[Cite as *State v. Reidenbach*, 2015-Ohio-2915.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
DANIEL REIDENBACH	:	Case No. 2014CA0019
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 13 CR 0071
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BENJAMIN E. HALL 318 Chestnut Street Coshocton, OH 43812	BROOKE M. BURNS 250 East Broad Street Suite 1400 Columbus, OH 43215

Farmer, J.

{¶1} On May 29, 2012, a complaint was filed in the juvenile court alleging appellant, seventeen years old Daniel Reidenbach, to be delinquent by reason of committing twenty counts of rape in violation of R.C. 2907.02 and twenty counts of gross sexual imposition in violation of R.C. 2907.05. Said charges arose from incidents involving appellant's half sibling, I.H., when the sibling was between six and nine years old.

{¶2} On May 30, 2012, the state filed a motion to relinquish jurisdiction, seeking to transfer the case to adult court. A probable cause hearing was held on January 12, 2012, and amenability hearings were held on March 26, and April 12, 2013. By judgment entry filed January 28, 2013, the juvenile court found probable cause, and by judgment entry filed June 6, 2013, found appellant was not amenable to treatment and granted the state's motion to relinquish jurisdiction. Appellant was indicted on November 20, 2013 on twenty counts of rape and three counts of gross sexual imposition.

{¶3} On June 11, 2014, appellant pled guilty to three counts of gross sexual imposition, felonies of the third degree. The remaining counts were dismissed. A sentencing hearing was held on July 8, 2014. By judgment entry filed July 10, 2014, the trial court sentenced appellant to thirty-six months, forty-two months, and forty-two months, to be served consecutively, for a total aggregate term of ten years in prison. The trial court also classified appellant as a Tier III sex offender.

{¶4} Appellant filed a notice of appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE COSHOCTON COUNTY COURT OF COMMON PLEAS ERRED WHEN IT SENTENCED DANIEL REIDENBACH TO CONSECUTIVE SENTENCES, BECAUSE THE COURT'S FINDINGS UNDER R.C. 2929.14(C)(4) ARE NOT SUPPORTED BY THE RECORD. R.C. 2953.08(G)(2)(a)."

II

{¶6} "THE COSHOCTON COUNTY COURT OF COMMON PLEAS ERRED WHEN IT CLASSIFIED DANIEL REIDENBACH AS A TIER III SEX OFFENDER REGISTRANT, AS DEFINED IN R.C. 2950.01(G)(1), BECAUSE THE APPLICATION OF THE ADULT REGISTRATION REQUIREMENTS OF R.C. CHAPTER 2950. TO JUVENILE OFFENDERS CREATES AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTON AND ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION."

III

{¶7} "THE COSHOCTON COUNTY COURT OF COMMON PLEAS ERRED WHEN IT CLASSIFIED DANIEL REIDENBACH AS A TIER III SEX OFFENDER REGISTRANT, AS DEFINED IN R.C. 2950.01(G)(1), BECAUSE THE APPLICATION OF THE ADULT REGISTRATION REQUIREMENTS OF R.C. CHAPTER 2950. TO JUVENILE OFFENDERS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENTS UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION."

IV

{¶8} "DANIEL REIDENBACH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF AN ADULT CLASSIFICATION ON A JUVENILE OFFENDER. FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; OHIO CONSTITUTION, ARTICLE I, SECTIONS 9 AND 10."

I

{¶9} Appellant claims the trial court erred in sentencing him to consecutive sentences. The state claims an appeal of right does not apply on this issue. We agree with the state.

{¶10} Appellant pled guilty to three counts of gross sexual imposition in the third degree, Counts 21, 22, and 23 of the indictment. The trial court sentenced appellant to thirty-six months on Count 21, forty-two months on Count 22, and forty-two months on Count 23, to be served consecutively for an aggregate term of ten years.

{¶11} Appellant argues the record does not support consecutive sentences under R.C. 2929.14(C)(4). Appellant argues he has the right to appeal the consecutive nature of his sentence under R.C. 2953.08(G)(2)(a) which states the following:

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence

> and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶12} Pursuant to this section, a sentencing challenge on appeal must fall under subsections (A), (B), or (C). Subsection (A) pertains to sentences that involve a maximum prison term, sentences that involve fourth and fifth degree felonies, sentences imposed under R.C. 2971.03(A)(3), sentences contrary to law, and sentences with an additional ten years imposed under R.C. 2929.14(B)(2)(a). All are inapplicable sub judice. Subsection (B) pertains to a state's right to appeal and is also inapplicable. Subsection (C) provides for the right to appeal consecutive sentences as follows in pertinent part:

> (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the

> Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

{¶13} Appellant did not seek leave to appeal, nor were his consecutive sentences imposed pursuant to R.C. 2929.14(C)(3). Appellant does not have an appeal as a matter of right to challenge his consecutive sentences under R.C. 2953.08.

{¶14} Assignment of Error I is denied.

II, III

{¶15} Appellant claims the sexual offender registration requirement of R.C. 2950.01(G)(1) is unconstitutional as it applies to juvenile offenders and constitutes cruel and unusual punishment. Appellant claims it is unconstitutional to impose adult sex offender registration requirements on a juvenile who has been bound over from the juvenile court to face prosecution as an adult. We disagree.

