

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

**IN RE J.T.,**

A Minor Child.

Case No.: 2014-0449

Appeal No. C-130434

Trial No. 13-2367 X

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ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS  
HAMILTON COUNTY, OHIO

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**MERIT BRIEF OF J.T.**

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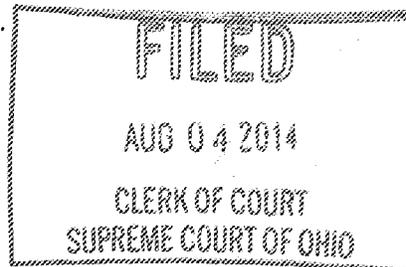
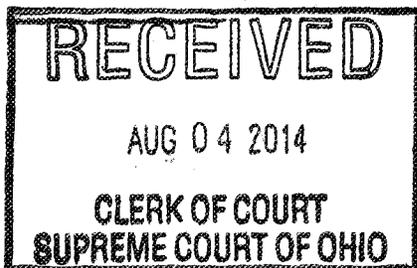
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## STATEMENT OF THE CASE AND FACTS

### A. PROCEDURAL POSTURE

On March 17, 2013, the state filed a complaint alleging that J.T. was delinquent of carrying, concealed on his person, a deadly weapon (i.e., a Highpoint 9mm), a fourth degree felony. T.d. 1. On March 27, 2013, the complaint was amended to delete “deadly weapon” and add “a handgun other than a dangerous ordnance.” T.d. 9.

At the opening of trial, on April 8, 2013, the state conceded the pistol was inoperable and requested that the complaint be amended to a first degree misdemeanor. T.p. 4, Apr. 8, 2013. The magistrate granted the amendment. *Id.* at 5; T.d. 12. The magistrate adjudicated J.T. delinquent, finding that “[e]vidence proved beyond a reasonable doubt that the defendant possessed the firearm in his waistband. The weapon was inoperable but was still capable of being used as a deadly weapon.” T.d. 12.

On April 22, 2013, J.T. timely filed a written objection to the magistrate’s decision. T.p. 13. Both J.T. and the state filed supporting memoranda, laying out their respective positions. T.d. 21 and 22. J.T. argued, as he does now, that the inoperable pistol was not a “deadly weapon” within the meaning of the statute. T.d. 21.

On May 22, 2013, the juvenile court heard oral arguments on J.T.’s objection. *See* T.d. 23; T.p. 3-37, May 22, 2013. The juvenile court denied J.T.’s objection, and accepted and adopted the magistrate’s decision. T.d. 24. On June 12, 2013, the juvenile court made a final dispositional entry, to which J.T. timely appealed. T.d. 26 and 27.

On appeal to the First District, J.T. argued, as he does now, that an inoperable pistol, carried in a waistband and not used or displayed in anyway, is not a “deadly weapon” within the statutory meaning.

On February 7, 2014, the First District Court of Appeals affirmed the juvenile court's judgment. The court found that "it is beyond cavil that the pistol had been designed as a weapon. And the arresting officer testified that the pistol was a heavy, blunt object -- evidence that the pistol was capable of inflicting deadly harm." Appx. 5.

## **B. STATEMENT OF FACTS**

J.T. is 16 years old and was 14 at the time of the alleged offense. T.d. 1. At the opening of trial on April 8, 2013, the state conceded the pistol was inoperable and requested that the complaint be amended to a first degree misdemeanor. T.p. 4, Apr. 8, 2013. Despite having previously amended the complaint to delete "deadly weapon" and add "a handgun other than a dangerous ordnance" to the charging language, the state did not request to amend the charging language in the complaint at trial. T.d. 9. The inoperable pistol was admitted into evidence. T.p. 16, Apr. 8, 2013; State's Exhibit 1-B.

At trial, the magistrate heard testimony from only one witness, Cincinnati Police Officer Frank Boggio. T.p. 6-7, Apr. 8, 2013. In the late afternoon of St. Patrick's Day, March 17, 2013, J.T. was standing with a group of children when he was approached by Officer Boggio and his partner. *Id.* at 7-8. Officer Boggio and his partner called for the youths to stay where they were. *Id.* at 8. Although other juveniles fled, J.T. stayed and talked with Officer Boggio. *Id.* Officer Boggio patted J.T. down and found the inoperable pistol in J.T.'s waistband. *Id.* at 9 and 11.

