

IN THE SUPREME COURT OF OHIO

In re D.S.
adjudicated delinquent child

: Case No. _____
:
:
: On Appeal from the Cuyahoga
: County Court of Appeals
: Eighth Appellate District
:
: C.A. Case No. 101161

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT D.S.**

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

This Court has found that for adults, the practice of awarding jail time credit is rooted in constitutional protections in both the Ohio and United States Constitutions. *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 7. R.C. 2967.191 requires a committing court to credit a defendant with jail time credit for the total number of days he was confined “for any reason arising out of the offense for which the prisoner was convicted and sentenced.” *Id.* at ¶ 8, citing R.C. 2967.191. Juveniles have a similar right to receive credit for the time they are held prior to disposition. *See* R.C. 2152.18(B). Recently, the General Assembly removed the phrase “held in detention,” from the statute, and replaced it with the word “confined,” which “broaden[ed] the circumstances under which [children] will receive credit against [their] term of institutionalization.” *In re K.A.*, 6th Dist. Lucas No. L-12-1334, 2013-Ohio-3847, ¶ 5, citing *State v. Napier*, 93 Ohio St.3d 646, 648, 758 N.E.2d 1127 (2001), and 2012 Am.Sub.S.B.No. 337 (Enacted September 28, 2012). The amendment also brought the juvenile statute more in line with the adult requirements. *See In re Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, ¶ 15 (distinguishing the pre-amendment version of the juvenile detention credit statute from R.C. 2967.191 because the juvenile statute did not contain the word “confined.”).

But, D.S.’s right to due process was violated when he was denied credit for the nine months that he was confined in both the juvenile detention center and the county jail in connection with the offense for which he was committed to DYS. R.C. 2152.18(B). D.S. was initially charged with aggravated robbery and a three-year firearm specification in juvenile court, but was transferred to criminal court for prosecution. *In re D.S.*, 8th Dist. Cuyahoga No. 101161, 2015-Ohio-518, ¶ 2; Juv.R. 30; R.C. 2152.12(A). Through negotiations with the State, he agreed to admit to an offense that was not eligible for mandatory transfer. *Id.* at ¶ 3. Yet,

rather than utilize the reverse waiver procedures of R.C. 2152.121, the State dismissed the indictment against D.S. and filed a new delinquency complaint in juvenile court alleging the lesser charge of robbery with a one-year firearm specification. *Id.* at ¶ 3. Although D.S. was committed to DYS for the same act he was originally charged with, both the juvenile court and the Eighth District found that he was not entitled to any confinement credit whatsoever because R.C. 2152.18(B) requires a committing court to only credit a child with time held on the complaint of commitment, not for time held for the alleged act. *Id.* at ¶ 4, 6.

The Eighth District's decision creates a disturbing precedent, whereby a child's right to due process can be denied if the State dismisses the original complaint and refiles the same allegation as a new offense under a new case number. This contradicts this Court's rationale in *Thomas*, and is in conflict with both the Third and First District Courts of Appeals, which have each determined that a court must credit a juvenile or criminal defendant with the time he is held on a charge that is dismissed or of which he is acquitted. *In re Felver*, 3rd Dist. Auglaize No. 2-01-20, 2002 Ohio App. LEXIS 1590, *14-15 (Apr. 10, 2002) (finding that a juvenile court must grant a child credit for time held in detention on a dismissed probation violation); *State v. Gregory*, 108 Ohio App.3d 264, 268, 670 N.E.2d 547 (1st Dist.1995) (holding that courts may not allocate jail time to dismissed charges as "'dead time'—a punishment without a crime.").

This Court should accept jurisdiction of this case to safeguard the due process rights of children facing a deprivation of liberty and to ensure uniform application of Ohio's juvenile confinement credit statute throughout the state.

