

IN THE SUPREME COURT OF OHIO

In the Matter of D.S.

Appellant

Case No.:

On Appeal From the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 15AP-487

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT D.S.

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**Explanation of Why This Case Presents a Substantial
Constitutional Question and Matters of Public or Great
General Interest**

This case presents two issues of great importance to Ohio juvenile courts and those who practice in them.

First, the case presents issues regarding the mandate of Juv.R. 9(A):

“In all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.”

The juvenile court below acted pursuant to this mandate by dismissing a complaint alleging gross sexual imposition finding that

“there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action. If the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing the services. The Court does not find it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter.”

The lead opinion of the court below found this to be inadequate. The lead opinion reversed this decision, noting that “no record evidence exists that the conduct at issue was innocent child's play showing no crime occurred or that proceeding to the adjudication stage would not be in the best interest of the child and the community.” But Juv.R. 9A) is not limited to circumstances when “no crime occurred.” Further, the record did contain evidence showing: (1) the ages of the children involved (age 12 and age 9 boys), (2) the children were three years apart in age, and (3) the complaint contained no allegation of force or threat of force. The lead opinion imposes a burden on the juvenile court that the Rules of Juvenile Procedure do not.

The second issue involves this Court's opinion in *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, which held that R.C. 2907.02(A)(1)(b) (Ohio's statutory rape provision) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13. The trial court relied on *D.B.* in dismissing the gross sexual imposition complaint, but the court of appeals reversed. In the view of the Court of Appeals *D.B.* is limited to statutory rape cases in which two children under the age of 13 engage in sexual conduct and has no application to gross sexual imposition cases in which two youths under 13 engage in sexual contact....even where, as here, the alleged sexual contact is actually sexual conduct. By so ruling, the court permits the state to circumvent *D.B.* merely through clever pleading.

This Court should accept jurisdiction to address these important issues and provide Ohio juvenile courts, juvenile law practitioners, law enforcement officers, and the public with clear guidance on them.

STATEMENT OF THE CASE AND FACTS

On November 25, 2013, D.S. was charged in Franklin County Juvenile Court with three delinquency counts of gross sexual imposition, violations of R.C. 2907.05(A)(4). The complaint alleges that these acts occurred on October 16, 2013 and further states that D.S. was twelve and the alleged victim was nine years old at the time of the offenses.

All counts alleged that D.S. had sexual contact with a child under the age of thirteen. Count One alleged that D.S. touched the penis of a child under thirteen; Count Two that he engaged in anal intercourse with a child under thirteen, and Count Three alleged that he performed fellatio on a child under thirteen. All charges involve the same

alleged victim, D. M., who was aged nine at the time. There was no allegation of use of force by D.S. or physical resistance by D.M.

On June 14, 2014, trial counsel for D.S. moved the court to dismiss the charges based upon the ruling of the Ohio Supreme Court in *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, which held that R.C. 2907.02(A)(1)(b) (Ohio's statutory rape provision) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13. The motion further asserted that the court should dismiss the complaint to avoid formal court action pursuant to Juv.R. 9(A). The motion came on for hearing before a magistrate of the Juvenile Court on November 5, 2014. On November 7, 2014, the magistrate issued a decision denying the motion.

On November 18, 2014, trial counsel timely filed an objection to the magistrate's decision. The Juvenile Court conducted a hearing on the objection on February 4, 2014, the Honorable Terri B. Jamison presiding. By Decision and Entry filed April 13, 2015, the trial court sustained the objection.

The State appealed the decision of the Juvenile Court, and asserted two assignments of error:

1. The Juvenile Court Erred in Finding R.C. 2907.05(A)(4) Unconstitutional as Applied to this Case.
2. The Juvenile Court Abused Its Discretion in Dismissing the Complaint Under Juv.R. 9.

On May 3, 2014, a divided panel released its decision. The Honorable Lisa Sadler wrote the lead opinion, which sustained the two assignments of error. The Honorable Betsy Luper Sshuster wrote a concurring opinion in which she agreed with Judge

Sadler's ruling on the Second Assignment of Error, but disagreed, in part, with the lead opinion on the First Assignment of Error:

while only appellee was charged, he did not meet his burden to prove that the statute is unconstitutional as applied. Specifically, appellee did not provide evidence that both children had the requisite mens rea to make the enforcement arbitrary and discriminatory. If appellee's argument is that neither child had the requisite mens rea, then the defense is to an element of the crime and not an as-applied constitutional challenge.

