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

CA 105845

	:
IN RE A.W.	:
A minor child.	:
	:
	:

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Pending before this Court is A.W.'s appeal challenging the invocation of the adult portion of his serious youthful offender ("SYO") sentence.

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). During those seven months at ODYS, A.W. did "really well." (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).

Despite A.W.'s success at ODYS, the juvenile court invoked A.W.'s adult sentence thereby sending A.W. to adult prison and saddling A.W. with an adult rape conviction and lifetime registration and community notification as a sex offender. The juvenile court invoked that adult sentence because A.W. did not complete a sex offender treatment program that had been purportedly ordered by the Court. In A.W.'s initial brief, he documented numerous reasons the juvenile court's basis for invoking the adult sentence was not justified. In particular, the alleged failure to complete sex offender treatment could not serve as a basis for invoking the adult sentence because:

1. The juvenile court did not actually order sex offender treatment in its original October 2016 dispositional order.

2. Once the juvenile court actually issued an order imposing sex offender treatment on

January 20, 2017, A.W. agreed to participate.

3. ODYS failed to provide A.W. with sex offender treatment from the date it was ordered in January 2017 until April 5, 2017. Indeed, at the March 31, 2017 review hearing, the Juvenile Court judge stated, **"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).

4. Given ODYS's failure to provide treatment, the Juvenile Court modified its order regarding treatment on March 31, 2017 to include both individual and group counseling and informed A.W. that Court **"will not impose your SYO"** if A.W. did everything he was expected to do from that point forward.

5. At the SYO hearing, A.W.'s individual counselor testified that A.W. never missed a counseling session, was "very engaged," and "did do the work." (5/22/17 Tr. at 7); and A.W.'s group counselor 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 short, there was no evidence that A.W. did anything other than fully participate in sex offender treatment finally provided by ODYS.**

6. Regardless of when A.W. would have started sex offender treatment, it was impossible for him to fully complete it. According to ODYS, its sex offender treatment program "is at least nine months long." (5/8/17 Tr. at 14). After A.W. was finally transported to ODYS and assessed in December 2016, he only had five months left on his commitment. (3/31/17 Tr. at 4).

7. The failure to complete a sex offender treatment program does not constitute "further bad acts" necessary to permit the invocation of an adult sentence.

In A.W.'s opening brief, he articulates five separate assignments of error that support vacating the adult sentence and conviction imposed by the Juvenile Court. The State has filed a brief in opposition, contending that each assignment of error lacks merit. Because the State's opposition suffers from interrelated flaws affecting multiple assignments of error, A.W.'s reply brief highlights the State's erroneous reasoning separate from the individual assignments of error.

1. The State's brief ignores several critical facts and mischaracterizes the impact of the invocation of A.W.'s adult sentence.

Throughout its brief, the State omits several critical procedural facts that make clear that the juvenile court's decision to invoke the sentence cannot be justified. For instance, the State

asserts the following:

> 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.

(State's Br. at 7-8). The State's assertion totally ignores numerous facts including:

- The juvenile court did not order sex offender treatment in its October 2016 dispositional order. Although the juvenile court changed that dispositional order in January 2017, there is no dispute that original dispositional order did not include court-ordered sex offender treatment.

- A.W. was not even assessed for potential sex offender treatment until December 2016, (3/31/17 Tr. at 4), and thus could not even arguably have started sex offender treatment until after that date.

- A.W. did not "chose not to participate in treatment," as claimed by the State. Rather, Dr. Alpert stated that he was not placed in treatment because A.W. continued to deny the offense and was not "completely open and honest about his sexual offending." (3/31/17 Tr. at 4). Because A.W. would not initially 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).

- A.W. was ready and willing to participate in treatment once it was finally ordered in January 2017 but *ODYS failed to provide it until* April 2017.

