NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Appeals

APPELLANT'S BRIEF FILED
October 13, 2017 12:51

By: CULLEN SWEENEY 0077187

Confirmation Nbr. 1197466

IN RE: A.W. CA 17 105845

vs.

Judge:

.

Pages Filed: 52

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

CA 105845

IN RE: A.W. :

Defendant-Appellant :

:

:

:

APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR

COUNSEL FOR APPELLEE

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
Justice Center 9th Floor
1200 Ontario Street
Cleveland, OH 44113
216-443-7800

COUNSEL FOR APPELLANT

MARK A. STANTON
Chief Public Defender
BY: FRANCIS CAVALLO
0073428 &
CULLEN SWEENEY #0077187
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
fcavallo@cuyahogacounty.us
csweeney@cuyahogacounty.us
216-443-7583
Fax: 216-443-6911

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ASSIGNMENTS OF ERROR

Assignment of Error I:

THE TRIAL COURT VIOLATED A.W.'S DUE PROCESS RIGHTS BY INVOKING HIS ADULT SENTENCE FOR FAILURE TO COMPLETE COURT-ORDERED SEX OFFENDER TREATMENT AT ODYS WHEN SUCH TREATMENT WAS NOT ORDERED AT THE TIME OF HIS DISPOSITION, WHEN A.W. RECEIVED NO NOTICE, AT THE TIME OF HIS DISPOSITION, THAT THE FAILURE TO COMPLETE SEX OFFENDER TREATMENT COULD RESULT IN THE INVOCATION OF HIS ADULT SENTENCE, AND WHEN IT WAS FACTUALLY IMPOSSIBLE TO COMPLETE SEX OFFENDER PROGRAMMING GIVEN THE SHORT LENGTH OF A.W.'S ODYS COMMITMENT.

Assignment of Error II:

THE TRIAL COURT LACKED THE AUTHORITY TO ORDER A.W. TO ENGAGE IN SEX OFFENDER TREATMENT WHILE IN ODYS CUSTODY

Assignment of Error III:

THE TRIAL COURT ERRED WHEN IT INVOKED THE ADULT PORTION OF THE SYO SENTENCE UNDER R.C. 2152.14(E) UPON INSUFFICIENT EVIDENCE OF MISCONDUCT, INVOKING IT INSTEAD UPON A FAILURE TO COMPLETE A COURT-ORDERED TREATMENT PROGRAM THAT HE WAS NEVER ORDERED TO COMPLETE AND THAT WAS IMPOSSIBLE FOR A.W. TO FINISH.

Assignment of Error IV:

THE TRIAL COURT VIOLATED A.W.'S CONSTITUTIONAL PROTECTIONS AGAINST INCRIMINATING HIMSELF BY CONSIDERING STATEMENTS A.W. WAS COMPELLED TO MAKE DURING HIS INDIVIDUAL AND GROUP SEX OFFENDER TREATMENT WHEN INVOKING A.W.'S ADULT SENTENCE.

Assignment of Error V:

THE TRIAL COURT ERRED BY DENYING A.W. HIS FUNDAMENTAL RIGHT TO DUE PROCESS BY FAILING TO PROVIDE PROPER NOTICE OF THE ADULT-SENTENCE-INVOCATION HEARING AS REQUIRED BY 2152.14(D)

ISSUES PRESENTED

ISSUE NO. I:

WHETHER THE TRIAL COURT VIOLATED A.W.'S DUE PROCESS RIGHTS BY INVOKING HIS ADULT SENTENCE FOR FAILURE TO COMPLETE COURT-ORDERED SEX OFFENDER TREATMENT AT ODYS WHEN SUCH TREATMENT WAS NOT ORDERED AT THE TIME OF HIS DISPOSITION, WHEN A.W. RECEIVED NO NOTICE, AT THE TIME OF HIS DISPOSITION, THAT THE FAILURE TO COMPLETE SEX OFFENDER TREATMENT COULD RESULT IN THE INVOCATION OF HIS ADULT SENTENCE, AND WHEN IT WAS FACTUALLY IMPOSSIBLE TO COMPLETE SEX OFFENDER PROGRAMMING GIVEN THE SHORT LENGTH OF A.W.'S ODYS COMMITMENT.

ISSUE NO. II:

WHETHER THE TRIAL COURT LACKED THE AUTHORITY TO ORDER A.W. TO ENGAGE IN SEX OFFENDER TREATMENT WHILE IN ODYS CUSTODY

ISSUE NO. III:

WHETHER THE TRIAL COURT ERRED WHEN IT INVOKED THE ADULT PORTION OF THE SYO SENTENCE UNDER R.C. 2152.14(E) UPON INSUFFICIENT EVIDENCE OF MISCONDUCT, INVOKING IT INSTEAD UPON A FAILURE TO COMPLETE A COURT-ORDERED TREATMENT PROGRAM THAT HE WAS NEVER ORDERED TO COMPLETE AND THAT WAS IMPOSSIBLE FOR A.W. TO FINISH.

ISSUE NO. IV:

WHETHER THE TRIAL COURT VIOLATED A.W.'S CONSTITUTIONAL PROTECTIONS AGAINST INCRIMINATING HIMSELF BY CONSIDERING STATEMENTS A.W. WAS COMPELLED TO MAKE DURING HIS INDIVIDUAL AND GROUP SEX OFFENDER TREATMENT WHEN INVOKING A.W.'S ADULT SENTENCE.

ISSUE V:

WHETHER THE TRIAL COURT ERRED BY DENYING A.W. HIS FUNDAMENTAL RIGHT TO DUE PROCESS BY FAILING TO PROVIDE PROPER NOTICE OF THE ADULT-SENTENCE-INVOCATION HEARING AS REQUIRED BY 2152.14(D)

INTRODUCTION

With this case, A.W. challenges the juvenile court's decision to invoke his adult sentence and conviction and to impose lifetime adult registration on the asserted basis that he did not complete court-ordered sex offender treatment while at ODYS. The juvenile court's decision finds no support in law or fact, violates A.W.'s constitutional rights, and should be reversed.

When A.W. admitted to a single count of rape with a serious youthful offender specification, the juvenile court told him that "the only way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts." (9/13/16 Tr. at 77-78). The juvenile court issued a dispositional order, committing A.W. to the custody of ODYS for a period of seven months (until his 21st birthday on May 23, 2017). (10/12/16 Tr. at 15). At the dispositional hearing, the juvenile court indicated that it wanted "sex offender treatment put in place for ODYS, but it did not order A.W. to participate in such treatment at that time.

In January 2017, the juvenile court ordered A.W., for the first time, to "*participate* and engage in sex offender treatment," and A.W. agreed to do so. (1/18/17 Tr. at 5 and 8). ODYS failed, however, to place A.W. in any sex offender treatment until April 5, 2017. (3/31/17 Tr. at 3 and 5). The juvenile court expressed frustration that "[i]t's been two months now where I ordered him to do something. He agreed to do it and we're the ones that are failing him," (3/31/Tr. at 5-6). Recognizing ODYS's failure, the juvenile court promised A.W. at the March 31st hearing that "if you do everything you're supposed to, I will not impose your SYO." (3/31/17 Tr. at 10). The juvenile court also provided that A.W. "needs to complete as much of the program he can" in the short time remaining on his commitment. (4/3/17 JE).

The juvenile court broke its repeated promise to A.W. that he would not go to adult

prison as long as he did not create delinquent acts and did "everything you're supposed to." By all accounts, A.W. did "really well" during his commitment at ODYS. (1/18/17 Tr. at 4 and 8-9). There was no indication that he engaged in fights or other behavior that placed staff or other juveniles at risk. A.W. participated "in his education requirement and [did] very well in that area." (5/8/17 Tr. at 7). A.W. successfully completed substance abuse treatment and engaged in aftercare programming. (1/18/17 Tr. at 4, 3/31/17 Tr. at 8, and 5/8/17 Tr. at 7). He engaged in individual and group counseling sessions, participated in music therapy, received "the orientation for sex offender treatment," and engaged in victim awareness programming. (1/18/17 Tr. at 4 and 3/31/17 Tr. at 7). And when he was finally provided individual and group sex offender treatment, he was not merely an observer but an active participant. His individual therapist, Dr. Greene, testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). And Bonita Reaves, the social worker who facilitated the group therapy, testified that A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments." (5/22/17 Tr. at 15 and 19).

Despite A.W.'s success at ODYS and his participation in sex offender treatment, the juvenile court invoked A.W.'s adult sentence and conviction for failing to complete sex offender treatment. A.W.'s alleged failure to complete sex offender treatment is not a legitimate basis for invoking his adult sentence and conviction because:

- The juvenile court lacks the authority to issue orders related to A.W.'s commitment at ODYS;
- The juvenile court never ordered A.W. to complete sex offender treatment but only to participate in it, which A.W. did once ordered to do so and once it was provided by ODYS;
- A.W. could never have completed sex offender treatment, which "is at least nine months long," given his short commitment to ODYS (only 5 months after he was transported and assessed for treatment needs in December 2016); (5/8/17 Tr. at 14),

- Even if the court could order A.W. to participate in treatment and A.W. somehow failed to totally participate in treatment, any such failure does not constitute "further misconduct" as required to invoke his adult sentence and conviction;

- The juvenile court's reliance, on A.W.'s initial reluctance to be "completely open and honest about his sexual offending" and his compelled statements during his participation in court-ordered treatment, to invoke his adult sentence violated A.W.'s Fifth Amendment protection against self-incrimination.

Given all of the progress made by A.W. and the lack of any misconduct at ODYS, the juvenile court improperly imposed an adult conviction, an adult prison sentence, and adult registration requirements upon A.W. because he did not fully complete a sex offender treatment program—something that he was never ordered to complete, something he could never have completed during his short ODYS commitment, and something that was delayed for three months *due to ODYS's* inability to provide prompt treatment.

