

NO. 2015-1847

IN THE SUPREME COURT OF OHIO

APPEAL FROM
EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO
NO. 102460

STATE OF OHIO

Plaintiff-Appellant

vs.

DARLELL ORR

Defendant-Appellee

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

LAW AND ARGUMENT

Proposition of Law: R.C. 2152.02(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J) consider a person who committed a crime as a juvenile but apprehended after their 21st birthday an adult subject to prosecution in the general division. These provisions do not violate the Ex Post Facto Clause of the United States Constitution or Retroactivity Clause of the Ohio Constitution when applied to a person who committed the crime of rape prior to attaining the age of 15.

The Appellee's concerns that adoption of the State's proposition of law would "encourage county prosecutors to delay charging some juvenile offenders until after their 21st birthdays, thereby avoiding juvenile jurisdiction altogether..." is unfounded and seeks to invoke fear that the State will purposefully delay cases. Such concerns fail to address the harsh reality of child rape victims who delay their reporting as well as the backlog of untested rape kits, which include cases of both potentially named suspects, known suspects and complete stranger rapes. The issues surrounding untested rape kits are not just limited to Cuyahoga County or the State of Ohio but is part of a national epidemic that has uncovered more than 70,000 untested rape kits – which is but a fraction of what may exist across all police agencies. *Why Haven't 70,000 Rape Kits Been Tested for DNA?* Available at <http://www.nbcnews.com/news/us-news/rape-kits-n393186>, last accessed August 9, 2016. The application of the statutes at issue do not affect the many crimes whose six-year statute of limitations have expired but instead impacts the sexual assaults that may be prosecuted under the applicable statute of limitations. This case is just one of many cases that were solved and charged as part of the State's efforts to end the backlog of untested rape kits. DNA evidence confirmed Orr's identity as a rapist. Regardless of the age of the suspect, sexual assaults has its toll upon the victim and can include both physical and psychological effects. *Effects of Sexual Assault and Rape*, (available at

<http://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape>, last accessed August 8, 2016). These effects are not minimized based upon the age of the offender.

In the case below the Eighth District in *State v. Orr*, 8th Dist. Cuyahoga No. 102460, 2015-Ohio-4081 held that Orr could not be prosecuted as an adult and that the juvenile court lacked any jurisdiction over the crimes that Orr committed as a juvenile. The decision in *Orr* followed the decision in *State v. Webber*, 8th Dist. Cuyahoga No. 101875, 2015-Ohio-1953. Again the court in *Webber* found that the defendant could not be prosecuted as an adult nor could he be prosecuted within the jurisdiction of the juvenile court system. *Webber*, ¶11.

Adoption of the proposition of law resolves the appropriate forum to hold Orr accountable for his offense and eases any concerns that juvenile courts may have regarding imposing a disposition upon an adult. Adoption of the proposition of law does not encourage dilatory action by prosecutors and addresses the real concern of seeking justice for victims of sexual assaults and victims of homicides (who would also be affected by this case given the lack of a statute of limitations for murder).

Ex Post Facto and Retroactivity Analysis

As argued in Appellant's merit brief and in the OPAA amicus curiae's merit brief, the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution are not implicated merely because Orr could have been adjudicated delinquent had his identity and culpability been determined immediately after the sexual assault was reported. Nor does the fact that Orr may be subjected to penalties under R.C. Chapter 2929 automatically implicate an infringement upon Orr's substantial rights. Again, the "[a]pplicaiton of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *State v. Walls*, 96 Ohio St.3d 437 at 444, 2002-Ohio-5059 citing *Hallowell v.*

Commons, 239 U.S. 506, 508 (1916) internal quotation marks omitted. It is not clear that Orr would have faced a lesser term of incarceration or detention while in juvenile court nor is it clear that a court in the General Division would consider Orr's age as a mitigating factor in the event that he were to be found guilty of the offenses charged. Orr has no constitutional right to be treated as a child, and his subsequent convictions cast doubt whether Orr would have benefited had he remained subject to the jurisdiction of the juvenile court. See *State v. Orr*, 8th Dist. Cuyahoga No. 100841, 2014-Ohio-4680. Courts in Ohio did not lose jurisdiction over the crimes committed by Orr because he turned 21 years old.

The appellate court's decision in *In re Cox*, 36 Ohio App. 2d 65 (7th Dist. 1973) which had construed R.C. R.C. 2151.355(I), illustrates early appellate court recognition that a juvenile court under then existing statutes to treat a juvenile who was over the age of twenty-one as an adult. Similar provisions exist under current law as R.C. 2152.02(C)(6) contemplates an ability to, "at any time after the person attains twenty-one years of age..." to make a disposition and that, "the places at which the person may be held under that disposition are not limited to places authorized under this chapter solely for confinement of children..." R.C. 2151.355(A)(12) in 1993 permitted a juvenile court to make, "any further disposition that the court finds proper..." Ohio laws contemplate an ability to adjudicate or prosecute crimes committed by a juvenile within the statute of limitations, even where the juvenile is now over the age of 21 years old.

