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Court of Appeals

APPELLEE'S BRIEF FILED
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By: JEFFREY M. MAVER 0091126

Confirmation Nbr. 1252922

IN RE: A.W. CA 17 105845

vs.

Judge:

.

Pages Filed: 16

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

STATE OF OHIO Appellee	)	
	)	Appeal No. 105845
vs.	)	
IN RE: A.W. Appellant	)	

BRIEF OF APPELLEE

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ISSUES PRESENTED FOR REVIEW

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 TREATMENTAT ODYS WHEN SUCH TREATMENT WAS NOT ORDERED AT THE TIME OF HIS DISPOSITION,WHEN A.W. RECEIVED NONOTICE, AT THE TIME OF HIS DISPOSITION, THAT THE FAILURE TO COMPLETE SEX OFFENDER TREATMENTCOULD 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.

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

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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 INVOKINGA.W.'S ADULT SENTENCE.

V. WHETHER THE TRIAL COURT ERRED BY DENYINGA.W. HISFUNDAMENTAL RIGHT TO DUE PROCESS BY FAILING TO PROVIDE PROPER NOTICE OF THE ADULT-SENTENCE-INVOCATIONHEARING AS REQUIRED BY 2152.14(D).

STATEMENT OF THE CASE AND FACTS

This case is about the trial court invoking a portion of an adult sentence when A.W. aged out of juvenile court without complying with the court's orders for sexual offender treatment.

1. The assault and charges.

On April 22, 2014, A.W. was charged with two counts of rape, two counts of gross sexual imposition, and one count of kidnapping. (9/7/16 Tr. At 4). The assault itself was on a 13-year-old girl. A.W. had vaginal and anal sex with her in the woods and A.W. wouldn't let her stop. (9/7/16 Tr. At 44-63). Instead of charging A.W. as an adult, the juvenile court added a Serious Youthful Offender ("SYO") specification to A.W.'s case. A.W. admitted to one count of rape with the SYO specification and the State dismissed the remaining charges. (9/13/16 Tr. At 76-78).

2. The court imposed sex offender treatment as a condition of the juvenile court.

In September 2016, the trial court placed A.W. at Paint Creek "so he can do what we call sex offender treatment." (Hearing 9/13/16 at 90). In the October 2016 hearing, the trial court mentions factors that measure A.W.'s potential progress as including whether he is "participating in group therapies…" and notes that "[a]nd if, in fact, you [A.W.] are not doing what you're supposed to, I am going to cut the sentence at ODYS and send you to prison." (Hearing 10/12/16 at 17). The trial court noted that "if you're still doing everything you can by May 23rd, 2017 [A.W.'s 21st birthday], you will have completed the terms of Juvenile Court, the SYO, the serious youth offender sentence will go away and you can go on and live your life….But young man, I want sex offender treatment put in place for ODYS. You have three sex offenses." (Hearing 10/12/16 at 18). The hope and purpose of the treatment was to give A.W. a better sense of "what's appropriate and what's not." (Hearing 10/12/16 at 18 and at 19).

In the January hearing, the court "wanted to make sure that [A.W. was] participating in the ODYS services." (Hearing 1/18/17 at 3). These services included sex offender treatment, in which, according to the parole officer, A.W. was not participating. (Hearing 1/18/17 at 4). The court takes this failure to participate seriously and reiterates that A.W. "needs to fully participate in sex offender treatment." (Hearing 1/18/17 at 8-9). Both the parole officer and the court believed this requirement of sex offender treatment had already been journalized. The parole officer directly asks "I mean, it's in the journal entry, right, that he has to have the sex offender treatment?" to which the court replies: "Yes." (Hearing 1/18/17 at 10). One week after this hearing, the journal entry was corrected to include the language that "the youth shall participate in sex offender treatment." (1/25/17 JE).

3. The court imposed a portion of A.W.'s adult sentence which A.W. appeals.

The trial court held hearings that considered A.W.'s participation in the treatment programs on 11/13/16, 10/12/16, 1/18/17, 3/31/17, 5/8/17, and 5/22/17. The court concluded that A.W. did not comply with court ordered treatment for rehabilitation, and therefore sentenced A.W. to two years in prison, and to temporarily classify A.W. as a Tier III sex offender (5/22/17 Tr. At 74-77). From this decision, A.W. appeals.