STATEMENT OF THE CASE AND FACTS

A. A.W. is charged, as a teenager, with sexual assault in April 2014.

On April 22, 2014, A.W., a minor child, was charged by complaint in juvenile court with two counts of rape, two counts of gross sexual imposition, and one count of kidnapping. (9/7/16 Tr. at 4). These charges were based on an incident that allegedly occurred eight months earlier, on August 17, 2013, when A.W. was 17 and the alleged victim, A.A., was 13.

The prosecution was delayed because A.A. initially claimed that she had been sexually assaulted by a stranger. When A.A. met with the police, she did not tell them that she had been texting with A.W. prior to meeting him at a festival or that she had intentionally met up with him. (9/7/16 Tr. at 56 and 60). She never gave police his contact information. (9/7/16 Tr. at 56-57).

B. Nearly three years after the alleged assault, the juvenile court begins to hold a

bindover hearing.

A.W. was detained on this case on May 12, 2016. On September 7, 2016, after A.W. spent 122 days in detention, the trial court held a probable cause hearing pursuant to the State's request to bind the case over to adult court. At the hearing, the State presented the testimony of S.W., the alleged victim's mother, and A.A., the alleged victim.

In his opening statement, the prosecutor asserted that A.A. "was pulled into the woods and forcibly raped by a stranger, someone she had not known, never met before in her life" and that the perpetrator remained "unknown" to the police until DNA testing connected the case to A.W. (9/7/16 Tr. at 12-13). While that description of the event reflected what A.A. told the police, A.A. provided a different story when she testified under oath at the probable cause hearing.

On August 17, 2013, 13-year-old A.A. went to the "Warrensville Festival" with her mom and a couple of friends. (9/7/16 Tr. at 17-18, 22, 23, and 36). Prior to and during the festival, A.A. had been texting with 17-year-old A.W, an individual she had met through a social media account. (9/7/16 Tr. at 11, 43, 52, 54 and 57). A.A. testified that she did not "remember how we started talking" but that she and this person had communicated "[t]hrough texting." (9/7/16 Tr. at 43 and 52).

At some point, A.A. got a text message from A.W. asking to meet up with her and she went to meet him with her friend. (9/7/16 Tr. at 41 and 58-59). A.A.'s friend then left. (9/7/16 Tr. at 59). A.A. testified that she was holding A.W.'s hand, that she talked to him for about five or ten minutes, and that they then walked over to the woods together. (9/7/16 Tr. at 41, 44, and 59). A.A. testified that A.W. had vaginal and anal sex with her. (9/7/16 Tr. at 44-45 and 63). A.A. testified that she did not consent to anything and that she "tried to stop" but A.W.

"wouldn't let me." (9/7/16 Tr. at 44, 46, and 61).

A.A. did not say anything to her mom that night. (9/7/16 Tr. at 20). However, the next day, A.A. told someone at her church that she had been sexually assaulted the night before. (9/7/16 Tr. at 20-21 and 48). A.A. went to the police station and then to Hillcrest Hospital "to be examined by a SANE nurse." (9/7/16 Tr. at 21). When she met with the police, A.A. did not tell them that she had been texting with A.W. prior to the festival or that she had intentionally met up with him. (9/7/16 Tr. at 56 and 60). She never gave police his contact information. (9/7/16 Tr. at 56-57).

C. A.W. and the State agree to keep the case in Juvenile Court and resolve the case by adding a Serious Youthful Offender ("SYO") specification.

After A.A. testified and before the bindover hearing had concluded, the parties approached the Juvenile Court with a resolution. Specifically, A.W. and the State agreed to keep the case in juvenile court by adding a serious youthful offender specification. (9/13/16 Tr. at 76-77). Pursuant to the agreement, A.W. admitted to one count of rape with a serious youthful offender specification, and the State withdrew its bindover request and dismissed the remaining charges. (9/13/16 Tr. at 77-78).

The juvenile court judge explained to A.W. that he was going to stay in Juvenile Court and told him that:

> [T]he only way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts.

(9/13/16 Tr. at 77-78). The juvenile court judge then engaged in a colloquy with A.W, during which A.W. admitted to the sole remaining charge of rape. (9/13/16 Tr. at 87). After A.W.'s admission, the juvenile court judge asked A.W. about his version of events. (9/13/16 Tr. at 87). A.W. explained that A.A. said she was 16, that A.A. initiated the sexual contact, and that the sex

was consensual. (9/13/16 Tr. at 88-89).

D. The juvenile court judge committed A.W. to Ohio's Department of Youth Services ("ODYS") for a period of approximately seven months (until A.W.'s 21st birthday on May 23, 2017).

On October 12, 2016, the juvenile court judge held a dispositional hearing and imposed the agreed-upon disposition that A.W. would be committed to ODYS for seven months (until his 21st birthday on May 23, 2017). (10/12/16 Tr. at 15). The trial court also imposed a suspended adult sentence of three years that would be imposed if the adult portion of A.W.'s SYO sentence were to be invoked. (10/12/16 Tr. at 17). Although the trial court stated that it wanted "sex offender treatment put in place for ODYS," it did not order A.W. to participate in such treatment. (10/12/16 Tr. at 18). [1]

E. Although A.W. had been committed to ODYS, the juvenile court held a "review hearing" in January 2017 and stated that A.W. is "doing really well" and that the "only issue is he needs to fully participate in sex offender treatment." (1/18/17 Tr. at 8-9).

Although the juvenile court had relinquished control over A.W. by committing him to ODYS, the juvenile court nonetheless held a "review hearing" on January 18, 2017, approximately three months into A.W.'s ODYS commitment.

At the hearing, Cynthia Dansby, A.W.'s parole officer, reported that A.W. "does well in all services except sex offender treatment." (1/18/17 Tr. at 4). She stated that A.W. participates in substance abuse treatment and individual and group sessions on his unit with the social worker. (1/18/17 Tr. at 4). However, according to reports from the psychologist and social worker, A.W. "continues to deny the accusations" and thus does not participate in sex offender treatment. (1/18/17 Tr. at 4).

---

[1] The juvenile court judge also resolved two other cases at the disposition hearing that did not involve an SYO specification are not related to the issues on appeal.

The juvenile court judge stated the following:

> I get the fact that you might have been upset that your girlfriend broke up with you and you might have posted a photo of her on Instagram with no clothes on. I get the fact that you got into another argument with your girl and you pushed her down. And I also get the fact that you hooked up with a 13-year-old girl at a fair and you thought she was 17 and it was perfectly fine.
>
> Regardless, which means, you know, in spite of all that, you are looking at prison. I'm not playing with you. I'm not messing around. You either participate in the sex offender treatment or you can sit for the next, I don't know what your tail was, six years?

(1/18/17 Tr. at 5). A.W. then told the judge that he was going to participate in the treatment. (1/18/17 Tr. at 8). And the juvenile court judge concluded that "the long and short of it is that he's doing really well" and that the "only issue is he needs to fully participate in sex offender treatment." (1/18/17 Tr. at 8-9).

After this hearing, the juvenile court issued a judgment entry which, *for the first time*, ordered A.W. to "participate" in sex offender treatment and stated that the failure to engage such treatment "may result in the Serious Youth Offender disposition being invoked." (1/20/17 JE). On January 25, 2017, the juvenile court also retroactively altered the October 12, 2016 entry to include, for the first time, are requirement that A.W. "participate" in sex offender treatment. (1/25/17 JE).

F. The juvenile court judge held a second "review hearing" on March 31, 2017 and learned that ODYS had not started group sex offender treatment for A.W. despite his willingness to participate.

Less than two months prior to A.W.'s 21st birthday, the juvenile court held a second review hearing. At the start of the hearing, A.W. told the judge that he was not scheduled to start his sex offender treatment until April 5, 2017. (3/31/17 Tr. at 3).

In response to the judge's questions about the delay, Dr. Alpert, the psychologist, explained the history. Dr. Alpert stated that, at A.W.'s initial assessment in December 2016,

A.W. denied his offense and that he told A.W. that he would not place him into treatment if he was not "completely open and honest about his sexual offending." (3/31/17 Tr. at 4). Because A.W. would not admit to his "sexual offending," the treatment team "shifted the focus of his treatment to Treatment Orientation Curriculum hoping that he could learn the benefit of engaging in treatment" and also put him in a "Music Therapy Program." (3/31/17 Tr. at 4).

After the January review hearing, Dr. Alpert met with A.W. again and "[a]t that time he was forthcoming about his sex offending." (3/31/17 Tr. at 5). However, because the sex offender group that began in September was "well under way," Dr. Alpert did not want to add A.W. to that group and was not able to place him into a group sex offender treatment program until April 5. (3/31/17 Tr. at 5).

The juvenile court judge was incredibly frustrated with ODYS and Dr. Alpert and stated:

> You know he's going to be 21 in May. You know that he has an SYO, meaning that I can send him to Adult Prison if he doesn't complete my orders. So I don't understand how – I don't understand how – even though you have a closed group and I understand that, how did we not go to Plan B and figure out how to get him the required sex offender treatment? *It's been two months now where I ordered him to do something. He agreed to do it and we're the ones that are failing him.*"

(3/31/17 Tr. at 5-6) (emphasis added).

The juvenile court judge asked whether ODYS could do "some type of tailored individual sex offender treatment" to augment the group treatment beginning on April 5. (3/31/17 Tr. at 9). Dr. Alpert told the judge that "[w]e can do that." (3/31/17 Tr. at 9). So the judge explained to A.W. that he was "going to start" sex offender treatment on April 5 and that they were "going to accelerate it by doing an individual program along with it." (3/31/17 Tr. at 10). *The juvenile court judge told A.W. "if you do everything you're supposed to, I will not impose your SYO."* (3/31/17 Tr. at 10). The juvenile court judge concluded by telling A.W. not to "screw up because prison is not a place you want to hang out" and that "[t]hey'll take a cute little boy like you and it

will be miserable for you." (3/31/17 Tr. at 16).

