

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 13-1591

STATE OF OHIO

Appellee

v.

ALEXANDER QUARTERMAN

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 26400

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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STATEMENT OF FACTS

Appellant Alex Quarterman was born February 5, 1995. On November 22, 2011, three persons filed complaints in Juvenile Court alleging that on November 17, 2011 Quarterman pulled a pistol on the victim, struck the victim in the head with the pistol, and robbed the victim at gunpoint of money and a cell phone. The State filed a motion to transfer Alexander Quarterman for prosecution as an adult.

The offense, aggravated robbery while armed with a firearm, required the Juvenile Court to transfer the case if there was probable cause that Quarterman committed the offense. The Juvenile Court found probable cause.

Testimony at the probable cause hearing in Juvenile Court was that Quarterman was watching several minors (who signed the complaints) play cards. Quarterman had left but returned with someone called Yodda. Quarterman's brother was there. As the card game went on Quarterman put a gun against a person's head and said to give Quarterman everything. R. 20 (Court of Appeals), T. 1/20/12, 7, 9. Quarterman threatened to shoot. Yodda had a gun and smacked other persons with it. Quarterman and Yodda took money and a cell phone. Quarterman, Yodda, and Quarterman's brother left after telling the victims to have a nice day and to be safe. *Id.* 8-10, 22-23.

Quarterman eventually pled guilty to aggravated robbery, R.C. 2911.01(A)(1), a felony of the first degree and a firearm specification. On March 7, 2012, Quarterman pled in exchange for an agreed sentence of three years in prison and a consecutive one-year sentence, instead of three-year sentence on the specification. Journal Entry dated March 16, 2012; R. 13 (Common Pleas).

Quarterman failed to argue in Juvenile Court or in the Court of Common Pleas that the mandatory bind over was unconstitutional. In the Ninth District Court of

Appeals Quarterman argued that the mandatory bind over statutes violated State and federal constitutional rights of Due Process, Equal Protection, and the prohibition against cruel and unusual punishment under the Eighth Amendment.

He also argued ineffective assistance of counsel because trial counsel in Juvenile Court did not object to the bind over. The Ninth District Court of Appeals did not address the issues because the guilty plea waived the non-jurisdictional issues in the Court of Common Pleas, *State v. Quarterman*, 2013-Ohio-3606, ¶5-¶6, and because the plea waived the ineffective assistance claim since Quarterman did not allege that the plea was not knowing, intelligent, and voluntary. *Id.* ¶7.

Concurring, Judge Belfance wrote that Quarterman's "limited argument" concerning ineffective assistance required rejection of the argument. *Id.* ¶10. Also concurring, Judge Carr wrote that Quarterman's failure to raise the constitutional issues below doomed them at the appellate level and that Quarterman failed to show prejudice under the ineffective assistance claim. *Id.* ¶12, ¶15-¶16.

In this appeal, Quarterman does not address the reasons advanced by the panel justifying rejection of his claims. He does not argue ineffective assistance or plain error. The State will address the Propositions of Law collectively.

PROPOSITIONS OF LAW I, II AND III

PROPOSITION OF LAW I

The Mandatory Transfer Of Juvenile Offenders To Adult Court Pursuant To R.C. 2152.10(A)(2)(b) And 2152.12(A)(1)(b) Violates Their Right To Due Process As Guaranteed By The Fourteenth Amendment To The United States Constitution And Article I, Section 16 Of The Ohio Constitution.

- I. Fundamental Fairness Requires That Every Child Be Given An Opportunity To Show His Capacity To Change.
- II. Youth Is Always A Mitigating Factor And Can Never Be Used As An Aggravating Factor.

PROPOSITION OF LAW II

The Mandatory Transfer Of Juvenile Offenders To Adult Court Pursuant To R.C. 2152.10(A)(2)(b) And 2152.12(A)(1)(b) Violates Their Right To Equal Protection As Guaranteed By The Fourteenth Amendment To The United States Constitution And Article I, Section 2 Of The Ohio Constitution.

- I. Revised Code Sections 2152.10 And 2152.12 Create Classes Of Similarly Situated Children Who Are Treated Differently, Based Solely Upon Their Ages.
- II. The Age-Based Distinctions In R.C. 2152.10(A)(2)(b) And 2152.12(A)(1)(b) Are Not Rationally Related To The Purpose Of Juvenile Delinquency Proceedings.

PROPOSITION OF LAW III

The mandatory transfer of juvenile offenders to adult court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates the prohibition against cruel and unusual punishments as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

- I. There is a national consensus against the transfer of children to adult court without an individualized determination by a juvenile judge.
- II. Independent Review.
 - A. Culpability of Offenders.
 - B. Nature of the Offenses.
 - C. Severity of Punishment.
 - D. Penological Justifications.

III. The juvenile court judge is uniquely qualified to determine whether to retain or transfer jurisdiction.

LAW AND ARGUMENT

The appeal should be dismissed.

The Ninth District Court of Appeals did not reach the merits of Quarterman's claims concerning due process, equal protection, or cruel and unusual punishment. In this Court, Quarterman does not argue that the court of appeals erred in not reaching the merits. He does not want the case remanded so that the court of appeals can consider the merits.

