

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-P-0031
JOSHUA L. FORTSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0381.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Brian J. Williams, 141 Broad Blvd., Suite 206, Cuyahoga Falls, OH 44221 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Joshua L. Fortson, appeals his conviction, following a no contest plea, of two counts of sexual battery in the Portage County Court of Common Pleas. At issue is whether R.C. 2151.23(l), which allowed the state to prosecute him as an adult for offenses he committed while he was a juvenile, violated his constitutional rights. Based on precedent established by the Supreme Court of Ohio and the reasons that follow, we hold the statute is constitutional and we affirm appellant's conviction.

{¶2} On June 18, 2010, appellant was indicted on four counts of rape, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b) and (B). The indictment alleged that the criminal conduct occurred some eight years earlier between January 1, 2002 and July 1, 2003, and that the female victim was less than ten years old at the time.

{¶3} Appellant concedes that between January 2002 and July 2003, he required the child to perform oral sex on him at her home on several occasions. The victim was then living with her mother and her mother's boyfriend, who is appellant's father. Appellant raped the child while he was babysitting her. At the time the victim was eight and nine years old and appellant was 14 and 15.

{¶4} The victim reported these crimes in 2009 to her counselor at the Children's Advocacy Center. The counselor forwarded the report to police and, following an investigation, appellant was indicted. At that time the victim was a teenager and appellant was 22 years old.

{¶5} Appellant entered a plea of not guilty. He was then serving time in prison for unrelated convictions. He subsequently filed a motion to dismiss, arguing that R.C. 2151.23(l) is unconstitutional. The trial court overruled the motion and a jury trial commenced.

{¶6} During the third day of trial, appellant and the state entered a plea bargain pursuant to which appellant pled no contest to counts one and two as amended to sexual battery, felonies of the third degree, in violation of R.C. 2907.03, and the remaining counts were nolle. The court found appellant guilty and referred the case for a presentence investigation.

{¶7} The court sentenced appellant on March 10, 2011. At that time appellant was 23 years old. He is now 24. In the instant case, the court sentenced appellant to five years in prison on each count, the terms to be served concurrently to each other, for a total of five years. Appellant was also adjudicated to be a Tier III sexual offender.

{¶8} On April 25, 2011, appellant appealed his conviction. The state moved to dismiss the appeal as untimely. Appellant filed a brief in opposition and a motion for a delayed appeal. By separate judgment entry, this court denied the state's motion to dismiss and granted appellant's motion to file a delayed appeal.

{¶9} Appellant asserts the following for his sole assignment of error:

{¶10} "The trial court erred in its order (April 13, 2011) by overruling Defendant's/Appellant's Motion to Dismiss Indictment."

{¶11} Appellant argues that because R.C. 2151.23(l) allowed the state to prosecute him as an adult for offenses he committed while he was a juvenile, the statute violated his fundamental right to be tried in juvenile court as well as his rights to due process and equal protection. We do not agree.

{¶12} It is well-established that statutes enjoy a strong presumption of constitutionality. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶6. A statute will be upheld unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶29.

{¶13} If a legislative enactment violates a fundamental right, it is subject to strict judicial scrutiny and will be found to be unconstitutional unless it is shown to be necessary to promote a compelling state interest. *Sorrell v. Thevenir*, 69 Ohio St.3d

415, 422 (1994). Further, if a legislative enactment impacts a suspect class, it is likewise subject to strict judicial scrutiny. *In re Chappell*, 164 Ohio App.3d 628, 2005-Ohio-6451, ¶34 (7th Dist.).

{¶14} In contrast, when a statute is challenged on due process grounds and a fundamental right is not involved, the rational basis test applies. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶49. A statute will be found valid under the rational basis test if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. *Id.*

{¶15} Likewise, in determining violations of equal protection when neither a fundamental right nor a suspect class is involved, a legislative classification passes muster if the state can show a rational basis for the unequal treatment of different groups. *Beatty v. Akron City Hospital*, 67 Ohio St.2d 483, 492 (1981). Equal protection does not preclude legislation that treats a class differently as long as there is a rational basis for such classification and the law treats similarly situated persons equally. *Conley v. Shearer*, 64 Ohio St.3d 284, 288 (1992).