- Given the short duration of A.W.'s commitment, there is no way A.W. could have "completed, or come close to completing" the entire treatment program. Indeed, Dr. Alpert stated that "Even if [A.W.] would have engaged in sex offender treatment on his first day in ODYS, that would not be enough time." (5/8/17 Tr. at 14).

When the case is considered in the context of all the facts, it is apparent that, at worst, A.W. could bear some responsibility for not participating in treatment for a one-month period from December 2016 to January 2017, at which time treatment had not been court-mandated.

In addition to omitting key historical facts, the State's brief also understates the impact on A.W. from invoking the adult sentence. The State claims that this decision only "temporarily classif[ies] A.W. as a Tier III sex offender." (State' Br. at 2). That is not accurate. If A.W. had

remained in juvenile court, he would have received a temporary sex offender classification (ranging from Tier I to Tier III with the possibility of declassification) and would *not* have been subject to community notification, placement on the public registry, or restrictions on where he can live. Because the juvenile court invoked the adult sentence, A.W. now is subject to lifetime registration as an adult *with* placement on the public registry, *with* community notification, *with* severe restrictions on where he can reside for the rest of his life, and *without* any possibility of ever being removed from the registry.

2. The State does not dispute that A.W. complied with every journalized court order regarding sex offender treatment.

Although the juvenile court judge indicated at the October 2016 dispositional hearing that she "want[ed] sex offender treatment put in place for ODYS," she did not order such treatment in the journal entry and certainly did not indicate that any failure to participate could result in the invocation of the adult portion of the SYO. (10/12/16 Tr. at 18). The Juvenile Court did not order sex offender treatment until its January 20, 2017 judgment entry. It was *only* at this point that the court ordered A.W. to "participate and engage in sex offender treatment" and that the court *for the first time*, provided that the failure to engage in sex offender treatment could result in in the adult SYO sentence being invoked. Once this order was journalized, A.W. fully engaged with any treatment provided by ODYS.

The State does not dispute any of the historical facts outlined above. It also acknowledged that the juvenile court did not order sex offender treatment in the October 2016 dispositional order and that it actually amended the dispositional order in January 2017 to add court-ordered sex offender treatment. Nonetheless, the State argues, "[r]egardless 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." (State's Br. at 4). The actual timing

of the court order is significant, however. The Juvenile Court did not actually order sex offender treatment until January and A.W. fully complied with that order. Indeed, his treatment was delayed until April due to ODYS's failure to provide it; not A.W.'s willingness to participate.

3. The trial court lacked the authority to impose court-ordered sex offender treatment.

Although A.W. maintains that he complied with the trial court's January 2017 order that he engage in sex offender treatment, he also maintains, in his second assignment of error, that the trial court lacked the authority to order A.W. to engage in sex offender treatment while at ODYS or to otherwise dictate A.W.'s conditions of confinement at ODYS. Once the court had committed A.W. to the custody of ODYS, it retained no further power to regulate the conditions of his confinement, let alone to add conditions which would later be utilized to justify invoking the adult portion of the SYO sentence.

In disputing this assignment of error, the State argues that "the trial court is permitted by R.C. 2152.22 to retain certain control over a juvenile" while in the custody of ODYS, and that "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." (State's Br. at 5). In other words, the State maintains that a juvenile court can dictate the conditions of a juvenile's confinement at ODYS.

The State's *sole* basis, for arguing that a court can invade the province of the executive branch by dictating conditions of confinement, is a generic citation to the jurisdiction of a juvenile court in R.C. 2152.22. In making this blanket assertion, the State ignores the fact that the statute actually squarely undermines its argument. R.C. 2152.22(A) specifically 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."

Although there are five exceptions to that general rule, those exceptions relate solely to judicial release and compliance with the sex offender registration and notification provisions.

Despite the plain language of R.C. 2152.22 undermining its argument, the State attempts to find support for its argument by suggesting that further language in R.C. 2152.22 effectively un-does the first line of the subsection (A). A careful examination of the statutory language shows why the state is mistaken.