Rather, Quarterman seeks to leapfrog into the merits as if the court of appeals decision does not exist and with no discussion whatsoever why his claims are preserved for review by this Court. He proceeds as if he fully preserved his constitutional claims or as if this case has morphed into an original declaratory judgment action. Under these circumstances the State submits that this case is an extremely poor vehicle to address the issues and that the better course is a determination that jurisdiction was improvidently granted.

In addition, the Ninth District Court of Appeals did not err. Quarterman never challenged the bind over in the Juvenile or Common Pleas Court. A parallel situation is in *State v. Bradford*, 5th Dist. No. 2013 CA 00124, 2014-Ohio-904. There, the Juvenile Court bound over the seventeen-year-old juvenile after a probable cause hearing on charges of aggravated robbery with firearm specifications. *Id.* ¶4-¶5.

Bradford pled guilty. In the court of appeals, he challenged the bind over on due process, equal protection, and Eighth Amendment grounds. *Id.* ¶13, ¶19-¶21. The court of appeals held that the claims were waived because of the guilty pleas. *Id.* ¶77, ¶79.

citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶78 and *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶105. The situation is no different here.

Standard of review.

There is a strong presumption that every statute is constitutional and unconstitutionality must be proved beyond a reasonable doubt. *State v. Cook*, 83 Ohio St.3d 404, 409 (1998); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶41. Only clear incompatibility with an express constitutional provision justifies judicial intervention. *State v. Parker*, 150 Ohio St. 22, 24 (1948). Any “***ruminations on the wisdom of [statutes] is for the legislature***.” *In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, ¶26.

A claim that a statute is facially unconstitutional means that the statute is unconstitutional in all situations. *Oliver v. Cleveland Indians Baseball Company Limited Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, ¶13; *Women’s Medical Professional Corporation v. Voinovich*, 130 F.3d 187, 193-194 (6th Cir. 1997).

The statutes.

Quarterman’s offense, aggravated robbery, is a category two offense. R.C. 2152.02(CC)(1). Because Quarterman was sixteen years old at the time of the offense and armed with a firearm, transfer was mandatory upon a finding that there was probable cause that he committed the offense. R.C. 2152.10(A)(2)(b); R.C. 2152.12(A)(1)(b)(ii); see Juv.R. 30(A)/(B). Armed with a firearm in this context means that the juvenile had a firearm on or about the juvenile’s person or under the juvenile’s control and either displayed, brandished, used, or indicated possession of the firearm. R.C. 2152.10(A)(2)(b).

A finding of probable cause requires credible evidence going to every element of the offense. *State v. Iacona*, 93 Ohio St.3d 83, 93, 2001-Ohio-1292.

All juveniles have the right to counsel. *In re Gault*, 387 U.S. 1, 41 (1967); Juv.R. 4(A). There must be a hearing to determine probable cause. Juv.R. 30(A). The court must state reasons for transfer. Juv.R. 30(G). This fully satisfies procedural due process. *State v. Agee*, 3rd Dist. No. 14-98-26, 1998 WL 812238, 8 (Nov. 18, 1998).

Other sixteen or seventeen year old minors eligible for mandatory transfer who commit a category two offense are those who previously were adjudicated delinquent for committing a category one or category two offense and who were then committed to the Department of Youth Services. R.C. 2152.10(A)(2)(a). Category one offenses are aggravated murder, murder, or an attempt to commit those offenses. R.C. 2152.02(BB).

No person under the age of sixteen is eligible for mandatory transfer under those provisions. R.C. 2152.12(A)(1)(b); H.B. 86, effective September 30, 2011. When the person reaches eighteen years of age the person is no longer a child. R.C. 2152.02(C)(1). Juveniles ten years old and up are subject to prosecution as delinquents. R.C. 2152.11(H). The statutes affect only the oldest juveniles.

Category two offenses eligible for mandatory transfer when the person is sixteen or seventeen years of age and armed with a firearm are limited to felonies of the first degree: voluntary manslaughter, rape, aggravated arson, aggravated robbery, aggravated burglary, involuntary manslaughter when a felony of the first degree, and former felonious sexual penetration, 2907.12, an aggravated felony of the first degree. R.C. 2152.02(CC)(1)-(3); R.C. 2152.10(A)(2). Transfer under these provisions is mandatory. *In re M.P.*, 124 Ohio St.3d 445, 2010-Ohio-599, ¶11; *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶1 FN1.

The issue is whether the statutes are facially unconstitutional.

Quarterman did not say in the court of appeals and does not say in this Court that a seventeen-year-old plus rapist armed with a firearm causing the death of the victim because of the rape, or any other juvenile, can lawfully be subject to mandatory transfer. His argument is that no juvenile can be subject to mandatory transfer under R.C. 2152.10(A)(2)(b) and R.C. 2152.12(A)(1)(b)(ii). He says that those provisions are facially unconstitutional.

Quarterman wants this Court to tread a path with far reaching consequences. A statute that is unconstitutional on its face is void ab initio requiring remedial legislative action. *State v. Mallis*, 196 Ohio App.3d 640, 2011-Ohio-4752, ¶23, ¶27 (citations omitted.) Accordingly, this Court cannot simply vacate the conviction and remand to the Juvenile Court but must tell the legislature that it's over fifteen year old judgment that certain juveniles deserve punishment as an adult must be redone.