Due Process

Appellee argues that as a matter of Due Process, the statutory mechanism that provides the forum in which the criminal charges against him, violate his Due Process rights. Appellee argues that the differences between adolescents and adults and the differences between the juvenile court and the General Division, makes his prosecution unconstitutional. Again, Appellee argues that he

is entitled to be treated as a “child” in juvenile court but also argued to the court below that even the juvenile court was not a proper forum to hear the charges against him. In this matter, treating Appellee as an adult, reflects his current age, holds him accountable for his crimes and provides him the Due Process rights afforded to all defendants who are charged with criminal offenses.

The argument that Mr. Orr’s Due Process rights are unsupported by *Vitek v. Jones*, 445 U.S. 480, 493-494, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). *Vitek* dealt with the Due Process rights of a convicted felon who was transferred to a mental hospital subject to involuntary commitment. Nothing in R.C. 2152.02(C)(3), R.C. 2152.23(I) or R.C. 2152.12(J) takes away rights that Orr would obtain in a criminal proceeding to ensure nor does it take away all ability for the trial court to consider youth as a mitigating factor in imposing sentence, if Orr were to be convicted in the criminal case.

Pre-Indictment Delay

The case below was not dismissed on the issue of pre-indictment delay and the appellate court affirmed the judgment of the trial court based upon the jurisdictional analysis. This Court recently confirmed the proper test for adjudging pre-indictment delay in *State v Jones*, Slip Opinion No. 2016-Ohio-5105. Appellee argues that because twenty years have elapsed, that the parties have aged is problematic, and that the passage of time also hampers the identification and location of witness is problematic. But these concerns are not for the Court to address at this time and *Jones* lays out the appropriate test for any pre-indictment challenge if this case is remanded to the trial court for further proceedings. Further the reasons for any unjustified delay is not addressed until actual prejudice is established.

Bindover Procedures, Sex Offender Registration

The State maintains that there is no substantive right to a bindover procedure and that Appellee's rights have not been infringed. Although there are noted differences between some adult behavior and behavior of juveniles, not all juveniles are subjected to remain in the juvenile justice system. Rather than view the bindover procedure as a "right" it should be viewed a mechanism to ensure that those who can benefit from the services of the juvenile justice system receive those services. One of the determinations to be made under a discretionary bindover is that:

The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

R.C. 2152.12(B)(3).

The statutory mechanism to conduct a discretionary bindover permits the juvenile court to conduct an investigation. One of the factors to consider for a discretionary bindover is whether there is sufficient time to rehabilitate the child within the juvenile system. See R.C. 2152.12(D)(9). Mandatory bindovers apply to certain juveniles who commit certain crimes, with the legislative determination that those juveniles because of their age and other factors, such as the crime, are not amenable to treatment in the juvenile court system. See R.C. 2152.12(A)(1)(a). The juvenile court system recognizes that its resources are not applicable to every person considered a "child" under the Ohio Revised Code and that is why the Revised Code provides exceptions to who is considered a "child." The statutory provisions: R.C. 2152.02(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J), reflect the understanding that persons who commit a crime as a juvenile but apprehended for those crimes as an adult are not necessarily amenable to the services normally reserved for children in

the juvenile court system. The statutory provisions also implicitly recognize the goals of holding offenders accountable for their actions and the need to provide justice for the victim.

Amicus curiae on behalf of Mr. Orr also argues that his *ex post facto* argument is further substantiated in that Mr. Orr would receive increased punishment under the Adam Walsh Act. But Mr. Orr is not subject to the Adam Walsh Act. Because the crime was committed prior to January 1, 2008, the Adam Walsh Act does not apply to him. *State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. Megan's Law to the extent applicable remains a civil-remedial remedy. See *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 869 N.E.2d 110. Despite objections to sex offender classification upon Orr, that issue is not ripe for review and the State notes that Orr is not necessarily foreclosed from challenging the application of sex offender registration in the event he is convicted or otherwise adjudicated for rape.

Finally the goal of juvenile dispositions are not limited to merely providing for the welfare of a "child" but also takes into consideration the purpose of protecting public interest and safety, holding the offender accountable for the offender's actions and to restore the victim. See R.C. 2152.01. By focusing primarily on the welfare of the child and holding that Orr can neither be prosecuted as an adult or adjudicated in any other court, the Eighth District in *State v. Orr*, 8th Dist. Cuyahoga No. 102460, 2015-Ohio-4081 and *State v. Webber*, 8th Dist. Cuyahoga No. 101875, 2015-Ohio-1953, provides that certain offenders – even if apprehended within the statute of limitations, are not held accountable for their actions and justice for the victim is now avoided.

CONCLUSION

There are no liberty interests or substantive right to jurisdiction in a particular court and merely because there may be additional consequences in one court, such as the potential for certain dispositions or sentences of collateral consequences such as sex offender registration does not require a determination that the defendant avoid all consequences for his criminal action by declaring that there are no remedies available either in the General Division of the Court of Common Pleas or that of the Juvenile Division of the Court of Common Pleas. Whether Mr. Orr should register as a sex offender under Megan's Law (to the extent the offense was committed prior to January 1, 2008) or whether such registration is permissible is not ripe for review, as Mr. Orr has not been adjudicated delinquent or convicted as a sex offender. The General Assembly enacted, R.C. 2152.02(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J) in recognition that those apprehended for their criminal offenses after attaining the age of 21, should have their cases heard in the General Division rather than have their cases heard in juvenile court which may not necessarily be able to address the rehabilitative needs of adult offenders who appear before that court. The State respectfully asks this Court to reverse the decision of the court of appeals and to remand this case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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