[Cite as *State v. Bailey*, 2005-Ohio-6409.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO **CASE NUMBER 1-05-42**

PLAINTIFF-APPELLEE

v. **O P I N I O N**

JARED BAILEY

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: December 5, 2005

ATTORNEYS:

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For Appellee.

Shaw, J.

{¶1} The defendant-appellant, Jared Bailey ("Bailey"), appeals the April 12, 2005 Judgment Entry of Conviction and the May 24, 2005 Judgment Entry of Sentencing from the Court of Common Pleas, Allen County, Ohio.

{¶2} On January 5, 2005, Bailey went onto the internet and made contact with an undercover police officer pretending to be a fourteen year old girl. Bailey solicited sexual activity with the undercover police officer through textual conversation. On February 17, 2005, the Allen County Grand Jury indicted Bailey on two counts: Count 1: Importuning, a violation of R.C. 2907.07(D)(2), a felony of the fifth degree and Count 2: Attempted unlawful sexual conduct with a minor, a violation of R.C. 2923.02 and 2907.04(A), a felony of the fifth degree.

{¶3} On February 23, 2005, Bailey filed a motion to dismiss Count 1 of the indictment, claiming that R.C. 2907.07(D)(2) was unconstitutionally overbroad. On February 25, 2005, Bailey was arraigned and entered a plea of not guilty. On March 31, 2005, Bailey filed a motion for judicial diversion with a supporting psychological evaluation. Bailey also filed a motion to dismiss Count 2 of the indictment.

{¶4} On April 5, 2005, the trial court filed a judgment entry overruling Bailey's motion for judicial diversion. On April 6, 2005, the trial court filed a judgment entry overruling Bailey's motions to dismiss on both counts of the

indictment. On April 11, 2005, a pretrial was held and Bailey entered a negotiated plea of No Contest to Count 1 of the indictment. The prosecution dismissed Count 2 of the indictment in exchange for Bailey's plea. The trial court then found Bailey guilty and entered a conviction upon the record. On May 23, 2005, during the sentencing hearing, the trial court sentenced Bailey to a two-year term of community control.

{¶5} On June 20, 2005, the defendant-appellant filed his notice of appeal raising the following assignments of error:

> **THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DIVERSION WITHOUT MEANINGFUL REVIEW OF THE PETITION FOR THE SAME.**
>
> **THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENSE MOTION TO DISMISS.**

{¶6} In Bailey's first assignment of error, he asserts that the trial court erred in overruling his motion for judicial diversion. In the motion, Bailey asserted that "'[j]udicial diversion' is a tool wherein the judiciary may, on certain occasions, dismiss a charge or charges against a citizen, over objection from the prosecution, and notwithstanding possible factual guilt, when the greater interests of justice are best met by some alternative to normal prosecution." Bailey relied on *State v. Busch* (1996), 76 Ohio St.3d 613, to support his argument.

{¶7} In *State v. Busch*, 76 Ohio St.3d at 615, the Supreme Court of Ohio noted:

> **Crim R. 48(B) recognizes by implication that trial judges may *sua sponte* dismiss a criminal action over the objection of the prosecution, since the rule sets forth the trial court's procedure for doing so. The rule does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to CrimR. 48(B) if a dismissal serves the interests of justice.**

{¶8} More specifically, in the same case the Supreme Court of Ohio held that:

> **[A] trial court has the discretion to *sua sponte* dismiss a criminal case over the objection of the prosecution where the complaining witness does not wish for the case to proceed.**

Id. In the case at hand, *Busch* is inapplicable because the complaining witness, being an undercover police officer, was in effect the State and accordingly, the "complaining witness" in this case did wish to proceed.

{¶9} Furthermore, subsequent to the Court's ruling in *Busch*, the Ohio General Assembly enacted Am.Sub.S.B. No. 98, effective March 17, 1998, which in effect overturned the Ohio Supreme Court's decision in *Busch* by amending R.C. 2930.06 to provide in pertinent part as follows:

> **A court shall not dismiss a criminal complaint, charge, information, or indictment *** solely at the request of the victim and over the objection of the prosecuting attorney, village solicitor, city director of law, or other chief legal officer responsible for the prosecution of the case.**

See *Cleveland v. Hogan* (1998), 92 Ohio Misc.2d 34, 43, 699 N.E.2d 1020.

{¶10} Moreover, in the case before us, the trial court in its' judgment entry denying Bailey's motion for judicial diversion stated:

> **First of all, this Court does not have an adult diversion program. Secondly, defendant says that this Court can, in exercising its inherent discretion, order a diversion-like disposition in this case under the authority of *State v. Busch* (1996), 76 Ohio St.3d 613.**
> ***
> **In any event, even if the court had a diversion program and even if the "victim" did not want to press the charge in this case, the Court finds the instant type of offense is of the type that should not be diverted. Many other courts, including the Court of Appeals of Allen County have, in examining the state's interest in enacting R.C. 2907.07(E)(2), found that it is significantly compelling to justify restricting the type of speech regulated by the statute. An obvious purpose of the enactment of R.C. 2907.07(E)(2) is to protect minors from the unlawful solicitation of sexual activity by adults. *State v. Snyder* (2003), 155 Ohio App.3d 453, 463. The United States Supreme Court has recognized that there is a compelling interest in protecting the physical and psychological well-being of minors, which extends to shielding minors from influences that are not obscene by adult standards. *Sable Communications of California, Inc. v. Fed. Communications Comm.* (1989), 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93; *Ginsberg v. New York* (1968), 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195; *New York v. Ferber* (1982), 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113.**

{¶11} A trial court abuses its discretion when, in addition to making an error of law or judgment, it acts with an unreasonable, arbitrary, or unconscionable attitude. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. For all of the foregoing reasons, including the fact that we find no abuse of discretion in this

instance, we find no error in the decision of the trial court denying Bailey's motion for diversion. Accordingly, we overrule Bailey's first assignment of error.

{¶12} In Bailey's second assignment of error, he asserts that the trial court erred in overruling his motion to dismiss Count 1 of the indictment on constitutional grounds. In his motion to dismiss Count 1 of the indictment, Bailey challenged the constitutionality of R.C. 2907.07(D)(2). However, this court, in *State v. Snyder,* 155 Ohio App.3d 453, 2003-Ohio-6399, recently addressed the same issues presented by Bailey in the instant appeal. We find that there are no grounds to distinguish this case from *Snyder*. Consequently, for the reasons set forth in *Snyder*, supra, we overrule Bailey's second assignment of error.

{¶13} Accordingly, Bailey's assignments of error are overruled and the April 12, 2005 Judgment Entry of Conviction and the May 24, 2005 Judgment Entry of Sentencing from the Court of Common Pleas, Allen County, Ohio are affirmed.

Judgment affirmed.

CUPP, P.J., and BRYANT, J., concur.

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