The cases from the Supreme Court of the United States do not support Quarterman.

The federal constitution forbids the death penalty for persons under the age of eighteen. *Roper v. Simmons*, 543 U.S. 551 (2005). It forbids a sentence of life without parole for persons under the age of eighteen guilty of a non-homicide offense. *Graham v. Florida*, 130 S.Ct. 2011 (2010). It forbids a mandatory sentence of life without parole for a person under the age of eighteen regardless of the offense. *Miller v. Alabama*, 124 S.Ct. 2455 (2012).

Those decisions speak to the available punishment of juvenile offenders, not the method or bona fides by which the adult court acquires jurisdiction. *See Miller*, 2464 (juveniles are “less deserving of the most severe punishments.”) The decisions provide

no support for Quarterman since they do not address automatic prosecution as an adult. Moreover, even in the context of punishment juvenile offenders may face a severe sentence as long as it is not death.

Quarterman fits in none of the prohibited categories established by *Roper*, *Graham*, and *Miller*. As far as his minimum sentence is concerned, it is unquestionably constitutional. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶20-¶21.

The basic rule is that “there is no constitutional right to be tried as a juvenile.” *State v. Jose C.*, 16 Conn. L. Rprt., 1996 WL 165549, 3 (Mar. 21, 1996) (collecting cases). Juveniles do not constitute a suspect class so strict scrutiny does not apply to statutes concerning them. *In re I.A.*, 2nd Dist. 2012-Ohio-4973, ¶6 (citations omitted.); *City of Richmond v. J.A. Croson*, 488 U.S. 467, 469 (1989).

Nor is status as a juvenile a fundamental right. *United States v. Quinones*, 516 F.2d 1309 (1st Cir. 1975). Indeed, status as a juvenile is not a constitutional right but a legislative grant. *Woodward v. Wainwright*, 556 F.2d 781, 784 (5th Cir. 1977).

Quarterman cites *Kent v. United States*, 383 U.S. 541 (1966). That case does not begin to undermine mandatory transfer statutes. *Kent* concerns the waiver of jurisdiction in the Juvenile Court, not mandatory transfer. *Kent* requires a hearing on the issue of waiver and the assistance of counsel. *Russell v. Parratt*, 543 F.2d 1214, 1216 (8th Cir. 1976). *Kent* does not affect statutes that require adult prosecution of juveniles based on the charge. *Jose C.*, 5-6 (citations omitted.) *Kent* addresses arbitrariness and disparate treatment in discretionary transfer determinations, not mandatory transfers. *State v. Agee*, 3rd Dist. No. 14-98-26, 1998 WL 812238, 7-8 (Nov. 18, 1998).

Ohio case law is against Quarterman

Mandatory transfer of juveniles in Ohio based on their age, offense, and probable cause dates back to January 1, 1996 and the re-instatement of the statutes by S.B. 269 effective July 1, 1996. *State v. Lee*, 11th Dist. No. 97-L-091, 1998 WL 637583, 2 (Sept. 11, 1998). Due Process and Equal Protection challenges to mandatory transfer were soon mounted and rejected.

In *Lee*, the defendant was charged in Juvenile Court with aggravated robbery and a firearm specification. The Juvenile Court rejected a constitutional challenge to mandatory transfer and the Court of Appeals affirmed.

The appellate court rejected a Due Process challenge finding that the State has a pressing interest in “protecting its citizens from serious, potentially violent offenders and in reducing violent offenses committed by juveniles.” *Id.* 5. The court rejected the applicability of *Kent* finding that the defendant had a probable cause hearing and counsel. *Id.*

The court rejected an Equal Protection challenge including that the statute created a separate class of persons, those subject to mandatory transfer and those who are not, by finding a rational relation to the legitimate governmental interest; the same interest stated above. *Id.* 6.

In *State v. Ramey*, 2nd Dist. No. 16442, 1998 WL 310741 (May 22, 1998) the defendant was charged in Juvenile Court with aggravated robbery and firearm specifications. The court rejected a challenge based on *Kent* because no amenability hearing was required. *Id.* 1; see *Parratt, supra*.

The court rejected an Equal Protection challenge based on the rational relationship between the class distinction and the legitimate governmental interest in

punishing violent juvenile offenders more harshly by denying them more lenient treatment in Juvenile Court. *Id.* 3.

Other Ohio appellate decisions adverse to Quarterman are *State v. Collins*, 9th Dist. No. 97CA006845, 1998 WL 289390, 1-2 (June 3, 1998) (aggravated robbery, kidnapping, and a firearm specification) and *Agee, supra*. In *State v. Wilson*, 8th Dist. No. 72165, 1998 WL 842060, 5-6 (Dec. 3, 1998), the court rejected a constitutional challenge to the mandatory transfer of a seventeen year old charged with murder.

These cases are still good law. The governmental interest identified in those cases is as important now as it was then; armed sixteen and seventeen-year-old “children” who steal at gunpoint or who commit serious offenses will always be a class that society deserves protection from.

