NO. 2018-1182

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 105845

IN RE: A.W., a minor child

MEMORANDUM IN RESPONSE TO JURISDICTION

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EXPLANATION OF WHY APPELLANT'S PROPOSITIONS OF LAW DO NOT PRESENT SUBSTANTIAL CONSTITUTIONAL QUESTIONS OR ISSUES OF GREAT PUBLIC OR GENERAL INTEREST

At 20 years old, A.W. was found delinquent of rape in the juvenile court. He was given the opportunity to participate in sex offender treatment programs to avoid the invocation of the adult part of his serious youthful offender sentence. Instead, he refused to participate. This refusal deprived him of the chance to obtain any benefit of the programs and, therefore, squandered the opportunity to decrease the serious risk of recidivism he posed to the community.

A.W. asks this Court to accept jurisdiction to correct perceived legal errors in his case. There is no indication that the lower court's majority decision conflicts with other district courts. Nor is there a substantial constitutional issue for this Court to decide. While A.W. raises a self-incrimination clause issue, the lower court correctly noted that it was not dispositive to the appeal because there was otherwise sufficient evidence to support the invocation of the adult sentence. Ultimately, A.W. asks this Court to accept jurisdiction for error correction. The State of Ohio respectfully submits that this appeal does not present a substantial constitutional question or issue of great public or general interest and respectfully asks that this Honorable Court decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

In April 2014, the State of Ohio filed a complaint alleging that A.W. was delinquent in committing rape, kidnapping, and gross sexual imposition. The case centered upon sexual conduct that occurred in August 2013 between A.W., then seventeen years old, and the victim, A.A., then thirteen years old. A.W. failed to appear and an arrest warrant was issued in April 2014. He was arrested in May 2015, and arraigned, but another arrest warrant was issued in September 2015. A.W. was again arrested about one year later in May 2016.

On September 7, 2016, the Juvenile Division of the Cuyahoga County Court of Common Pleas (hereinafter "trial court") held a probable cause hearing. It noted that A.W. was then twenty years old and that a significant amount of time passed in the case because A.W. was "AWOL". The hearing was continued to September 13, 2016, at which time the State amended the complaint to include a notice of its intent seeking a serious youthful offender sentence. A.W. then admitted to committing a first-degree felony rape. The trial court explained that if A.W. fails to do what the Ohio Department of Youth Services (hereinafter "ODYS") requires, he could be sentenced to three to eleven years in prison.

On October 12, 2016, the trial court sentenced A.W. to remain in the custody of ODYS until his twenty-first birthday. At that hearing, the trial court warned A.W. that he would be brought back in 90 days and asked "are you getting your education" and "are you participating in group therapies". The trial court stated that "if, in fact, you are not doing what you're supposed to, I am going to cut the sentence at ODYS and send you to prison". A.W. stated that he understood this. The trial court specifically emphasized the importance of sex offender treatment:

> Court: But young man, I want offender treatment put in place for ODYS. You have three sex offenses. So does that mean that you're just a predator? Does that mean you're a stupid kid? What is it that makes you continually have sex offenses, and not just teenage stuff? [A.W.], they're serious, serious offenses.
> So I don't know the answer to that, but by the time you get back here in 90 days I want you to have a better understanding of what's appropriate and what's not. Do you understand me?
>
> A.W.: Yes.

A.W. was then transferred to the custody of ODYS where he was ordered to participate in sex offender treatment.

The trial court held a review hearing on January 18, 2017. A.W.'s parole officer reported that A.W. "does not participate in any type of treatment" and "continues to deny the accusations".

The trial court stated that it was "not messing around" and A.W. must "either participate in the sex offender treatment" or go to prison.

A second review hearing was held on March 31, 2017. At the hearing it was established that A.W. had been receiving individual sex offender programming. However, the group programs were filled and a position would only become open to A.W. on April 5, 2017. The trial court pointed out that had A.W. cooperated with treatment from the beginning he could have "been finishing up Phase 1 right now on [his] way to Phase 2". The trial court urged A.W. to "wake up". It then announced that efforts would be made to accelerate treatment to allow A.W. to complete as much treatment as possible before he turned twenty-one years old. The trial court explicitly told A.W.: "[I]f you do everything you're supposed to, I will not impose your SYO."