In re D.S., 10th Dist. Franklin App. No. 15AP-487, 2016-Ohio-2810, ¶34.

The Honorable William Klatt dissented on the Second Assignment of Error, and would find that the juvenile court did not abuse its discretion in dismissing the complaint pursuant to Juv.R. 9(A):

As noted in the majority decision, in deciding whether the court properly exercised its discretion in dismissing the case under Juv.R. 9, we must liberally interpret and construct the rule so as to "provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and * * * to protect the public interest by treating children as persons in need of supervision, care and rehabilitation." Juv.R. 1(B)(3) and (4). See also *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988) ("The best interests of the child and the welfare and protection of the community are paramount considerations in every juvenile proceeding in this state.").

Although the evidentiary record in this case is relatively thin, I believe there is evidence in the record to support the trial court's conclusion that the conduct at issue was not criminal in nature and that proceeding to the adjudication stage would not be in the best interest of the child and the community. There was evidence before the trial court indicating: (1) the ages of the children involved (age 12 and age 9 boys), (2) the children were three years apart in age, and (3) the complaint contained no allegation of force or threat of force. Given this evidence, I do not believe the trial court abused its discretion when it dismissed the complaint pursuant to Juv.R. 9.

Appellant now urges this Court to accept jurisdiction and determine the issues presented here on their merits.

ARGUMENT

First Proposition of Law

A juvenile court's decision to utilize non-judicial community resources in lieu of criminal prosecution is matter Juv.R. 9(A) entrusts to the discretion of the juvenile court. That decision may not be overturned on appeal in the absence of an abuse of discretion.

Appellate courts are to avoid deciding questions of constitutional law if a case can be decided on non-constitutional grounds. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 9; *Hall China Co. v. Public Utilities Comm.*, 50 Ohio St. 2d 206, 210, 364 N.E.2d 852 (1997); *Norandex, Inc. v. Limbach*, 69 Ohio St.3d 26, 28, 1994 Ohio 536, 630 N.E.2d 329 (1994); *In re Boggs*, 50 Ohio St.3d 217, 221, 553 N.E.2d 676 (1990); *Kinsey v. Police & Firemen's Disability & Pension Fund Bd. Of Trustees*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989 (1990). This case can, and should, be decided on non-constitutional grounds, because the juvenile court's dismissal of the complaint was an appropriate exercise of the court's discretion.

Juvenile Rule 9(A), provides as follows:

"In all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court."

This Court has held that the goals of the "best interests of the child and the welfare and protection of the community *** are most effectively met at the initial intake of the juvenile by the juvenile court. The overriding rule upon intake of a child is that formal court action should be a last resort to resolving juvenile problems." *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988).

"Whether a [juvenile] proceeding should be dismissed or reach the merits is within the sound discretion of the trial judge." *In re Arnett*, 3rd Dist. Hancock App. O. 5-

04-20, 2004-Ohio-5766, at ¶ 9. Further, “it is clear from the language of Juv.R. 9 that formal court action is permissible in appropriate cases, and that it is within the discretion of the juvenile court to proceed in such a manner.” *In re Corcoran*, 68 Ohio App.3d 213, 216, 587 N.E.2d 957 (1990); accord, *In re Carter*, 12th Dist. Butler No. CA95-05-087, (March 11, 1996)

“The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Steiner v. Custer*, 137 Ohio St. 448, 31 N.E. 2d 855 (1940); *Conner v. Conner*, 170 Ohio St. 85, 162 N.E. 2d 852 (1950); *Chester Township v. Geauga Co. Budget Comm.*, 48 Ohio St. 2d 372, 358 N.E. 2d 610 (1976). “Abuse of discretion” implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *State v. Tijerina*, 99 Ohio App.3d 7, 649 N.E.2d 1256 (1994).

The juvenile court specifically found that

“there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action. If the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing the services. The Court does not find it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter.”