After this hearing, the juvenile court issued another judgment entry which indicated that A.W. had expressed a desire to participate in sex offender treatment but was told by ODYS that "the next class was not until April 5, 2017 and would take approximately nine months." (4/3/17 JE). The juvenile court further indicated that A.W. was turning 21 on May 23, 2017 and "*needs to complete as much of the program as he can.*" (4/3/17 JE) (emphasis added). The juvenile court also ordered ODYS to provide "an additional individualized program to accelerate [A.W.'s] progress" and ordered A.W. to participate in "individualized sex offender treatment." (4/3/17 JE).

G. The juvenile court judge held a third "review hearing" on May 8, 2017 and was told by supervising psychiatrist that A.W.'s initial involvement in treatment had revealed a "vast amount of issues" that could not have been adequately addressed even if A.W. had begun sex offender treatment "on his first day in ODYS."

The trial court held a third "review hearing," less than two weeks prior to A.W.'s release on his 21st birthday.

Although Dr. Alpert did not provide any of the treatment for A.W., he reported to the juvenile court judge that A.W. "began [group] sex offender specific treatment on April 5th [with Ms. Reaves] and it's being augmented by individual therapy with Dr. Greene." (5/8/17 Tr. at 4, 5, and 7). Dr. Greene told the juvenile court judge that she was engaged in individualized counseling and sex offender treatment with A.W. (5/8/17 Tr. at 5). According to Dr. Greene, A.W. has been "very willing, I'll say to talk about a lot of very sensitive issues which has been important" and that they have "talked pretty extensively about his triggers." (5/8/17 Tr. at 6). Ms. Reaves did not appear at the hearing to report on A.W.'s participation in group treatment. And while he did not have any first-hand information, Dr. Alpert claimed, with respect to the group treatment, that A.W. attends the sessions but is "superficially engaged" and "doesn't really

buy into the treatment or feel that he needs treatment, but he is going." (5/8/17 Tr. at 4).

Dr. Alpert stated that the "bottomline is the treatment providers and behavioral health find that [A.W.] has a vast amount of issues that contribute to his dangerous predator behaviors and he needs the ongoing clinical attention." (5/8/17 Tr. at 7). The juvenile court judge asked Dr. Alpert if there is "any glimmer of hope for [A.W.] that he can see beyond his issues and actually garner the knowledge that he needs not to continue to offend." (5/8/17 Tr. at 8). And Dr. Alpert stated "[n]ot prior to turning 21, your Honor." (5/8/17 Tr. at 8). A.W. told the judge:

> Judge Rini, I'm doing my treatment. I'm doing everything I'm supposed to do. I'm not missing treatment, I'm doing the homework. I'm talking to Ms. Greene. I'm doing everything you told me to do. I haven't missed a day of treatment. I've been doing all my homework, bringing it back on time. Everything. I mean I talk about my treatments, my thinking cycle, things I'm not going to do when I get out. I'm trying my hardest not to get bonded over.

(5/8/17 Tr. at 8-9).

After A.W.'s parole officer asked A.W. to be excused from the hearing, she and Dr. Alpert discussed statements that A.W. allegedly made during treatment that constituted "fantasizing about his rapes" and that he enjoyed "violent pornography, which he has made clear that he's going to continue to watch when he leaves here." (5/8/17 Tr. at 12-13). When A.W.'s attorney pressed Dr. Albert on the amount of time needed for adequate treatment, Dr. Albert responded that:

> Even if [A.W.] would have engaged in sex offender treatment on his first day in ODYS, that would not be enough time. Sex offender treatment is at least nine months, but [A.W.] does have a vast amount of issues that need ongoing clinical attention.

(5/8/17 Tr. at 14). Dr. Greene also stated that A.W. has reported being a victim of sexual abuse himself. (5/8/17 Tr. at 18).

H. The trial court invoked A.W.'s adult sentence and imposed an adult conviction because A.W. had made disclosures during treatment that suggested he remained a

risk to the community and because he did not complete sex offender treatment.

Less than a week before A.W.'s 21st birthday, the State filed a motion to invoke the adult portion of A.W.'s SYO sentence due to A.W.'s alleged failure to complete court-ordered sex offender treatment.

The trial court held a hearing on the State's motion to invoke the SYO specification on May 22, 2017. The State presented three witnesses at the hearing: Dr. Erin Greene, the psychologist who had engaged A.W. in individual counseling for a month and a half; Bonita Reaves, the social worker who had facilitated the group sex offender treatment that A.W. had engaged in since April 5, 2017; and Dr. Robin Palmer, who was asked by ODYS to evaluate A.W. and provide a report regarding risk factors for sexual reoffending.

1. A.W.'s individual therapist testified that A.W. was "very engaged" in the counseling and "did do the work" but that he would need a "significant amount of additional treatment" to make "any lasting change."[2]

Dr. Erin Greene is a licensed psychologist who "conducts individual and group sexual offender treatment" at Cuyahoga Hills Correctional Facility. (5/31/17 JE at 2). Dr. Greene explained that the group sex offender treatment program consists of two phases, with the first phase lasting approximately 4-5 months. (5/31/17 JE at 2). Dr. Greene explained that, in order to be accepted into the group treatment program, the youth "must discuss all the offense in detail." (5/31/17 JE at 2). She testified that, once a youth receives a sex offender assessment, he "enters Phase 1 with the next available group." (5/31/17 JE at 2). According to Dr. Greene, "[s]ince the groups are closed, once a group begins, a youth may not join and must wait until a new group begins." (5/31/17 JE at 2).

[2] A portion of Dr. Greene's testimony was not transcribed because the recording device was not turned on until after she began testifying. Accordingly, some of her testimony is taken from the juvenile court's summary in its judgment entry.

Dr. Greene engaged A.W. in seven individual counseling sessions, beginning April 1, 2017 and concluding on May 11, 2017. (5/22/17 Tr. at 5; 5/31/17 JE at 2).). She testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). Dr. Greene's concern was that A.W. was not processing the information "at a deeper level" and was not ready to stop engaging in the "major risky triggers in his life," such as "viewing pornography." (5/22/17 Tr. at 7; 5/31/17 JE at 2). Dr. Greene specifically testified about statements made by A.W. during their individual counseling sessions. (5/31/17 JE at 2).

Dr. Greene testified that A.W. had probably completed 10 to 15% of the sex offender treatment and that if he had begun six months ago "he could potentially be, you know, 60 to 70% done. But again, it's very variable." (5/22/17 Tr. at 9).

2. A.W.'s group therapist testified that A.W. "did well" in the group, did "a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments" and that A.W. was not, to her knowledge, considered for group treatment until April 2017.

Bonita Reaves testified that, as a social worker at the Cuyahoga Hills Juvenile Correctional Facility, she is responsible for Phase 1 of the group sex offender programming. (5/22/17 Tr. at 11-12). Ms. Reaves testified that Phase 1 consists of 35 lessons and typically takes about four to six months to complete. (5/22/17 Tr. at 12-13). Ms. Reaves testified that she began working with A.W. on April 19, 2017 in a group consisting of four kids and that A.W. had completed seven of the lessons. (5/22/17 Tr. at 13-14). Ms. Reaves testified that A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments." (5/22/17 Tr. at 15 and 19). Having just had A.W. for about 30 days, Ms. Reaves testified that A.W. should continue counseling and that his sex offender treatment was incomplete. (5/22/17 Tr. at 18).

Ms. Reaves testified that, although she had a prior sex offender group, "we don't just put

kids into – it's a closed group." (5/22/17 Tr. at 17). Once a group starts, they do not add kids to the group "because we're always building on what we learn the day before." (5/22/17 Tr. at 21). She testified that A.W.'s name was never mentioned as being included in a group prior to April 2017. (5/22/17 Tr. at 17). And while there are three social workers who do Phase 1 group sex offender treatment at the facility, Ms. Reaves did not know why it took from January, when A.W. agreed to participate in the group, to April to get him into a group. (5/22/17 Tr. at 23-24).

3. Dr. Robin Palmer authored a report regarding A.W.'s risk factors "correlated to sexual reoffending" and opined that treatment would have little or no impact on A.W.

Dr. Palmer testified that she was asked by ODYS to evaluate A.W. and provide a report regarding risk factors for sexual reoffending. (5/22/17 Tr. at 27-29). Dr. Palmer testified that she interviewed A.W. on May 15, 2017 and that A.W. was cooperative during the interview. (5/22/17 Tr. at 29-31). According to Dr. Palmer, A.W. told her that "he really felt that he needed counseling, sex offender specific counseling" and that "he was more than willing to participate in it." (5/22/17 Tr. at 33).

Dr. Palmer testified that A.W. had 20 of the 25 risk factors in the ERASOR evaluation tool that are "correlated to sexual reoffending." (5/22/17 Tr. at 36 and 41). Dr. Palmer testified that, when someone has a large number of risk factors, that person "probably has a higher propensity to possibly again – this is not a direct correlation – to engage in some kind of illegal inappropriate sexual behavior." (5/22/17 Tr. at 37). Dr. Palmer acknowledged, however, that the ERASOR tool, had not been validated for use on 20-year-olds who are transitioning from the juvenile system; however, she stated that "doesn't make it absolutely wrong to use that instrument." (5/22/17 Tr. at 42).

In A.W.'s case, Dr. Palmer testified that she did not think that therapy would be effective for A.W. because he "has been diagnosed with antisocial personality disorder with narcissistic

tendencies." (5/22/17 Tr. at 39 and 44). According to Dr. Palmer, "there isn't any supported, any research that supports treatment out there for antisocial personality disorder." (5/22/17 Tr. at 44). Dr. Palmer testified that she believed a "correctional approach" would "be the most effective." (5/22/17 Tr. at 40).

4. The juvenile court judge invoked A.W.'s adult sentence because he did not complete sex offender treatment.

During closing argument at the SYO hearing, the State argued that the juvenile court judge should invoke the SYO because A.W. "has not completed the Court-mandated treatment," regardless of whether "that is on ODYS or the juvenile himself." (5/22/17 Tr. at 58 and 68). While the State conceded that A.W. "might be doing well," it argued that he "still has a ways to go." (5/22/17 Tr. at 59).