Under Equal Protection’s rational relation test the statute stands unless there is no interest imaginable that can justify the classification. *State v. Thompkins*, 75 Ohio St.3d 558, 561 (1996); *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 353 (1994). Quarterman cannot meet that burden. In addition, there is nothing fundamentally unfair about transferring juveniles close to adulthood for serious offenses. *See In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶¶71-¶72 (Due Process requires fundamental fairness.)

Miller identified the Eighth Amendment’s “concept of proportionality”, as seen through “evolving standards of decency” as central to the cases. *Miller*, 132 S.Ct., 2463. The court emphasized that “children” are different from adults for purposes of punishment. *Id.* 2464-2465. Thus, the sentencer must “have the ability to consider the ‘mitigating circumstances of youth’”. *Id.* 2467.

The court discounted the number of jurisdictions authorizing the soon to be forbidden penalty, a “distorted view” in the opinion of the court. *Id.* 2472. It may be that discounting authorizing jurisdictions means that the court is now looking solely to its “own independent judgment” in proportionality cases. *See Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

Regardless whether we now have an unelected national legislature, it is clear beyond doubt that *Miller’s* focus is on punishment of juveniles as adults. There is nothing in the opinion that forbids sentencing per se of minors in adult court. *See In re C.P.*, ¶28 (*Roper* and *Graham* address juveniles tried as adults.)

In *State v. Long*, Slip Opinion 2014-Ohio-849, this Court stated that *Miller* does not forbid an Ohio court to sentence a person who was a juvenile at the time of the offense to a discretionary sentence of life without parole. However, the sentencing court must consider youth as a mitigating factor and the record must reflect that youth was so considered. *Id.*, paragraphs one and two of the syllabus. At the time of committing aggravated murder in 2009, Long was seventeen years old. *Id.* ¶2. The statute required then as it does now mandatory transfer for that offense. R.C. 2152.10(A)(1)(a); R.C. 2152.02(BB)(1). *Long* makes clear that *Miller* is concerned with setting a ceiling on punishment in adult court and procedural safeguards on the maximum allowable sentence.

The Ohio Constitution’s equivalent to the Eighth Amendment forbids punishments that are “shocking to any reasonable person”, or shocking to “the sense of justice of the community.” *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶60 (quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70 (1964) and *State v. Chaffin*, 30 Ohio St.2d 13 (1972), paragraph three of the syllabus.)

It is absurd to think the idea that sixteen or seventeen-year-old juveniles armed with firearms and committing first degree felonies must face prosecution in adult court shocks a reasonable person or the community's sense of justice. What is shocking is the notion that they cannot.

In addition, mandatory transfer statutes have been held not to constitute a punishment under the Eighth Amendment but rather a mechanism to determine the culpability of juveniles charged with certain offenses. *People v. Branch*, (Ill. App. 1 Dist.) 2014 WL 996879, ¶14. There is no reason not to interpret the Ohio constitutional provision in the same manner. Article I, Section 9 prohibits "cruel and unusual punishments" and the Ohio mandatory transfer statutes at issue here merely determine the forum where the court may levy punishment; the statutes do not themselves impose punishment. Moreover, the class of offenders is relatively small as it is limited to older juveniles who commit one or more of a specified number of first-degree felonies.

In re C.P., *supra* concerns the applicability of S.B. 10 to a juvenile who remained in Juvenile Court. *Id.* ¶6. The case does not concern a transfer to adult court of any sort.

In re D.W., 133 Ohio St.3d 434, 2012-Ohio-4544 holds that where an amenability hearing is required the juvenile may waive the hearing and thus consent to prosecution in adult court. *Id.* syllabus. The case does not concern mandatory transfer. *Id.* ¶11, ¶18. The ability of a juvenile to waive an amenability hearing is no support for an argument that there must be an amenability hearing in cases similar to Quarterman's.

Cases from outside Ohio reject Quarterman's arguments.

Quarterman cites no case finding mandatory transfer statutes unconstitutional. He is swimming against the tide on this issue. Post-*Miller*, courts have upheld such statutes.

In *Cherms v. Brazelton*, (E.D. Cal.) 2014 WL 1091748, a habeas corpus case, the court found that the Supreme Court of the United States including in *Miller* had not passed on the question whether a person who was a juvenile at the time of the offense is entitled to a fitness hearing in Juvenile or whether such a person may be tried as an adult. Under those circumstances, there was no federal question to consider. *Id.* 12; see *Heraz v. McEwen*, (C.D. Cal.) 2013 WL 3755959, 12 (same).

In *People v. Branch*, (Ill. App. 1 Dist.) 2014 WL 996879, the court held that automatic transfer to adult court for first-degree murder was not cruel and unusual punishment and was not a violation of due process. As stated above the court found that the automatic transfer statute was not a punishment or penalty, but "merely governs the procedure to be utilized to determine the culpability of juvenile offenders***." *Id.* ¶14. The court rejected the substantive and due process challenge under prior authority from the Illinois Supreme Court, *People v. J.S.*, 103 Ill.2d 395 (1984) and found that *Roper*, *Graham*, and *Miller* did not require a different result because those cases concerned sentencing statutes. *Id.* ¶19-¶20. The court stated that the public interest identified in *J.S.* was the threat posed to the victim and the community by the violent nature of the offense and its frequency of occurrence. *Branch*, ¶19.

