

In the
Supreme Court of Ohio

IN RE D.S., : Case No. 2014-0607
:
Adjudicated delinquent child. : On Appeal from the
: Licking County
: Court of Appeals,
: Fifth Appellate District
:
: Court of Appeals
: Case No. 13CA58
:

**OPPOSITION TO RECONSIDERATION OF
APPELLEE STATE OF OHIO**

BROOKE M. BURNS* (0080256)
Chief Counsel, Juvenile Department
The Office of the Ohio Public Defender
**Counsel of Record*
250 East Broad Street, Suite 1400
Columbus, OH 43215
614-466-5394; 614-752-5167 fax
Brooke.burns@opd.ohio.gov

Counsel for Appellant
D.S.

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

KENNETH W. OSWALT (0037208)
Licking County Prosecutor
LIA J. MEEHAN (0082133)
Licking County Assistant Prosecutor
20 S. Second Street, Fourth Floor
Newark, Ohio 43055
740-670-5264; 740-670-5241 fax
lmeehan@lcounty.com

Counsel for Appellee
State of Ohio

OPPOSITION

D.S. offers no sound reason for reconsideration. To warrant reconsideration, a party must show that it presented an argument to the court and the court either “inadvertently” overlooked it or committed “obvious error.” *See, e.g., State v. Oliver*, 2016-Ohio-1250 ¶ 2 (7th Dist.) (“A motion for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered.”); *State v. Wellington*, 2015-Ohio-2095 ¶ 9 (7th Dist.) (“An application for reconsideration is not a mechanism to raise an entirely new argument and issue to the appellate court that was not raised in the appellate brief.”). D.S.’s motion to reconsider, with few exceptions, reprises arguments from his merits brief. The State has already responded to those arguments, and this Court has already rejected them. There is no reason for the Court to retrace its steps.

A. D.S. did not present his argument that the registration statute violates his right to a jury trial under the Due Process Clause, but this Court implicitly rejected it and explicitly rejected similar arguments, and it did not err in doing so.

D.S. first raises a new argument not presented in his merits brief, but that the Court nevertheless addressed. He argues that the registration statute violates his due-process rights because, unlike the serious-youthful-offender and transfer statutes, it does not afford a jury trial prior to imposing the adult portion of his sentence. Recon. Br. 4-6. Because this argument appears nowhere in his merits brief, it is an inappropriate basis for reconsideration.

Nevertheless, the Court did not overlook the issue. Indeed, the dissent explicitly discussed the trial rights afforded by the serious-youthful-offender statute, *see In re D.S.*, ___ Ohio St. 3d ___, 2016-Ohio-1027 ¶¶ 45-46 (Lanzinger, J., dissenting), and concluded that, because certain “procedural protections, including the right to a jury trial . . . , are lacking in this case, the” statute “violates D.S.’s due-process rights,” *id.* ¶ 52 (Lanzinger, J., dissenting). The majority, fully aware of this objection, declined to adopt the dissent’s rationale. Moreover, D.S.

drew similar juxtapositions between the offender-registration statute and the serious-youthful-offender and transfer statutes in his merits brief. App't Br. 24-26. The State addressed those claims, State Br. 26-28, and the Court ultimately rejected them, holding that the registration statute did not violate due process, *D.S.*, 2016-Ohio-1027 ¶¶ 36-37. This is not an issue the Court overlooked.

Regardless, the claim has no merit. D.S. has no right to have the possible post-age-21 consequences of his registration status imposed by a jury. *In re J.V.*, 134 Ohio St. 3d 1, 2012-Ohio-4961 ¶ 13; *State v. D.H.*, 120 Ohio St. 3d 540, 2009-Ohio-9 ¶ 59, 61. Nor does he have—and, indeed, he has not claimed he has—a right to a jury trial at the adjudicative phase. As *J.V.* explained, “juveniles do not enjoy a right to a trial by jury. . . . In *D.H.*, we stated that juries have an ‘important role in the adjudicative portion of Ohio’s serious-youthful-offender disposition *statutory* scheme.’ But juries are not required. . . .” 2012-Ohio-4961 ¶ 11-12 (emphasis added) (internal citation omitted). In other words, the General Assembly may, but need not, afford a jury trial at the adjudicative stage. It declined to do so here, as it has for all other juvenile proceedings except serious-youthful-offender cases.

