

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	CASE No. 2015-0192
PLAINTIFF-APPELLANT	:	
	:	ON APPEAL from the Montgomery
v.	:	County Court of Appeals
	:	Second Appellate District
DELAQUAN BROOKSHIRE	:	
	:	C.A. CASE No. 25859
DEFENDANT-APPELLEE	:	
	:	

MERIT BRIEF OF DEFENDANT-APPELLEE, DELAQUAN BROOKSHIRE

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Introduction

This case presents a question regarding the process that is due for children who are charged with and convicted of offenses that are subject to both mandatory and discretionary transfer to the criminal justice system. In 2011, the General Assembly recently created a system of reverse transfer, to ensure that a child receives an amenability hearing if the child is transferred to the adult system through the mandatory transfer process, but is ultimately convicted of an offense which would not be subject to mandatory transfer. R.C. 2152.121(B).

The Second and Eighth District Courts of Appeals have come to opposite conclusions regarding how a child should be sentenced under the reverse transfer procedure in R.C. 2152.121, after being convicted of a mixture of offenses which would and would not be subject to mandatory transfer. The certified question before this Court is:

Once an adult court determines under R.C. 2152.121(B)(4) that at least one charge for which the juvenile was convicted is subject to mandatory transfer, is that court permitted to sentence the juvenile under R.C. Chapter 2929 on all charges in the case, or must the adult court complete a separate analysis under R.C. 2152.121(B) for each charge individually?

For the reasons that follow, this Court should hold that the adult court must conduct a separate analysis under R.C. 2152.121(B) for each offense of conviction. This would enforce the plain language of the statute, which requires sentencing as to each “offense” of conviction. R.C. 2152.121(B). Thus, if a child is convicted of or pleads guilty to an offense that would not have been subject to mandatory transfer, the adult court must impose and suspend an adult prison term for that offense, and transfer the offense back to the juvenile court for disposition as set forth in R.C. 2152.121(B)(3). After transfer back to the juvenile court, the statute requires the court to impose either a serious youthful offender dispositional sentence; or, if the State objects, to conduct an amenability hearing to determine whether the child should receive a juvenile

disposition or be transferred back to the adult court for the prison term to be imposed. Simply put, this ensures that the juvenile court will make an amenability determination before subjecting the child to adult punishment for a non-mandatory offense.

Sentencing in accordance with the plain language of the statute would not cause an illogical result, as the State suggests. The illogical and unjust result occurs when a child is sentenced to adult prison for a discretionary transfer offense without an amenability determination. And an illogical and unjust result occurs when the State can achieve this by packaging disparate charges together in a single “case;” and, because one offense was subject to mandatory transfer, the child is subject to conviction and punishment for all offenses without any opportunity for an amenability determination. Such a result contravenes the purpose of the transfer and reverse transfer statutes, which seek to ensure that every child receives an amenability determination when facing a conviction and sentence for an offense that did not require mandatory transfer to the adult system.

Statement of the Case and Facts

This was Delaquan Brookshire’s first involvement with the juvenile justice system; he had no prior delinquency charges or adjudications. (PSI, p. 3). Delaquan’s mother and father have both been incarcerated for the majority of his life. (PSI, p. 4). Delaquan was often in foster care, where he suffered abuse. (PSI, p. 4). In the seventh grade, Delaquan went to live with his great grandmother and his environment improved. (PSI, p. 4). Delaquan was a good student in school—he had never been suspended, did not get in fights with other students, and played on the junior varsity basketball team. (PSI, p. 4).

DeLaquan was charged in juvenile court with committing an aggravated robbery, and kidnapping at a Burger King restaurant on January 9, 2013 in case JC 2013-639, and aggravated

robbery and kidnapping at a Penn Station restaurant on January 20, 2013 in case JC 2013-468. (1/28/2013 Complaints). A witness to the Penn Station robbery followed the two individuals who committed the robbery as they climbed into a minivan driven by another individual, and drove away from the restaurant. (2/20/2013 T.pp. 43, 44-45). The witness identified another child, but not Delaquan, as one of the robbers. (2/20/2013 T.p. 65). Huber Heights Police Officer Dulaney stopped the suspect vehicle soon after the witness stopped following it, and testified that Delaquan was the driver. (2/20/2013 T.p. 65). Officer Dulaney stopped the vehicle on Little York Road near Poe Avenue, which is less than three miles from the Penn Station restaurant. (2/20/2013 T.p. 65).