LAW AND ARGUMENT

APPELLANT'S ASSIGNMENT OF ERROR NO. I: THE TRIAL COURT VIOLATED A.W.'S DUE PROCESS RIGHTS BY INVOKING HIS ADULT SENTENCE FOR FAILURE TO COMPLETE COURT-ORDERED SEX OFFENDER TREATMENTAT ODYS WHEN SUCH TREATMENT WAS NOT ORDERED AT THE TIME OF HIS DISPOSITION,WHEN A.W. RECEIVED NONOTICE, 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.

In juvenile due process cases, "fundamental fairness is the overarching concern." *In re C.P.,* 131 Ohio St. 3d 513. A.W. alleges that his due process rights were violated by the trial court imposing a portion of an adult sentence when A.W. did not follow the sex offender treatment imposed by the juvenile court. But, viewing the trial court's statements on sex offender treatment chronologically shows that the trial court always intended to have sex offender treatment be an essential part of A.W.'s rehabilitation and safety.

In September 2016, the trial court placed A.W. at Paint Creek "so he can do what we call sex offender treatment." (Hearing 9/13/16 at 90). This provided notice of the sex offender treatment even before the October hearing. In the October 2016 hearing, the trial court mentions factors that measure A.W.'s potential progress as including whether he is "participating in group therapies…" and notes that "[a]nd if, in fact, you [A.W.] are not doing what you're supposed to, I am going to cut the sentence at ODYS and send you to prison." (Hearing 10/12/16 at 17). Participation in sex offender treatment was never intended to be impossible to accomplish, but was clearly intended to be mandatory. The trial court noted that "if you're still doing everything you can by May 23rd, 2017 [A.W.'s 21st birthday], you will have completed the terms of Juvenile Court, the SYO, the serious youth offender sentence will go away and you can go on and live your

life….But young man, I want sex offender treatment put in place for ODYS. You have three sex offenses." (Hearing 10/12/16 at 18). The hope and purpose of the treatment was to give A.W. a better sense of "what's appropriate and what's not." (Hearing 10/12/16 at 18 and at 19).

The trial court journalized this order in October, but amended it in January, shortly after another hearing on January 18, 2017. In the January hearing, the court "wanted to make sure that [A.W. was] participating in the ODYS services." (Hearing 1/18/17 at 3). These services included sex offender treatment, in which, according to the parole officer, A.W. was not participating. (Hearing 1/18/17 at 4). The court takes this failure to participate seriously and reiterates that A.W. "needs to fully participate in sex offender treatment." (Hearing 1/18/17 at 8-9). Both the parole officer and the court believed this requirement of sex offender treatment had already been journalized. The parole officer directly asks "I mean, it's in the journal entry, right, that he has to have the sex offender treatment?" to which the court replies: "Yes." (Hearing 1/18/17 at 10). One week after this hearing, the journal entry was corrected to include the language that "the youth shall participate in sex offender treatment." (1/25/17 JE).

Given this record of the court's intention, A.W. was given clearly presented with the importance of the sex offender treatment, and the weight the court would place on it to consider A.W's progress at ODYS. While the correction of the journal entry delayed the recording of the sex offender treatment requirement, the trial court was clear from the first that A.W. should participate to the degree time allowed. Regardless of the exact timing of the order, the court did condition A.W.'s getting out of the SYO on compliance with the court's orders, which included sex offender treatment. The court was aware that not all the treatment could be completed, but was willing to accept the portion that could be.

APPELLANT'S ASSIGNMENT OF ERROR NO. II: THE TRIAL COURT LACKED THE AUTHORITYTO ORDER A.W. TO ENGAGE IN SEX OFFENDER TREATMENT WHILE IN ODYS CUSTODY.