While acknowledging that the pistol was inoperable, the assistant prosecutor asked the officer to speculate if the pistol "could" cause harm. T.p. 12, Apr. 8, 2013. Officer Boggio responded that it "[c]ould be used as a blunt object." *Id.* However, Officer Boggio readily conceded that, in his five years as an officer, he had never been involved in a case where a pistol was used as a bludgeon. *Id.* at 13. More importantly, J.T. was not using the inoperable pistol as a

bludgeon in this case. *Id.* at 13-14. In fact, he did not use it at all; it was just tucked in his waistband. *Id.* at 14.

## ARGUMENT

### PROPOSITION OF LAW:

An inoperable pistol, which is not used or displayed in any way, is not, per se, a “deadly weapon” within the meaning of the carrying concealed weapon statute, pursuant to R.C. 2923.11(A).

The carrying concealed weapon statute requires that “[n]o person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand, any of the following: (1) [a] deadly weapon other than a handgun; (2) [a] handgun other than a dangerous ordnance; (3) [a] dangerous ordnance.” R.C. 2923.12(A).

A handgun is, of course, a subset of “firearm.” R.C. 2923.11(B) and (C). “The state must present evidence beyond a reasonable doubt that a firearm was operable at the time of the offense.” *State v. Murphy*, 49 Ohio St.3d 206, 551 N.E.2d 932 (1990), at syllabus. The state and courts below agree that the inoperable pistol at issue in this case was not a “firearm.”

A “deadly weapon” is “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” R.C. 2923.11(A).

J.T. submits that the important consideration is whether the “instrument, device, or thing” is “capable of inflicting death” as actually designed, adapted, or used. The First District determined that the pistol was “designed as a weapon.” The court’s logic was essentially that once something is designed as a weapon it is always a weapon, regardless of whether it has lost its intended function.

Yes, the pistol here may have been designed as a weapon, but it was designed to propel a projectile. It was designed as a “firearm.” It was not designed to be a bludgeon.

This Court has long held that to be a “firearm,” the pistol must be operable. *See Murphy* at syllabus. The same logic should apply here. The pistol in this case may have started as a “firearm,” but it lost that designed function.

J.T. submits that the better rule is that an object must retain its designed function in order to be a weapon by virtue of having been designed as a weapon. The pistol in this case does not fire bullets. It does not do what it was designed to do. It has lost its essence.

The First District’s decision begs the question – how far attenuated from its designed purpose must something be before it is no longer a “weapon?” Is the rusted Revolutionary War musket still a “deadly weapon?” Is the old cannon ball? Is the blunted Civil War sabre? Is a disarmed World War II grenade? Is the Native American arrowhead found by a Boy Scout and carried out of camp in a pocket? All of these objects were certainly designed not just as “weapons,” but as extremely deadly instruments of warfare. And due to their size, weight, or sharpness, they are all still capable of inflicting death. Yet none of them are deadly in the way they were designed to be.

Once an object has lost its designed function, it should only be considered a deadly weapon if it is capable of inflicting death and “possessed, carried, or used as a weapon.” R.C. 2923.11(A).

Certainly, “almost any hard object is capable of being used as a bludgeon,” thereby rendering it a “deadly weapon.” *State v. Nelson*, 2d. Dist. Montgomery No. 14775, 1995 Ohio App. LEXIS 3367 \* 7 (Aug. 18, 1995). But, “although \* \* \* an inoperable gun may be a deadly weapon,” evidence must show “that the defendant actually used or threatened to use it as a

bludgeon.” *State v. Macias*, 2d. Dist. Drake No. 1562, 2003-Ohio-1565, ¶ 37. In *Macias*, the court found “the record is devoid of evidence indicating that [the] assailant possessed, carried, or used an inoperable gun as a bludgeon,” and therefore concluded that it was not a deadly weapon.

*Id.*

For example, in *State v. Marshall*, 61 Ohio App.2d 84, 399 N.E.2d 112 (10th Dist. 1978), in the commission of a robbery, defendant used a revolver that was plugged, inoperable, and would probably explode if fired. This was considered a “deadly weapon” only because it was used “as a weapon.” *Id.* at 86.

The statute is not designed to declare all inoperable weapons to be considered “deadly weapons” without further consideration. An expansion of this magnitude causes the statute to lose its essence. If any device originally designed as a weapon is to be considered per se deadly, the statute is open to prosecuting a collector for transporting a Civil War relic. The First District opened a slippery slope of cases under this statute if any inoperable weapon can be considered per se deadly.