Delaquan admitted to law enforcement that he was “part of” an aggravated robbery at the Penn Station restaurant, with two other youth. (2/20/13 T.pp. 65, 78-79). Delaquan also admitted that he was “involved” in an aggravated robbery at a Burger King restaurant weeks earlier on January 9, 2013. He did not admit to law enforcement what roles he played in the robberies. (2/20/13 T.pp. 65, 78-79). Based on Delaquan’s admissions, the juvenile court found probable cause to transfer his cases for criminal prosecution as mandatory transfers. (2/20/13 T.pp. 91-95). An indictment was filed in one common pleas case number, charging Delaquan with the offenses from both juvenile court cases. (2013 CR 00635 Indictment). Delaquan pleaded guilty to one count of aggravated robbery with corresponding firearm specifications, two counts of aggravated robbery without firearm specifications, and three counts of kidnapping. (7/5/2013 Judgment Entry). He was sentenced to concurrent, six-year prison terms for each of the aggravated robbery charges, and concurrent, five-year prison terms for each of the kidnapping charges, to be served consecutively to a three-year firearm specification, for a total aggregate prison term of nine years. (7/5/2013 Judgment Entry).

Delaquan timely appealed, challenging the constitutionality of Ohio's mandatory transfer provisions, and alleging that the trial court committed plain error by failing to sentence Delaquan in accordance with the reverse transfer provisions of R.C. 2152.121, and that his counsel was ineffective. The Second District overruled Delaquan's challenges to the constitutionality of his mandatory transfer, and found that his counsel was not ineffective. *Op.* at ¶ 12-13, 35. However, the court held that the trial court committed plain error by failing to transfer the charges which would have not been subject to mandatory transfer back to the juvenile court. *Op.* at ¶ 28. The Second District remanded the following five counts for sentencing under R.C. 2152.121: count 2, kidnapping; count 3, kidnapping; count 7, aggravated robbery without firearm specification; count 8, aggravated robbery without firearm specification, and count 10, kidnapping. *Op.* at ¶ 28, 30.

The State filed a motion for reconsideration as to the convictions for aggravated robbery in counts 7 and 8, which related to the Penn Station robbery. The State argued that whether or not the aggravated robbery charges had a corresponding firearm specification, the charges would have been subject to mandatory transfer because the indictment specified that Delaquan used a firearm in the commission of the offense. Delaquan opposed reconsideration, arguing that the record did not include a finding that he personally used a firearm in the commission of counts 7 and 8; that he could have been indicted as the principal even if it was alleged that he was merely complicit in his co-defendant's use of a firearm. He noted that because the record in the common pleas court did not establish that Delaquan personally used a firearm in the commission of counts 7 and 8, those offenses of conviction would not have been subject to mandatory transfer, and he should be sentenced under R.C. 2152.121(B). *See State v. Hanning*, 89 Ohio St.3d 86, 728

N.E.2d 1059 (2000). However, the Second District granted the State's motion for reconsideration, and affirmed Delaquan's convictions in counts 7 and 8. *Op.* at ¶ 9.

Both the State and Delaquan filed discretionary appeals to this Court, which were declined. *State v. Brookshire*, Case No. 2015-0072. This Court accepted review of a certified conflict between the Second District, and the Eighth District's decision in *State v. Mays*, 8th Dist. Cuyahoga No. 100265, 2014-Ohio-4858.