Also unavailing is D.S.’s attempt to rehash his argument that only the offender-registration statute “carr[ies] consequences that follow the juvenile offender beyond the jurisdiction of the juvenile court.” Recon. Br. 5; *see* App’t Br. 18-23. The dissent echoed this rationale, *see D.S.*, 2016-Ohio-1027 ¶¶ 51-52 (Lanzinger, J., dissenting), but the majority declined to adopt it. Thus, once again, D.S.’s argument treads familiar ground. Moreover, as the State has explained at length, the “arguments that D.S.’s classification has effects that go beyond other juvenile punishments are in fact claims that juvenile classification is a cruel and unusual punishment” and, “even under that test, the statute is constitutional as applied to D.S.” *See* State

Br. 21-26. Moreover, as the majority notes, classification may be periodically reviewed and then modified or terminated. *D.S.*, 2016-Ohio-1027 ¶ 36. There is no certainty that D.S. or anyone similarly situated will face *any* post-age-21 consequences. *Cf. State v. Adkins*, 129 Ohio St. 3d 287, 2011-Ohio-3141 ¶ 15 (some adult consequences of juvenile adjudication “100%” attributable to post-adulthood conduct (citation and quotation marks omitted)).

B. D.S.’s argument that the Court’s double jeopardy and due process rulings conflict misreads the Court’s opinion in numerous ways.

There is nothing inconsistent about the Court’s double-jeopardy and due-process rulings. D.S. accuses the State (and, necessarily, this Court) of trying to “have it both ways” by concluding that the statute violated neither double jeopardy nor due process. Recon. Br. 6. In his view, if the differences between adults and juveniles “is what keeps Ohio’s juvenile sex offender scheme from violating double jeopardy protections, those same differences must” mean that allowing registration duties to continue into adulthood violates due process. *Id.* In other words, the statute must have violated *something*.

This misconstrues the opinion. Contrary to D.S.’s claims, *see id.*, the Court’s double-jeopardy ruling depended not on differences between juveniles and adults, but on timing. The Court concluded that one “ha[s] a legitimate expectation of finality when the trial court enter[s] its judgment of conviction” *D.S.*, 2016-Ohio-1027 ¶ 25. It did not hold that the standard differed for adults; it merely held that, whereas the common pleas court violated double jeopardy in *Raber* by imposing registration duties after failing to mention them in its disposition order, the juvenile court here satisfied the requirement by imposing deferred registration in its order. *Id.*

Additionally, the comments the Court made about juvenile courts after issuing its double-jeopardy holding were fully consistent with those it made in the due-process context. The Court noted that deferment allowed the juvenile court to consider classification after a child had

undergone rehabilitation, encouraging the child to complete the treatment and providing the court with more information to consider. *See id.* ¶ 26. “Thus,” concluded the Court, “deferred classification of the juvenile offender is consistent with the juvenile court’s exercise of discretion in its rehabilitative role and with the statutory scheme.” *Id.* There is nothing inconsistent about this conclusion in the Court’s double-jeopardy analysis and the Court’s holding that the statute did not violate due process because “the juvenile court judge maintains discretion throughout the course of the offender’s registration period to consider whether to continue, terminate, or modify the juvenile’s classification.” *Id.* ¶ 36. Both demonstrate the Court’s recognition of the importance of juvenile courts discretion.

D.S. has things backwards. He assumes (and in his third argument states explicitly) that the juvenile court’s discretion undermines due process. This Court has already rejected that argument in this case and others. *See In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446 ¶ 85 (invalidating automatic classification statute that “eliminates the important role of the juvenile court’s discretion in the disposition of juvenile offenders and thus fails to meet the due process requirement of fundamental fairness”); *id.* ¶ 61 (“We trust judges to make the important calls in imposing the adult portion of the [serious-youthful-offender] sentence. . . . But under [the classification statute], . . . [t]here is none of the important, individualized work that juvenile judges do.”); *D.H.*, 2009-Ohio-9 ¶ 59.

C. D.S. would have this Court curtail the juvenile court’s discretion, the “essential element” of the juvenile process, based on recycled arguments that are more appropriately considered (and rejected) under the Eighth Amendment.