The juvenile court judge stated that it found be clear and convincing evidence that, among other things, A.W. "engaged in conduct that created a substantial risk to safety, and I can clarify that by saying if you had done your treatment, that is the substantial risk to safety." (5/22/17 Tr. at 29-31). In its written judgement entry, the juvenile court concluded that A.W. "has placed the community at Risk since Court Ordered Sexual Offender Treatment was offered upon the youth entering ODYS at Cuyahoga Hills Correctional Institution and the youth refused treatment and did not engage in until April 2017." (5/31/17 JE at 5).

Accordingly, the trial court terminated the juvenile disposition and sentenced A.W. to two years in prison. (5/22/17 Tr. at 74-76). The juvenile court also classified A.W. as a Tier III sex offender. (5/22/17 Tr. at 76-77).

LAW AND ARGUMENT

Assignment of Error I:

THE TRIAL COURT VIOLATED A.W.'S DUE PROCESS RIGHTS BY INVOKING HIS ADULT SENTENCE FOR FAILURE TO COMPLETE COURT-ORDERED SEX OFFENDER TREATMENT AT ODYS WHEN SUCH TREATMENT WAS NOT ORDERED AT THE TIME OF HIS DISPOSITION, WHEN A.W. RECEIVED NO NOTICE, AT THE TIME OF HIS DISPOSITION, THAT THE FAILURE TO COMPLETE SEX OFFENDER TREATMENT COULD RESULT IN THE INVOCATION OF HIS ADULT SENTENCE, AND WHEN IT WAS FACTUALLY IMPOSSIBLE TO COMPLETE SEX OFFENDER PROGRAMMING GIVEN THE SHORT LENGTH OF A.W.'S ODYS COMMITMENT.

A.W.'s due process rights were violated when the juvenile court judge invoked his adult sentence for failing to complete court-ordered sex offender treatment when: 1) The trial court did not order A.W. to engage in sex offender treatment at the time of his disposition; 2) The trial court did not advise A.W., at the time of his disposition, that the failure to participate in sex offender treatment could result in the invocation of his adult sentence; and 3) It was factually impossible for A.W. to complete the sex offender treatment program given the short length of his ODYS commitment.

A. A.W.'s due process rights were violated when the juvenile court invoked his adult sentence for the failure to complete sex offender treatment *despite failing to impose court-ordered sex offense treatment* at A.W.'s dispositional hearing in October 2016, when A.W. was committed to ODYS.

At the invocation hearing, both the State and the juvenile court seemed to be operating on the belief that the juvenile court ordered sex offender treatment at the original disposition hearing in October 2016. Indeed, when the juvenile court rendered its decision to invoke the adult sentence, it specifically referenced its belief that the court-ordered treatment was imposed as November 2016. That was not the case, however.

The juvenile court did not order A.W. to participate in sex offender treatment at the time of his disposition hearing. While the juvenile court judge stated at the hearing that "I want sex

offender treatment put in place for ODYS," (10/12/16 Tr. at 18), the juvenile court did not order it. Moreover, the juvenile court's October 12, 2016 journal entry is silent on this issue and does not impose any requirement that A.W. participate in sex offender treatment. It is "axiomatic that '[a] court of record speaks only through its journal entries.'" *Hernandez v. Kelly* (2006), 108 Ohio St. 3d 395, 400; *see also In re Guardianship of Hollins* (2007), 114 Ohio St. 3d 434, 439. Indeed, the juvenile court itself recognized, at A.W.'s first "review" hearing, that it had not ordered sex offender treatment in its dispositional order. On *January 25, 2017*, the trial court purported to issue a "corrected judgement" for October 12, 2016 which, for the first time, included the order "that the youth shall participate in sex offender treatment." (1/25/17 JE). At the March 31, 2017 hearing, the juvenile court stated that it had been "two months now" where A.W. had been ordered to do sex offender treatment. (3/31/17 Tr. at 5-6). Once again, the trial court recognized that it had not ordered sex offender treatment until January 2017.

Because the trial court did not, in fact, order A.W., at his disposition hearing in October 2016, to participate in sex offender treatment, the trial court erred and violated A.W.'s due process rights by invoking his adult sentence due to A.W.'s failure to start sex offender treatment immediately upon his admission to ODYS in November 2016.

B. A.W.'s due process rights were violated when the juvenile court invoked his adult sentence for the failure to complete sex offender treatment *despite failing to provide A.W. with notice* at the October 2016 disposition hearing that his failure to participate in sex offender treatment would or could result in the invocation of his adult sentence.

In addition to not actually ordering sex offender treatment at the October 16th hearing, the juvenile court did not provide A.W. with notice, at the time of his disposition hearing, that his failure to participate in and/or complete treatment could result in the invocation of his adult sentence. When A.W. entered his admission to the amended SYO complaint, the juvenile court

judge was quite clear with A.W. that the *only* thing that would lead to the invocation of his adult sentence was further delinquent acts:

> [T]he only way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts.

(9/13/16 Tr. at 77-78). At the disposition hearing, the juvenile court was a little more vague, telling A.W. that he could be sent to adult prison if A.W. "mess[es] up at ODYS at any given time," and if A.W. is "not doing what [he was] supposed to." (10/12/16 Tr. at 15 and 17). And while the juvenile court indicated that it wanted sex offender treatment put in place by ODYS, (10/12/16 Tr. at 18), it never stated that A.W.'s failure to complete that treatment would be grounds to invoke the adult sentence.

The Fourteenth Amendment of the United States Constitution forbids the States from depriving any person of life, *liberty*, or property without due process of law. XIV AMEND. U.S. CONST. "Engrained in [the] concept of due process is the requirement of notice." *Lambert v. California* (1957), 355 U.S. 225, 228. Moreover, the fair warning requirement of the Due Process Clause prohibits an individual from being held "criminally responsible for conduct which he could not reasonably understand to be proscribed." *Rose v. Locke* (1975), 423 U.S. 48, 49. Due Process requires laws to give sufficient warning so that individuals "may conduct themselves so as to avoid that which is forbidden." *Id.* at 50; *see also Grayned v. Rockford* (1972), 408 U.S. 104, 108-109; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162 ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'") As emphasized by the United States Supreme Court in the context of sex offender registries, notice "serves to apprise individuals of their responsibilities and to ensure compliance" with the law and is important for

the law to be enforced by criminal penalties. *Smith v. Doe* (2003), 538 U.S. 84, 96.

Constitutional due process requires that A.W. have specific notice of the conduct that could lead to the invocation of his adult sentence. When, as here, he is told that his adult sentence will only be invoked by his engaging in delinquent acts, his due process rights are violated when his adult sentence is invoked for some other condition (non-completion of sex offender treatment) of which he was never advised.

C. A.W.'s due process rights were violated when the juvenile court invoked his adult sentence based upon his failure to complete sex offender treatment *despite the factual impossibility* of him completing such treatment given the short duration of his ODYS commitment.

The juvenile court's invocation of A.W.'s adult sentence due to his failure to complete sex offender treatment also violated A.W.'s due process rights because it was impossible for A.W. to complete the sex offender program given the short duration of his ODYS commitment.

"Due process of law is the primary and indispensable foundation of individual freedom." *In re Gault*, 387 U.S. 1, 20 (1967). "It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id.* The Constitutional protections of the Due Process Clause apply to juvenile proceedings as "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *Id.* at 13; *In re D.S.*, 146 U.S. 3d 182, 190 ("Due Process rights are applicable to juveniles through the Due Process Clause of the Fourteenth Amendment to the Constitutional and Article I, Section 16 of the Ohio Constitution."). The juvenile court's unique role as functioning a "'parental' relationship is not an invitation to procedural arbitrariness." *Kent v. United States*, 338 U.S. 541, 554-55 (1966). Although the nature of the due process clause defies a rigid application in juvenile cases, the Ohio Supreme Court has held that "fundamental fairness is the overarching concern." *In re C.P.*,

131 Ohio St. 3d 513, 532 (2012). "At a minimum, juveniles are entitled to proceedings that 'measure up to the essentials of due process and fair treatment.'" *In re J.V.*, 134 Ohio St. 3d 1, 6 (2012).

In addition to not providing adequate notice to A.W. of the existence of court-ordered sex offender treatment and consequences of failing to complete it, the proceedings in this case do *not* "measure up to the essentials of due process and fair treatment" because it was impossible for A.W. to meet the juvenile court's unstated expectation that he complete sex offender treatment at ODYS. A.W. was not assessed for his treatment needs until December 2016. (3/31/17 Tr. at 4). At that point, A.W. had only five months remaining on his ODYS commitment prior to his 21st birthday. Both A.W.'s treating psychologist and the supervising psychologist at ODYS were quite clear that, given the abbreviated duration of A.W.'s ODYS commitment, it would have been impossible for A.W. to complete the sex offender treatment programming. Dr. Alpert testified that "[e]ven if [A.W.] would have engaged in sex offender treatment on his first day in ODYS, that would not be enough time" because sex offender treatment is "at least nine months" and A.W., given his "vast amount of issues," may have required even more time. (5/8/17 Tr. at 14). Dr. Greene likewise testified that even if A.W. had begun his sex offender treatment at the beginning of his ODYS commitment he "could potentially be, you know, 60 to 70% done" though "it's very variable." (5/22/17 Tr. at 9).

Because A.W. could not complete sex offender treatment during his short commitment to ODYS, it is fundamentally unfair for the juvenile court to use that as the basis for invoking his adult sentence.

D. Conclusion as to Assignment of Error I

Although referred to as the invocation of an adult sentence, it is important to be clear

about the consequences of the juvenile court's decision here. A.W. was removed from the juvenile system and received an adult rape conviction, a lifetime adult sex offender label, and an adult prison sentence. These extremely severe consequences were the product of a fundamentally flawed process that offends due process.