STATEMENT OF THE CASE AND FACTS

On May 14, 2013, a complaint was filed in the Cuyahoga County Juvenile Court, Case No. DL13106887, alleging that then 17-year-old D.S. was delinquent of two counts of aggravated robbery, violations of R.C. 2911.01(A)(1), felonies of the first degree if committed by an adult. *Op.* at ¶ 2. Each charge carried two firearm specifications pursuant to R.C. 2941.141 and 2941.145. *Id.* The court remanded D.S. to the juvenile detention center following the State's notice that it intended to pursue transfer of his case to criminal court pursuant to Juv.R. 30. *Id.* On July 26, 2013, the juvenile court found probable cause to believe that D.S. committed the acts charged and transferred his case to criminal court for prosecution. *Id.* The court also imposed a \$50,000 bond and remanded D.S. to county jail, where he was confined for several months because he could not post bond. *Id.* at ¶ 3.

On February 25, 2014, the parties informed the common pleas court that they reached an agreement in which the State would dismiss the aggravated robbery charge without prejudice and D.S. would admit to robbery with a one-year firearm specification. *Id.* The State had already filed a new complaint in juvenile court charging D.S. with the lesser offense. *Id.* The criminal court dismissed the case without prejudice and ordered D.S. transferred back to the juvenile detention center pending further proceedings. *Id.*

On February 28, 2014, the juvenile court held D.S.'s adjudication and disposition hearing. *Id.* at ¶ 4. The parties agreed that he would admit to one count of robbery, with a one-year firearm specification, and serve a one-year minimum commitment in the Department of Youth Services ("DYS") with a mandatory year commitment for his firearm specification. *Id.* The juvenile court recalled that D.S.'s case was previously filed under case number DL13106887 and that a probable cause hearing had been held under that case number. (Case No.

DL14102017, 2/28/14 T.p. 17). The court referenced the testimony that the victims and officers gave at the probable cause hearing. (Case No. DL14102017, 2/28/14 T.pp. 17-18). Following a brief colloquy, D.S. entered an admission; and, the court found him delinquent. *Op.* at ¶ 4.

For disposition, the court imposed the jointly recommended two-year minimum commitment. *Id.* But, the court ordered that D.S. would receive no credit, because the 2014 case number was a new case. (Case No. DL14102017, 2/28/14 T.p. 26). D.S., his mother, and defense counsel objected. (Case No. DL14102017, 2/28/14 T.p. 26). Defense counsel and the State reminded the court that the 2014 case number was simply a refile of the 2013 case, and that the confinement credit from that case was to be credited against D.S.'s commitment to DYS. (Case No. DL14102017, 2/28/14 T.pp. 27-28). The court refused to grant D.S.'s request for credit for the time he was confined in Case No. DL13106887. *Op.* at ¶ 4.

On appeal, D.S. assigned error to the juvenile court's denial of his request for 286 days of confinement credit. *Id.* at ¶ 1, 5. The State conceded error. *Id.* at ¶ 1. But, the Eighth District affirmed, finding that R.C. 2152.18(B) requires a committing court to grant a child credit only for the time he was confined under the complaint upon which the order of commitment is based. *Id.* at ¶ 6. The court held that since the State elected to re-file the amended charges under a new complaint with a new number, D.S. was not entitled to credit for the nine months he was confined for his offense. *Id.* at ¶ 6. D.S. timely appeals.

ARGUMENT

PROPOSITION OF LAW

When a juvenile court commits a child to the Department of Youth Services, the court must state in its entry of commitment the total days the child was confined in connection with the offenses on which the order of commitment is based, including time for which the child was held on charges that were dismissed. R.C. 2152.18(B). Fifth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Section 16.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *In re Gault* 387 U.S. 1, 13-14, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The applicable due process standard, as developed by *Gault* and *Winship* is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); *see also Lassiter v. Dept. of Social Servs. Of Durham Cty., North Carolina*, 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). In this case, D.S. asks this Court to determine whether it is fundamentally fair for children to receive credit only for time they were confined under a specific complaint rather than all the time they were confined in connection with their offense of commitment.

Ohio Revised Code Section 2152.18(B) states that a child is to receive credit for the time he was “confined in connection with the delinquent child complaint which the order of commitment is based.” *See also Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, at ¶ 11.¹ The statute provides:

When a juvenile court commits a delinquent child to the custody of the department of youth services pursuant to this chapter, the court shall state in the order of commitment the total number of days that the child has been confined in connection with the delinquent child complaint upon which the order of commitment is based. [* * *]. The department shall reduce the minimum period

¹ R.C. 2152.18 has been amended since *Thomas* to reflect that a child is to receive credit for all time “confined” rather than “detained,” but the phrase “in connection with” has remained the same.

of institutionalization that was ordered by both the total number of days that the child has been so confined as stated by the court in the order of commitment and the total number of any additional days that the child has been confined subsequent to the order of commitment but prior to the transfer of physical custody of the child to the department.