Argument

This Court has reasoned that “[p]rocedural protections are vital” when determining whether a child is amenable to treatment within the juvenile justice system, or whether the child should be prosecuted as an adult. *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 13. In *D.W.*, this Court reviewed the “juvenile court milieu,” recognizing that juvenile courts were rooted in social welfare and the goal of providing guidance and rehabilitation for a delinquent child. *Id.* at ¶ 7. But, in response to a rise in juvenile offenses and a belief that some juveniles cannot be rehabilitated, the General Assembly long ago enacted a statutory scheme that requires children to be prosecuted as adults in certain circumstances. *Id.* at ¶ 7-10. Since then, and in light of widespread acceptance that juveniles as “super-predator” never materialized, there has been a move away from over-criminalization and mandatory treatment of children as adults. *Id.* at ¶ 8; *see also* Richard E. Redding, U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* (June 2010) 8, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> (accessed September 18, 2015); Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, *New York Times* (Feb. 9, 2001), <http://www.nytimes.com/2001/02/09/>

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The General Assembly has most recently amended Ohio's statutory scheme involving juvenile transfer to ensure that juvenile courts may either retain jurisdiction of children or have the opportunity to conduct an amenability determination when the child has committed offenses which are not so serious as to require mandatory transfer. R.C. 2152.121; *see State v. Murphy*, 8th Dist. Cuyahoga No. 97459, 2012-Ohio-2924, ¶ 9, quoting 2001 Am.Sub.H.B No. 86.

A. R.C. 2152.121 unambiguously vests jurisdiction in the juvenile court to enter disposition for offenses which would not be subject to mandatory transfer, or conduct an amenability hearing to determine whether the adult prison term should be imposed.

As the Second District recognized below, R.C. 2152.121 is jurisdictional, and the juvenile court "shall retain jurisdiction" over offenses of conviction which would not be subject to mandatory transfer. *Op.* at ¶ 25-27. "The General Assembly explained in R.C. 2152.121(B) what the adult court must do at the time of sentencing regarding different types of 'offenses.'" *Op.* at ¶ 25. The State adds emphasis and attempts to draw this Court's attention to the part of the statute that refers to transferring the "case," but the plain language of the statute requires sentencing for each offense of conviction. Specifically, R.C. 2152.121(B)(1) requires the court of common pleas to treat the offense of conviction as though it had been the offense that was originally charged. R.C. 2152.121(B)(1).

It is a well-established rule of statutory construction that if words in a statute are unambiguous, a court must look no further than the face of the statute and simply apply its terms. *State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 392, 750 N.E.2d 583 (2001). And, courts must presume that the legislature did not intend to enact statutes that produce absurd results. *Id.* The paramount concern in interpretation of a statute is to ascertain and give effect to the legislature's

intent in enacting that statute. *State v. S.R.*, 63 Ohio St.3d 590, 594, 589 N.E.2d 1319 (1992). And generally, a court is required impose a sentence for each offense of conviction, and may not impose a sentence for the entire “case.” See *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, paragraph one of the syllabus (holding that “a sentence is the sanction or combination of sanctions imposed for each separate, individual offense.”).

For a child who is ultimately convicted of an offense that would not have required mandatory transfer, but would have been eligible for only discretionary transfer, R.C. 2152.121(B)(3) applies, and requires the trial court to impose a stayed adult sentence, and return the matter to the juvenile court to proceed with disposition. Appellee relies upon subsections of the mandatory transfer statutes, R.C. 2152.12(F)(2) and 2152.12(I), to support its argument that R.C. 2152.121 refers to the entire “case,” not the offense. *Appellant’s Merit Brief* at 4-5.

However, the enactment of R.C. 2152.121 was designed to ensure that children have the opportunity to have the juvenile court conduct amenability determinations for offenses that are not so serious as to require a mandatory transfer. “H.B. 86 states that a purpose of R.C. 2152.121 is to ‘establish a new mechanism, which may involve transfer back to a juvenile court, for determining the sanction for certain children who are convicted of a crime in criminal court after their case is transferred under a specified mandatory transfer provision[.]’ *Murphy*, 8th Dist. Cuyahoga No. 97459, 2012-Ohio-2924, at ¶ 9, quoting 2011 Am.Sub.H.B No. 86. To interpret R.C. 2152.121 as the State suggests does not give effect to the legislature’s intent. This is because of the various ways that children may be charged, and their cases transferred to adult court. The State’s interpretation would create an absurd result, in that it seeks to ensure that there is neither an opportunity for an amenability determination at the charging stage, or at the sentencing stage.