R.C. 2152.22 plainly states that when a juvenile court commits a youth to the custody of ODYS, the court relinquishes control over that individual for all but Judicial Release and SORN compliance purposes. There is no provision in the ODYS dispositional statute that permits a court to do what it did to A.W., to impose an ODYS commitment order and then to add additional conditions on top of that order, the compliance with which would potentially impact the final sentence of the court.

The state's reply on this point is rooted in a misreading of the controlling statute, and is therefore lacking in any merit.

4. The State's assertion, that a juvenile court can invoke the adult portion of an SYO sentence, without any affirmative misconduct, contravenes the plain language of the SYO statute and is at odds with controlling case law.

Setting aside questions regarding the court's authority to impose court-ordered sex offender treatment and whether A.W. complied with those orders as a matter of fact, there is also the legal question of whether any alleged non-compliance with those orders can, without more, justify the invocation of the adult portion of an SYO sentence.

In making the argument the adult portion of an SYO sentence can be invoked without any affirmative misconduct, the State misconstrues the legal requirements for invoking the adult portion of the SYO sentence. In essence, the State contends that R.C. 2152.14 does not require

exactly what it says it requires to invoke the adult portion of a juvenile's SYO sentence: an affirmative act of "misconduct." R.C. 2152.14(A)(2) and R.C. 2152.14(E)(1)(c).

The State asserts that "the main turning point of this section is not serious misconduct but a finding that the 'person's conducts demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.'" (State's Br. at 6). The State's suggested interpretation would require this Court to effectively draw a red line through half of the language the General Assembly wrote in R.C. 2152.14(E)(1)(c), deleting "[t]he person engaged in conduct or acts charged under division (A), (B) or (C) of this section," all of which require proof of misconduct.

The Ohio Supreme Court has plainly stated that R.C. 2152.14 "requires a finding by clear and convincing evidence **both** that the juvenile is "unlikely to be rehabilitated during the remaining period of juvenile jurisdiction" **and** *that the juvenile has engaged in further bad conduct* pursuant to R.C. 2152.14(A) or (B). *State v. D.H.*, 120 Ohio St. 3d 540 at 545 (emphasis added). The Court has already precluded exactly the argument the state is making here, that the only necessary factor to consider is the potential for rehabilitation. "Only *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 (emphasis added).

Not surprisingly, subsequent Courts that have examined this section in light of the Supreme Court's plain language have also read this SYO invocation statute as requiring misconduct or further bad acts, something not present in this case. *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).

That the State seeks to "read this out" of the statute is a virtual acknowledgement that no such conduct was present in this case. Because the statutory language includes both this requirement as well as a finding that the individual cannot be rehabilitated in the juvenile system, the two sections are plainly distinct requirements to invoke the SYO. The state's effort to urge this court to simply ignore the section of the statute that is inconvenient for their argument is nothing more than an attempt at misdirection.

The State claims that two cases from this District allegedly support its proposition that "the unlikelihood of rehabilitation in the juvenile system has been accepted in this county as a reason for binding juveniles over." (State's Br. at 6). The State's reliance on both of those cases is misplaced as neither suggest, let alone hold, that further bad acts are *not* required in order to invoke the adult portion of an SYO sentence.

On the contrary, both of the State's cases articulate the requirement of proving additional further bad acts and both cases included evidence that the juvenile engaged in further affirmative acts of misconduct while at ODYS. In the first case cited by the State, *In re M.S.* the juvenile's record at ODYS demonstrated the following incidents of misconduct: an altercation with ODYS staff in which the juvenile engaged in a "'wrestling and tussling' match" with a teacher that sent the teacher to Urgent Care; the juvenile was affiliated with a gang in the institution; the juvenile

"picked up a chair and hit another youth who was sitting down"; and in a later incident "appellant struck a student in the print shop, and continued to kick the student in the head after he fell". *In re M.S.*, 2010-Ohio-2101 at 27-28.