Other Illinois decisions also rejected Eighth Amendment cruel and unusual arguments and due process arguments based on *Graham* and *Roper* for the reasons identified in *Branch*. *People v. Patterson*, 2012 Il. App. (1st) 101573, 975 N.E.2d 1127

(2012), ¶127 (due process); *People v. Jackson*, 2012 Il App. (1st) 100398, 965 N.E.2d 623 (2012), ¶14 (due process), ¶23 (cruel and unusual punishments).

In *In re M.J.*, (W.Va. 2013), 2013 WL 3184638, the sixteen year old defendant was charged with armed robbery and was transferred to adult court after a probable cause determination. The court rejected a challenge based on *Graham* and *Miller* because the defendant could not face a sentence of life without parole. *M.J.*, 2.

The collateral arguments have no merit.

Quarterman argues that R.C. 2152.10(A)(2)(b) and R.C. 2152.12(A)(1)(b) create an irrebuttable presumption that juveniles who are sixteen or seventeen years old are as culpable as adults. Quarterman did not make this claim in the Ninth District Court of Appeals, Brief, R. 35 (Court of Appeals) and it is not in Quarterman's Memorandum in Support of Jurisdiction. This Court should not consider the claim. *Long, supra* ¶9. Moreover, the real issue is whether there is an adequate convergence between the classification and the underlying policy; in other words is there a rational basis for the classification. *See Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989).

The statutes properly aim at juveniles at the top end of the juvenile age range who commit first degree felonies while in possession of a firearm. The policy is to punish violent juvenile offenders by denying lenient treatment in Juvenile Court, to reduce crime, and to protect the public from such offenders. *Ramey, supra* 3; *Lee, supra* 5. The policy underlying repeat offender juveniles, R.C. 2152.10(A)(2)(a), is obviously to reach juveniles who demonstrate that a DYS sanction is insufficient to deter them from committing serious offenses.

Quarterman's laundry list of alleged collateral consequences is as much an argument against punishing any person; say an eighteen year old, for aggravated robbery as it is for punishing a juvenile for the offense in adult court.

Quarterman's remedy if any is with the legislature.

Quarterman and Amici cite a host of studies, articles, polls, and position papers from various associations in support of his contention that the mandatory transfer statutes are unconstitutional. He references legislation or proposed legislation in other States getting away from the "adultification" of youth and even, twice, a brief from high school students opposing life without parole sentences for juveniles. Review of the briefs leaves one with the distinct impression that Quarterman wants to void all Ohio statutes permitting mandatory transfer: "Requiring an amenability determination in every case in which a child may be transferred would make the law constitutional." Quarterman Brief, 29.

This is all for the legislature. The wisdom of the mandatory transfer statutes may be debatable but this Court is not the place for that debate. As far as this appeal is concerned, if this Court decides to reach the merits, then there can be no doubt that Quarterman fails to meet his burden to show that the statutes requiring transfer in his case are unconstitutional beyond a reasonable doubt.

CONCLUSION

Pursuant to the argument offered, the State respectfully requests this Court to dismiss the appeal or to affirm the judgment of the Ninth District Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S.

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APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
CAPITOL BUILDING
COLUMBUS, OHIO 43260
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2013 AUG 21 AM 9:07

STATE OF OHIO

COURT OF APPEALS
CLERK OF COURTS
CASE No. 26400

Appellee

v.

ALEXANDER QUARTERMAN

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 12 02 0303

DECISION AND JOURNAL ENTRY

Dated: August 21, 2013

HENSAL, Judge.

{¶1} Alexander Quarterman appeals a judgment of the Summit County Common Pleas Court convicting him of aggravated robbery. For the following reasons, this Court affirms.

I.

{¶2} A group of friends were playing cards when Mr. Quarterman robbed them at gunpoint. The victims filed criminal complaints against him in juvenile court, alleging that he was delinquent for committing acts that constitute aggravated robbery. Because of the nature of the offenses, the juvenile court was required by statute to transfer the case to adult court. The Grand Jury subsequently indicted Mr. Quarterman for three counts of aggravated robbery, each with a firearm specification. Pursuant to a plea agreement, Mr. Quarterman pled guilty to one count of aggravated robbery and the associated firearm specification. The trial court sentenced him to four years imprisonment. Mr. Quarterman has appealed, assigning four errors.

II.

ASSIGNMENT OF ERROR I

THE JUVENILE COURT ERRED WHEN IT TRANSFERRED ALEXANDER QUARTERMAN'S CASE TO ADULT COURT BECAUSE THE MANDATORY TRANSFER PROVISIONS IN R.C. 2152.10(A)(2)(b) AND R.C. 2152.12(A)(1)(b) ARE UNCONSTITUTIONAL IN VIOLATION OF A CHILD'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II

THE JUVENILE COURT ERRED WHEN IT TRANSFERRED ALEXANDER QUARTERMAN'S CASE TO ADULT COURT BECAUSE THE MANDATORY TRANSFER PROVISIONS IN R.C. 2152.10(A)(2)(b) AND R.C. 2152.12(A)(1)(b) VIOLATE A CHILD'S RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 2 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR III

THE JUVENILE COURT ERRED WHEN IT TRANSFERRED ALEXANDER QUARTERMAN'S CASE TO ADULT COURT BECAUSE THE MANDATORY TRANSFER PROVISIONS IN R.C. 2152.10(A)(2)(b) AND R.C. 2152.12(A)(1)(b) VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR IV

ALEXANDER QUARTERMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO HIS CASE BEING TRANSFERRED TO ADULT COURT WHEN THE TRANSFER PROVISIONS IN R.C. 2152.10(A)(2)(b) AND R.C. 2152.12(A)(1)(b) ARE UNCONSTITUTIONAL.

