Supreme Court of Ohio Clerk of Court - Filed November 16, 2015 - Case No. 2015-1847

NO.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

vs.

DARLELL ORR

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST

In 1993, when Appellee was 13-years old, he raped the 14-year old victim. The victim did not know who her rapist was. The rape kit was tested in 2013, where a preliminary association was made with Appellee. Further DNA testing confirmed Appellee's identity as the rapist. The decision in *State v. Orr*, 8th Dist. Cuyahoga No. 102460, 2015-Ohio-4081 follows the case of *State v. Webber* , 8th Dist. Cuyahoga No. 101875, 2015-Ohio-1953 highlights a need for clarity in the law and guidance as to whether a person who commits a rape as a child but was not apprehended until after the child turned 21 can be prosecuted. The trial court dismissed the indictment and denied the State's request to transfer the case to the juvenile court. The Eighth District affirmed the dismissal and determined that the juvenile court could not hear the case because the child was now 21 years old. Like the decision in *State v. Webber*, 8th Dist. Cuyahoga No. 101875, 2015-Ohio-1953, the decision in *Orr*, 8th Dist. Cuyahoga No. 102460, 2015-Ohio-4081 does not permit the prosecution of such a child either as an adult or through juvenile delinquency proceedings.

Recent decisions from this Court and the United States Supreme Court highlights the view of youth as a mitigating factor. *Miller*, __ U.S. ___, 132 S.Ct. at 2467, 183 L.Ed.2d 407; *Graham*, 560 U.S. ___ (2010). Although the juvenile justice system is centered around rehabilitation, this case illustrates young offenders are still capable of committing heinous and violent offenses. Such acts cannot remain without consequences. According to the U.S. Department of Justice, there were a reported total number of 15,586 arrests for forcible rape in 2010. Of that number 2,198, the arrested person was under the age of 18, 7 were under the age of 10 and 195 were between the ages of 10 and 12. 73 juveniles who were under the age of 15 were arrested for murder and nonnegligent manslaughter *Sourcebook of Criminal Justice Statistics Online*,

http://www.albany.edu/sourcebook/pdf/t472010.pdf. In 2011, 736 under the age of 15- arrested for forcible rape. *Sourcebook of Criminal Justice Statistics Online,* http://www.albany.edu/sourcebook/pdf/t472011.pdf, last accessed November 15, 2015.

The net result of this case is that a person such as Orr cannot be tried as a child or an adult and that there is no mechanism in Ohio to prosecute Orr. The State argues that under the statutory scheme, Orr can be prosecuted as an adult without constitutional impediment. In the alternative, the State argues that the Eighth District misconstrued statutory provisions and case law in holding that the juvenile court lacked jurisdiction to prosecute Orr. This Court should accept review of this case to resolve whether Orr and others like him can be held accountable for the commission of violent criminal offenses.

STATEMENT OF THE CASE AND FACTS

On or about June 25, 1993, the victim in the instant case, S.L., was raped. S.L., 14 years old at the time, reported to Cleveland Police Department (CPD) officers that she had been raped by a male who was unknown to her. The victim stated to police that the male had requested to have sex with her and she refused. The Appellee then forced himself on her in an upstairs bedroom, sexually assaulted her, and burned her as she attempted to get away.

The victim was taken to St. Luke's Medical Center Emergency Room for medical treatment and where a rape kit was collected. On June 28, 1993, a Rape Kit was submitted to the Cleveland Police Department Forensic Lab. Presumptive Positives were obtained from the Vaginal Swabs, Vaginal Smear Slides, Genital Swabbing. The positives indicated semen, blood, and spermatozoa. On April 1, 2013, a match was obtained for the Vaginal Swabs. The DNA was a presumptive match to the Appellee. On April 8, 2013, BCI informed CPD that a search of Ohio's State DNA

Index System revealed a preliminary association between a DNA profile found in the rape kit and Appellee.

Appellee was indicted on May 23, 2013 on one count of Rape, one count of Sexual Battery, and one count of Kidnapping. On July 26, 2013 BCI confirmed that the DNA profile found on the items from the rape kit was consistent with Appellee's DNA. Appellee committed these crimes at the age of 13.