A third review hearing was held on May 8, 2017, only fourteen days before A.W. turned twenty-one years old and the trial court lost jurisdiction. Dr. Albert reported at the hearing that A.W. was "superficially engaged in his treatment". Counsel for A.W. inquired about what superficial engagement meant. Dr. Albert clarified that A.W. is "going through the motions". He would attend meetings but continued to verbalize "how much he enjoys fantasizing about his rapes". "He also 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." The doctor's statements were made in response to a question from A.W.'s counsel and were never objected to.

The trial court held a final hearing on May 22, 2017. Dr. Greene testified that A.W. needed "a significant amount of additional treatment". She testified that he was approximately "10 to 15%" complete in the first phase of treatment. If he had started treatment six months ago he could be closer to "60 to 70%" complete. A.W.'s social worker, Bonita Reaves, testified as well. She explained that there are two phases to sex offender treatment. Phase one consists of thirty-five

lessons and A.W. had completed only seven. The first six lessons are essentially an introduction. Phase two is the same length as phase one.

Finally, Robin Palmer, testified. She is the President of the Mokita Center which contracts with the trial court to perform assessments of juveniles charged with sex offenses. She interviewed A.W. on May 15, 2017. She was asked about a psychological evaluation performed on May 4, 2017, during which A.W. stated "[t]his is bulllshit" and "I don't need treatment". Counsel for A.W. asked the trial court to strike that testimony because the statement by A.W. was made to someone other than Ms. Palmer. The trial court agreed to strike the statement made during the psychological evaluation. Palmer then testified that there were twenty-five risk factors that are correlated to sexual offenses and A.W. had twenty of the twenty-five factors.

At no time during the proceedings in the trial court did A.W. raise a challenge to the admission or consideration of his statements on the basis of the Fifth Amendment to the United States Constitution. Counsel for A.W. did argue, however, that he was provided insufficient notice of the hearing. On that basis, he continued to object to witnesses who were presented. Ultimately, the trial court found by clear and convincing evidence that A.W. engaged in conduct that created a substantial risk to safety by failing to undergo sexual offender treatment. It ordered that the juvenile disposition be terminated and the adult portion of the disposition be put into effect.

A.W. filed a direct appeal and raised several arguments. First, he argued that the trial court violated his due process rights when it invoked his adult sentence for failing to complete sex offender treatment because such treatment was never ordered by the court in its sentencing entry. The majority of the lower court held regardless of whether the trial court ordered the treatment, it was ordered by ODYS. *In re A.W.*, 8th Dist. Cuyahoga No. 105845, 2018-Ohio-2644, ¶ 25-26.

The majority also held that A.W. had clear notice at the hearing in the trial court that he was expected to complete the treatment programs. *In re A.W.*, ¶ 31.

A.W. argued that the trial court erred in invoking the adult sentence because it was impossible to complete treatment before A.W. turned twenty-one and that there was no evidence that he engaged in misconduct. The majority recognized that the trial court "simply expected participation and progress in the required therapies" and noted that A.W. "could have avoided the adult sentence if he complied with the required therapies when they were offered to him in December 2016". *In re A.W.*, ¶ 33. The majority decision of the lower court also held that failure to actively participate in sex offender treatment may constitute misconduct. *In re A.W.*, ¶ 36-48. It relied upon a decision from the Ninth District Court of Appeals which reached the same conclusion. *See In re D.J.*, 9th Dist. Summit Nos. 28472, 28473, 2018-Ohio-569.

A.W. also argued that the trial court violated his constitutional right against self-incrimination by considering statements he was compelled to make as part of his sex offender treatment. The majority decision acknowledged that A.W.'s statements were privileged under the Fifth Amendment but held that the "record contains sufficient evidence to support the trial court's decision to invoke A.W.'s adult sentence without" the statements. *In re A.W.*, ¶ 57. It noted that A.W. was described as "superficially engaged" in treatment and was just "going through the motions". *In re A.W.*, ¶ 60.

LAW AND ARGUMENT

Appellant's Proposition of Law 1: The adult portion of an SYO sentence cannot be invoked for failure to complete ODYS programming unless the offender was given notice that the failure to comply could trigger invocation of the adult sentence and it was possible for the offender to have completed it.

A.W. argues that the adult portion of his serious youthful offender sentence was improperly invoked based on his failure to complete sex offender treatment. He argues that he was never

given notice that treatment was necessary to avoid invocation of the adult sentence. Additionally, he argues that completion of treatment was not possible before he turned twenty-one years old. These arguments are based on an incomplete recitation of the facts.