The juvenile court's invocation of A.W.'s adult sentence based upon his failure to complete sex offender treatment offends every aspect of due process from its "procedural arbitrariness" to its lack of notice and fundamental unfairness. A.W. admitted to an SYO complaint that was to include a short commitment at ODYS and was told that he would not be sent to adult prison unless he committed multiple additional delinquent acts. At his disposition hearing, the juvenile court did not order sex offender treatment and did not inform A.W. that he could receive an adult sentence if he did not immediately begin the sex offender treatment that was never explicitly ordered. And finally, the juvenile court set up an unstated condition that simply could not be met—it was impossible for A.W. to complete a sex offender treatment program that was, at a minimum nine months long, in the five months between December 2016 and May 2017.

As explained by the United States Supreme Court, "the condition of being a boy does not justify a kangaroo court." *In re Gault*, 387 U.S. at 28. This is particularly true when, as here, the consequences of the flawed court proceedings is that the boy is thrust into the adult prison and a lifetime of adult sex offender registration. Because the juvenile court proceedings did not adhere to "the procedural regularity and the exercise of care implied in the phrase 'due process," the resulting decision must be vacated.

Assignment of Error II:

THE TRIAL COURT LACKED THE AUTHORITY TO ORDER A.W. TO ENGAGE IN

SEX OFFENDER TREATMENT WHILE IN ODYS CUSTODY.

Although the juvenile court did not order A.W. to participate in sex offender treatment at the time of his disposition in October 2016, it certainly made an attempt to do so in its January 20, 2017 judgment entry. Specifically, the January judgment entry states:

> The youth was committed to the Department of Youth Services in October 2016 and has done well by participating in substance abuse treatment and individual counseling.
>
> Although the youth was committed for a sex offense, he refuses to take responsibility for his actions nor participate in sex offender treatment. The youth shall fully participate in Sex Offender Treatment.
>
> **IT IS THEREFORE ORDERED** that the youth shall participate and engage in sex offender treatment.
>
> **IT IS THEREFORE ORDERED** that failure to engage with services may result in the adult SYO disposition being invoked.

On January 25, 2017, the juvenile court also retroactively altered the October 12, 2016 entry to include, for the first time, the following:

> **IT IS THEREFORE ORDERED** that the youth shall participate and engage in sex offender treatment.

Unlike A.W.'s original dispositional order, the January 2017 orders at least purport to impose court-ordered sex offender treatment and to provide notice that non-compliance could result in the invocation of the adult sentence. However, this order cannot be relied upon as a basis for invoking the adult sentence because the juvenile court lacked the authority to issue such an order.

Just as an adult court cannot dictate the conditions under which an adult inmate serves his prison sentence, *see e.g. State v. Williams*, 8th Dist. No. 88737, 2007-Ohio-5073, ¶ 20 (concluding that a trial court cannot order solitary confinement as a condition of the defendant's prison sentence), a juvenile court lacks the authority to set those conditions upon a juvenile when he is committed to ODYS.

Revised Code Section 2152.22 (A) provides that "[w]hen a child is committed to the legal custody of the department of youth services under this chapter, the juvenile court relinquishes control with respect to the child so committed, except as provided in divisions (B), (C), (D), and (H) of this section or in sections 2152.82 to 2152.86 of the Revised Code." R.C. 2152.22(B)-(D) govern the juvenile court's power to grant a child judicial release. R.C. 2152.22(H) governs the powers the court has while the child is on supervised release. And R.C. 2152.82 to 2152.86 govern juvenile offender classification. None of these sections are relevant here as the order imposed by the juvenile court occurred while A.W. was still committed to ODYS and did not involve judicial release, supervised release, or classification as a sex offender.

R.C. 2152.22(A) therefore establishes a bright-line between the judiciary's power to impose a definite minimum commitment and ODYS's executive power to determine the conditions under which that commitment is served and when a child's indefinite commitment has expired. By prohibiting ODYS from reducing a child's minimum commitment, R.C. 5139.51 insulates against the danger that the executive branch will alter the judicial decision of the juvenile court's imposition of a minimum commitment. See *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 53, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). And, the language of R.C. 2152.22(A) and 5139.51(A)-(E) clearly reflect the legislature's intent that the juvenile court not engage in tasks that are more appropriately "accomplished by [other] branches" of the government. *Bodyke*, at ¶ 53, citing *Morrison v. Olson*, 487 U.S. 654, 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

Here the juvenile court infringed upon the role of the executive branch in its attempt to establish the conditions under which A.W. served his commitment at ODYS. The juvenile court lacked the authority to order sex offender treatment and, as it did even more clearly in its March

31, 2017 judgement entry, to specify the manner in which ODYS provided that treatment. Because the juvenile court lacked the authority to order sex offender treatment, such an order is invalid and cannot serve as the basis for invoking the adult sentence.

Assignment of Error III:

THE TRIAL COURT ERRED WHEN IT INVOKED THE ADULT PORTION OF THE SYO SENTENCE UNDER R.C. 2152.14(E) UPON INSUFFICIENT EVIDENCE OF MISCONDUCT, INVOKING IT INSTEAD UPON A FAILURE TO COMPLETE A COURT-ORDERED TREATMENT PROGRAM THAT HE WAS NEVER ORDERED TO COMPLETE AND THAT WAS IMPOSSIBLE FOR A.W. TO FINISH.

A.W. maintains that the trial court's decision to invoke the adult portion of the SYO sentence was not supported by legally sufficient evidence for three reasons: 1) The failure to complete sex offender treatment does not constitute "misconduct" within the meaning of the SYO statute; 2) A.W. fully complied with the trial court's January 2017 orders to *participate* in treatment and April 2017 order that he "complete as much of the program as he can;" 3) A.W. cannot have his sentence revoked for failing to complete a court-ordered treatment program that was impossible for him to finish given the length of his disposition.

A claim of insufficient evidence raises due process considerations and requires an examination of whether the evidence adduced at trial is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541 (1997); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Moreover, even if the evidence in this case was technically sufficient, the trial court's judgment was clearly against the manifest weight of the evidence because the court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d at 387.

In this case A.W. was adjudged a Serious Youthful Offender (SYO) under R.C. 2152.13.

"A serious-youthful-offender disposition consists of a 'blended' sentence: a traditional juvenile disposition and a stayed adult sentence. R.C. 2152.13(D)(2). The court may enforce the adult portion of the sentence at a later time if the juvenile commits certain acts that indicate that the juvenile disposition has been unsuccessful in rehabilitating him. R.C. 2152.14." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 2, 901 N.E.2d 209. "R.C. 2151.14 installs procedural protections for juveniles before the adult portion of their disposition can be invoked." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, ¶ 79, 967 N.E.2d 729. The invocation procedure can only be initiated through a defined process. "[T]he stay on the adult portion of the blended sentence may not be lifted unless certain procedural safeguards are satisfied." *In re T.D.R.,* 11th Dist. No. 2014-L-209, 2015-Ohio-3541, ¶ 18.

R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a serious youthful offender sentence. *D.H.*, 120 Ohio St. 3d at 545. To invoke the adult portion of the SYO sentence, a trial court must find the following by clear and convincing evidence that:

1. The person is "serving the juvenile portion of a serious youthful offender dispositional sentence." R.C. 2152.14(E)(1)(a).

2. The person is at least fourteen years old and has been admitted to a DYS facility, or criminal charges are pending. R.C. 2152.14(E)(1)(b).

3. The "person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c).

4. And the person engaged in a *further act or acts of "misconduct"* which either:

    - Is a violation of the rules of the institution or the conditions of supervision *and* could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).

- "[C]reates a substantial risk to the safety or security" of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).

Id. (emphasis added).

In the instant case, A.W. maintains that the State failed to present legally sufficient evidence of "misconduct" to permit the invocation of the adult sentence as required by R.C. 2152.14 and state and federal due process.

A. The State failed to present any evidence of further misconduct by A.W.

The State's sole allegation of misconduct related to A.W.'s failure to complete sex offender treatment. Because the failure to complete treatment does not constitute misconduct as contemplated by the SYO statute, the trial court's invocation of the adult sentence is not supported by legally sufficient evidence.

R.C. 2152.14 (A)(2) defines the "further misconduct" the court is to consider for invoking the adult portion of an SYO sentence. Under that section the court may consider imposing the sentence if it finds by clear and convincing evidence one of two things:

> **(a)** The person committed an act that is a violation of the conditions of supervision and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.
>
> **(b)** The person has engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim.

While subsections (a) and (b) each contemplate a separate analysis, the standard has been well-established that both require a showing that the juvenile committed some additional act that would form the basis of the SYO invocation. *In re C.P.*, 131 Ohio St. 3d 513.

The Ohio Supreme Court has stated that in order for a juvenile court to impose the adult portion of an SYO sentence "the juvenile must commit a *further* bad act while in custody before the invocation process can begin." *In re C.P.*, at 534. (emphasis in original). Ohio appellate

courts have interpreted this to establish that the juvenile court can only invoke adult punishment "if the juvenile has engaged in further serious wrongdoing." *In re J.B.*, 12th Dist. App. No. CA2004-09-226, 2005-Ohio-7029, ¶ 139.

"The conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. 2152.14(A)(2)(b) and (B)(2)." *State v. D.H.*, 120 Ohio St. 3d 540 at 545-546.

In the present case, the state did not produce evidence to establish any such misconduct. Under subsection (a) there was no showing, nor even an allegation, that A.W. engaged in any conduct that could be charged as a new crime during the period of his incarceration at ODYS. The state did not argue this, and the trial court did not claim this as a basis for the invocation.

The State's only claim was that A.W. engaged in misconduct, as contemplated by subsection (b), when he failed to complete sex offender treatment. The court made the finding that the conduct under R.C. 2152.14 (B)(2) that permitted the invocation of A.W.'s adult sentence was not a new offense, nor any misconduct whatsoever, but rather a failure to complete sex offender treatment during the juvenile sentence. In essence, the court found insufficient evidence of any overt misconduct, and still elected to invoke the adult sentence, based upon a rationale that is not provided for in the statute.