A complaint alleging delinquency and initiating a case in juvenile court may be filed by “any person,” and need not be brought by the prosecuting attorney. Juv.R. 10(A). And, there is no requirement that the complaint include only offenses that occurred as part of the same incident or as part of the same course of conduct. *Id.* Given the rehabilitative nature of the juvenile system, it has long been held that “a complaint in juvenile court alleging delinquency does not need to be read as strictly as a criminal indictment.” *In re Good*, 118 Ohio App.3d 371, 375, 692 N.E.2d 1072 (12th Dist.1997) (permitting a juvenile court to find a child delinquent of a firearm specification even though it was not alleged in the initial complaint, because of the rehabilitative and informal nature of juvenile proceedings); *In re Burgess*, 13 Ohio App.3d 374, 375, 469 N.E.2d 967 (12th Dist.1984) (noting that any person can file a complaint, that the complaint need not be read as strictly as a criminal indictment, and the juvenile rules need not be “hypertechnically” construed.)

Thus, a child may be charged in a complaint, filed by any person, with one offense subject to mandatory transfer, as well as any number of other, non-mandatory offenses. Under the State’s reading of the transfer statute, if probable cause is found as to the mandatory-transfer charge, the entire “case” must be transferred to the adult system, no matter what other offenses are alleged. *Appellant’s Merit Brief* at 4-5. Or, as occurred in this case, multiple cases alleging separate incidents may be transferred from the juvenile court, but a single indictment may be returned containing all of the charges, even those occurring weeks apart. (See Juvenile Case Nos. JC 2013-468 and JC 2013-639, and Common Pleas Case No. 2013 CR 00635). Then, under the State’s reasoning, if the child is ultimately convicted of the offense that is subject to mandatory transfer, as well as any other offenses, the adult court maintains jurisdiction and must impose adult punishment for all offenses, with no possibility of return to the juvenile system. *Appellant’s*

Merit Brief at 7. This permits disparate charges to ride on the coattails of a mandatory-transfer offense, and assures that those charges will remain in the adult system with no opportunity for a juvenile court to consider whether the child is amenable to rehabilitation in the juvenile system, or should be subject to conviction and punishment as an adult. But this situation is precisely what the reverse transfer statute seeks to prevent.

Under R.C. 2152.121, if, after mandatory transfer, the child is convicted in criminal court of an offense or offenses that did not require mandatory transfer, but which were eligible for discretionary transfer, the adult court must issue a sentence, stay that sentence, and return the child to the juvenile court for an SYO disposition or amenability hearing for the non-mandatory offenses. R.C. 2152.121(B)(3). This ensures that a child is not automatically subject to punishment in the adult system, regardless of the level or circumstances of the offenses, because of the way in which the offenses were charged and transferred. That is, simply because they were charged with one offense subject to mandatory transfer.

B. Sentencing in both the juvenile and adult systems does not bring about an illogical result.

The State argues that sentencing in both the juvenile and the adult systems could not have been intended by the General Assembly. *Appellant's Merit Brief* at 8-9. However, the General Assembly enacted the reverse transfer statute specifically so that juvenile courts have the opportunity to consider whether a child should remain in the juvenile system and be subject to juvenile sanctions for offenses which are not subject to mandatory transfer to the adult system. If a child is given a juvenile disposition for offenses that are not subject to mandatory transfer, before serving the sentence for the mandatory transfer offense, the child will have the opportunity to benefit from the resources of the juvenile system before entering the criminal justice system. Taking the opportunity to treat a child as a child while he is still a child makes

sense from a developmental and policy perspective, and is not prohibited by Ohio's sentencing scheme.

The State questions the logistics of how reverse waiver sentencing as ordered by the Second District in this case would be structured. *Appellant's Merit Brief* at 8-9. In a reverse waiver scenario under R.C. 2152.121(B), such as in this case, wherein a child is convicted of both mandatory- and discretionary-transfer offenses, the sentencing will depend on the options permitted by the offenses of conviction. And, the sentencing will depend on the subsequent proceedings in the juvenile court pursuant to R.C. 2152.121(B).