In the Eighth District's majority opinion, the lower court noted that the trial court "specifically told A.W. at the dispositional hearing [on October 12, 2016] that it wanted him to receive sex offender treatment." *In re A.W.*, ¶ 30. The trial court told A.W. that it was "going to bring [him] back in 90 days" to see how he is doing. The trial court explained that means "are you participating in group therapies". The trial court then warned that "if, in fact, you are not doing what you're supposed to, I am going to cut the sentence at ODYS and send you to prison".

It was clear to A.W. as early as October 2016 that if he did not participate in group therapy, the trial court would invoke the adult sentence. Instead of participating in group therapy, he refused. Even after the trial court warned A.W. in January 2017 of the consequences of failing to participate, testimony established that A.W. was only superficially engaged in treatment.

A.W. alternatively argues that it was impossible to complete sex offender treatment. Dr. Greene testified in May 2017 that if A.W. had cooperated in treatment six months ago, he would likely have completed close to 60-70% of the sex offender treatment. However, the majority decision below recognized that A.W.'s argument is built upon a false premise: "the court never conditioned the adult portion of his sentence on completion of the entire sex offender program." *In re A.W.*, ¶ 32. The trial court expected participation in the program which would provide A.W. with "a better understanding of what's appropriate and what's not." A.W. delayed for months in participating in the program which prevented him from obtaining benefits from the treatment.

<u>Appellant's Proposition of Law 2</u>: A juvenile court may not invoke the adult portion of an SYO sentence without evidence of further affirmative misconduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.

A juvenile court may invoke the adult portion of a serious youthful offender dispositional sentence if it finds by clear and convincing evidence that the person "has engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim." R.C. 2152.14(B)(2). A.W. argues that his refusal to participate in sex offender treatment was insufficient evidence of such conduct. He does not separately challenge the trial court's finding that he was "unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." *See* R.C. 2152.14(E)(1)(c). Thus, A.W. only asks this Court to address whether his refusal to participate in sex offender treatment was "conduct" which created a substantial risk to the safety of the community.

The Ninth District Court of Appeals squarely addressed this issue. *In re D.J.*, 9th Dist. Summit Nos. 28472, 28473, 2018-Ohio-569. It noted that 'conduct' is not defined in the Revised Code but that Black's Law Dictionary refers to "conduct" as both action and inaction. *In re D.J.*, ¶ 11. In that case, the juvenile court found that "D.J. waited until only 9 months before he turned 21 to begin sex offender treatment". *In re D.J.*, ¶ 11. D.J. "could not understand what he needed to do to prevent a relapse of his conduct." *In re D.J.*, ¶ 9. Therefore, the Ninth District held that there was sufficient evidence that in failing to complete sex offender treatment, D.J. "engaged in conduct that created a substantial risk to the safety of the community." *In re D.J.*, ¶ 11.

In this case, the lower court applied similar reasoning. It held that A.W.'s refusal to participate in sex offender treatment "caused substantial delay in the start of the treatment program." *In re A.W.*, ¶ 42. He completed only seven introductory lessons and he still possessed twenty of the twenty-five risk factors for reoffending. *In re A.W.*, ¶ 42. The majority decision

noted that A.W. "had only scratched the surface" of treatment and "failed to demonstrate any meaningful progress". *In re A.W.*, ¶ 43. Based on these facts, the lower court correctly affirmed the trial court's judgment that A.W.'s refusal to participate in sex offender treatment created a substantial risk of safety to the community.

> ***Appellant's Proposition of Law 3*: When a juvenile court relies on evidence admitted in violation of the Fifth Amendment in invoking the adult portion of an SYO sentence, the invocation must be reversed unless admission of the improperly admitted evidence is harmless beyond a reasonable doubt.**

A.W. argues that the trial court impermissibly considered statements he was compelled to make as part of his court ordered treatment in violation of his right against self-incrimination. The lower court held that even without the incriminating statements, "the record contains sufficient evidence to support the trial court's decision to invoke" the adult sentence. *In re A.W.*, ¶ 57. Now A.W. argues that the lower court applied the wrong standard and should have considered whether the remaining evidence was harmless beyond a reasonable doubt.