The State's reliance on its second case, *In re A.A.W.*, is particularly perplexingly as this Court emphasized the overwhelming evidence of misconduct present to justify invocation of the adult sentence. In that case, it was "undisputed that A.A.W. engaged in conduct that could be charged as a felony or misdemeanor of violence, if committed by an adult." *In re A.A.W.*, 2015-Ohio-1297 at ¶ 27. Indeed, the ODYS Youth Incident Summary Report, which was made part of the record, demonstrated that A.A.W. engaged in over 80 acts of violence, including choking another youth into unconsciousness and assaulting a youth specialist. *Id.*

Recognizing perhaps the absence of any misconduct in this case that would rise to the level of further bad acts as contemplated by the Supreme Court, the State argues instead that A.W.'s alleged failure to "complete his court-mandated sexual offender treatment" amounted to "conduct that created a substantial risk to the community." (St. Br. at 7). This is an attempt by the State to stretch the meaning of R.C. 2152.14 past the breaking point. The statute does not contemplate conduct by omission. The State can cite to no case that demonstrates such a fact pattern, and the Supreme Court has effectively precluded such a reading.

For all of these reasons, the State's reply on this point is without merit.

5. The State's contention, that juveniles enjoy far less constitutional protections against self-incrimination, is meritless.

In his fourth assignment of error, A.W. argues that his Fifth Amendment rights were violated because 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.

In its response, the State does not dispute A.W. was compelled to participate in court-ordered individual and group sex offender treatment. Nor does it dispute that such participation required him to make incriminating statements. And finally, the State does not dispute that statements A.W. made during these compulsory counseling sessions were used against him to transform his juvenile case to adult conviction with an adult prison sentence. Indeed, the State continues to rely on statements made by A.W. during treatment *to justify* the trial court's invocation of A.W.'s adult sentence. In arguing that this Court should uphold the invocation of A.W.'s adult sentence, the State explicitly referenced A.W.'s alleged statement during court-mandated treatment that he "fanaticizes [sic] about violent rapes." (State's Br. at 8).

Nevertheless, the State maintains that A.W.'s Fifth Amendment rights were not violated because a juvenile's right to be free from compulsory self-incrimination is limited to court-ordered polygraphs and not court-ordered sex offender treatment. The State offers no basis for this arbitrary distinction. Fifth Amendment protections do not arise because a polygraph is employed; rather they exist to protect an individual from being compelled to incriminate themselves.

The State also attempts to brush off decades of Fifth Amendment jurisprudence by suggesting that it only applies to adults and not juveniles. Once again the State cites to no legal support for such an assertion. Indeed, the Ohio Supreme Court's decision, in *In re D.S.* (2006), 111 Ohio St. 3d 361, 365-66 explicitly rejects such a distinction by concluding, that the Fifth Amendment protections articulated by the United States Supreme Court for adult probationers in *Minnesota v. Murphy*, 465 U.S. 420 (1984), likewise apply to juveniles.

The State also totally ignores the Amicus brief filed in this case which details numerous decisions that have held that individuals, including juveniles, enjoy Fifth Amendment protections

in the context of statements made or required by court-ordered treatment or therapy. *See e.g. State v. Evans*, 144 Ohio App. 3d 539, 561 (2001); *Welch v. Kentucky*, 149 S.W.3d 407 (Ky. 2004); *State v. Fuller*, 276 Mont. 155, 167 (1996); *State v. Gaither*, 100 P.3d 768 (Or. Ct. App. 2004); *In the Matter of Linberry*, 572 S.E.2d 229 (N.C. App. 2002) (penalizing a youth with extended custody who refuses to admit guilt in court-ordered sex offender treatment violated right against self-incrimination); *Mace v. Amestoy,* 765 F. Supp. 847 851 (D. Vt. 1991); *State v. Imlay*, 813 P.2d 979 (Mont. 1991).