Appellee filed a motion to dismiss which the trial court granted. Appellee had argued that jurisdiction was not proper before the General Division. The trial court agreed, reasoning that because 13 year olds were not subject to bindover, it was of no consequence that Appellee was apprehended as an adult. (Tr. 143).

LAW AND ARGUMENT

PROPOSITION OF LAW I: R.C. 2152.02(C)(3), R.C. 2151.23(I) AND R.C. 2152.12(J) CONSIDERS A PERSON WHO COMMITTED A CRIME AS A JUVENILE BUT APPREHENDED AFTER THEIR 21ST BIRTHDAY AN ADULT SUBJECT TO PROSECUTION IN THE GENERAL DIVISION. THESE PROVISIONS DO NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION OR RETROACTIVITY CLAUSE OF THE OHIO CONSTITUTION WHEN APPLIED TO A PERSON WHO COMMITTED THE CRIME OF RAPE PRIOR TO ATTAINING THE AGE OF 15.

O.R.C. 2152.02 (C)(2) states:

> "Subject to division (C)(3) of this section, any person who violates a federal or state law or a municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of that person's age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held."

O.R.C. 2152.02(C)(3) states:

> "Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act."

O.R.C. 2151.23(I) states:

> "If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) [mandatory transfer] and (B) [discretionary transfer] of section 2152.12 of the Revised Code do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case that it has in other criminal cases in that court."

O.R.C. 2152.12(J) states:

> "If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of this section do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court."

This Court has stated that O.R.C. 2151.23(I) and O.R.C. 2152.12(J) "reiterate the clear legislative intent underlying R.C. 2152.02(C)(3) that once an offender reaches 21 years of age, he is to be prosecuted as an adult, regardless of his age when the acts were committed." *State v. Warren*, 118 Ohio St.3d 200, at 205-06. In that case, the defendant was indicted in 2004 for rape offenses committed in 1988, when he was 15 years old. He was tried and convicted as an adult. The Court held that the defendant "does not demonstrate that his rights to due process and fundamental fairness were violated" by the application of the statutes that he challenged, including O.R.C. 2152.02(C)(3).

In *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, the Supreme Court of Ohio first addressed the constitutionality of the 1997 amendments to R.C. Chapter 2151, analyzing them under the Retroactivity Clause of the Ohio Constitution and the Ex Post Facto Clause of the United States Constitution. The defendant in that case, Walls, was charged with aggravated murder for an offense he committed in 1985 when he was 15, and he was not indicted until 1998 when he was 29. *Id.* at ¶ 2, 4. Walls made the argument that Appellee here puts forth: that the general division of the court of common pleas lacked subject matter jurisdiction to hear his case because the amended statutes were unconstitutionally retroactive as they violated his right to a bindover proceeding in juvenile court. *Id* . at ¶ 8.

This Court rejected Walls' jurisdictional arguments and found that the statutes requiring that he be tried as a juvenile withstood constitutional challenges. "In rejecting Walls' retroactivity argument, the court determined that the statutes did not impair any substantive rights because Walls did not have a substantive right to a juvenile bindover proceeding under prior law." *State v. Adams*, (Ohio App. 10 Dist.) 2012-Ohio-5088 at ¶ 17.

This Court subsequently determined whether R.C. 2152.02(C)(2), 2151.23(I), and 2152.12(J) violated due process and fundamental fairness in a case where the defendant was prosecuted as an adult and sentenced to life in prison for rape when he was 15 at the time of the offense and found no constitutional error to apply the statutes to the defendant. *Warren,* supra.

Other Ohio appellate districts have similarly relied on *Walls* in rejecting constitutional challenges nearly identical to those raised by Appellee in the present case. In *State v. Scharr,* (Ohio App. 5 Dist.), 2004–Ohio–1631, the defendant argued that his adult prosecution for gross sexual imposition violated constitutional guarantees of fundamental fairness, substantive due process, and equal protection because he was 17 at the time the crimes were alleged to have been committed.

