Supreme Court of Ohio Clerk of Court - Filed October 26, 2015 - Case No. 2014-2190

IN THE SUPREME COURT OF OHIO

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| IN RE: A.G., AN ADJUDICATED DELINQUENT CHILD | : | CASE NO. 2014-2190 |
| | : | |
| | : | ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS EIGHTH APPELLATE DISTRICT |
| | : | |
| | : | C.A. CASE NO. 101010 |

# REPLY BRIEF OF APPELLANT A.G.

Cuyahoga County Prosecutor's Office

Gregory Ochocki #0063383
Assistant Prosecuting Attorney

1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 348-4463
(216) 698-2270—Fax

Counsel for State of Ohio

The Office of the Ohio Public Defender

Charlyn Bohland #0088080
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167—Fax
charlyn.bohland@opd.ohio.gov

Counsel for A.G.

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## Statement of the Case and Facts

A.G. relies on the Statement of the Case and Facts set forth in his merit brief.

## Argument

### 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.**

In its response brief, the State fails to address the Eighth District Court of Appeals's application of *Blockburger v. United States* as the relevant test for merger in juvenile courts. (State's Brief at 3-11). And, the State fails to address the problems created by having different double jeopardy merger analyses in adult and juvenile courts in Ohio. Instead, the State urges this Court not to apply R.C. 2941.25 to juvenile cases, which is not at issue in this case. (State's Brief at 3, 7).

The State is correct in the notion that children "are not entitled to all procedural rights afforded" to adult criminal defendants. (State's Brief at 3). Indeed, the U.S. Supreme Court and this Court have held that children are not entitled to certain rights, such as trial by jury, bail, or speedy trial. *See, e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (finding that "in our legal system the jury is not a necessary component of accurate factfinding"); *State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St.2d 433, 434-435, 329 N.E.2d 680 (1975). A.G. is not asking this Court to recognize a new right for juveniles. A.G. is asking this Court to enforce a protection that has already been recognized for juveniles—the protection against double jeopardy. *See*

*Breed v. Jones*, 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.E.2d 346 (1975); *see also In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 21.

The State acknowledges that double jeopardy protections, including the protection against "multiple punishments for the same offense," "apply to Ohio citizens." (State's Brief at 5). But, the State contends that R.C. 2941.25(A) "is an enhanced statutory protection" afforded only to adult criminal defendants. (State's Brief at 4-6). This contention ignores this Court's jurisprudence on the merger doctrine, in which this Court found that the General Assembly codified "the judicial doctrine" of merger in R.C. 2941.25 "to guide courts in the determination of offenses subject to merger." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 12, citing *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Since its enactment in 1974, R.C. 2941.25 has never been amended; but, this Court's analysis of the merger doctrine has changed. (*See* Merit Brief at 6-8).

Just because a constitutional protection is not codified in Ohio law does not mean that the protection does not exist. In fact, even without R.C. 2941.25, the double jeopardy protection under the merger doctrine would still apply to adult criminal defendants in Ohio. And, without a corresponding codification in the Juvenile Code, the double jeopardy principles underlying the merger doctrine for adults must also apply to children.

For example, in 1974, the General Assembly enacted R.C. 2901.05, providing that a criminal defendant "is presumed innocent until proven guilty beyond a reasonable doubt." This statute represents the codification of the principle that a showing of proof

beyond a reasonable doubt is the standard that is constitutionally required in criminal cases. *See, e.g.*, *Miles v. United States*, 103 U.S. 304, 26 L.Ed. 481 (1880), paragraph 6 of the syllabus. And, although there is no corresponding Juvenile Code provision to R.C. 2901.05 and there is no clear intention that the General Assembly intended for R.C. 2901.05 to apply to juvenile court cases, the standard applies to children in Ohio through case law. *See In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (holding that proof beyond a reasonable doubt is also the standard that is constitutionally required in juvenile cases).

Other states have decided that merger applies to children through the double jeopardy clause. For example, in a juvenile merger case in Maryland, the Maryland Supreme Court determined that because children have the same double jeopardy protections as adults, "the doctrine of merger is applicable to juvenile delinquency proceedings." *In re Montrail M.*, 601 A.2d 1102, 1102, 1106 (Md. 1992) (finding that there was not a violation, because while the child was adjudicated of separate offenses, the child only received one disposition). A.G. asks for the same result here.

The cases cited by the State in support of its argument that R.C. 2941.25 should not apply to juvenile cases do not address the proposition of law before this Court. (State's Brief at 8-9). None of those cases acknowledges a child's right to the same double jeopardy protections as adults. *See In the Matter of Skeens*, 10th Dist. Franklin Nos. 81AP-882, 81AP-883, 1982 Ohio App. LEXIS 12181, 6-7 (Feb. 25, 1982) (finding that R.C. 2941.25 does not apply to juvenile cases; and, even if it did, it would not have been violated in this case, because the child received only one disposition); *In re Bowers*, 11th

Dist. Ashtabula No. 2002-A-0010, 2002-Ohio-6913, ¶ 23-28 (finding that R.C. 2941.25 does not apply to juvenile cases; and, even if it did, it would not have been violated in this case because the statutory elements of each offense did not correspond to the others); *In re S.S.*, 4th Dist. Vinton No. 10CA682, 2011-Ohio-4081, ¶ 29-31 (finding that R.C. 2941.25 does not apply to juvenile cases; and, even if it did, it would not have been violated in this case because the child received only one disposition); *In re M.C.*, 6th Dist. Erie No. E-12-031, 2013-Ohio-2808, ¶ 22 (finding that R.C. 2941.25 does not apply to juvenile cases).

Finally, the State's reliance on R.C. 2152.17(F) is misplaced, because the mere fact that this statute was enacted does not support the conclusion that the General Assembly intended to disavow double jeopardy protections against multiple punishments for the same offense. (State's Brief at 8). Just as for adult criminal defendants in R.C. 2929.14(C)(4), R.C. 2152.17(F) permits juvenile courts to commit children to the Ohio Department of Youth Services for consecutive periods for multiple delinquent acts. These statutes merely permit courts to order consecutive sentences or commitments, so long as there are no constitutional violations. *See* R.C. 2929.14(C)(4); 2152.17(F).

As set forth in his merit brief, A.G. asks this Court to apply the merger doctrine set forth in *State v. Johnson* to juvenile delinquency cases. In so doing, this Court will ensure that all courts in Ohio utilize the same analysis to determine if offenses should merge and that children's double jeopardy rights are protected, just as for adults.

## Conclusion

This Court should reverse the decision of the Eighth District Court of Appeals and remand this case for resentencing and a proper application of the *State v. Johnso*n merger analysis.

Respectfully submitted,

The Office of the Ohio Public Defender
*/s/ Charlyn Bohland*
Charlyn Bohland #0088080
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167—Fax
charlyn.bohland@opd.ohio.gov

Counsel for A.G.

## Certificate of Service

I hereby certify that a copy of the foregoing **Reply Brief of Appellant A.G.** was forwarded by regular U.S. Mail this 26th day of October, 2015 to Gregory Ochocki, Assistant Cuyahoga County Prosecuting Attorney, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113.

*/s/ Charlyn Bohland*
Charlyn Bohland #0088080
Assistant State Public Defender

Counsel for A.G.

#452610