catch-all provision to justify an unlimited minimum commitment.

C. Juvenile courts are without authority to impose consecutive DYS commitments for parole violations.

A general rule of statutory construction provides that the specific inclusion of one thing implies the exclusion of another. *See Montgomery Cty. Bd. of Commr's v. Public Utilities Comm.*, 28 Ohio St.3d 171, 175, 503 N.E.2d 167, 170 (1986). Appellee's argument—that the

juvenile court had authority to order consecutive commitments in this case because no statute specifically prohibits the court from doing so—is unpersuasive. R.C. 2152.17 authorizes the juvenile court to order consecutive commitments in a few limited circumstances, none of which are applicable here. The General Assembly did not expand this authority to other situations, namely a DYS commitment for a parole violation under R.C. 5139.52(F). That demonstrates the limited application of consecutive commitments in juvenile cases. Appellee’s reliance on *In re Caldwell*, 76 Ohio St.3d 156, 1996-Ohio-410, is inappropriate, because *Caldwell* was superseded by R.C. 2152.17, effective January 1, 2002.

Further, *Jordan v. Maxwell*, 1 Ohio St.2d 76, 204 N.E.2d 61 (1965), has no application to juvenile commitments, and is now obsolete regarding adult criminal sentencing. Revised Code Section 2929.141 was enacted on July 8, 2002, and specified that if a sentencing court imposes a prison term for a violation of post-release control, the prison term “imposed for the violation shall be served consecutively to any prison term imposed for the new felony.” R.C. 2929.141(A)(1). If the General Assembly had intended DYS commitments imposed by juvenile courts for parole violations to run consecutively to commitments for new felony offenses, it would have included a similar provision in the juvenile code. Instead, R.C. 2152.17 does not include commitments imposed for a parole violation under R.C. 5139.52(F), as one of the specific circumstances in which a juvenile court may impose consecutive commitments.

Appellee’s argument that the parole revocation should “relate back to the felony offense from which the juvenile was placed on parole thereby satisfying R.C. 2152.17(F) and allowing for the commitments to be ordered served consecutively” fails as a distortion of the law, and a violation of the constitutional protection against double jeopardy. (*Appellee’s Brief* p. 9). A juvenile court may impose consecutive commitments for “two or more acts that would be felonies if committed by an adult.” R.C. 2152.17(F). In this case, Henry completed his DYS

commitment for his underlying offense of domestic violence, and was released to parole. He violated the terms of his parole, and the juvenile court committed him pursuant to R.C. 5139.52(F) for the rule violation. To permit the juvenile court to impose a consecutive commitment by relating it back to the original felony offense would result in a second punishment in a successive proceeding for domestic violence, in violation of R.C. 2152.17, and Henry's right to be free from double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

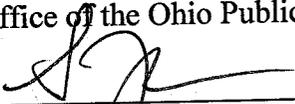
Appellee relies on *State v. Black*, 2d. Dist. No. 24005, 2011-Ohio-1273, to support its argument in this regard, but *Black* is distinguishable. (*Appellee's Brief* p. 9). The consecutive prison term at issue in *Black* was imposed after the defendant violated the terms of community control for his forgery conviction. *Id.* at ¶ 4. The prison term imposed for forgery after the community control violation was the first instance in which the court ordered the defendant to serve a prison term for that offense. *Id.* at ¶ 3-4. Here, Henry completed his commitment for domestic violence before he was released to parole. Further, because a rule violation is not a felony if committed by an adult, the juvenile court cannot reach back and rely on that underlying felony again as one of the requisite "acts that would be felonies if committed by an adult" to justify a consecutive commitment. R.C. 2152.17(F).

D. Conclusion

For the foregoing reasons, this Court should reverse the decision of the Ninth District Court of Appeals, and remand the case for further proceedings.

Respectfully submitted,

Office of the Ohio Public Defender



SHERYL TRZASKA #0079915
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
sheryl.trzaska@opd.ohio.gov

COUNSEL FOR H.V.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant H.V. and the Appendix to the Merit Brief of Appellant H.V.**, was forwarded by regular U.S. Mail, postage prepaid, this 15th day of May, 2013 to Chris A. Pyanowski, Assistant Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035 and by email to Chris.Pyanowski@LCProsecutor.org.



SHERYL TRZASKA #0079915
Assistant State Public Defender

COUNSEL FOR H.V.

#388578

IN THE SUPREME COURT OF OHIO

In Re: H.V.

:
:
:
:
:
:
:
:
:

Case No. 2012-1688

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

C.A. Case Nos. 11CA010139
11CA010140

APPENDIX TO

MERIT BRIEF OF MINOR CHILD-APPELLANT H.V.

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 6
*** Annotations current through November 9, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.141 (2013)

§ 2929.141. New felony committed by person on post-release control

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under *sections 2929.15 to 2929.18 of the Revised Code* for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

HISTORY:

149 v H 327. Eff 7-8-2002; 152 v H 130, § 1, eff. 4-7-09.