

NO. 2014-2190

IN THE SUPREME COURT OF OHIO

IN RE: A.G.,
AN ADJUDICATED
DELINQUENT CHILD

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On June 29, 2012, at approximately 1:00 a.m., Archie Wynn drove to a neighborhood beverage store, withdrew money from an ATM within the store, and proceeded to walk back to his car. (6/14/2013 Tr. pp. 16-17). As he approached his car, Wynn noticed a man approaching the store. (6/14/2013 Tr. p. 17). Wynn described the encounter as follows:

And I'm thinking he's [fixing] to go to the store, but instead he pulls a small revolver out of his pocket and tells me to get in the car. I stood there and looked at him. Then he said, get in the car, n****r, or I will shoot you. And I looked and I turned and I ran * * *.

(6/14/2013 Tr. P. 17).

Police investigated the incident and found a fingerprint on the car that did not belong to the victim. The fingerprint was traced to defendant/appellant A.G., then fifteen years old.

A two-count complaint was filed in the Cuyahoga County Court of Common Pleas, Juvenile Division against A.G. on October 24, 2012. Count 1 of the complaint alleged A.G. was a delinquent child for committing aggravated robbery in violation of R.C. 2911.01(A)(1), a first-degree felony if committed by an adult, enhanced with a firearm specification. Count 2 of the complaint alleged A.G. was delinquent for committing kidnapping, in violation of R.C. 2905.01(A)(2), a first-degree felony if committed by an adult, also enhanced with a firearm specification.

The State requested the juvenile court relinquish jurisdiction and bind over A.G. to the general division of the criminal court for prosecution as an adult. The juvenile court declined to do so, determining A.G. would be amenable to rehabilitation in the juvenile system. (6/14/2013 Tr. P. 71).

A.G. admitted to the aggravated robbery and kidnapping and was adjudicated delinquent on both counts. (11/13/2013 Tr. P. 18).

At the disposition hearing, the juvenile court imposed a commitment to the Ohio Department of Youth Services (DYS) for a minimum of three years with a maximum to A.G.'s 21st birthday. (12/20/2013 Tr. pp. 6-7). A one-year commitment was imposed for the firearm specification, a twelve-month commitment for the aggravated robbery count, and a twelve-month commitment for the kidnapping count, to be served consecutively, for a total minimum commitment of three years in DYS. (12/20/2013 Tr. pp. 6-7).

A.G. appealed, asserting two assignments of error: (1) the juvenile court erred when it failed to merge his adjudications for robbery and kidnapping, alleging these were allied offenses of similar import, and (2) trial counsel was ineffective for failing to object to A.G.'s adjudication for allied offenses of similar import.

The Eighth District Court of Appeals affirmed the juvenile court's decision. *In re A.G.*, 8th District Cuyahoga No. 101010, 2014-Ohio-4927. In reaching its decision, the court found the language of the Double Jeopardy Clause in both the United States and Ohio Constitutions does not protect a person from being sentenced or punished for allied offenses of similar import. *Id.* at ¶12. By enacting R.C. 2941.25, the Ohio General Assembly signaled its intent to prohibit cumulative punishments for crimes considered "allied offenses of similar import." *Id.* at ¶15. Citing decisions from the Fourth, Sixth, Eighth, Tenth and Eleventh Districts, the court held R.C. 2941.25, a criminal statute, does not apply to juvenile delinquency proceedings. *Id.* at ¶20. The court further held the test to be employed in these situations was set forth in *Blockburger v. United States*, 284 U.S.299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *In re A.G.* at ¶24. The court determined that under the *Blockburger* analysis, A.G.'s adjudications for aggravated robbery and

kidnapping would not merge. *Id.* at ¶26. As such, the Eighth District found juvenile delinquency proceedings were subject to constitutional double jeopardy protections but not the statutory provision pertaining to allied offenses of similar import.

A.G. appealed to this Court on December 19, 2014, asserting a single proposition of law: The merger analysis set forth in *State v. Johnson* applies to juvenile delinquency proceedings to protect a child’s right against double jeopardy. This Court accepted the matter for appeal on May 20, 2015. *In re A.G.*, 142 Ohio St.3d 1464, 2015-Ohio-1896, 30 N.E.3d 973. The only issue before this Court is whether R.C. 2941.25 applies to juvenile delinquency proceedings, not whether appellant A.G. was convicted of allied offenses of similar import.

