

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN RE: N.A.M.

Appellate Case No. 27723

Trial Court Case No. A-2017-001871

[Civil Appeal from Juvenile Court]

DECISION AND FINAL JUDGMENT ENTRY

February 1, 2018

PER CURIAM:

{¶ 1} N.A.M. appealed the juvenile court’s order transferring him to adult court for criminal prosecution. His adult case has not yet been resolved. The State of Ohio moved to dismiss the appeal, arguing that the “mandatory bindover” order was not final and appealable under *In re Becker*, 39 Ohio St.2d 84, 314 N.E.2d 158 (1974). N.A.M. responded that the order was final as a provisional remedy under the statute defining final appealable orders. R.C. 2505.02(B)(4). He argues he should have the opportunity to immediately appeal the juvenile court’s decision not to conduct an amenability hearing during mandatory bindover proceedings. See *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862 (“*Aalim I*”) (mandatory transfers without amenability determinations violate due process). Upon consideration, we conclude that the mandatory

bindover order is not final and appealable at this time and dismiss the appeal for lack of jurisdiction.

{¶ 2} It is well established that an appellate court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 3} R.C. 2505.02 defines final orders. N.A.M. relies on the provisional remedy section:

An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4). Thus, to determine if the mandatory bindover order is final under this section, we consider “(1) whether the orders are provisional remedies, (2) whether the orders determine the action and prevent a judgment in [N.A.M.’s] favor with respect to the provisional remedies, and (3) whether [N.A.M.] would have a meaningful or effective remedy if his appeal must wait until after final judgment in his case.” *In re D.H.*, Ohio Sup. Ct. Slip Opinion No. 2018-Ohio-17, ¶ 11.

{¶ 4} This case turns on the third prong, as the Supreme Court of Ohio has held that a mandatory bindover order is a provisional remedy within the statute's definition. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 23; see also *In re D.H.* at ¶ 12-13. And, the bindover order here determined the action with respect to that provisional remedy. *In re D.H.* at ¶ 14-15.

{¶ 5} To satisfy the third prong of the test, N.A.M. must "demonstrate that he would lack a meaningful or effective remedy if he must wait to appeal until after final judgment in the adult court." *In re D.H.* at ¶ 16. N.A.M. argues that an appeal after an adult conviction "is meaningless" for several reasons related to the amenability hearing to which he claims to be entitled.

{¶ 6} First, he asserts that delay in allowing an appeal would be prejudicial to him as a juvenile:

The clock is ticking. The time to rehabilitate N.M. within the juvenile system is being cut shorter and shorter each day. As N.M. continues to get older, his rehabilitative opportunities diminish. N.M. could age out of juvenile detention. In that case, there would be no meaningful review whatsoever. Even if he does not age out, the less time he has for rehabilitation, the less likely the court will find him amenable to rehabilitation.

{¶ 7} The Supreme Court of Ohio recently rejected a similar time-based argument in *In re D.H.*:

D.H. points out that one factor in determining whether a juvenile should be bound over to adult court is the sufficiency of time to rehabilitate him in the juvenile system. See R.C. 2152.12(D)(9) and (E)(8). In D.H.'s view, if he has

to wait for final judgment in adult court before challenging the bindover decision, he loses time for rehabilitation and—potentially—could age out of the juvenile system. But by itself, the passage of time—a factor in virtually every case in which a party must wait to appeal—does not render a future appeal meaningless or ineffective.

Id. at ¶ 17. The Court concluded that D.H. had a meaningful remedy by way of appeal after any adult conviction. We find that conclusion compelling here.

{¶ 8} N.A.M. distinguishes the situation in D.H. by noting that D.H. received an amenability hearing, whereas N.A.M. did not. While true, we are not convinced this impacts our analysis. D.H. was transferred to adult court by way of a discretionary bindover, a procedure requiring the juvenile court to conduct an amenability hearing. R.C. 2152.12(B)(3). N.A.M.’s transfer to adult court was a mandatory one, i.e., a procedure that – under the current law – does not require the juvenile court to conduct an amenability hearing. See *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883 (“*Aalim II*”) (reconsidering *Aalim I* and holding that mandatory bindovers without amenability determinations do not violate due process). N.A.M.’s argument thus rests on his speculation that this court will find error on appeal and hold that the juvenile court was required to conduct an amenability hearing before issuing a mandatory bindover order. See *Aalim I*. We decline to find the lack of a meaningful remedy on the basis of such speculation.

{¶ 9} N.A.M. also asserts the lack of a meaningful remedy because the juvenile court cannot now satisfy the statutory requirement that an investigative report (for the purposes of determining amenability to rehabilitation in the juvenile system) be prepared

and submitted within 45 days of when the juvenile court ordered the investigation. R.C. 2152.12(C). However, should this court conclude on appeal after the conviction that an investigative report should have been ordered, such an order could be issued and the report timely prepared. N.A.M. does not lack a meaningful remedy on this basis.

{¶ 10} Like D.H. and others, N.A.M. can adequately address his claimed error on appeal from any conviction in adult court. See, e.g., *State v. Dorsey*, 2d Dist. Montgomery No. 26831, 2018-Ohio-34, ¶ 33-34 (challenging his mandatory bindover after adult criminal conviction); *State v. Carpenter*, 2d Dist. Clark No. 2016-CA-66, 2017-Ohio-8905, ¶ 14-19 (same). We conclude that N.A.M. has not shown he would lack a meaningful or effective remedy if he must wait to appeal until after final judgment in the adult court. This third prong of the provisional remedy test being unsatisfied, we conclude that the transfer order is not a final appealable order. The State's motion to dismiss is therefore SUSTAINED. We DISMISS this appeal, Montgomery Appellate Case No. 27723, for lack of jurisdiction.

{¶ 11} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

JEFFREY M. WELBAUM, Presiding Judge

MARY E. DONOVAN, Judge

JEFFREY E. FROELICH, Judge

Copies to:

Kelly Schroeder
One S. Main Street, Suite 1800
Dayton, Ohio 45402
Attorney for Appellant

Heather Jans
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
Attorney for Appellee

Hon. Anthony Capizzi
Montgomery County Juvenile Court
380 W. Second Street
Dayton, Ohio 45422

Courtesy copies to:

Hon. Barbara P. Gorman
Montgomery County Common Pleas Court
41 N. Perry Street
P.O. Box 972
Dayton, Ohio 45422
Re: Montgomery Common Pleas Court Case No. 2017 CR 02506

Bradley Baldwin
854 E. Franklin Street
Dayton, Ohio 45459

Justin Sheridan
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

CA3/KY