Having accused the Court of trying to have it both ways, D.S. next tries to do just that. Only pages earlier D.S. claims support in *D.H.*, Recon. Br. 4, which extolled the “expertise of [the] juvenile judge” and, with respect to serious-youthful-offender dispositions, the importance of “leav[ing] that determination to an expert.” *D.H.*, 2009-Ohio-9 ¶ 59; *see also C.P.*, 2012-

Ohio-1446 ¶¶ 61, 77, 85. Now, however, we learn that a juvenile court’s “unfettered discretion” should be condemned because it leads to “harsher punishments.” Recon. Br. 7-8. Thus, D.S. would have this Court strip juvenile courts of “‘th[e] essential element of the juvenile process’—the judge’s discretion.” *D.S.*, 2016-Ohio-1027 ¶ 83 (quoting *C.P.*, 2012-Ohio-1446 ¶ 77).

Other reasons doom D.S.’s attack on discretion. For one, his claim about “harsher punishments” is, obviously, a claim about punishments appropriately addressed under the Eighth Amendment. As mentioned, the State has already identified the faults in this line of reasoning. *See* State Br. 21-28. In addition, this argument seeks to litigate scenarios that D.S. will not face by pointing to a supposed disparity in how the same crime would be classified for a juvenile and an adult. We have all been through this at the merits stage. *See* State Br. 27. Finally, this Court addressed the role of juvenile courts’ discretion in offender classification at length in its opinion; indeed, the issue features ubiquitously in its due-process analysis. *See D.S.*, 2016-Ohio-1027 ¶¶ 29-37. The Court ultimately held that this discretion safeguarded, rather than undermined, due process. *Id.* ¶¶ 37-38. D.S. presents no new reason to stray from that reasoned conclusion.

D. D.S. yet again contrasts procedural protections in the offender-registration and serious-youthful-offender statutes that the State has already addressed and this Court rightly rejected.

D.S.’s final point is perhaps his most transparent restatement of prior arguments. He notes, first, that whereas a serious-youthful-offender sentence is only a “potential sentence,” offender registration is “presumed” and the ability to avoid registration “is not guaranteed.” Recon. Br. 8-9 (citation and quotation marks omitted). In his merits brief he made the same argument with slightly different words: a serious youthful offender sentence is a “potential sentence,” whereas offender registration is “automatic[]” and the ability to avoid registration “is not guaranteed.” App’t Br. 24, 26 (citation and quotation marks omitted). Next, he cites *D.H.* and notes that the court must find that a defendant committed a “triggering bad act” and is

“unlikely to be rehabilitated during the remaining period of juvenile jurisdiction” before imposing a serious-youthful-offender sentence, whereas it need not make similar findings prior to an offender classification. Recon. Br. 9-10 (citation and quotation marks omitted). This also echoes his merits brief, where he cited *D.H.* and noted that the court must find that a defendant committed a “further bad act” and is “unlikely to be rehabilitated during the remaining period of juvenile jurisdiction” prior to imposing a serious-youthful-offender sentence, whereas it need not make similar findings prior to an offender classification. App’t Br. 24-26 (citation and quotation marks omitted). The same argument merits the same result.

Regardless, the State has already outlined the extensive protections afforded to juveniles under the offender registration statute, State Br. 17-19, and, as mentioned above, it has already addressed D.S.’s arguments, *id.* 26-28. Additionally, both the majority and dissenting opinions discussed the case law relating to the serious-youthful-offender statute at length. *See D.S.*, 2016-Ohio-1027 ¶¶ 29-37; *id.* ¶ 44 (Lanzinger, J., dissenting) (“As the majority explains in its analysis, the question . . . must be decided in light of our decisions in [*D.H.*] and [*C.P.*]”).

* * *

D.S. may disagree with this Court’s decision. But his motion simply rehashes arguments from his merits brief that the State addressed, the dissent adopted, and the majority rejected. His brief underscores the Court’s careful attention to his arguments. Accordingly, the Court should deny the motion for reconsideration.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

/s/ Eric E. Murphy

ERIC E. MURPHY* (0083284)

State Solicitor

**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980; 614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

KENNETH W. OSWALT (0037208)

Licking County Prosecutor

LIA J. MEEHAN (0082133)

Licking County Assistant Prosecutor

20 S. Second Street, Fourth Floor

Newark, Ohio 43055

740-670-5264; 740-670-5241 fax

lmeehan@lcounty.com

Counsel for Appellee

State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Reconsideration of Appellee State of Ohio was served via ordinary mail this 6th day of April, 2016 upon the following counsel:

Brooke M. Burns
Chief Counsel, Juvenile Department
The Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, OH 43215

Counsel for Appellant
D.S.

/s/ Eric E. Murphy
Eric E. Murphy
State Solicitor