R.C. 2152.18(B). “Confinement” has been defined as time spent at any facility in which a person is “not free to come and go as he wishe[s].” *In re K.A.*, 6th Dist. Lucas No. L-12-1334, 2013-Ohio-3847, ¶ 5, quoting *State v. Napier*, 93 Ohio St.3d 646, 758 N.E.2d 1127 (2001).

In *Thomas*, this Court held that a juvenile is entitled to receive credit not only for time held on the original complaint, but also for time held in detention awaiting final disposition for a probation violation. *Thomas* at ¶ 13. This Court’s rationale was that the phrase “in connection with” requires juvenile courts to grant children credit in those circumstances because probation violations stem from the original complaint and are “sufficiently linked to the adjudication of the original charges.” *Id.*; see also *In re Marlin*, 3d Dist. Paulding No. 11-04-15, 2005-Ohio-1429, ¶ 12-14 (reversing a juvenile court’s denial of the child’s request for credit where the record reflected that a probation officer’s motion to invoke the child’s suspended commitment was clearly “in connection with” the original complaint); *In re P.F.*, 9th Dist. Lorain No. 07CA009099, 2007-Ohio-4913, ¶ 6-8 (finding that a juvenile was entitled to credit for the time he was detained while awaiting adjudication for a probation violation). A juvenile court has no discretion in that regard according to the language of the statute. See *In re R.A.I.*, 2d Dist. Miami Nos. 2006 CA 43-44, 2007-Ohio-2365, ¶ 14 (found the use of the word “shall” indicates the mandatory nature of R.C. 2152.18). And, DYS must deduct the days credited from the total number of days the juvenile is ordered to be institutionalized. R.C. 2152.18(B).

Although *Thomas* concerned the specific question of whether a child is entitled to credit for time held on a probation violation, the reasoning of *Thomas* requires that a child receive

credit for any time he was held “in connection with” the offense for which he is committed to DYS, including time held on a charge that is amended or dismissed.

The 2013 complaint against D.S. alleged that on May 8, 2013, he committed aggravated robbery enhanced with a three-year firearm specification, in violation of R.C. 2911.01(A)(1) and R.C. 2945.145, respectively. *Op.* at ¶ 2. Following D.S.’s transfer to criminal court, the State dismissed that charge and refiled the lesser included offense of robbery enhanced with a one-year specification in a 2014 delinquency complaint. *Id.* at ¶ 3. The 2014 complaint alleged that on May 8, 2013, D.S. violated R.C. 2911.02(A)(1) against the same victim that was listed in the 2013 complaint. *Id.* at ¶ 3. Each complaint charged D.S. with an offense based on the same act, supported by the same facts and circumstances. (Case No. DL14102017, 2/21/14 Complaint; 2/28/14 T.pp. 17-18; 29-30). Accordingly, D.S.’s confinement on the 2013 complaint was “in connection with” his commitment to DYS on the 2014 complaint. *Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, at ¶ 13.

But, because the State filed a new complaint against D.S. immediately prior to his entering an admission to the amended charge, the nine months he was confined for his offense was credited to the 2013 complaint, which was dismissed. *Op.* at ¶ 3-4. The Eighth District found that R.C. 2152.18(B) did not require the juvenile court to credit D.S. with any of the time he was confined on the 2013 complaint because the plain language of the statute requires only that the court credit a child with the days he was confined on the complaint of commitment—which, in this case, was the 2014 complaint. *Op.* at ¶ 6. Specifically, the Eighth District held that “the statute permits no interpretation other than that the confinement relates to the underlying complaint, not any proceedings under previously dismissed complaints or

indictments.” *Id.* But, the Eighth District’s reading of R.C. 2152.18(B) does not comport with due process and fundamental fairness.