{¶3} In his first three assignments of error, Mr. Quarterman argues that the statutory provisions that required the juvenile court to transfer his case to adult court violate his right to due process, equal protection, and to be free from cruel and unusual punishment. This Court

need not address the merits of his arguments, however, because Mr. Quarterman waived them by pleading guilty.

{¶4} The Ohio Supreme Court has held that “a defendant who * * * voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 78, quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This Court has explained that “[a] defendant who enters a plea of guilty waives the right to appeal all nonjurisdictional issues arising at prior stages of the proceedings, although [he] may contest the constitutionality of the plea itself.” *State v. Atkinson*, 9th Dist. Medina No. 05CA0079-M, 2006-Ohio-5806, ¶ 21, quoting *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, ¶ 13 (12th Dist.).

{¶5} Whether the Revised Code’s mandatory bind-over provisions are constitutional does not implicate the common pleas court’s jurisdiction. Under Sections 2151.23(H) and 2152.12(I), the common pleas court’s general division has jurisdiction over any case that is transferred to it from the juvenile court, regardless of whether it is a mandatory bind-over under Section 2152.12(A) or a discretionary bind-over under Section 2152.12(B). R.C. 2151.23(H); 2151.12(I). *State v. Wilson*, 73 Ohio St.3d 40, 44 (1995)

{¶6} In his appellate brief, Mr. Quarterman does not argue that his plea was not knowing, intelligent, or voluntary. Rather, he argues that the juvenile court should not have transferred his case to adult court. By pleading guilty to aggravated robbery, however, he waived his right to challenge the constitutionality of the mandatory transfer provisions, which involved an earlier stage of the proceeding. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-

5283, ¶ 105 (explaining that defendant's "guilty plea waived any complaint as to claims of constitutional violations not related to the entry of the guilty plea.").

{¶7} In his fourth assignment of error, Mr. Quarterman argues that his trial counsel was ineffective for not objecting to the constitutionality of his transfer to adult court. This Court has held that "[a] guilty plea waives the right to appeal issues of ineffective assistance of counsel, unless the ineffective assistance of counsel caused the guilty plea to be involuntary." *State v. Carroll*, 9th Dist. Lorain No. 06CA009037, 2007-Ohio-3298, ¶ 5. In his brief, Mr. Quarterman has not argued that his lawyer's allegedly deficient performance caused the entry of his guilty plea to be less than knowing, intelligent, and voluntary. *State v. Dallas*, 9th Dist. Wayne No. 06CA0033, 2007-Ohio-1214, ¶ 4. We, therefore, conclude that he has also waived his ineffective assistance of counsel claim.

{¶8} By pleading guilty to the charge of aggravated robbery, Mr. Quarterman waived his right to appeal the constitutionality of the mandatory transfer provisions and his lawyer's failure to object to their application. Mr. Quarterman's assignments of error are overruled.

III.

{¶9} Mr. Quarterman waived his arguments regarding the constitutionality of Revised Code Section 2152.10(A)(2)(b) and 2152.12(A)(1)(b). The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



JENNIFER HENSAL
FOR THE COURT

BELFANCE, P. J.
CONCURRING IN JUDGMENT ONLY.

{¶10} I concur in the majority's judgment. With respect to Mr. Quarterman's fourth assignment of error, in light of the limited argument made on appeal, I agree that it is properly overruled.

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶11} I agree with the majority that Quarterman's conviction must be affirmed albeit on a different basis.

{¶12} In regard to his first three assignments of error challenging the constitutionality of the mandatory bindover provisions, I would conclude that he has not properly preserved those issues for appeal. This Court has recognized:

“Failure to raise at the trial level the issue of the constitutionality of a statute or its application, which is apparent at the time of the trial, constitutes a waiver of such issue * * * and therefore need not be heard for the first time on appeal.” *State v. Pitts*, 9th Dist. Summit No. 20976, 2002-Ohio-6291, ¶ 106, quoting *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. See also *State v. Jefferson*, 9th Dist. Summit No. 20156, 2001 WL 276343 (Mar. 21, 2001) (holding that defendant’s failure to raise the constitutionality of a statute at the trial court level waived such issue on appeal).

State v. Moore, 9th Dist. Summit No. 21182, 2003-Ohio-244, ¶ 14. Accordingly, I would decline to address those assignments of error except as necessary to address the fourth assignment of error.

{¶13} In regard to his fourth assignment of error, I would overrule it as Quarterman failed to demonstrate prejudice. This Court uses a two-step process as set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), to determine whether a defendant’s right to the effective assistance of counsel has been violated.

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

{¶14} To demonstrate prejudice, “the defendant must prove that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the

judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691.