Given that Fifth Amendment's protection against compulsory self-incrimination applies to juveniles and adults alike, A.W.'s Fifth Amendment rights were clearly violated in this case. 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 at the invocation hearing and which the State continues to point to on appeal to justify the trial court's invocation decision.

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.

6. The State incorrectly asserts that defense counsel received notice on May 8, 2017 that an SYO invocation hearing was going to take place on May 22, 2017.

In addition to all of the substantive errors associated with the juvenile court's handling of the SYO invocation hearing, there was a glaring procedural violation – namely, the State provided insufficient notice, as required by statute and due process, of its intent to seek invocation of the adult portion of the SYO sentence. Even the trial court, in this case, concluded that the State's notice to invoke was "filed in an untimely manner." (5/22/17 Tr. at 71). The Court should have taken the obvious next step and concluded that insufficient notice precluded the hearing from occurring on that date.

The State responds to its untimely filing and insufficient notice issue in two ways. First, it contends that defense counsel received ample notice of the SYO invocation because "Defense Counsel was present in Court on May 8, 2017 when the Court set the SYO invocation hearing date." (State's Br. at 10). That is patently false. Defense counsel was indeed present at a status hearing on May 8, 2017—but no invocation hearing was set that day. The trial court record is clear: the parties were informed that a May 22, 2017 review hearing was being kept "on the books" by the court. (5/8/17 Tr. at 12 and 22). However, it was unclear at that point whether the State would be seeking to invoke the adult portion of the SYO sentence – no final decision had been made. And while the State contends that the "Defense" was "preparing as if the hearing was going forward," (State's Br. at 10), there is simply no evidence of that fact. On the contrary, A.W.'s defense counsel was unequivocal in his insistence on the record, at the May 22, 2017 hearing, that he had not been properly notified or been afforded an opportunity to properly prepare for the invocation hearing.

Secondly, the State takes the position that A.W.'s notice argument lacks merit because, although R.C. 2952.14(D) requires notice to the parties of the SYO invocation, it "does not specify any timeframe" for doing so. (State's Br. at 10). In the State's view, any notice, however

slight, is sufficient.

A.W. submits that both due process and the statute require more. A.W. is not, as suggesting by the State, seeking to rewrite the statute and inject a specific number of days of notice. He simply asks this Court to conclude that notice must be given in enough time for the hearing to be meaningful. Here, according to the defense counsel, he had not received notice and thus had made no attempt to prepare for the hearing at all. Whatever the General Assembly intended when crafting a notice requirement without a specified timeframe, it could not have been so minimal as to be functionally meaningless—as it was effectively rendered here.

Notice requirements such as these are not mere procedural hurdles, they exist in order to ensure that all the parties to a hearing are afforded ample time to prepare. *In re Gault* demanded that notice must "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *Gault* at 50. To hold as the state urges this court to do here, that an untimely filing constituted sufficient time for A.W. and counsel to prepare effectively, would make a mockery of the guarantees of *Gault* and the very purpose underlying the requirement of notice provisions. This is particularly true when, as here, the hearing involved one of the most significant matters ever heard by a juvenile court, potentially impacting the entire course of a juvenile's life.

Due to the untimely filing by the State, A.W.'s counsel had virtually no time to prepare for a hearing that had life-altering consequences for A.W. The State seeks to minimize the seriousness of that failing and asks this Court to effectively ignore the notice requirements of the statute and state and federal due process. This Court should not do so.

Conclusion:

For the reasons set forth above and in appellant's initial brief, A.W., asks this Honorable Court to sustain his assignments of error and vacate the juvenile court's invocation of the adult portion of his SYO sentence.

Respectfully Submitted,

/s/ Frank Cavallo
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SERVICE

A copy of the foregoing Appellant's Reply Brief was served upon Michael C. O'Malley, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 and/or a member of his staff on this 17th day of January 2018.

/s/ Frank Cavallo
Assistant Public Defender