LAW AND ARGUMENT

APPELLANT’S PROPOSITION OF LAW 1: THE MERGER ANALYSIS SET FORTH IN STATE V. JOHNSON APPLIES TO JUVENILE DELINQUENCY PROCEEDINGS TO PROTECT A CHILD’S RIGHT AGAINST DOUBLE JEOPARDY

I. Because of the fundamental differences between juvenile court delinquency proceedings and adult criminal trials, juveniles are not entitled to all procedural rights afforded adult criminal defendants

Juvenile courts are legislative creations. *In re Agler*, 19 Ohio St.2d 70, 72, 249 N.E.2d 808 (1969). They were premised on profoundly different assumptions and goals than criminal courts. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 66, citing *United States v. Johnson*, 28 F.3d 151, 157 (D.C. Cir.1994) (Wald, dissenting). In juvenile proceedings, the state’s *parens patriae* interest in preserving and promoting the welfare of the child, * * * makes a juvenile proceeding fundamentally different from an adult criminal trial.” *In re J.V.*, 134 Ohio St. 3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 15 (citations omitted). This Court has recognized that juvenile proceedings are neither

criminal nor penal in nature. See *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 66-67.

Because they are not facing criminal prosecution in juvenile court, juvenile offenders are not afforded the full range of procedural protections provided to adult criminal defendants. Juveniles are not entitled to indictment by the grand jury. *Aglar*, paragraph 2 of syllabus. They are not also not entitled to trial by jury. *Id.* In reaching this determination, the Ohio Supreme Court stated:

Juvenile Court proceedings are essentially noncriminal, and the infusion into such procedure of the full inventory of rights or features provided in criminal cases, other than those essential to due process generally, would predictably destroy the individualized, remedial nature of adjudication therein.

Id. at 19 Ohio St. 78-79.

Likewise, it has widely been held that juveniles do not have a constitutional right to bail. See, e.g., *State ex rel. Peaks v. Allaman*, 66 Ohio L. Abs. 403, 115 N.E. 2d 849, *6 (2nd Dist. 1952). In *Allaman*, the Second District held that since the juvenile was not charged with an “offense,” he was not entitled to release on bail under the provision of Article I, Section 9, of the Ohio Constitution. *Id.* at paragraph 4 of syllabus.

This Court has also declined to extend criminal statutory protections to juvenile delinquency proceedings. Juveniles under the jurisdiction of the juvenile court are not entitled to statutory speedy trial rights under R. C. 2945.71 (C). *State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St.2d 433, 329 N.E.2d 680 (1975).

II. R.C. 2941.25 is an enhanced statutory protection afforded adult criminal defendants

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put

in jeopardy of life or limb.” This protection applies to Ohio citizens through the Fourteenth Amendment to the United States Constitution and is additionally guaranteed by the Ohio Constitution, Article I, Section 10. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 16.

The Double Jeopardy Clause protects against three abuses: (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *Id.* (citations omitted).

The Ohio Supreme Court has held the Double Jeopardy Clause of the Fifth Amendment applies to juvenile delinquency proceedings and prohibits a juvenile court from reimposing a suspended commitment to DYS after a juvenile has been released from probation. *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258.

However, when multiple punishments are imposed in the same proceeding, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *State v. Rogers*, 2015-Ohio-2459, 2015 Ohio LEXIS 1562, ¶ 16, (citations omitted). Thus, a person may be punished for multiple offenses arising from a single criminal act without violating the Double Jeopardy Clauses of the United States and Ohio Constitutions, so long as the General Assembly intended cumulative punishment. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 25 (citation omitted).

“Absent a more specific legislative statement, R.C. 2941.25 is the primary indication of the General Assembly’s intent to prohibit or allow multiple punishments for two or more offenses resulting from the same conduct.” *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶11. See also *Missouri v. Hunter*, 459 U.S.

359, 366, 103 S. Ct. 673, 74 L. Ed.2d 535 (1983) (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing a greater punishment than the legislature intended.”)

R.C. 2941.25(A) is not an absolute prohibition of multiple punishments for two or more allied offenses of similar import. The relevant test is whether the legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes.” *Johnson* at ¶ 25 (citation omitted). A defendant is not placed in jeopardy twice for the same offense so long as courts properly apply R.C. 2941.25 to determine the intent of the General Assembly with regard to the merger of offenses. *Id.*

III. The General Assembly did not intend for the statutory protections of R.C. 2941.25 to apply to adjudications of juvenile delinquency

A. The plain language of R.C. 2941.25(A) demonstrates the General Assembly did not intend for the statute to apply to juvenile delinquency proceedings

When interpreting a statute, the court must examine the words used by the legislature. *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12. Where the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written. *Id.*

R.C. 2941.25(A) states as follows:

Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the **indictment or information** may contain counts for all such offenses, but the **defendant** may be **convicted** of only one. (Emphasis added).