{¶15} This Court has previously discounted a constitutional challenge to the statutory mandatory bindover provisions. We concluded that, where the defendant has not claimed that the right to an amenability hearing constitutes a fundamental right, the legislative purposes of societal protection and crime reduction present a rational basis for the legislation. *State v. Collins*, 9th Dist. Lorain No. 97CA006845, 1998 WL 289390 (June 3, 1998). Moreover, other appellate courts have concluded that the mandatory bindover provisions are constitutional based on all the arguments Quarterman has raised here. *See, e.g., State v. Smith*, 8th Dist. Cuyahoga No. 76692, 2001 WL 1134871 (Sept. 18, 2001); *State v. Wilson*, 8th Dist. Cuyahoga No. 72165, 1998 WL 842060 (Dec. 3, 1998); *State v. Kelly*, 3d Dist. Union No. 14-98-26, 1998 WL 812238 (Nov. 18, 1998); *State v. Lee*, 11th Dist. Lake No. 97-L-091, 1998 WL 637583 (Sept. 11, 1998); and *State v. Ramey*, 2d Dist. Montgomery No. 16442, 1998 WL 310741 (May 22, 1998).

{¶16} Here, although Quarterman argued that he had a due process right to an amenability hearing, he did not couch his argument in terms of a substantive right to such hearing. He similarly made no such argument with regard to equal protection. Moreover, in regard to his cruel and unusual punishment argument, he cites no authority for application of the Eighth Amendment proscription to matters that do not constitute punishment. Mandatory bindover does not equate to punishment any more than the mere prosecution of an adult in the common pleas court constitutes punishment. Accordingly, Quarterman has not demonstrated that defense counsel’s failure to challenge the constitutionality of the mandatory bindover provision resulted in prejudice in that the result of the proceedings would have been different.

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OHIO RULES OF JUVENILE PROCEDURE

RULE 4. Assistance of Counsel; Guardian Ad Litem

(A) Assistance of counsel. Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

(B) Guardian *ad litem*; when appointed. The court shall appoint a guardian *ad litem* to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

- (1) The child has no parents, guardian, or legal custodian;
- (2) The interests of the child and the interests of the parent may conflict;
- (3) The parent is under eighteen years of age or appears to be mentally incompetent;
- (4) The court believes that the parent of the child is not capable of representing the best interest of the child.
- (5) Any proceeding involves allegations of abuse or neglect, voluntary surrender of permanent custody, or termination of parental rights as soon as possible after the commencement of such proceeding.
- (6) There is an agreement for the voluntary surrender of temporary custody that is made in accordance with section 5103.15 of the Revised Code, and thereafter there is a request for extension of the voluntary agreement.
- (7) The proceeding is a removal action.
- (8) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) Guardian *ad litem* as counsel.

- (1) When the guardian *ad litem* is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist.
- (2) If a person is serving as guardian *ad litem* and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian *ad litem*, the court shall appoint another person as guardian *ad litem* for the ward.
- (3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian *ad litem*, the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian *ad litem*.

(D) Appearance of attorneys. An attorney shall enter appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court of said representation.

(E) Notice to guardian ad litem. The guardian ad litem shall be given notice of all proceedings in the same manner as notice is given to other parties to the action.

(F) Withdrawal of counsel or guardian ad litem. An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown.

(G) Costs. The court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.

[Effective: July 1, 1972; amended effective July 1, 1976; July 1, 1994; July 1, 1995; July 1, 1998.]

R.C. 2152.11 Dispositions for child adjudicated delinquent.

(A) A child who is adjudicated a delinquent child for committing an act that would be a felony if committed by an adult is eligible for a particular type of disposition under this section if the child was not transferred under section 2152.12 of the Revised Code. If the complaint, indictment, or information charging the act includes one or more of the following factors, the act is considered to be enhanced, and the child is eligible for a more restrictive disposition under this section;

(1) The act charged against the child would be an offense of violence if committed by an adult.

(2) During the commission of the act charged, the child used a firearm, displayed a firearm, brandished a firearm, or indicated that the child possessed a firearm and actually possessed a firearm.

(3) The child previously was admitted to a department of youth services facility for the commission of an act that would have been aggravated murder, murder, a felony of the first or second degree if committed by an adult, or an act that would have been a felony of the third degree and an offense of violence if committed by an adult.

(B) If a child is adjudicated a delinquent child for committing an act that would be aggravated murder or murder if committed by an adult, the child is eligible for whichever of the following is appropriate:

(1) Mandatory SYO, if the act allegedly was committed when the child was fourteen or fifteen years of age;

(2) Discretionary SYO, if the act was committed when the child was ten, eleven, twelve, or thirteen years of age;

(3) Traditional juvenile, if divisions (B)(1) and (2) of this section do not apply.

(C) If a child is adjudicated a delinquent child for committing an act that would be attempted aggravated murder or attempted murder if committed by an adult, the child is eligible for whichever of the following is appropriate:

(1) Mandatory SYO, if the act allegedly was committed when the child was fourteen or fifteen years of age;

(2) Discretionary SYO, if the act was committed when the child was ten, eleven, twelve, or thirteen years of age;

(3) Traditional juvenile, if divisions (C)(1) and (2) of this section do not apply.