This determination is entitled to great deference. It may not be set aside absent a demonstration of abuse of discretion—a heavy burden that the State did not met. As Judge Klatt pointed out in his dissent, the record contains evidence to support the trial court's conclusion that the conduct at issue was not criminal in nature and that proceeding to the adjudication stage would not be in the best interest of the child and the community.

There was evidence before the trial court indicating: (1) the ages of the children involved (age 12 and age 9 boys), (2) the children were three years apart in age, and (3) the complaint contained no allegation of force or threat of force.

Second Proposition of Law

R.C. 2907.05(A)(4) is unconstitutional as applied to a child under the age of 13, who allegedly engaged in sexual contact with another child under 13.

In *In re D.B.*, this Court reviewed R. C. 2907.02(A)(1)(b), Ohio's statutory rape statute, and its constitutionality in cases in which the alleged offender and victim were both under the age of thirteen. The Court held that "R.C. 2907.02(A)(1)(b) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13." The Court found that the statute, when applied to a child under 13, violates that child's right to due process and equal protection under the law. The judgment was reversed, and the cause remanded.

The Court reasoned that the application of the statute to a child under 13 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §16, of the Ohio Constitution, because it criminalizes sexual conduct between two members of the protected class and fails to provide guidelines designating which actor is the offender and which actor is the victim. This lack of specificity or guidance results in the arbitrary enforcement of the law to children who are both the accused and members of the protected class. When faced with a criminal statute under which a child may be

both a perpetrator and victim, and without guidance from the legislature, the risk of the state arbitrarily prosecuting one child over the other is inherent, including the possibility that a prosecutor's personal assumptions or biases relating to gender and sexuality may influence his or her charging decisions. The Court explained this reasoning:

Due process is not satisfied if a statute is unconstitutionally vague. *Skilling v. United States* (2010), U.S. , 130 S.Ct. 2896, 2928, 177 L.Ed.2d 619. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)." *Hill v. Colorado* (2000), 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597.

The United States Supreme Court has identified the second reason as the primary concern of the vagueness doctrine: "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.' *Smith [v. Goguen]* (1974), 415 U.S. [566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605]. * * * Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' *Id.*, at 575, 94 S.Ct. at 1248." *Kolender v. Lawson* (1983), 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903. This prong of the vagueness doctrine not only upholds due process, but also serves to protect the separation of powers: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese* (1876), 92 U.S. 214, 221, 23 L.Ed. 563.

As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory

enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

The facts of this case provide an example of the temptation for prosecutors to label one child as the offender and the other child as the victim. Based apparently upon the theory that D.B. forced M.G. to engage in sexual conduct, the state alleged that D.B., but not M.G., had engaged in conduct that constituted statutory rape. However, while the theory of D.B. as the aggressor was consistent with the counts alleging a violation of RC. 2907.02(A)(2), which proscribes rape by force, this theory is incompatible with the counts alleging a violation of statutory rape because anyone who engages in sexual conduct with a minor under the age of 13 commits statutory rape regardless of whether force was used. Thus, if the facts alleged in the complaint were true, D.B. and M.G. would both be in violation of RC. 2907.02(A)(1)(b).

The prosecutor's choice to charge D.B. but not M.G. is the very definition of discriminatory enforcement. D.B. and M.G. engaged in sexual conduct with each other, yet only D.B. was charged.³ The facts of this case demonstrate that R.C. 2907.02(A)(1)(b) authorizes and encourages arbitrary and discriminatory enforcement when applied to offenders under the age of 13. The statute is thus unconstitutionally vague as applied to this situation.

It must be emphasized that the concept of consent plays no role in whether a person violates R.C. 2907.02(A)(1)(b): children under the age of 13 are legally incapable of consenting to sexual conduct. Furthermore, whether D.B. used force to engage in sexual conduct does not play a role in our consideration of R.C. 2907.02(A)(1)(b). The trial court found that D.B. did not use force. Whether an offender used force is irrelevant to the determination whether the offender committed rape under R.C. 2907.02(A)(1)(b).

In re D.B., ¶¶ 23-27.

The Court went on to find that the statute violated the equal protection guarantees of the United States and Ohio Constitutions. *In re D.B.*, ¶¶ 29-30.

