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

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102460

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DARLELL ORR

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-574648-A

BEFORE: Keough, P.J., E.A. Gallagher, J., and Kilbane, J.

RELEASED AND JOURNALIZED: October 1, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, state of Ohio, appeals from the trial court's decision dismissing without prejudice the indictment against defendant-appellee, Darlell Orr. For the reasons that follow, we affirm.

{¶2} In 2013, Orr was named in a three count indictment charging him with rape, sexual battery, and kidnapping. The charges stemmed from an incident that allegedly occurred in June 1993, when Orr was 13 years old. The indictment arose after the contents of the victim's 1993 rape kit were subject to DNA testing in April 2013.

{¶3} In December 2014, Orr moved to dismiss the indictment contending the prosecution violated his rights to due process, speedy trial, and that the application of the current laws in effect violate the prohibition against ex post facto laws under both the United States and Ohio Constitutions. According to Orr, had he been charged contemporaneously with the alleged incidents, he would have been subject to the exclusive jurisdiction of the juvenile court. In fact, the law in effect at the time of the incident precluded Orr's prosecution as an adult. Accordingly, Orr argued that as applied in his case, current R.C. 2152.02(C)(3) and 2152.12(J) create a substantial violation of his rights to due process of law and a fair sentencing hearing under Sections 10 and 16 of Article I of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The state opposed Orr's motion.

{¶4} Following a hearing, the trial court granted the motion and dismissed the indictment without prejudice against Orr. The court, in concluding that the state could not properly pursue the prosecution in either the adult or juvenile court, stated

> [A]t the time of the alleged incident, the State did not want to punish 13-year-olds in adult court; that there — they were not subject to bindover and, for that reason, jurisdiction in this general division is inappropriate.
>
> Without violating the ex post facto provisions of our U.S. and state constitutions, it would be improper for this Court then to also submit it back to juvenile court as the defendant is now not less than 21 years of age. So, it would be an act, a meaningless act, to send it back to the juvenile division because they lack jurisdiction * * *.

{¶5} The state now appeals, raising two assignments of error, both challenging the trial court's dismissal of the indictment.

{¶6} This court recently addressed the same issues raised in this appeal under similar facts in *State v. Webber*, 8th Dist. Cuyahoga No. 101875, 2015-Ohio-1953, where this court determined that the trial court properly dismissed Webber's motion to dismiss.[1]

{¶7} In *Webber*, the state indicted Webber for offenses that occurred in 1993 when he was 14 years old. The charges were brought after the victim's rape kit was submitted for DNA analysis, which implicated Webber. Webber

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[1]The state appealed this decision to the Ohio Supreme Court. *State v. Webber*, 2015-1119. The jurisdiction memorandums have been filed; the court has not accepted jurisdiction as of the date of this opinion.

moved to dismiss the indictment arguing that prosecuting him as an adult for crimes allegedly committed when he was 14 years old, violated the Due Process and the Ex Post Facto Clauses of the Ohio and United States Constitutions.

{¶8} This court determined that "[u]nder the law in effect at the time of the alleged offenses, Webber was not eligible to be bound over to the general division of the common pleas court for trial as an adult" because he was 14 years of age at the time of the alleged offenses. *Id.* at ¶ 11. Under the law at the time, a person under the age of 15 could not be subjected to prosecution as an adult in the general division of the common pleas court. *Id.* at ¶ 10.

> Thus, Webber's only concern would have been a juvenile adjudication. There was no possibility he could be tried as an adult, and this was not a matter of speculation. Further, he had no notice he could be tried as an adult. As the trial court aptly recognized at the hearing in this matter, at the time the underlying criminal conduct occurred, "the legislature did not intend to punish delinquents under the age of 15 in Common Pleas Court." Additionally, application of the amended statutes would clearly impose a greater penalty than the juvenile law in effect at the time of the alleged conduct and impair Webber's substantive rights.

Id. at ¶ 11.

{¶9} Accordingly, this court concluded that application of the current versions of R.C. 2152.02(C)(3) and 2152.12(J) to Webber would violate the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions. *Id.* at ¶ 11.

{¶10} In this case, Orr was 13 years old at the time the alleged offenses occurred. Therefore, just like Webber, Orr could not have been tried as an adult under the law in effect at the time of the offense and thus, any application of current laws would violate the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions. On the authority of *Webber*, we affirm the trial court's decision. The state's first assignment of error is overruled.

{¶11} The state's second assignment of error contends that the trial court erred in dismissing the indictment without first transferring the case to juvenile court. The trial court determined that the juvenile court lacked jurisdiction over Orr because he was over the age of 21. We agree. *See Webber* at ¶ 13, citing *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203 ("juvenile courts have jurisdiction over adjudicated delinquents until they are 21 years old. The obvious flip side of that statement is that juvenile courts do not have jurisdiction over adjudicated delinquents once they are 21 years old"). Accordingly, the state's second assignment of error is overruled.

{¶12} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY EILEEN KILBANE, J., CONCUR

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PER APP.R. 22(C)

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