{¶16} Because appellant argues that the relevant statutes are unconstitutional as applied to his particular situation, he has the burden of presenting clear and convincing evidence of a presently existing state of facts that make the statutes unconstitutional when applied to those facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶38.

{¶17} In 1997, the General Assembly promulgated a series of amendments to R.C. Chapter 2151. Specifically, appellant challenges R.C. 2151.23(I), which was added to this chapter as part of these amendments. That section provides:

{¶18} (I) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, * * * the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act * * *.

{¶19} The Supreme Court of Ohio considered the 1997 amendments to R.C. Chapter 2151 in *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059. While the ultimate issue in *Walls* was different, i.e., whether the retroactive application of the amended statutes was unconstitutional, *Walls* is instructive. In *Walls*, the defendant was indicted in 1998 for an aggravated murder that occurred in 1985 when he was 15. Although Walls was a minor at the time of the offense, the new statutes were in effect at the time of his indictment, and the state therefore prosecuted him as an adult. Walls moved to dismiss his indictment, arguing that the 1985 version of R.C. 2151.011(B)(1), under which he could not be tried as an adult until the juvenile court had first bound him over

to the general division, should instead control his case. The trial court denied the motion. Walls was tried as an adult, convicted of aggravated murder, and sentenced to life imprisonment.

{¶20} Walls argued the common pleas court lacked jurisdiction because the statutes allowing for his trial as an adult were unconstitutionally retroactive as applied to him. However, the Supreme Court held that the retroactive application of the statutes was constitutional. *Id.* at ¶41. The Supreme Court noted that “the statutory amendments made the age of the offender *upon apprehension* the touchstone of determining juvenile-court jurisdiction without regard to whether the alleged offense occurred prior to the amendments’ effective date.” (Emphasis sic.) *Id.* at ¶14.

{¶21} The Supreme Court then considered whether the statutes were substantive or remedial for purposes of retroactivity analysis. The Supreme Court rejected Walls’ argument that the 1997 statutory changes were substantive. *Id.* at ¶17. The Supreme Court stated:

{¶22} The 1997 changes to R.C. Chapter 2151 did not impair any of Walls’s vested rights * * *. Although the 1997 amendments * * * allowed criminal prosecution without the bindover proceeding required under the 1985 law, we cannot characterize this change as anything other than remedial. Even under the law in effect in 1985, Walls was subject to criminal prosecution in the general division * * * if the juvenile court made certain determinations specified by statute. * * *. Thus, under either the 1985 law or the 1997 law, Walls was on notice that the offense he allegedly

committed could subject him to criminal prosecution as an adult in the general division * * *. The 1997 law merely removed the procedural prerequisite of a juvenile-court proceeding. Even though they may have an occasional substantive effect on past conduct, “it is generally true that laws that relate to procedures are ordinarily remedial in nature.” [*State v.*] *Cook*, 83 Ohio St.3d [404,] 411 [(1998)] * * *. *Walls*, *supra*, at ¶17.

{¶23} The Supreme Court in *Walls* further explained that “application of a new jurisdictional rule usually “takes away no substantive right but simply changes the tribunal that is to hear the case.” *Id.* at ¶18, quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994). The court in *Walls* noted that a bindover proceeding is merely a procedural matter that determines the forum in which guilt or innocence will be found. *Id.* Consequently, the court held that application of the 1997 amendments in place at the time the state commenced criminal proceedings against Walls did not impair his substantive rights. *Id.* at ¶19-20.