Other courts of appeals have interpreted Ohio’s confinement and jail time credit statutes to require courts to credit juveniles or defendants with all the time they are held in connection with their offense of commitment, including time they were held on charges that were dismissed or of which they were acquitted. *Felver*, 3d Dist. Auglaize No. 2-01-20, 2002 Ohio App. LEXIS 1590, *14-15 (finding that a juvenile court’s failure to grant a child credit for time held on a dismissed probation violation was improper); *Gregory*, 108 Ohio App.3d 264, 268, 670 N.E.2d 547 (finding that the mandatory language of R.C. 2967.191 “requires that the trial court calculate credit for any time of incarceration that arises out of the offense for which Gregory was convicted and sentenced.”). This makes sense because denying a child credit for the time he was confined on a charge that is ultimately dismissed results in the child serving “dead time.” *Felver*, at 15-16; *Gregory* at 268. The imposition of “dead time” is fundamentally unfair to a defendant because it creates a punishment without a crime. *State v. Klein*, 1st Dist. Hamilton Nos. C-040176 and C-040224, 2005-Ohio-1761, ¶ 31. Further, under the Eighth District’s reasoning, the State could systemically deny juveniles their right to confinement credit by simply dismissing an initial complaint after a child has been held for months on those allegations, and refiling the case as a lesser included offense immediately prior to the child’s admission—which is precisely what happened here.

In its opinion, the Eighth District distinguished Ohio’s juvenile confinement credit statute from its adult counterpart, which specifically requires that committing courts credit defendants with the total number of days the prisoner was confined “for any reason arising out of the offense

for which the prisoner was convicted or sentenced.” *Op.* at ¶ 7, citing R.C. 2967.191. But this distinction must not be permitted to stand.

As outlined above, this Court’s interpretation of the phrase “in connection with” in *Thomas* demonstrates that whenever a child’s confinement is “sufficiently linked to the adjudication of the original charges,” the child is entitled to credit against his commitment. *Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, at ¶ 11. Here, the State dismissed the higher level felony offense and charged D.S. with the same act, albeit as a lesser included offense, in a new complaint. *Op.* at ¶ 3. The alleged act in the 2014 complaint was the same alleged act described in the 2013 complaint. (Case No. DL14102017, 2/21/14 Complaint; 2/28/14 T.pp. 17-18; 29-30). Accordingly, the time D.S. was held on the 2013 complaint was sufficiently linked to the charges alleged in the 2014 complaint; thus, under *Thomas*, D.S. was entitled to nine months of confinement credit.

Further, the General Assembly’s recent amendments to R.C. 2152.18(B) reflect the legislature’s intent to broaden the circumstances for which a child receives credit against his period of institutionalization, not narrow them. *K.A.*, 6th Dist. Lucas No. L-12-1334, 2013-Ohio-3847, at ¶ 5 (finding that the use of the term confinement required a committing court to credit a child with credit for days he was held at a community correctional facility and treatment center). And, the amendment creates more symmetry between the juvenile confinement credit statute and the adult jail time credit statute. *See Thomas*, 100 Ohio St.3d 89, 2003-Ohio-5162, 796 N.E.2d 908, at ¶ 15 (distinguishing the pre-amendment version of the juvenile detention credit statute from R.C. 2967.191 because the juvenile statute did not contain the word “confined.”). Accordingly, the Eighth District’s interpretation of R.C. 2152.18(B) is inconsistent

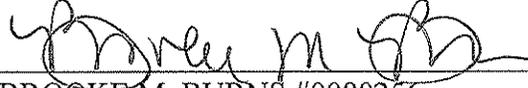
with the legislature's recent expansion of a child's right to receive credit for time served prior to a commitment to DYS.

CONCLUSION

Left to stand, the Eighth District's decision renders meaningless a child's pre-disposition confinement, in violation of R.C. 2152.18(B) and the child's right to due process. Thus, for all the foregoing reasons, D.S. respectfully requests that this Court accept jurisdiction of this case.

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 D.S. was served by ordinary U.S. Mail, this 30th day of March, 2015 to the office of Timothy McGinty, 1200 Ontario Street, 8th and 9th Floor, Cleveland, Ohio 44113.



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