R.C. 2152.14 and the Ohio Supreme Court cases that have examined it, require a showing of some "further serious wrongdoing" in order to invoke an adult sentence. See *In re C.P.*, 131

Ohio St. 3d 513; *State v. D.H.*, 120 Ohio St. 3d 540. This "further wrongdoing" must extend beyond the original charge. *State v. D.H.*, 120 Ohio St. 3d 540. "The juvenile would have to engage in separate conduct detrimental to his own rehabilitation in the juvenile system to be committed to an adult facility." *Id.*

Across the state of Ohio, many previous cases have examined the standard necessary for the invocation of a stayed adult SYO sentence. In these cases, appellate courts have upheld the invocation of adult sentences only in cases involving "further serious wrongdoing," such as serious violations of institutional rules or outright criminal activity. *See In re T.F.*, 9th Dist. Summit No. 23979, 2008-Ohio-3106, ¶ 13, 18 (affirming the invocation because T.F. was the aggressor in two fights at DYS); *In re M.S.*, 8th Dist. Cuyahoga No. 93550, 2010-Ohio-2101, ¶ 27-29, 31 (affirming the invocation because M.S. assaulted a teacher and other youth at the institution, and damaged institutional property); *In re D.F.*, 9th Dist. Summit No. 25026, 2010-Ohio-2999, ¶ 9-14, 18 (affirming the invocation because D.F. was convicted of weapons charges while on DYS parole); *In re C.M.L.*, 2d Dist. Greene No. 2010CA0002, 2011-Ohio-1132, ¶ 35-38 (affirming the invocation because C.M.L. engaged in more than 120 incidents in DYS and was involved in assaults on youth and staff); *A.A.W.*, 2015-Ohio-1297, at ¶ 28-30 (affirming the invocation because A.A.W. engaged in more than 80 acts of violence).

Because this standard as adopted by the Supreme Court requires the showing of some *additional* misconduct, it precludes the invocation of the adult sentence as further sanction for the original charge. "The juvenile cannot be sent directly to an adult facility for the acts that led to his serious-youthful-offender status." *State v. D.H.*, 120 Ohio St. 3d 540. In this case, A.W. was not alleged to have committed a "further bad act" but was alleged to have failed to complete the full course of treatment, a program that was directly focused on dealing with the issues

arising from his original offense. By invoking the adult sentence in the absence of any further misconduct, and only on the basis of his alleged failure to complete court-ordered treatment, the trial court here effectively sanctioned him for his original conduct, and not for any additional misconduct.

The standard is clear that "[o]nly further bad acts by the juvenile as he is rehabilitated in the juvenile system can cause the stayed adult penalty to be invoked" *In re C.P.*, 131 Ohio St. 3d 513 at 517. The state here did not produce any evidence to demonstrate that A.W. engaged in any "further bad acts." Accordingly, the trial court's ruling is not only an incorrect application of R.C. 2152.14, but also is based upon insufficient evidence in the record.

B. Even if the failure to complete treatment could, under some circumstances constitute misconduct, it cannot do so here when A.W. when the trial court ordered A.W. to just "participate" in sex-offender treatment "complete as much as he can" and when it was impossible to even complete the entire treatment program during his incarceration.

The conduct that was relied upon as the basis of the adult sentence invocation was A.W.'s alleged failure to complete sex offender treatment. While this does not amount to "further serious wrongdoing" as outlined in both *In re C.P.* and *State v. D.H.*, the trial court's decision to invoke the adult sentence on this basis also rests, in this particular case, upon a flawed and fundamentally unfair premise. A.W. was never ordered to complete sex offender treatment. Rather, he was ordered to "participate" in treatment and, beginning in April 2017, "to complete as much of the program as he can," (1/20/17 JE and 4/3/17 JE). A.W. complied with both of those orders. Moreover, invoking the adult sentence due to an alleged failure to complete treatment is fundamentally unfair in this case because A.W. never had time to complete the whole treatment program regardless of when he started treatment.

As noted in A.W.'s prior assignments of error, the trial court did not order sex offender

treatment at A.W.'s dispositional hearing in October 2016. It was not until a January review hearing that the juvenile court ordered A.W. to "participate and engage" in sex offender treatment. The juvenile court did *not* order A.W. to complete that treatment, simply to participate. And it is undisputed that A.W. agreed to participate at this point. At a review hearing on March 31, 2017, the juvenile court learned that sex-offender treatment had not begun, despite A.W.'s willingness to participate, because ODYS only placed him in a group that was scheduled to start on April 5. (3/31/17 Tr. at 4-5). A.W.'s sex offender treatment (which was not court-ordered until January 18, 2017) was delayed for over two and a half months due solely to the scheduling procedures of the ODYS institution.

The Court was incredulous, stating:

> It's been two months now where I ordered him to do something. He agreed to do it and we're the ones that are failing him."

The record is clear that the trial court acknowledged during the March 31, 2017 hearing that the delay in implementing sex offender treatment from January to April was the fault of the scheduling procedures at ODYS, and placed the blame squarely upon the institution. It is also clear that the court informed A.W. at that time, that if he participated *from that point onward*, the adult sentence would not be invoked. Indeed, in its judgment entry, the juvenile court provided that A.W. was turning 21 on May 23, 2017 and "*needs to complete as much of the program as he can.*" (4/3/17 JE) (emphasis added). And the court promised A.W. "if you do everything you're supposed to, I will not impose your SYO. (3/31/17 Tr. at 10).

The next hearing in the matter was held on May 8, 2017. The court inquired as to A.W.'s participation in both group and individual treatment. (5/8/17 Tr. at 4). There was no dispute that he was doing both. (5/8/17 Tr. at 4-5). A.W.'s individual therapist, Dr. Greene testified that A.W. was totally engaged in treatment with her:

> So [A.W.] engages in our individual sessions. He's been very willing, I'll say to talk about a lot of very sensitive issues which has been important. Basically, we focus on looking at his underlying thinking error, thoughts, perceptions, feelings that contribute to his behaviors. We talked pretty extensively about his triggers and that's kind of where we're at with things. He is engaging in the conversation and he and I have talked about one of my main concerns is, you know, our discussions of triggers and thinking errors and that we're right at the beginning of treatment.

(5/8/17 Tr. at 6).

Similarly, at the May 22, 2017, the uncontroverted evidence established that A.W. was actively participating in both individual and group sex offender treatment. His individual therapist, Dr. Greene, testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). And Bonita Reaves, the social worker who facilitated the group therapy, testified that A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments." (5/22/17 Tr. at 15 and 19).

In summary, the evidence in this case established that:

- A.W. was never ordered to complete sex offender treatment.
- A.W. was only ordered to "participate" in treatment as of January 2017.
- A.W. was willing to participate in treatment as of January 2017 but ODYS itself caused a delay in implementing the program from January until early April.
- Once the treatment was implemented, A.W. did participate, in both group and individual therapy.
- The full treatment program was a minimum of nine months, which was longer than the period of A.W.'s commitment to ODYS. (5/8/17 Tr. at 14).

Because the juvenile court never ordered A.W. to "complete" sex offender treatment, it could not invoke his adult sentence on that basis. And when the juvenile court ordered A.W. to "participate" in sex-offender treatment in January and April 2017, A.W. had become engaged in

treatment since ODYS made it available to him and complied with the court's April order to "complete as much of the program as he can." The juvenile court's decision to invoke A.W.'s adult sentence for not completing sex offender treatment was not only unfair given that he was never ordered to complete it but also because completion of the program was impossible due to the length of A.W.'s commitment. According to the supervising psychologist, the sex offender program is "at least nine months" and A.W. could not have completed it even if he had "engaged treatment on his first day at ODYS." (5/8/17 Tr. at 14).

The juvenile court's invocation of an adult conviction and sentence based on A.W.'s failure to fulfill an impossible condition (completion of sex offender treatment) that was never ordered and could never have been satisfied violates the very fabric of the Due Process Clause.

Assignment of Error IV:

THE TRIAL COURT VIOLATED A.W.'S CONSTITUTIONAL PROTECTIONS AGAINST INCRIMINATING HIMSELF BY CONSIDERING STATEMENTS A.W. WAS COMPELLED TO MAKE DURING HIS INDIVIDUAL AND GROUP SEX OFFENDER TREATMENT WHEN INVOKING A.W.'S ADULT SENTENCE.

At a reviewing hearing, held less than two months prior to the end of A.W.'s ODYS commitment, the juvenile court judge told A.W. very clearly that the adult sentence would not be invoked as long as A.W. participated in individual and group treatment once ODYS put it into place. (3/31/17 Tr. at 9-10). The juvenile court judge told A.W. *"if you do everything you're supposed to, I will not impose your SYO."* (3/31/17 Tr. at 10). From that moment on, A.W. did everything he was supposed to do. When he was finally provided individual and group sex offender treatment, he was not merely an observer but an active participant. His individual therapist, Dr. Greene, testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). And Bonita Reaves, the social worker who facilitated the group therapy, testified that

A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments." (5/22/17 Tr. at 15 and 19).

So why did the juvenile court judge invoke the adult sentence despite A.W.'s compliance with court-ordered treatment? The answer is that, once A.W. finally opened up during his compelled individual and group treatment sessions, the juvenile court was concerned by A.W.'s compelled statements and used those statements against him in deciding to invoke the adult sentence. As set forth in detail below, A.W.'s Fifth Amendment rights were violated when the juvenile court relied on his compelled statements made during court-ordered treatment to transform his case from a juvenile matter to adult conviction with an adult prison sentence and lifetime registration.

A. The State sought to invoke A.W.'s adult conviction and adult prison sentence due to statements made by A.W. during his court-ordered treatment and the trial court considered statements made by A.W. during his court-ordered treatment in its decision to invoke A.W.'s adult sentence.

