Supreme Court of Ohio Clerk of Court - Filed March 03, 2017 - Case No. 2016-0907

IN THE SUPREME COURT OF OHIO

In the Matter of D.S., Appellant	Case No.: 2016-0907 On Appeal From the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 15AP-487

REPLY BRIEF OF APPELLANT D.S.

Yeura R. Venters 0014879
Franklin County Public Defender

-and-

David L. Strait 0024103
Assistant Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
Telephone: 614/525-8872
Facsimile: 614/461-6470
E-Mail: dlstrait@franklincountyohio.gov

Attorney for Appellant

Ronald J. O'Brien 0017245
Franklin County Prosecuting Attorney

-and-

Seth L. Gilbert 0072929
373 South High Street, 14th Floor
Columbus, Ohio 43215
Phone: 614/462-3555
Fax: 614/462-6103

Attorney for Appellee

TABLE OF CONTENTS

Page No.

Table of Authorities iii

Argument 1

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. 1

I. Even after enactment of HB 179 in 2002, the primary goals of the Ohio juvenile system continue to be serving the best interests of the child, protecting the community, and avoiding the stigmatization and other consequences of a formal delinquency adjudication. 1

II. In furtherance of those goals, Ohio law vests juvenile court with broad discretion in determining whether an alleged offender should be prosecuted as a delinquent 2

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... 4

I. The analysis of *In re D.B.* applies here even though the alleged offenses are based upon "sexual contact" rather than "sexual conduct" 4

I. The State fails to demonstrate a need to overrule precedent 8

Conclusion 9

Certificate of Service 10

TABLE OF AUTHORITIES

Page No.

Cases

Ada v. Guam Soc. of Obstetricians & Gynecologists,
506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) 4

In re Corcoran,
68 Ohio App. 3d 213, 216-17, 587 N.E.2d 957 (1990) 3

In re C.S.,
115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177 1

In re D.B.,
129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528 4

In re Frederick,
63 Ohio Misc. 2d 229, 622 N.E.2d 762 (C.P. 1993).. 3

In re M.D.,
38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988) 2

State v. Aalim,
2016-Ohio-8278 2

Westfield Ins. Co. v. Galatis,
100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 8

Yajnik v. Akron Dept. of Health, Hous. Div.,
101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E.2d 632 4

Statutes

R. C. 2151.01(B) 3

R.C. 2907.01(A).. 6

R.C. 2907.01(B) 6

R. C. 2907.02(A)(1)(b) 4, 5, 7

Page No.

R.C. 2907.05(A) (4) 4, 5

Rules

Juv.R. 1 2

Juv.R. 9(A) 2, 3

Juv.R. 29(F) (2) (d) 2

Constitutional Provisions

Fourteenth Amendment, United States Constitution 5

Article I, §16, Ohio Constitution 5

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.

I.

EVEN AFTER ENACTMENT OF HB 179 IN 2002, THE PRIMARY GOALS OF THE OHIO JUVENILE SYSTEM CONTINUE TO BE SERVING THE BEST INTERESTS OF THE CHILD, PROTECTING THE COMMUNITY, AND AVOIDING THE STIGMATIZATION AND OTHER CONSEQUENCES OF A FORMAL DELINQUENCY ADJUDICATION.

At the outset of its argument in response to this Proposition of Law, the State urges that the changes brought about by the enactment of House Bill 179 in 2002 "represent a policy shift in delinquency proceedings" that shifts the focus of juvenile justice away from its traditional emphasis on the treatment and rehabilitation of juvenile offenders. The State apparently believes that the legislation's emphasis on making juvenile offenders accountable for their crimes represents a significant policy shift that somehow renders authority based upon the policy basis of juvenile justice irrelevant.

Post House Bill 179 decisions by this Honorable Court belie this contention. The Court stated in *In re C.S.,* 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 65 that juvenile courts "occupy a unique place in our legal system." The Court went on to note

> we have found * * * that the General Assembly has adhered to the core tenets of the juvenile system even as it has made substantive changes to the Juvenile Code in a get-tough response to increasing juvenile caseloads, recidivism, and the realization that the harms suffered by victims are not dependent upon the age of the perpetrator.

In re C.S., at ¶74. See, also, *State v. Aalim,* 2016-Ohio-8278, ¶ 16,

II.

IN FURTHERANCE OF THOSE GOALS, OHIO LAW VESTS JUVENILE COURT WITH BROAD DISCRETION IN DETERMINING WHETHER AN ALLEGED OFFENDER SHOULD BE PROSECUTED AS A DELINQUENT.

Consistent with these objectives, Ohio law empowers the juvenile court with the authority to reject formal prosecution in favor of the utilization of other resources to address the circumstances that bring the juvenile to the attention of the court. The juvenile court has the authority to divert a child out of the juvenile court system prior to the filing of a complaint, during the pendency of a case, or after adjudication. See generally, Ohio Juv. R. 1; R. 9: and R. 29(F) (2) (d). Significantly, the Rules do not limit the authority of the juvenile court to divert a child to cases involving only minor offenses. Further, the Rules do not require agreement by the prosecution in order to divert. The State does not have the right or ability to veto the diversion decision.