{¶24} The *Walls* court noted that the defendant’s claim that the statutory amendments increased the punishment for his conduct was speculative at best. *Id.* at ¶31. The court held that, while the defendant remained technically eligible for retention within the jurisdiction of the juvenile court, Walls had no realistic chance of being retained in the juvenile court system. *Id.* at ¶31. The court cited two reasons for this holding: (1) the purpose of the former bindover statute, R.C. 2151.26, was “the assessment of the probability of rehabilitating the child within the juvenile justice system;” and (2) the former bindover statute “contemplate[d] the assessment of a

person *younger* than 21 years of age.” (Emphasis added.) *Id.* at ¶38-40. Further, the court noted that even if a juvenile court retained jurisdiction over a delinquency complaint against a person over 21 years old, its dispositional options would be “profoundly limited.” *Id.* at ¶40. As an example, the court noted that the former law would have prevented a juvenile court from imposing any type of institutionalization or confinement on a person over 21 years old. *Id.* The court held that in these circumstances, any bindover hearing under the former bindover statute would have been simply a procedural step in the process of transferring Walls for prosecution as an adult. *Id.* at ¶41.

{¶25} While the court in *Walls* did not address appellant’s specific argument that trying him as an adult for a crime he committed when he was a juvenile violated fundamental fairness, due process, or equal protection, the *Walls* court expressly found “no constitutional violations” in prosecuting the defendant as an adult for an offense he committed when he was a juvenile. *Id.* at ¶57.

{¶26} Two years later in 2004, the Fifth District in *State v. Schaar*, 5th Dist. No. 2003CA00129, 2004-Ohio-1631, addressed the identical arguments asserted here by appellant. In *Schaar*, the defendant, who was 22 years old, was indicted in 2003 for gross sexual imposition. In 2001, the victim, who was then eight years old, reported that the defendant had abused her in 1998 when she was five years old and the defendant was 17 years old. The defendant filed a motion to dismiss, which the trial court denied. The defendant pled no contest. On appeal, he argued the state’s prosecution of him as an adult pursuant to R.C. 2151.23(I) violated his constitutional right of fundamental fairness. He argued that it was fundamentally unfair to prosecute

him as an adult for an offense he committed when he was a juvenile. He also argued his prosecution as an adult violated his due process and equal protection rights.

{¶27} The Fifth District noted that, even though the defendant alleged the state had violated his “constitutional guarantee[] of fundamental fairness,” the case did not involve a fundamental right or a suspect class. As a result, the court held that the state was only required to show a rational basis for the legislation. *Id.* at ¶28.

{¶28} The Fifth District held that R.C. 2151.23(l) does not violate due process or equal protection. *Schaar, supra*, at ¶¶27-29. The Fifth District relied on *Walls, supra*, in support of its holding. Specifically, the Fifth District held that R.C. 2151.23(l) did not violate the defendant’s due process rights because, in *Walls*, the Ohio Supreme Court held that changing the jurisdiction from juvenile court to the general division did not involve any substantive right. *Schaar, supra*, at ¶27. Likewise, the Fifth District found no equal protection violation because there was a rational basis for the classification in the statute. The court held that by enacting R.C. 2151.23(l), the legislature determined that persons who commit a crime as a juvenile, but are not prosecuted for it until after turning 21, are not likely to be amenable to the juvenile justice system and are automatically bound over for prosecution as an adult. *Id.* at ¶29.

{¶29} Four years later, in *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, the Supreme Court of Ohio held that due process and fundamental fairness were not violated by the application of the challenged statutes to the defendant when he was prosecuted as an adult and sentenced to life in prison for the rape of a child under 13 when he was 15 at the time of the offense, but not prosecuted until he was over 21. *Id.* at ¶58. In *Warren*, the defendant raped the female victim multiple times in 1988, when

she was 9 and he was 15. The victim did not report the abuse to police until 2004. After the defendant was found guilty, he was sentenced to life on each of the rape convictions and adjudged to be a sexual predator. After the appellate court affirmed the conviction, the Supreme Court of Ohio considered whether the 1997 statutory amendments were unconstitutionally applied to him because he was a minor at the time of the alleged crimes. Appellant argued his right to due process and a fair trial was denied when he was sentenced as an adult for crimes alleged to have been committed when he was 15 years old. He argued that juvenile offenders are entitled to special protections, and asserted that due process requires that in determining an offender's guilt, the trial court must take into account the offender's minority status at the time of the offense.