The argument that the lower court should apply a beyond-a-reasonable doubt standard was not made in the lower court. In A.W.'s merit brief below, A.W. argued that the State should not have used A.W.'s statements and asked the lower court to vacate the adult sentence. He did not ask the court of appeals to determine if his statements were harmless beyond a reasonable doubt. Nor did A.W. file a motion for reconsideration of the lower court's decision.

The Supreme Court of the United States has held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). The reasoning was that an "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Chapman*, 18 U.S. at 23-24. That standard applies in criminal trials because the prosecutor bears the burden of proving his case

beyond a reasonable doubt. However, the standard of proof that applies to the invocation of A.W.'s adult sentence is clear and convincing evidence. *See* R.C. 2152.14(E)(1).

This Court held that invocation hearings were less akin to delinquency proceedings or adult criminal trials and more akin to "proceedings incident to a criminal court's imposition of a suspended sentence." *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 16. "Because the invocation proceeding is not a criminal proceeding, the fact-finding need not be according to the beyond-a-reasonable doubt standard required in criminal trials. The clear-and-convincing standard allowed by R.C. 2152.14(E)(1) is less rigorous". *In re J.V.*, ¶ 20. Because the invocation of the adult portion of A.W.'s SYO sentence was subject to a clear-and-convincing standard, it was not necessary for the lower court to apply a harmless beyond a reasonable doubt standard of review.

Finally, A.W. forfeited the issue of self-incrimination by failing to object in the trial court to the admission of his statements. A.W.'s objections to the admission of his statements were not related to the right against self-incrimination. While he did raise the issue of self-incrimination in the Eighth District Court of Appeals, he never objected in the trial court. Admittedly, the State of Ohio did not raise the issue of forfeiture to the lower court. Nonetheless, this Court has held that failure to raise a constitutional issue in the trial court forfeits all but plain error. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 2; *see also State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph 3 of the syllabus ("It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention").

Appellant's Proposition of Law 4*: *The only evidence that may be considered to invoke the adult portion of an SYO sentence is that which is admitted at the invocation hearing.

A.W. argues that the trial court should not have considered Dr. Alpert's statements at the May 8, 2017, hearing that A.W. was "superficially engaged in his treatment" and "going through the motions". He implies that because these statements were relayed to the trial court before the invocation hearing, the trial court was forbidden from considering them. The argument that the trial court erred in considering statements from Dr. Alpert was never raised before in this case. Because A.W. did not raise the argument, it is now forfeited on appeal. Additionally, Dr. Alpert's statements were invited by questions posed by A.W.'s counsel:

> Mr. King: Doctor, several times you referred to - - I'm Barry King. I'm the Attorney for [A.W]. Several times you described his participation as being superficial. Would you help me to understand what you mean by that?
>
> Dr. Alpert: Sure. So [A.W.] is going through the motions. He's going to group. He's meeting with his individual therapist. He's completing the assignments asked of him. However, he is actively verbalizing how much he enjoys fantasizing about his rapes.

Contrary to A.W.'s claim that Dr. Alpert's opinion was presented without the opportunity for cross-examination, A.W. actually invited the statements by posing questions to Dr. Alpert.

Finally, A.W. takes issue with the admissibility of statements made by Robin Palmer at the invocation hearing. The majority below noted that according to Palmer, A.W. did what he was supposed to do, not because he was interested in reforming his behavior, but because he wanted to avoid prison. A.W. did not object to that statement from Palmer. Additionally, the only statement by A.W. that was struck from the record was the following statement, contained in a psychological report that was not prepared by Palmer: "This is bullshit. I don't have a problem. I don't need treatment. I don't care. I'm out of here in May. I got shit to do."

The trial court could properly consider Dr. Alpert's opinion that A.W. was superficially engaged in treatment. It also could properly consider Palmer's opinion that A.W. was not interested in reform and possessed twenty of twenty-five risk factors for reoffending. A.W. has not cited to any legal authority which would establish that this evidence was improperly considered.

CONCLUSION

For these reasons, the State respectfully submits that this appeal does not present a substantial constitutional question or issue of great public or general interest and asks this Court to decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was provided by electronic mail this 18th day of September, 2018 to Deputy Public Defender Cullen Sweeney at csweeney@cuyahogacounty.us and Assistant Public Defender Frank Cavallo at fcavallo@cuyahogacounty.us.

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