Moreover, contrary to the holding of the court below and the State's argument here, nothing in the juvenile rules limits the authority of the juvenile court to divert to cases in which there is "record evidence" that no crime was committed. One of the goals of Juv.R. 9 is to avoid the creation of "record evidence" in the first place. After all, the diversion decision can be made before the complaint is even filed. Further, if no crime has been committed, the court should dismiss the matter outright and not even contemplate diversion.

In this case, the juvenile court exercised its jurisdiction to divert after the filing of the complaint. In *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988), this Court recognized that in an appropriate case, the juvenile court has the authority and obligation

to dismiss a delinquency complaint for diversion. The authority to dismiss a delinquency complaint post-filing is consistent with Juv. R. 9(A). The rule gives the juvenile court the discretion to determine whether court action is in the best interest of the child and public and whether the hearing should be formal or informal. *In re Corcoran*, 68 Ohio App. 3d 213, 216-17, 587 N.E.2d 957 (1990) (citing to a previous version of the Revised Code that called for the law "[t]o protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefore a program of supervision, care, and rehabilitation[.]" R. C. 2151.01(B) *See also In re Frederick*, 63 Ohio Misc. 2d 229, 622 N.E.2d 762 (C.P. 1993).

The State argues that diversion in the proceedings below was inappropriate because the juvenile court did not consider the interests of the alleged victim. But the very language of the juvenile court's decision belies this contention:

> The Court further finds this case should be DISMISSED under Rule 9 as ***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***.
>
> (Franklin County Juvenile Court Decision, April 13, 2015)(Emphasis added.)

This would certainly appear to be an appropriate resolution of a case in which two children who were under thirteen and who lived in the same household engaged in sexual conduct and contact on a single day. The juvenile court's ruling reflects the view that the issues underlying the allegations are best addressed through the utilization of community resources on a voluntary basis—and the view that if the parents are unable to do so,

formal intervention through the filing of a dependency action, as opposed to a delinquency complaint, might be appropriate.

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.

I.

THE ANALYSIS OF *IN RE D.B.* APPLIES HERE EVEN THOUGH THE ALLEGED OFFENSES ARE BASED UPON "SEXUAL CONTACT" RATHER THAN "SEXUAL CONDUCT."

R.C. 2907.05(A) (4) is unconstitutional as applied to a child under the age of 13. An as-applied challenge such as this alleges that application of the statute in a particular factual context is unconstitutional. *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 14, citing *Ada v. Guam Soc. of Obstetricians & Gynecologists,* 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting).

In *In re D.B.,* 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528.*,* 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.

R.C. 2907.05(A) (4) is analogous to R.C. 2907.02(A) (1) (b) and suffers from the same constitutional infirmities. It bases criminal liability when the alleged victim is under 13 even though the alleged offender is also under 13. Both are within the protected class.

The State again argues 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. But 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.

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. Both the alleged victim and the alleged offender or legally incapable of consenting to sexual activity.

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. 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. It should also be noted that the very language of the complaint filed below states that D.S. engaged in sexual contact or that D.S. caused D.M. to engage in sexual contact. Since the element of purpose (i.e., "for purpose of sexually arousing or gratifying either person") lies in the definition of sexual contact, the allegation that D.S. caused D.M. to engage in sexual contact does little to distinguish who the offender is. One cannot engage in sexual contact without the purpose of sexually arousing or gratifying either person. The language of the indictment seems to suggest that both D.S. and D.M. had this purpose.

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.*

It is particularly noteworthy that both in the proceedings below and in its briefing here, the State argues that D.S. was actually the offender—but offered no argument as to *why* the State deemed him so. The State has pointed to absolutely no facts that would support that determination.

II.

THE STATE FAILS TO DEMONSTRATE A NEED TO OVERRULE PRECEDENT.

The State urges this Court to overrule the *D.B.* decision. But the State's argument fails to meet the standards set forth in this Court's opinion in *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

In *Galatis*, the Court recognized the importance of adherence to precedent:

> Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

Id. at ¶1.

In *Galatis*, the Court established a three-part test for overruling precedent:

> A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Id. at paragraph one of the syllabus.

The State does not cite *Galatis*. It merely argues that *D.B.* was wrongly decided, but the argument is little more than a disagreement with the decision. The State does not assert any argument about—and cannot establish---the other two parts of the *Galatis* test. In the absence of such argument and proof, the State's argument for reversal of precedent fails.

CONCLUSION

For the foregoing reasons, and those set forth in his opening brief, Appellant respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

Yeura R. Venters 0014879
Franklin County Public Defender

BY:/s David L. Strait
David L. Strait 0024103 (Counsel of Record)
373 South High Street, 12th Floor
Columbus, Ohio 43215
Telephone: (614) 525-8872
Facsimile: (614) 461-6470
E-Mail: dlstrait@franklincountyohio.gov

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Reply Brief of Appellant D.S. was served upon the following counsel by hand delivery, this 3rd day of March 2017:

Seth L. Gilbert
Assistant Franklin County Prosecuting Attorney
373 South High Street, 14th Floor
Columbus, Ohio 43215

Attorney for Appellee

BY:/s David L. Strait
Attorney for Appellant