{¶30} The Supreme Court in *Warren* noted that, while *Walls* was not directly on point because the defendant there did not raise due process or fundamental fairness issues, the *Warren* court noted that the similarities between the two cases were substantial, and that “the essential principles that emerge from *Walls* make it impossible for Warren to prevail on his due process argument.” *Warren, supra*, at ¶48.

{¶31} The *Warren* court held that *Walls* stands squarely in the way of any argument that Warren might make about the lack of a bindover hearing in his case because, although Warren “perhaps remained eligible for retention within the jurisdiction of the juvenile court under a technical reading of the old statutes, the practical reality is that [he] had virtually no chance of being kept in the juvenile system.” *Warren, supra*, at ¶50, quoting *Walls, supra*, at ¶31. The *Warren* court held that, “[a]s in *Walls*, any bindover hearing under the statute that was in place in 1988 would have

been simply a procedural step in the process of transferring Warren for prosecution as an adult.” *Warren, supra*, citing *Walls, supra*, at ¶41.

{¶32} Further, the Supreme Court in *Warren* cited with approval the Fifth District’s holding in *Schaar, supra*. The *Warren* court stated:

In [*Schaar, supra*,] the defendant argued that his conviction for gross sexual imposition violated * * * fundamental fairness because he committed the offense while he was a juvenile, but prosecution did not commence until he was 22 years old and he was prosecuted as an adult. In rejecting that argument, the Fifth District, at ¶27, noted that this court in *Walls* “specifically held that changing the jurisdiction from the juvenile to the general division * * * did not involve any substantive right. Thus, appellant’s substantive due process rights were not violated.” *The Schaar court properly interpreted the effect of Walls on a situation with some parallels to that of the present case.* (Emphasis added.) *Warren, supra*, at ¶52.

{¶33} We note that, despite the obvious relevance of the *Schaar* decision to the instant case, the state’s reliance on *Schaar*, and the Supreme Court’s approval of the Fifth District’s holding in *Schaar*, appellant does not challenge its application here or even attempt to distinguish it.

{¶34} In summary, the Supreme Court of Ohio in *Walls* held that the 1997 amendments do not impair a defendant’s substantive rights. *Id.* at ¶19. The statute merely removed the bindover procedure and changed the tribunal in which guilt or innocence would be found. *Id.* at ¶17-18. Further, in *Schaar*, the Fifth District held that

R.C. 2151.23(I) does not violate due process or equal protection. *Id.* at ¶27, 29. Finally, in *Warren*, the Supreme Court approved the Fifth District's holding in *Schaar*, *supra*. The Supreme Court thus agreed with the Fifth District's holding that due process and equal protection are not violated when a person in appellant's position is prosecuted in the general division pursuant to R.C. 2151.23(I). The *Warren* court further held that due process and fundamental fairness were not violated by application of the new statute to a defendant who turned 21 after his commission of the crimes and was prosecuted as an adult and sentenced to life. *Id.* at ¶58.

{¶35} Turning our attention to the instant case, appellant argues that R.C. 2151.23(I), as applied to him, violated his fundamental right "to fairness during criminal proceedings." He argues that because he committed the alleged offenses when he was 14 and 15, he had a fundamental right to be tried in juvenile court. He argues that because R.C. 2151.23(I) allowed the state to try him as an adult for these offenses, he was deprived of this right. Because he claims this right is fundamental, he argues the state was required to demonstrate a compelling interest to support the statute, which, he claims, the state failed to do. However, for the reasons that follow, we hold that R.C. 2151.23(A) did not impair any fundamental right of appellant.

{¶36} First, appellant cites no authority holding that he had a fundamental right to be tried in juvenile court and our independent research has not revealed any such authority.

{¶37} Second, the Ohio Supreme Court's precedent does not support appellant's contention that R.C. 2151.23(I) violated a fundamental right. Since the Supreme Court in *Walls* held that R.C. 2151.23(I) did not infringe any substantive right

of appellant and fundamental rights are more cherished and entitled to greater protection than substantive rights, see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), since R.C. 2151.23(l) does not interfere with any substantive right, logic dictates it does not interfere with any fundamental right.