The trial court is permitted by R.C. 2152.22 to retain certain control over a juvenile. While the section relates largely to judicial release, and there are some exceptions, the bright-line rule of the statute is that "all other dispositional orders made by the court under this chapter shall be temporary and shall continue for a period that is designated by the court in its order, until terminated or modified by the court or until the child attains twenty-one years of age." R.C. 2152.22(A). A.W. alleges that this rule establishes a distinction between branches of power to determine conditions of minimum commitment, however, the ability of the court to determine what A.W. needs to do in ODYS does not itself affect the conditions of minimum commitment. The trial court's order that A.W. participate in sex offender treatment is no different from the trial court's order that A.W. participate in any other ODYS service. Further, far from overstepping the bounds of judicial authority, the other authorities such as the parole officer, did not need anything beyond the court's order to impose treatment. (Hearing 1/18/17 at 10). Additionally, the record shows that all of the medical professionals involved with A.W.'s case agree that A.W. has significant issues that require treatment to be resolved or managed. Given this uniformity in all the authorities' understanding of A.W.'s position, the trial court did not impose anything outside of its authority, nor beyond what was conducive of A.W.'s controlled rehabilitation.

APPELLANT'S ASSIGNMENT OF ERROR NO. 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 COMPLETEAND THATWAS IMPOSSIBLEFOR A.W. TO FINISH.

The trial court may impose the adult portion of a SYO's sentence in accordance with R.C. 2152.14(E). That section provides:

> **(1)** The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:
>
> **(a)** The person is serving the juvenile portion of a serious youthful offender dispositional sentence.
>
> **(b)** The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.
>
> **(c)** The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.
>
> **(2)** The court may modify the adult sentence the court invokes to consist of any lesser prison term that could be imposed for the offense and, in addition to the prison term or in lieu of the prison term if the prison term was not mandatory, any community control sanction that the offender was eligible to receive at sentencing.

R.C. 2152.14(E).

These findings are not done at the full criminal standard, but are only shown by clear and convincing evidence. And the main turning point of this section is not serious misconduct, but a finding that 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). The unlikelihood of rehabilitation in the juvenile system has been accepted in this county as a reason for binding juveniles over in *In re M.S.*, 8th Dist. Cuyahoga No. 93550, 2010-Ohio-2101 and *In re A.A.W.*, 8th Dist. Cuyahoga No. 101580, 2015-Ohio-1297. Here, A.W.'s claim of insufficient evidence to support the invocation of the adult portion of the sentence therefore looks to the sufficiency of the

evidence the trial court used to determine that A.W. was unlikely to be rehabilitated in the juvenile jurisdiction. The trial court made that finding based on the testimony of those in charge of A.W.'s care in ODYS, who testified consistently that A.W. did require treatment to be rehabilitated. During the hearing set on May 8, 2017, Dr. Greene told the Court that "there are several issues that need ongoing treatment" and "the hope would be that he would get hopefully individual and group wherever he ends up." (5/8/17 Tr. At p.6, 19-22). In that same hearing, Dr. Alpert stated that "The bottom line is the treatment providers and behavior health find that [A.W] has a vast amount of issues that contribute to his dangerous predatory behaviors and he needs the ongoing clinical attention." (5/8/17 Tr. At p.7, 1-5).

Further, A.W. alleges that the court invoked the sentence upon insufficient evidence. "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. R.C. 2152.14(A)(2)(b) and (B)(2)." *In re M.S.,* 8th Dist. Cuyahoga No. 93550, 2010-Ohio-2101, ¶ 20. Here, A.W. engaged in conduct that created a substantial risk to the community by failing to complete his court-mandated sexual offender treatment. Due to A.W.'s history, including three separate sex offenses, it was imperative that he undergo and engage in sex offender therapy to ensure that these types of incidents do not occur once A.W. is back in the community. Had A.W. began his treatment in November when he was supposed to, he would have completed, or come close to completing, what was required of him. However, A.W. chose not to participate in

treatment until later, thus not allowing him to begin treatment until months later in April (5/8/17 Tr. At p.9, 7-16).

The Supreme Court of Ohio noted that abuse of discretion is the standard in *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812. The trial court did not abuse its discretion because the judge made the determination based on A.W.'s multiple sexual offenses, the need for extended treatment to facilitate rehabilitation, and the time constraints imposed by the juvenile system. To hold that the trial court abused its discretion would limit the court's ability to rehabilitate offenders, and here would mean that a sex offender who fanaticizes about violent rapes would be released without significant treatment. Without being able to impose an adult sentence, the trial court would be forced to release a child rapist without any registration, or hardly any rehabilitation treatment. This Court should defer to the Trial Court's discretion for the safety of A.W., but also for the social policy concerns if the trial court did not invoke.

APPELLANT'S ASSIGNMENT OF ERROR NO. 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 INVOKINGA.W.'S ADULT SENTENCE.