(D) If a child is adjudicated a delinquent child for committing an act that would be a felony of the first degree if committed by an adult, the child is eligible for whichever of the following is appropriate:

(1) Mandatory SYO, if the act allegedly was committed when the child was sixteen or seventeen years of age, and the act is enhanced by the factors described in division (A)(1) and either division (A)(2) or (3) of this section;

(2) Discretionary SYO, if any of the following applies:

(a) The act was committed when the child was sixteen or seventeen years of age, and division (D)(1) of this section does not apply.

(b) The act was committed when the child was fourteen or fifteen years of age.

(c) The act was committed when the child was twelve or thirteen years of age, and the act is enhanced by any factor described in division (A)(1), (2), or (3) of this section.

(d) The act was committed when the child was ten or eleven years of age, and the act is enhanced by the factors described in division (A)(1) and either division (A)(2) or (3) of this section.

(3) Traditional juvenile, if divisions (D)(1) and (2) of this section do not apply.

(E) If a child is adjudicated a delinquent child for committing an act that would be a felony of the second degree if committed by an adult, the child is eligible for whichever of the following is appropriate:

(1) Discretionary SYO, if the act was committed when the child was fourteen, fifteen, sixteen, or seventeen years of age;

(2) Discretionary SYO, if the act was committed when the child was twelve or thirteen years of age, and the act is enhanced by any factor described in division (A)(1), (2), or (3) of this section;

(3) Traditional juvenile, if divisions (E)(1) and (2) of this section do not apply.

(F) If a child is adjudicated a delinquent child for committing an act that would be a felony of the third degree if committed by an adult, the child is eligible for whichever of the following is appropriate:

(1) Discretionary SYO, if the act was committed when the child was sixteen or seventeen years of age;

(2) Discretionary SYO, if the act was committed when the child was fourteen or fifteen years of age, and the act is enhanced by any factor described in division (A)(1), (2), or (3) of this section;

(3) Traditional juvenile, if divisions (F)(1) and (2) of this section do not apply.

(G) If a child is adjudicated a delinquent child for committing an act that would be a felony of the fourth or fifth degree if committed by an adult, the child is eligible for whichever of the following dispositions is appropriate:

(1) Discretionary SYO, if the act was committed when the child was sixteen or seventeen years of age, and the act is enhanced by any factor described in division (A)(1), (2), or (3) of this section;

(2) Traditional juvenile, if division (G)(1) of this section does not apply.

(H) The following table describes the dispositions that a juvenile court may impose on a delinquent child:

OFFENSE CATEGORY AGE 16 & 17 AGE 14 & 15 AGE 12 & 13 AGE 10 & 11

(Enhancement Factors)

Murder/Aggravated Murder N/A MSYO, TJ DSYO, TJ DSYO, TJ

Attempted Murder/Attempted Aggravated Murder N/A MSYO, TJ DSYO, TJ DSYO, TJ

F1 (Enhanced by Offense of Violence Factor and Either Disposition Firearm Factor or Previous DYS Admission Factor) myso, TJ DYSO, TJ DYSO, TJ DYSO, TJ

F1 (Enhanced by Any Single or Other Combination of Enhancement Factors) DYSO, TJ DYSO, TJ DYSO, TJ TJ

F1 (Not Enhanced) DYSO, TJ DYSO, TJ TJ TJ

F2 (Enhanced by Any Enhancement Factor) DYSO, TJ DYSO, TJ DYSO, TJ TJ

F2 (Not Enhanced) DYSO, TJ DYSO, TJ TJ TJ

F3 (Enhanced by Any Enhancement Factor) DYSO, TJ DYSO, TJ TJ TJ

F3 (Not Enhanced) DYSO, TJ TJ TJ TJ

F4 (Enhanced by Any Enhancement Factor) DYSO, TJ TJ TJ TJ

F4 (Not Enhanced) TJ TJ TJ TJ

F5 (Enhanced by Any Enhancement Factor) DYSO, TJ TJ TJ TJ

F5 (Not Enhanced) TJ TJ TJ TJ

(I) The table in division (H) of this section is for illustrative purposes only. If the table conflicts with any provision of divisions (A) to (G) of this section, divisions (A) to (G) of this section shall control.

(J) Key for table in division (H) of this section:

(1) "Any enhancement factor" applies when the criteria described in division (A)(1), (2), or (3) of this section apply.

(2) The "disposition firearm factor" applies when the criteria described in division (A)(2) of this section apply.

(3) "DSYO" refers to discretionary serious youthful offender disposition.

(4) "F1" refers to an act that would be a felony of the first degree if committed by an adult.

(5) "F2" refers to an act that would be a felony of the second degree if committed by an adult.

(6) "F3" refers to an act that would be a felony of the third degree if committed by an adult.

(7) "F4" refers to an act that would be a felony of the fourth degree if committed by an adult.

(8) "F5" refers to an act that would be a felony of the fifth degree if committed by an adult.

(9) "MSYO" refers to mandatory serious youthful offender disposition.

(10) The "offense of violence factor" applies when the criteria described in division (A)(1) of this section apply.

(11) The "previous DYS admission factor" applies when the criteria described in division (A)(3) of this section apply.

(12) "TJ" refers to traditional juvenile.

Effective Date: 01-01-2002

R.C. 2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

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