{¶38} Third, like appellant, the defendant in *Schaar*, *supra*, argued that his conviction violated “fundamental fairness” and that it was “fundamentally unfair” to prosecute him as an adult for an offense he committed when he was a juvenile. The Fifth District held that this argument did not implicate a fundamental right. *Id.* at ¶28.

{¶39} We therefore hold that appellant has failed to demonstrate that R.C. 2151.23(l) impaired any fundamental right.

{¶40} Next, appellant argues that juveniles are a suspect class and that the challenged statute established an arbitrary classification of persons who committed offenses as juveniles but who are prosecuted as adults upon reaching the age of 21. A “suspect class” is defined as one that is saddled with such disabilities, or subjected to such a history of purposeful, unequal treatment as to command extraordinary protection, such as race, national origin, religion, and sex. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351 (1994). The distinction established in R.C. 2151.23(l) is between (1) offenders who commit offenses when they are juveniles and are prosecuted when they are still juveniles in juvenile court as opposed to (2) such offenders who are prosecuted in the general division after they turn 21. The basis of the distinction is the age of the defendant, not his or her membership in a suspect class. The statute applies evenly across every classification that has evinced heightened

scrutiny. Offenders are all treated alike under the statute. Thus, the challenged statute does not affect a suspect classification.

{¶41} In any event, Ohio courts have consistently held that juveniles do not constitute a suspect class in the context of equal protection law. *Chappell, supra*, at ¶37. For example, in *In re R.L.*, 8th Dist. Nos. 84543, 84545, and 84546, 2005-Ohio-26, the Eighth District held that juveniles have never been treated as a suspect class, and legislation aimed at juveniles has never been subjected to the test of strict judicial scrutiny. *Id.* at ¶16, quoting *In re Vaughn*, 12th Dist. No. CA89-11-162, 1990 Ohio App. LEXIS 3456 (Aug. 13, 1990).

{¶42} Alternatively, appellant argues that if this court determines that no fundamental right or suspect class is implicated, then this court should find that R.C. 2151.23(l) deprived him of his right to due process and/or equal protection.

{¶43} However, appellant's due process rights were not violated because changing the jurisdiction from juvenile court to the general division does not violate a defendant's due process rights. *Schaar, supra*, at ¶27. Moreover, no equal protection violation was shown because the record demonstrates a rational basis for the classification contained in R.C. 2151.23(l). The legislature chose to authorize prosecution of those in appellant's position in the general division because persons who commit offenses as juveniles but who are not prosecuted until after they turn 21 are not likely to be amenable to the juvenile justice system. *Id.* at ¶29.

{¶44} Appellant argues his due process rights were also implicated due to the difference in the penalties he would face in juvenile court as opposed to the potential sentence he faced in a prosecution in the general division. However, pursuant to *Walls*,

supra, appellant's claim that the new statutes would increase the punishment for his conduct is speculative. *Id.* at ¶30-40. While appellant remained technically eligible for retention in juvenile court under the former law, the practical reality was that he had virtually no chance of being kept in the juvenile system. He was 22 years old at the time he was indicted; the former bindover law contemplated assessment of a person younger than 21; and the former law would have prohibited the juvenile court from imposing any type of confinement on appellant for his four counts of rape. *Id.* Moreover, this argument was significantly undercut by *Walls, supra*, in which the Supreme Court of Ohio held that no substantive rights are affected in this situation. *Warren, supra*, at ¶51, citing *Walls, supra*, at ¶19.

{¶45} Finally, appellant asserts that he was prejudiced due to the passage of time between the commission of his offenses and his indictment. He does not argue that he was prevented from presenting any witnesses or other evidence as a result of the eight-year delay. Instead, he argues that he was prejudiced because, by the time he was tried, he had matured, looked like an adult, and his appearance “conjured up thoughts of sexual perversion.” However, appellant cites no authority for the proposition that because he looked like an adult by the time of trial, he could not have received a fair trial or that the results of his trial would have been different. In short, there is no evidence here of prejudice.

{¶46} We therefore hold the trial court did not err in denying appellant's motion to dismiss.

{¶47} For the reasons stated in this opinion, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.