R.C. 2941.25, which prohibits multiple **convictions** for allied offenses of similar import, is not applicable to delinquency proceedings in the juvenile court. This Court has

previously stated that delinquency proceedings do not result in criminal convictions. *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766 (citation omitted). See also *In re C.S.* at ¶ 67, citing *State v. Joiner*, 28 Ohio Dec. 199, 1917 Ohio Misc. LEXIS 58 (C.P. 1917) (“Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal nor penal in its nature * * *.) Where the legislature has intended for juvenile adjudications to be treated as criminal convictions, it has expressly stated as such. See, e.g., R.C. 2923.13, R.C. 2950.01 and R.C. 2901.08.

Likewise, juveniles are not considered “defendants”:

Instead of "defendants," children are "respondents" or simply "juveniles"; instead of a trial, children receive "hearings"; children are not found guilty, they are "adjudicated delinquent"; and instead of sentencing, children's cases are terminated through "disposition." See R.C. Chapter 2151 and Rules of Juvenile Procedure.

State v. Hanning, 89 Ohio St. 3d 86, 89, 728 N.E.2d 1059 (2000).

Moreover, juveniles are charged by complaint. They are not indicted or charged by information. See R.C. 2152.021.

R.C. 2941.25 is a clear indication of the General Assembly’s intent to permit cumulative sentencing for the commission of certain offenses. *State v. Bickerstaff*, 10 Ohio St.3d 62, 66, 461 N.E.2d 892 (1984), fn. 1. The plain, unambiguous language of R.C. 2941.25 demonstrates the General Assembly’s intent. R.C. 2941.25 applies to criminal proceedings and makes no mention of juvenile adjudications.

B. The General Assembly has expressly authorized consecutive periods of commitment for multiple delinquency adjudications, but has not codified double jeopardy protections for allied offenses of similar import into juvenile delinquency proceedings

In R.C. 2152.17(F), the General Assembly expressly authorized juvenile courts to impose consecutive periods of commitment if a child is adjudicated a delinquent child for committing two or more acts that would be felonies if committed by an adult:

If a child is adjudicated a delinquent child for committing two or more acts that would be felonies if committed by an adult and if the court entering the delinquent child adjudication orders the commitment of the child for two or more of those acts to the legal custody of the department of youth services for institutionalization in a secure facility pursuant to section 2152.13 or 2152.16 of the Revised Code, the court may order that all of the periods of commitment imposed under those sections for those acts be served consecutively in the legal custody of the department of youth services, provided that those periods of commitment shall be in addition to and commence immediately following the expiration of a period of commitment that the court imposes pursuant to division (A), (B), (C), or (D)(1) of this section. A court shall not commit a delinquent child to the legal custody of the department of youth services under this division for a period that exceeds the child's attainment of twenty-one years of age.

R.C. 2152.17, which was enacted in 2002, does not include any prohibition against consecutive periods of commitment for allied offenses of similar import. The legislature limited the cumulative period of consecutive commitments to the child's twenty-first birthday. *Id.*

The Eighth District correctly noted the General Assembly has not enacted a statute codifying allied offenses of similar import protections in juvenile delinquency proceedings, despite the fact that *Skeens*¹ was decided over thirty years ago. *In re A.G.*, 2014-Ohio-4927 at ¶22. *Skeens* holds that R.C. 2941.25(A) does not apply to situations where a minor is alleged to be a delinquent minor since, under the Juvenile Code, such a minor is not charged with a crime. *Skeens*, 1982 Ohio App. LEXIS 12181 at *6-7.

While the commission of acts which would constitute a crime if committed by an adult sets the machinery of the Juvenile Court in motion, the issue before the court is whether or not the minor has engaged in the kind of

¹ 10th District Franklin Nos. 81AP-882 and 81AP-883, 1982 Ohio App. LEXIS 12181 (Feb. 25, 1982).

conduct that constitutes delinquency and will therefore justify the intervention of the state to assume his protection and custody. Evidence that the minor committed acts that would constitute a crime if committed by an adult is used only for the purpose of establishing that the minor is delinquent, not to convict him of a crime and to subject him to punishment for that crime.