The Fifth District disagreed. In rejecting the defendant's claims that R.C. 2151.23(I) violated due process and fundamental fairness, the court relied on *Walls* and held that "changing the jurisdiction from the juvenile to the general division of the common pleas court did not involve any substantive right." *Schaar* at ¶ 27; *see also Warren* at ¶ 52 (citing *Schaar* with approval). The court also found no equal protection violation. *Id.* at ¶ 29. The court determined that there was a rational basis for R.C. 2151.23(I) in that the statute recognizes that persons who commit a crime as a juvenile but are not apprehended until after 21 are not likely to be amenable to the juvenile justice system. *Schaar* at ¶ 29. Likewise, in *State v. Fortson,* (Ohio App. 11 Dist.), 2012–Ohio–3118, the Eleventh District rejected the defendant's claim that R.C. 2151.23(I) violated his fundamental right to be tried in juvenile court as well as his rights to due process and equal protection. The court found no authority supporting the view that the defendant had a fundamental right to be tried in juvenile court and stated that such a view would conflict with the holdings in *Walls, Schaar,* and *Warren. Id.* at ¶ 34, 43.

This Court should therefore accept jurisdiction in this case.

PROPOSITION OF LAW II: A JUVENILE COURT MAY EXERCISE JURISDICTION OVER A PERSON OLDER THAN 21 NOTWITHSTANDING OTHER PROVISIONS OF THE OHIO REVISED CODE.

In this case, the Eighth District in addition to holding that Orr could not be prosecuted as an adult, held that Orr could not be charged in juvenile court, leaving no court with jurisdiction to adjudicate the offenses committed by Orr. A review of the pertinent statute indicates that, where the General Division's jurisdiction over the "child" is at issue, the trial court must transfer the case to juvenile court before dismissing or discontinuing proceedings in the General Division.

In 1993, R.C 2151.25 provided a mechanism wherein a case such at the one at bar can be transferred from the adult court to the juvenile court. R.C. 2151.25 provided:

> When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, proceedings regarding such child shall be initially in the juvenile court in accordance with this chapter. If the child is taken before a judge of a county court, mayor, judge of the municipal court, or judge of the court of common pleas other than a juvenile court, such judge of a county court, mayor, judge of the municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court, whereupon proceedings shall be in accordance with this chapter. Upon such transfer all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of a county court, mayor, municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive jurisdiction of the juvenile court.

Appellee argued to the trial court that the juvenile court's jurisdiction terminated when the juvenile turned 21 and transfer provisions did not apply, and asked the trial court to dismiss the case in its entirety." (July 31, 2014 proceeding, Tr. 7). The result of the Eighth District's holding and arguments made by the Appellee is that there is no court with jurisdiction over the crimes committed by the Appellee. The Eighth District cited to *In re J.V.,* 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203 to argue that the juvenile court lacks jurisdiction over anyone over the age of 21. *In re J.V.* itself construed R.C. 2152.02(C)(6) which states:

> (6) The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, except as otherwise provided in this division, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a "child" until the person attains twenty-one years of age. If a person is so adjudicated a delinquent child or juvenile traffic offender and the court makes a disposition of the person under this chapter, at any time after the person attains twenty-one years of age, the places at which the person may be held under that disposition are not limited to places authorized under this chapter solely for confinement of children, and the person may be confined under that disposition, in accordance with division (F)(2) of section 2152.26 of the Revised Code, in places other than those authorized under this chapter solely for confinement of children.

R.C. 2152.02(C)(6) provides that a juvenile court may not exercise jurisdiction over a "child" who attains the age of 21 if an adjudication is made before the child turns 18. The same statue provides that the juvenile court may impose an adjudication at anytime after the child has attained 21 years of age and that the places the person may be held for that disposition are not limited to places such as ODYS. Therefore, when the Eighth District agreed with Webber's "argument that the juvenile court lacks jurisdiction in this matter," it did so without meaningful consideration of R.C. 2152.02(C)(6) in its entirety.

Therefore, this proposition of law should be accepted for review to resolve whether a juvenile court may exercise jurisdiction over a person over the age of 21 in the event they are not prosecuted as an adult.

CONCLUSION

Accordingly, the State would ask this Court to accept jurisdiction in this case to determine whether Orr's prosecution as an adult violates the Ex Post Facto Clause and Retroactivity Clause; and alternatively consider whether any court, including the juvenile court may exercise jurisdiction over Orr's commission of sexual assaults.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support was sent by regular U.S. mail or electronic service this 16th day of November, 2015 to:

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