It is important to consider that the procedure set forth in R.C. 2152.121(B) does not require that the child remain in the juvenile system—if the State objects to a SYO dispositional sentence for offenses not subject to mandatory transfer, the juvenile court must conduct an amenability hearing. R.C. 2152.121(B)(3)(b). The juvenile court must determine whether the child is amenable to the juvenile system, weighing all factors, including the child's pending adult sentence for the offense or offenses that are subject to mandatory transfer as a factor. But given that adult correctional facilities are ill-equipped to house children, it makes sense that a child be retained in the juvenile system for less serious offenses, to ensure that the child receives the rehabilitative efforts of the juvenile system before being subjected to adult sanctions. *See* Daniel C. Murrie, *Psychiatric Symptoms Among Juveniles Incarcerated in Adult Prison*, 60:8 *Psychiatric Servs.*, 1092, 1096 (Aug.2009); Jeffrey Fagan and Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 *Duke Forum for L. & Soc. Change* 29, 54-55, 58-60. Incarcerating children in adult facilities is physically and psychologically destructive, and exacerbates existing problems the children may be suffering. *Id.* Thus, it is perfectly logical for

the child to receive the rehabilitative efforts of the juvenile system while the child ages and matures, before being subject to adult sanctions.

This Court must also consider that there are multiple offenses that are subject to mandatory transfer, but which do not require imposition of a prison term, if the court makes the requisite findings. R.C. 2929.13(D)(2). These include aggravated robbery, aggravated burglary, voluntary manslaughter, and involuntary manslaughter, when those offenses are committed with a firearm, but without corresponding firearm specifications. R.C. 2152.02(BB); 2152.10(A); 2152.12(A). Thus, there may be a scenario in which an adult court has imposed a community control sanction upon a child for an offense that was subject to mandatory transfer. Certainly, it would make sense for the child to be retained in the juvenile system to serve a juvenile disposition for the less serious offenses, before serving an adult community control sanction.

And, if an adult court has imposed a prison term for an offense subject to mandatory transfer, and the juvenile court has found the child amenable to the juvenile system for the offenses returned pursuant to R.C. 2152.121(B), it would make sense that the child would serve the juvenile portion of the sentence first while he is still a child, and then serve the adult sanction for the offense that was subject to mandatory transfer. This allows the child to receive the rehabilitative efforts of the juvenile system before being held in adult correctional facilities, which are well known to be inappropriate for children. *See Children's Law Ctr., Inc., Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System* (2012) 2, available at http://www.campaignforyouthjustice.org/documents/FR_OH_0512.pdf (accessed September 18, 2015); Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (2007), 6-14, available at http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf (accessed September 18, 2015)

(reporting statistics about the increased likelihood of isolation, exacerbating mental health issues, and the increased likelihood of suicide and assault for youth held in adult facilities).

Although the child will still be subject to adult punishment for the offense or offenses which would be subject to mandatory transfer, first serving a juvenile disposition for the less serious offenses means that the child will have the opportunity to mature and benefit from age-appropriate services in the juvenile system before being incarcerated in an adult prison. *Juvenile Incarceration* at 54-55, 58-60. This puts the child in a better position to adjust properly in the adult system, and in a more favorable position to request consideration for early release at the time the child is eligible.

Not only is it logical for a child to serve a juvenile disposition before adult sanctions, if this Court accepts the State's position, it will defeat the intent of the reverse transfer statute by permitting children to be sentenced to adult prison for non-mandatory-transfer offenses without any amenability determination. Accordingly, this Court should recognize that the Second District properly concluded that Delaquan should have been returned to the juvenile court for sentencing pursuant to R.C. 2152.121(B) for offenses which would have not been subject to mandatory transfer.

Conclusion

For the foregoing reasons, this Court should hold that the adult court must conduct a separate analysis under R.C. 2152.121(B) for each offense of conviction.

Respectfully submitted,

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Certificate of Service

Undersigned counsel certifies that a copy of the foregoing MERIT BRIEF OF DEFENDANT-APPELLEE, DELAQUAN BROOKSHIRE was served by ordinary U.S. Mail, postage-prepaid, this 21st day of September, 2015, to the office of Andrew French, Montgomery County Prosecutor, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422.

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