At the May 8th review hearing, A.W.'s, individual therapist Dr. Greene, stated that A.W. talked "about a lot of very sensitive issues" and "talked pretty extensively about his triggers." (5/8/17 Tr. at 6). And Dr. Alpert summarized the treatment providers conclusions, based upon statements made by A.W. during treatment, that A.W. "has a vast amount of issues that contribute to his dangerous predatory behaviors." (5/8/17 Tr. at 7). Although Dr. Alpert and Ms. Dansby did not exhaustively list all of A.W.'s statements, they did indicate that A.W. "gets all excited when he talks about his offense of young boys," that A.W. "is actively verbalizing how much he enjoys fantasizing about his rapes," that A.W. refers to his "last rape" as "a premeditated violent rape," that A.W. "enjoys talking about his past animal cruelty and he enjoys violent pornography, which he has made clear that he's going to continue to watch when he

leaves here. (5/8/17 Tr. at 11-13). And based upon A.W.'s disclosures during treatment, a "general consensus" was reached that "this kid is a danger to the community" and that A.W. should have his adult conviction and adult prison sentence invoked. (5/8/17 Tr. at 10-11).

At the invocation hearing on May 22, 2017, the juvenile court judge again heard testimony from A.W.'s treatment providers about statements he made during his compelled treatment. For instance, Dr. Greene, A.W.'s individual therapist, testified that, based on her treatment sessions, she was concerned that A.W. was not processing the information "at a deeper level" and was not ready to stop engaging in the "major risky triggers in his life," such as "viewing pornography." (5/22/17 Tr. at 7; 5/31/17 JE at 2). Dr. Greene specifically testified about statements made by A.W. during their individual counseling sessions that reflected A.W.'s cognition that "women are not necessarily worthwhile and should be used predominantly in a sexual manner." (5/31/17 JE at 2). According to Dr. Greene, A.W. stated to her during their first counseling session that "some women deserve to be raped if they are conceited or act full of themselves." (5/31/17 JE at 2).

B. The trial court's reliance on statements made during court-ordered treatment to impose an adult prison sentence violated A.W.'s right not to incriminate himself.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person . . . shall be compelled in a criminal case to be a witness against himself." This privilege against self-incrimination is also protected by the Ohio Constitution and applies both to juvenile and adult proceedings. *In re D.S.*, 111 Ohio St.3d, 2006-Ohio-5851, 856 N.E.2d 921. This privilege against self-incrimination extends beyond a criminal trial and affords individuals the absolute right not to answer questions "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

Moreover, an individual does not "lose this protection [against self-incrimination] by reason of his conviction of crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements." *Id.* The bottomline is that if probationer or inmates "statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." *Id.*

Although an individual must generally assert the Fifth Amendment privilege, that requirement is "inapplicable in cases where the assertion of the privilege is penalized so as to 'foreclose a free choice to remain silent.'" *Murphy*, 465 U.S. 420 at 434. Where an individual is threatened with adverse consequences [even economic ones like discharge from his employment] for his silence, the individual so threatened "has not waived [the privilege] by responding to questions rather than standing on his right to remain silent." *Id.* (noting that *Garrity v. New Jersey*, 385 U.S. 493 (1967) was "such a case.") In *Murphy*, the United States Supreme Court noted that if the State, expressly or by implication, indicates that remaining silent would result in revocation of probation "it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." *Id.* at 435.

Here, the juvenile court created a classic Catch-22 situation against which the Fifth Amendment was designed to protect. In January and April 2017, the juvenile court issued orders compelling A.W. to fully engage in both individualized and group sex offender treatment. (1/20/17 JE and 4/3/17 JE). Both orders specifically provided that "failure to engage with services may result in the adult SYO disposition being invoked." (1/20/17 JE and 4/3/17 JE). In other words, if A.W. remained silent and refused to engage in sex offender treatment, he would receive an adult conviction, receive an adult sex offender label, and receive an adult prison

sentence. Faced with this threat of an adult conviction and sentence, A.W. participated in treatment and thereby made statements that were expressly used to incriminate him. As set forth in detail above, the State (ODYS) sought to transform A.W.'s case from a juvenile adjudication into an adult conviction with an adult sentence and adult sex offender label because of statements that A.W. was compelled to make during his treatment about criminal acts and other behavior that the treatment providers deemed troubling. And then these compelled statements were relied upon by the juvenile court in invoking the adult conviction and sentence.

Whether the juvenile court's decision to invoke A.W.'s adult conviction is viewed as punishing A.W. for choosing to remain silent during the first month or so of his juvenile commitment or whether it is viewed as punishing A.W. for making statements pursuant to court-ordered treatment, it is equally violative of the Fifth Amendment.

1. Punishment for remaining silent and not participating in court-ordered treatment.

In this case, A.W., when he first arrived at ODYS, "continue[d] to deny the accusations" and thus did not participate in sex offender treatment. (1/18/17 Tr. at 4). When advised of this, the juvenile court informed A.W.:

> I'm not playing with you. I'm not messing around. You either participate in the sex offender treatment or you can sit for the next, I don't know what your tail was, six years?

(1/18/17 Tr. at 5). The juvenile court memorialized this threat of adult incarceration in its January and April judgment entries stating that the failure to engage in such treatment "may result in the Serious Youth Offender disposition being invoked." The trial court violated A.W.'s Fifth Amendment rights by compelling such participation in treatment with the threat of an adult conviction and sentence.

As explained above, A.W.'s state and federal protections against self-incrimination

remained despite his juvenile adjudication for rape. *See Murphy*, 465 U.S. at 426 ("A defendant does not lose this protection by reason of his conviction of a crime. . . .") Moreover, "as a general rule, countervailing government interests, such as criminal rehabilitation, do not trump this right." *United States v. Antelope* (9th Cir. 2005), 395 F.3d 1128, 1134. When "'questions put to [a] probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution,' he may properly invoke his right to remain silent." *Id.* at 1135 (quoting *Murphy*, 465 U.S. at 435).

In *Antelope*, the Ninth Circuit addressed the very same constitutional dilemma present in this case. The defendant, in that case, was placed on probation for possession of child pornography. *Id.* at 1131. The defendant's probation carried a requirement that the defendant complete a "sexual history autobiography assignment and 'full disclosure polygraph' verifying his 'full sexual history.'" *Id.* at 1131. When the defendant refused to participate in treatment and disclose his full sexual history, the court sent him to prison for that refusal. *Id.* 1131-32. The Ninth Circuit reversed the trial court finding that the court-ordered treatment condition violated the defendant's Fifth Amendment right not to incriminate himself:

> The treatment condition placed Antelope at a crossroads – comply and incriminate himself or invoke his right against self-incrimination and be sent to prison.

Id. at 1135. While the court did not doubt the important rehabilitative purpose of the court-ordered treatment, the Court explained that the "irreconcilable constitutional problem" is that disclosures made during that treatment "may be starkly incriminating" and may be used for "prosecutorial purposes." *Id.* at 1138. Thus, the Court held that the defendant's "privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with [the treatment regimen's] disclosure requirements." *Id.*

Like the defendant in *Antelope*, A.W. was placed in the "classic penalty situation" contemplated by *Murphy* where the State has "expressly or by implication, asserted that invocation of this privilege would lead to revocation of probation" or, as in this case, invocation of an adult criminal conviction and adult prison sentence. 465 U.S. 420 at 435. Thus, the juvenile court violated A.W.'s privilege against self-incrimination by invoking his adult sentence due, in whole or in part, to his original expression of a desire to remain silent.

2. Punishment for making incriminating statements during court-ordered treatment.

The juvenile court compounded the Fifth Amendment violation in this case by not only punishing A.W. for his initial silence but also punishing him for A.W.'s statements made after succumbing to the juvenile court's threat of invoking his adult sentence for his silence. As explained above, there is little question that A.W.'s statements during treatment led directly to the State seeking to invoke his adult sentence and to the juvenile court's decision to invoke the adult conviction and sentence. In so doing, the State violated A.W.'s Fifth Amendment privilege against self-incrimination.

Although A.W. did not expressly assert his Fifth Amendment right against self-incrimination at the time of his court-ordered treatment disclosures, "that right is self-executing where is assertion 'is penalized so as to foreclose free choice.'" *United States. v. Bahr*, 730 F.3d 963, 966 (*quoting Murphy*, 465 U.S. at 434). When the government conditions supervised release (or as is the case avoidance of an adult criminal conviction and prison sentence) "on compliance with a treatment program requiring full disclosure of past sexual misconduct, with no provision of immunity for disclosed conduct, it unconstitutionally compels self-incrimination." *Id.* As such, the "use of the compulsory treatment disclosures at sentencing violate[s] [a defendant's] Fifth Amendment privilege against incarceration." *Id.* at 965.

A.W.'s case is analogous to the Ninth Circuit's case in *Bahr*. In *Bahr*, the defendant was convicted of rape and "was required to complete an approved sex offender treatment program" in order to remain on supervised release. *Id.* at 965. During the treatment, the defendant revealed "that, as a minor, he had sexual contact with six other minors," that "as an adult, he had sexual contact with seven different minors," and that "he had sexually abused eighteen children." *Id.* When the State attempted to rely on those treatment disclosures at a sentencing proceeding, the defendant sought to suppress them because their use would violate his Fifth Amendment right against self-incrimination. *Id.* And while the trial court denied the motion, the Ninth Circuit reversed, holding that the "government compelled Bahr's treatment disclosures in violation of the Fifth Amendment and the district court should not have considered the information." *Id.* at 967.

As in *Bahr*, A.W. was compelled to make treatment disclosures in violation of the Fifth Amendment and these disclosures were improperly used against him at a later proceeding, in his case to invoke his adult sentence. The State could not rely on such compelled disclosures to seek invocation of A.W.'s adult sentence and the juvenile court could not consider them in deciding to invoke that adult conviction and sentence. Accordingly, this Court must vacate the juvenile court's invocation order.