In this case, the State argued, and two of the judges of the Court of Appeals below found, that *D.B.* is inapplicable here because it involved the constitutionality of R.C. 2907.02(A)(1)(b), Ohio’s statutory rape provision, as opposed to the present case which involves charges of gross sexual imposition in violation of R.C. 2907.05(A)(4). The State sees this distinction as dispositive, basing its argument upon the difference in the statutory definitions of *sexual conduct* (an element of the offense of rape) and of *sexual contact* (an element of gross sexual imposition.) R.C. 2907.01(B) defines *sexual contact* as

any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

while R.C. 2907.01(A) defines *sexual conduct* as

vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

In the State’s view, R.C.2907.01(B)’s use of the “for the purpose of sexually arousing or gratifying either person” language somehow removes gross sexual imposition from the *D.B.* analysis. Apart from the obvious questions—Can one engage in *sexual conduct* without *sexual contact*? Isn’t sexual arousal or gratification implicit in the acts of intercourse contained in the definition of *sexual conduct*?—the State’s argument collapses for several reasons.

First, two of the counts at issue here—the second and third counts—allege acts of intercourse. Count two alleges fellatio, and count three alleges anal intercourse. These

allegations are allegations of rape although the complaint designates them as gross sexual imposition in a transparent attempt at avoiding the *D.B.* holding. The State should not be permitted to do indirectly what *D.B.* prevents it from doing directly.

Further, the presence of the “purpose” language in the definition of sexual contact does not preclude application of the *D.B.* analysis. The aspect of the definition of rape at issue in *D.B.* deals with *sexual conduct* with an individual under 13 years of age whom the law presumes incapable of consenting to the conduct. The constitutional issue in *D.B.* arose from the prosecution of an individual under 13 for engaging in *sexual conduct* with someone who is also under the age of 13. The same infirmities addressed in *D.B.* also arise in the prosecution of someone under the age of 13 for engaging in *sexual contact* with another who is also underage. The presence of the “purpose” language does not affect the analysis.

The State relied upon *In re T.A.*, 2nd Dist. Nos. 2011-CA-28, 2011-CA-35, 2012-Ohio-3174; *In re K.A.*, 8th Dist. Nos. 98924, 99144, 2013-Ohio-2997; *In re K.C.*, ___ N.E.3d. ___, 2015-Ohio-1613 (1st Dist.) in support of its argument. The juvenile court appropriately gave these cases little weight because they are factually dissimilar from the case at bar. The court noted that the age difference in this case (*D.B.* was twelve at the time of the alleged offenses while the other child was nine) is less than the age differences in the other cases (*T.A.* was over ten while his victim was two; *K.A.* was twelve while the victim was five; *K.C.* was twelve while the victim was six.)

The *T.A.* case was also procedurally different from this case. The appellant in *T.A.* had entered an admission to an amended charge of gross sexual imposition before the Supreme Court’s decision in *D.B.*, and attempted to use the *D.B.* holding as a basis for

withdrawing that admission. The Second District Court of Appeals found that the trial court had failed to comply with Juv.R. 29(D) and, as a result, found that the appellant's admission to the amended charge of gross sexual imposition was invalid. Curiously, though, the appellate court went on to address the constitutionality argument.

Moreover, these three cases are based upon a fundamentally flawed analysis. The cases deemed that the "purpose" language provides a way to differentiate between the victim and the offender. But the definition in question reads:

...for the purpose of sexually arousing or gratifying *either person*.
(Emphasis added.)

It is impossible to see how this language provides any basis whatsoever to differentiate between victim and offender, since it turns on the purpose to gratify either party.

The *D.B.* decision found, that as applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

Similarly, when two children under the age of 13 engage in sexual contact, the same analysis applies—particularly where, as here, the activity alleged as sexual contact is actually sexual conduct (intercourse). The *D.B.* analysis, then, applies notwithstanding the definitional differences between sexual conduct and sexual contact. The decision of

the juvenile court below, then, was not erroneous. Rather, it was consistent with the analysis of this Court in *D.B.*

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to accept jurisdiction and reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following by electronic mail this 17th day of June 2016:

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APPENDIX

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Court of Appeals Opinion, May 3, 2016.....A-3