The First District’s decision below is at odds with not only other districts, but its prior decisions as well.

In *State v. Brown*, 101 Ohio App.3d 784, 656 N.E.2d 741 (1st Dist. 1995), the defendant grabbed the victim and threatened to shoot her with a BB gun if she would not have sex with him. The defendant later shot the victim and her friend with the BB gun. The court affirmed the defendant’s conviction for attempted rape. However, the court reversed the defendant’s felonious assault conviction, finding that the BB gun was not a “deadly weapon.” Even though the defendant threatened to shoot and did shoot the victim with the BB gun, there was no indication

that the BB gun could cause death through shooting. Moreover, “there was no evidence adduced that the BB gun was ever used or threatened to be used as a bludgeon.” *Id.* at 788.

The First District has also held that an unloaded starting pistol was not a “deadly weapon,” where no attempt was made to strike any of the victims of the robbery. *State v. Luckey*, 322 N.E.2d 354 (1st Dist. 1974) (decided under the former statutory definition of “deadly weapon”).

In order for an inoperable weapon to be considered a “deadly weapon” under the statute, an investigation into the use under the circumstances is required. If the object is not used as designed or as a bludgeon, it should not be considered per se a “deadly weapon,” as confirmed by the appellate court in *Luckey*. An inoperable pistol cannot be considered per se a “deadly weapon,” unless this Court is willing to accept a critical and unintended expansion of the statute.

If the General Assembly had wanted to make inoperable guns per se “deadly weapons,” it would have done so. The General Assembly could have included facsimile firearms in the list of objects that cannot be carried concealed. The General Assembly included objects indistinguishable from a firearm in the list of items that cannot be conveyed into a school zone. *See* R.C. 2923.122(C)(1). Such objects are not included in R.C. 2923.12(A).

In this case, the state conceded that the pistol was inoperable and, therefore, was not a “firearm.” The inoperable pistol is not capable of inflicting death in the way that it was designed to function, i.e., as a firearm. The key here is its capability of inflicting death as used. Officer Boggio testified that J.T. did not use the inoperable pistol as a bludgeon. There was no testimony that J.T. had done anything but stand peaceably with the inoperable pistol in his waistband.

Here, Officer Boggio had to reach well beyond his personal experience in other cases to the realm of pure speculation to postulate the inoperable pistol could have been used as a

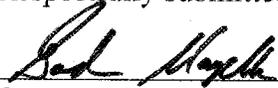
bludgeon. There was absolutely no evidence that J.T. used the inoperable pistol as a bludgeon. The inoperable pistol was not a “deadly weapon” within the meaning of the statute.

Thus, the state failed to present sufficient evidence that the inoperable pistol was a deadly weapon, and the case should be discharged. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

### CONCLUSION

An inoperable pistol, which is not used or displayed in any way, is not, per se, a “deadly weapon.” Therefore, this Court should reverse the decision of the First District.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned certifies that, on this 1st day of August 2014, a copy of the foregoing was personally served on:

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**APPENDIX**

Notice of Appeal to the Ohio Supreme Court (Mar. 24, 2014) .....Appx. 2  
Judgment Entry of the First District Court of Appeals (Feb. 7, 2014) .....Appx. 4

IN THE  
SUPREME COURT OF OHIO

14-0449

IN RE J.T.,

Appeal No. C-130434

A Minor Child.

Trial No. 13-2367 X

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ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS  
HAMILTON COUNTY, OHIO

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NOTICE OF APPEAL

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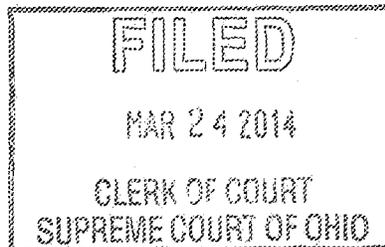
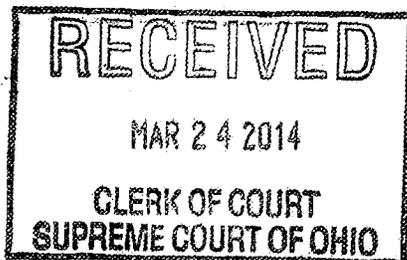
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IN THE  
SUPREME COURT OF OHIO

IN RE J.T.,

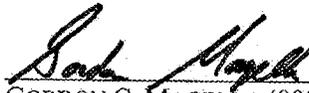
A Minor Child.