Assignment of Error V:

THE TRIAL COURT ERRED BY DENYING A.W. HIS FUNDAMENTAL RIGHT TO DUE PROCESS BY FAILING TO PROVIDE PROPER NOTICE OF THE ADULT-SENTENCE-INVOCATION HEARING AS REQUIRED BY 2152.14(D)

The United States Supreme Court, in the seminal case of *In re Gault*, analyzed the due process requirements attendant to all juvenile court adjudications. In that landmark opinion, the

Court specifically addressed the importance of procedural due process protections in juvenile cases. One of the specific areas the Court highlighted were the notice requirements for the subject of any hearing, as well as his or her family and counsel. "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded" *In re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) at 50.

The Ohio Supreme Court has made it clear that "a juvenile court must recognize a juvenile's due process rights" *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 15. This extends to the notice requirements for juvenile court hearings as codified in the Ohio Revised Code. When discussing the notice requirements of the adult-transfer (or "bindover") statute under R.C. 2152.12(G), the Fourth District wrote: "The notice provision in R.C. 2152.12(G) is also a constitutional due process requirement." *Turner v. Hooks*, 2016-Ohio-3083, 55 N.E.3d 1133, 2016 Ohio App. LEXIS 1917, 2016 WL 2943151 (Ohio Ct. App., Ross County May 18, 2016) at 21.

In the instant case, the applicable notice provision is contained in R.C. 2152.14 (D) which states that a juvenile court "shall not invoke the adult portion of the dispositional sentence" without a hearing at which the juvenile has the right to be present with counsel, the *right to "receive notice of the grounds upon which the adult sentence portion is sought to be invoked,"* and the right to "present evidence on the person's own behalf." Under *Gault* and the cases that have analyzed the issue in Ohio, the notice provision in R.C. 2152.14 (D) is a constitutional due process protection that must be adhered to by the juvenile court. While the text of this section does not enumerate a specific time frame required for the notice to be effective, in order for this due process protection to have any meaning, let alone to comply with the plain language of

Gault, it must "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *Gault* at 50.

That was not done in this case.

Here, the Cuyahoga County Prosecutor's Office filed a motion with the court seeking to invoke the adult portion of the appellant's sentence on May 18, 2017, at 1:49pm. (State's Mot. To Invoke). That was a Thursday. The court held its hearing on the motion on the Monday following, May 22, 2017. (5/31/17 JE). The state asserts that notice was sent via electronic means to appellant's trial counsel. (State's Mot. To Invoke at 4).

At the time of the May 22, 2017 hearing however, trial counsel registered his objection that he had not actually been served with the state's motion to invoke *until that day*. (King Aff. at 1-2). While the motion itself is date stamped from the clerk's office as having been filed at 1:49pm on May 18, 2017, there appears to be nothing in the record to demonstrate that it was actually served on A.W.'s counsel prior to the hearing date itself, and counsel asserts that there is no evidence that it was ever served until just before the invocation hearing commenced. (King Aff. at ¶ 5-6).

The court did not preserve a record of the objection, because the recording device was apparently not turned on when the hearing began. (5/22/17 Tr. at 4).This lapse was not corrected until the testimony of the state's first witness was already underway, and the trial court did not attempt to correct the record. (5/22/17 Tr. at 4). A.W.'s trial counsel has supplemented the record with an affidavit attesting to his objection, and the transcript reflects that he registered his continuing objection to each of the state's witnesses during the course of the hearing itself. (5/22/17 Tr. at 11).

> MR. KING: Your Honor, before the witness testifies I have the same objection I had to the doctor. Thank you.

THE COURT: Yes. Okay. Objection noted. You may proceed.
(5/22/17 Tr. at 11).

Counsel made the same objection to the state's third and final witness, Robin Palmer. (5/22/17 Tr. at 25).

Even taking the broadest possible view in favor of the state however, if appellant and his counsel were to be considered "on notice" the moment the motion was filed, they were only provided the remainder of Thursday May 18th, and Friday May 19th, just slightly less than three hours plus one full business day. That gave appellant and his counsel approximately 11 work-hours between the filing of the motion and the day of the actual invocation hearing.

R.C. 2152.14 (D) contemplates that the subject of the hearing, through counsel, shall be afforded an opportunity to present evidence, including evidence of mental illness or intellectual disability. In this case, by filing their motion mere days before the expiration of the juvenile court's jurisdiction and by holding the hearing within only days of the notice being given, there was no reasonable opportunity for appellant, or his counsel to adequately prepare evidence in the manner envisioned by the statute or *Gault*. This fatally prejudiced A.W.'s ability to contest the state's motion on May 22, 2017.

While R.C. 2152.14 (D) does not contain a specific time required for the notice to be effective, it is notable that R.C. 2152.12(G), the provision addressing transfer/bindover hearings to adult court, requires "notice in writing" provided to counsel "at least three days prior to the hearing." Both statutes are written to handle juvenile court adjudications, and both deal with the potential transfer from juvenile court to the adult felony court, albeit via two different procedural mechanisms. In either case, the subject matter of the hearing is necessarily of a serious character, as both involve the juvenile court surrendering its jurisdiction in favor of the adult felony court.

It is reasonable to draw the conclusion that in the absence of a specific time frame outlined in R.C. 2152.14(D), the SYO statute, procedural due process protections would necessitate, *in the very least*, no less than the same three day notice requirements prescribed in the bind-over statute.

Even that minimal amount of time was not provided to A.W. and his counsel in this case. The trial court addressed this issue only briefly, and gave it very little consideration:

> THE COURT: Okay. All right. So here's what the Court is struggling with. I am struggling with the fact that this was filed on May 18th. Though, on January 18th the journal entry clearly stated, it's further ordered that the failure to engage in services may result in adult serious youth offender disposition being invoked and then on March 31st the journal entry further stated, it's further ordered that the youth shall fully cooperate, including but not limited to engaging with sexual offender treatment. And then on May 8th, the journal entry states that the youth is superficially engaged and does not buy in and feels that he does not need treatment per the clinicians.
>
> So we set this on May 22nd, 2017 for this serious youth offender disposition hearing. So he was on proper notice that it was. Unfortunately, it was filed in an untimely manner, but that is going to have to be something that I'm not going to try and blame on one side or the other.
> (5/22/17 Tr. at 71)

Gault and its progeny require the juvenile court to recognize and respect constitutional due process rights for all persons subject to its jurisdiction. In this case, the court failed to honor that obligation. The court did recognize that the motion for invocation was filed by the state of Ohio in an "untimely manner" but side-stepped the issue by choosing not to "try and blame one side or the other." (5/22/17 Tr. at 71)

The court's reference to the setting of the May 22nd hearing is notable. It correctly observed that the hearing date was chosen in advance, at the conclusion of the May 8th, 2017 review hearing. (5/8/17 Tr. at 16-17).

> THE COURT: Okay. So what we're going to do is on May 22nd at 2:00 we are going to have a hearing scheduled. And the Prosecutor that's in the room is going to find out from Director Reaves where the letter is, at what stage.

> Regardless, I think it might behoove [AW] to at least have the hearing.
> (5/8/17 Tr. at 16).

The court on May 22nd seemed to find that because the date was chosen in advance, A.W. and his counsel were *effectively* on notice, even if the state ultimately filed their invocation motion in an untimely fashion. This conclusion is misplaced.

For one, A.W. himself was excused from the May 8, 2017 hearing before the discussion about the May 22, 2017 date took place. (5/8/17 Tr. at 10). The court conducted the discussion about a potential new date outside of his presence. (5/8/17 Tr. at 12). There is nothing in the record to indicate that A.W. was ever subsequently informed about the prospective May 22, 2017 court date.

Second, the record is clear that the issue of whether such a motion was going to be filed was not settled on the May 8, 2017 court date. On May 8, 2017, the court simply directed the State on the record to inquire with the juvenile institution as to whether they were asking for the adult sentence to be invoked under R.C. 2152.14 (A) ("to find out … where the letter is...") (5/8/17 Tr. at 16). The setting of the May 22 date therefore, did not function to provide A.W. or his counsel *notice of an invocation hearing*, it was simply a date on the calendar reserved *in case* ODYS or the state of Ohio chose to file such a motion.

ODYS did not issue their letter until four business days before the May 22 date, on May 16, 2017 (5/31/17 JE). That in turn, led the state to file their motion to invoke the adult sentence two days later, on May 18, 2017. Thus, even if A.W.'s attorney received a copy of the motion the day it was filed, he only had one and a half business days notice, *at most*, of the State's intention to pursue the adult sentence invocation at that hearing.

R.C. 2152.14 imposes a burden on the institution to send a letter to the state seeking the invocation of the adult sentence. It imposes a burden on the state of Ohio to file the appropriate

motion to invoke the adult sentence. It imposes a burden upon the trial court to conduct a hearing with proper notice given to all parties. R.C. 2152.14 imposes *no burden* on A.W. or any subject juvenile against whom an adult sentence might be imposed; rather it provides A.W. with procedural protections, denied in this case, to ensure that his due process rights are respected.

The trial court could have denied the state's motion as untimely filed. It could have declined to invoke the adult sentence given the fact that A.W.'s due process rights could not have been protected under these circumstances. It did neither. Instead the trial court decided not to blame "one side or the other" – as if to assert that A.W. and his counsel, under no obligation whatsoever, were potentially as much at fault for the untimely motion as ODYS or the state of Ohio. With that glib and incorrect assertion, the trial court here summarily dismissed the issue of A.W.'s constitutional due process protections.

This failure by the trial court to protect A.W.'s due process rights placed appellant and his counsel in a position of having to participate in a hearing of the most serious character, without even the minimal time necessary to prepare evidence or to arrange potential witnesses. For that reason, the process itself was fundamentally unfair. A.W.'s ability to mount a defense was fatally prejudiced as a result.

CONCLUSION

For the reasons set forth above, this Court should sustain A.W.'s assignments of error and vacate the juvenile court's order invoking the adult portion of A.W.'s SYO sentence.

Respectfully Submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY
FRANK CAVALLO

SERVICE

A copy of the foregoing Appellant's Brief and Assignment of Errors was served electronically upon Michael C. O'Malley Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on October 13, 2017.

/s/ Cullen Sweeney
CULLEN SWEENEY