A.W. was not required to waive his constitutional rights, and was not compelled to testify. Enforcing truthfulness in juvenile rehabilitation programs is a case-by-case consideration. The Supreme Court of Ohio held "that evidence must support the use of a polygraph for a particular juvenile before it is a reasonable community-control condition." *In re D.S.*, 111 Ohio St. 3d 361. In *In re D.S.,* the delinquent was a sexual offender who was 11 at the time of his offense who was subjected to a polygraph as part of his treatment—the Court held that was unreasonable without factual support of its necessity. *Id.* The degree of self-incrimination in juvenile sex offender cases is thus one of unnecessary polygraphs. This is also seen very recently in Cuyahoga County in *In*

re L.M., 2017-Ohio-8067. The key to these cases is that unnecessary polygraphs violate the protection against self-incrimination for juveniles. The holdings allow for even the use of polygraphs on minors if it is necessary. On the self-incriminating nature of the polygraph test in *In re D.S.,* the Court held that "the order could be interpreted to mean that if D.S. refused to answer a question, an automatic violation of community control has occurred, since he has failed to "submit" to the exam as ordered. This interpretation is incorrect. The polygraph order cannot compel incriminating statements." *In re D.S.*, 111 Ohio St. 3d 361 at 365.

Here A.W. is ordered to complete treatment, when he is 20, which includes no polygraph, but only talk treatment factually supported as necessary by medical professionals. To say that medically necessary treatment that is not invasive beyond a doctor speaking with a 20 year old violates the constitution ignores the reasoning of the most relevant president.

A.W. alleges that he was placed in a catch-22 situation by being ordered to participate in a treatment program that requires he speak, and then having his speech in the treatment program used against him to show he is not making progress, but this is not in keeping with Ohio law. A.W. cites case-law predominantly related to adult probationers who are compelled to testify about new crimes. But, the facts of A.W.'s case show that his speech was as a juvenile, in necessary rehabilitation treatment, without the invasion of a polygraph. The proper consideration is under *In re D.S.* If the order for D.S. does not compel incriminating statements, when D.S. is a learning-impaired 11-year-old, certainly the order for A.W. does not compel incriminating statements as a 20-year-old. The statements obtained by A.W.'s treatment do not violate his constitutional rights.

APPELLANT'S ASSIGNMENT OF ERROR NO. V: THE TRIAL COURT ERRED BY DENYINGA.W. HISFUNDAMENTAL RIGHT TO DUE PROCESS BY FAILING TO PROVIDE PROPER NOTICE OF THE ADULT-SENTENCE-INVOCATIONHEARING AS REQUIRED BY 2152.14(D).

Accepting the notice under R.C. 2152.14(D) on little time was within the plain language of the statue and the discretion of the trial court. Without showing the witnesses he would have called, without explaining the basis for objecting to the motion, and without a showing of the prejudicial injury beyond the timing of the motion, A.W. in effect requests that this Court write into R.C. 2152.14(D) that notice must be given not less than 3 business days before the hearing. R.C. 2152.14(D) does require that notice be given, but does not specify any timeframe. Here, notice was given, though not with very much time. While the trial court noted that the motion was not filed timely, it also accepted the State's motion in its discretion without blame. (5/22/17 Tr. At 71). For this Court to hold that the trial court abused its discretion and to rewrite the statute to specify a timeframe for notice would be inappropriate.

Moreover, Defense Counsel was present on May 8, 2017 when the Court set the SYO invocation hearing date, asking A.W.'s doctors to prepare information on him to be discussed at that hearing (5/8/17 Tr. At p 15-16). After this request, the Court put the State and Defense on notice that a hearing was going to be scheduled on May 22, 2017 at 2:00pm (5/8/17 Tr. At p 16, 5-6) and told A.W.'s doctors to "expect subpoenas" (5/8/17 Tr. At p 19, 11). The State contends that Defense not only had proper notice of the hearing, but was also preparing as if the hearing was going forward by questioning A.W.'s doctors and requesting information on him.

CONCLUSION

For these reasons, the State of Ohio respectfully requests this Court overrule Appellant's assignments of error and uphold the adult portion of Appellant's sentence.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee was sent by regular U.S. mail or electronic service this 18th day of December, 2017 to:

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