Appeal No. C-130434

Trial No. 13-2367 X

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Now comes J.T., a juvenile and appellant below, and hereby files his Notice of Appeal to the Ohio Supreme Court in the above captioned matter. Said appeal is from the decision of the First District Court of Appeals, entered on February 7, 2014, affirming the trial court's judgment. This appeal involves issues of public or great general interest.



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was personally served on the Hamilton County Prosecutor's Office on this 21st day of March 2014.



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ENTERED  
FEB -7 2014

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

IN RE: JOSHUA THOMPSON. : APPEAL NO. C-130434  
: TRIAL NO. 13-2367 X  
:  
: JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Appellant Joshua Thompson appeals from his adjudication as a delinquent child by the Hamilton County Juvenile Court for carrying a concealed weapon, in violation of R.C. 2923.12(A), a felony offense if committed by an adult. Police officers had found the 14-year-old Thompson with a loaded but inoperable Hi-Point C-9 semiautomatic pistol concealed in his waistband.

In a single assignment of error, Thompson challenges the sufficiency of the evidence adduced to prove that the concealed pistol was a deadly weapon—an essential element of the state’s proof. See R.C. 2923.12(A). Thompson argues that since the pistol was inoperable, it could not be considered a deadly weapon absent evidence that he had used the pistol as a bludgeon. R.C. 2923.11(A) defines a “deadly weapon” as (1) any instrument capable of inflicting death, and either (2) designed or specially adapted for use as a weapon, or (3) possessed, carried, or used as a weapon.



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The test for the sufficiency of the evidence required to sustain a conviction was enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Id.*; see *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 36. The same test applies in juvenile-delinquency adjudications. See *In re Washington*, 75 Ohio St.3d 390, 392-393, 662 N.E.2d 346 (1996).

Here, the pistol taken from Thompson was admitted into evidence. It is beyond cavil that the pistol had been designed as a weapon. And the arresting police officer testified that the pistol was a heavy, blunt object—evidence that the pistol was capable of inflicting deadly harm. See *State v. Gray*, 1st Dist. Hamilton No. C-081257, 2009-Ohio-5844, ¶ 11; see also *State v. Barnes*, 1st Dist. Hamilton Nos. C-950784 and C-950785, 1996 Ohio App. LEXIS 4624 (Oct. 23, 1996) (trier of fact could reasonably infer that a BB gun was capable of inflicting death as a bludgeon where state introduced into evidence a large, heavy, metal BB gun).

Thus the record reflects substantial, credible evidence from which the magistrate and the juvenile court, in overruling Thompson's objections to the magistrate's decision, could have reasonably concluded that all the elements of the charged offense had been proven beyond a reasonable doubt, including the contested element that Thompson had concealed an instrument capable of inflicting death that had been designed for use as a weapon. See R.C. 2923.11(A); see also *Conway* at ¶ 36. The assignment of error is overruled.

In its cross-assignment of error, the state argues that since Thompson had appealed more than 30 days after the juvenile court's May 30, 2013 adoption of the

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magistrate's decision adjudicating him a delinquent, his appeal was untimely. Under App.R. 3(C)(2), we note that the state is not required to raise a cross-assignment of error to defend the judgment below "on a ground other than that relied on by" the juvenile court.

Here, the juvenile court's entry adopting the magistrate's decision was not accompanied by an order of disposition. The May 30 entry was not, therefore, a final appealable order. See *In re Sekulich*, 65 Ohio St.2d 13, 14, 417 N.E.2d 1014 (1981). After adopting the magistrate's decision, the juvenile court continued the matter for disposition. The magistrate ultimately entered a dispositional order releasing Thompson to his mother. That decision was adopted by the juvenile court and was journalized on June 12, 2013. Thompson filed a notice of appeal within the 30-day period which commenced on that date. See App.R. 4(A). The state's cross-assignment of error is overruled.

Therefore, the judgment of the juvenile court is affirmed.

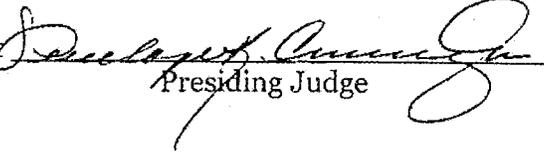
Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

**CUNNINGHAM, P.J., HILDEBRANDT and DEWINE, JJ.**

To the clerk:

Enter upon the journal of the court on February 7, 2014

per order of the court

  
Presiding Judge