Id.

In addition to the Eighth District, other appellate districts have followed the Tenth District's decision in *Skeens* and held R.C. 2941.25 does not apply to juvenile delinquency proceedings: the Fourth District (*In re S.S.*, 4th Dist. Vinton No. 10CA682, 2011-Ohio-4081), the Sixth District (*In re M.C.*, 6th Dist. Erie No. E-12-031, 2013-Ohio-2808), and the Eleventh District (*In re Bowers*, 11th Dist. No. 2002-A-0010, 2002-Ohio-6913).²

Likewise, the legislature has not seen to amend R.C. 2941.25 since its enactment in 1974. See, e.g., *Johnson*, 2010-Ohio-6314, ¶16.

Based on the above, it is clear that the General Assembly has declined to extend the statutory protections of R.C. 2941.25 to juveniles. The Court must interpret the statute as written. Nothing in R.C. 2941.25 indicates the legislature intended for the statute to apply to juvenile delinquency proceedings.

C. The Court should apply the same rationale it used in *State ex rel. Williams v. Court of Common Pleas of Lucas County, Ohio* and hold R.C. 2941.25 does not apply to proceedings under the jurisdiction of the juvenile court

This Court previously held statutory speedy trial rights do not apply to juveniles under the jurisdiction of the juvenile court. *State ex rel. Williams v. Court of Common Pleas of Lucas County, Ohio*, 42 Ohio St.2d 433, 329 N.E.2d 680 (1975).

² The Twelfth District, citing *Skeens*, found that juvenile courts are not authorized to merge complaints of juvenile delinquency. *In re M.P.R.*, 12th Dist. Butler No. CA2014-10-209, 2015-Ohio-3102.

In *Williams*, three affidavits alleging delinquency were filed against the appellant, then age sixteen. *Id.* at 433. The state filed a motion requesting that the juvenile court relinquish jurisdiction over the appellant and transfer him to the common pleas court, general division, for trial as an adult. *Id.* The state's motion was granted and appellant subsequently filed a writ of prohibition, alleging his statutory speedy trial rights had been violated. *Id.*

The Ohio Supreme Court affirmed the appellate court, agreeing R.C. 2945.71's deadline for commencing trial did not begin to run until the Juvenile Court relinquished jurisdiction and transferred the accused to the "adult" court. *Id.* at 434.

In reaching its decision, the Court stated:

The time limits set forth in R. C. 2945.71 (C) apply only to "[a] person against whom a charge of felony is pending * * *." A juvenile who has lodged against him an affidavit alleging that he is delinquent because he committed an act which, if committed by an adult, would constitute a felony is not a person against whom a charge of felony is pending. See *In re Agler* (1969), 19 Ohio St. 2d 70, 249 N. E. 2d 808; *Cope v. Campbell* (1964), 175 Ohio St. 475, 196 N. E. 2d 457 (paragraph one of the syllabus); *In re Darnell* (1962), 173 Ohio St. 335, 182 N. E. 2d 321; *Prescott v. State* (1869), 19 Ohio St. 184. The juvenile becomes such a person and is, therefore, included within the scope of R. C. 2945.71 (C) only if and when the Juvenile Court relinquishes jurisdiction over the case and transfers it to the appropriate "adult" court.

Id. at 434-435.

Using the same rationale to the case at bar, this Court should hold R.C. 2941.25 does not apply to matters under the jurisdiction of the juvenile court. Both R.C. 2941.25 and R.C. 2945.71 are statutes that provide broader (in some respects) protections to their corresponding constitutional guarantees. Juveniles would still be afforded their constitutional rights under the Double Jeopardy Clause of the United States and Ohio Constitutions. They would not, however, be entitled to the enhanced statutory protection (the merging of "allied offenses of similar import") until and unless the juvenile court

relinquished jurisdiction over the case and transferred it to the appropriate “adult” court or until the General Assembly clearly indicated R.C. 2941.25 should apply to juvenile delinquency proceedings.

CONCLUSION

The juvenile court’s consecutive commitments for multiple delinquency adjudications in this matter were authorized by statute. When multiple punishments are imposed in the same proceeding, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. As the General Assembly did not intend for R.C. 2941.25 to be applicable to juvenile delinquency proceedings, A.G.’s commitments for aggravated robbery and kidnapping did not violate his rights under the Double Jeopardy Clause of the United States or Ohio Constitution.

For the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court affirm the decision of the Eighth Appellate District in this matter.

Respectfully submitted,

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