{¶16} We find appellant failed to challenge the constitutionality of the statutory scheme at the trial court level. As stated by the Supreme Court of Ohio in *State v. Awan,* 22 Ohio St.3d 120 (1986), syllabus: "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal."

{¶17} We will review the constitutional issue under ineffective assistance of counsel in Assignment of Error IV. We will also address the cruel and unusual punishment argument therein.

{¶18} Assignments of Error II and III are denied.

IV

{¶19} Appellant claims he was denied the effective assistance of counsel as his trial counsel failed to object to the imposition of an adult sex offender classification upon him as a juvenile. We disagree.

{¶20} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶21} Appellant argues the imposition of a Tier III adult sex offender classification on a juvenile is unconstitutional and constitutes cruel and unusual punishment.

{¶22} In our review, we find appellant's trial counsel strenuously litigated the case and in fact argued during the sentencing hearing the onerous nature of treating juveniles as adults (July 8, 2014 T. at 8-9):

> The second is a little more difficult when you deal with a juvenile offender who has been bound over to it be treated as an adult. That is to protect the public from future crime by this offender and others. Your Honor has a rare opportunity today. We are aware that my learned opponents are going to argue for a 10-year sentence.
>
> I remember serving as a three-judge panel up in Wayne County on a capital murder charge in which a young offender, was previously sent for a long stretch in prison, came out a hardened sexual predator, abducted a young girl on her way home from the county fair, raped her, killed her, dismembered her, and left her body in pieces throughout the Killbuck swamp in Wayne County. And I remember sitting there trying to decide whether this person should receive life without parole or death and saying, you know, every once in a while if we could turn the clock back and we had the opportunity not just to send sex offenders to prison so they come out hardened sexual predators, maybe in those situations in the future I need to stand up and say let's consider what we're doing.

> Your Honor, we know what the risk of incarceration is for somebody like Danny, with his mental health issues, with his history of abuse, with his offending behavior, with the issues that he has had, whether he was in juvenile court or whether he was under supervision by this court. You Honor, you have a rare opportunity today, we submit, to order community control sanctions, to go against the presumption and say, Danny, let's see if you can prove that you are serious. Let's see if you can prove that you are serious about getting into the most difficult kind of counseling. And, Your Honor, we have interacted with people who are drug-dependent, who are alcoholics. As a matter of fact, I am sure you probably assume most people who appear in this chair are either drug-dependent or alcoholic.
>
> Sex offender therapy is not easy. It's not a hotel. There is no room service therapy. Giving Danny that opportunity, rather than just shipping him away for a long period of time with him coming back into the community as a potentially hardened sex offender, is something that is worth pursuing. Why? Because it accomplishes the purpose of protecting the public from future crime by this offender and others.

{¶23} Originally, appellant was charged in juvenile court with forty counts, twenty counts of rape (felonies in the first degree) and twenty counts of gross sexual imposition (felonies of the third degree). In adult court, appellant pled to three counts of gross sexual imposition in the third degree, reduced from R.C. 2907.05(A)(4) to R.C. 2907.05(B). A conviction under R.C. 2907.05(B) classifies an adult as a Tier III sex

offender: " 'Tier III sex offender/child-victim offender' means***[a] sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to***[a] violation of division (B) of section 2907.05 of the Revised Code." R.C. 2950.01(G)(1)(b).

{¶24} If appellant would have pled or been convicted of one of the rape charges, he would have been classified as a Tier III sex offender. R.C. 2950.01(G)(1)(a). If appellant had not been bound over, he could have been classified as a juvenile offender registrant pursuant to R.C. 2950.01(M).

{¶25} R.C. 2950.07(B)(1) governs registration requirements for a Tier III sex offender and states the following:

> (B) The duty of an offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense or a child-victim oriented offense and the duty of a delinquent child who is or has been adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense and is classified a juvenile offender registrant or who is an out-of-state juvenile offender registrant to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code continues, after the date of commencement, for whichever of the following periods is applicable:
>
> (1) Except as otherwise provided in this division, if the person is an offender who is a tier III sex offender/child-victim offender relative to the sexually oriented offense or child-victim oriented offense, if the person is a

delinquent child who is a tier III sex offender/child-victim offender relative to the sexually oriented offense or child-victim oriented offense, or if the person is a delinquent child who is a public registry-qualified juvenile offender registrant relative to the sexually oriented offense, the offender's or delinquent child's duty to comply with those sections continues until the offender's or delinquent child's death. Regarding a delinquent child who is a tier III sex offender/child-victim offender relative to the offense but is not a public registry-qualified juvenile offender registrant relative to the offense, if the judge who made the disposition for the delinquent child or that judge's successor in office subsequently enters a determination pursuant to section 2152.84 or 2152.85 of the Revised Code that the delinquent child no longer is a tier III sex offender/child-victim offender, the delinquent child's duty to comply with those sections continues for the period of time that is applicable to the delinquent child under division (B)(2) or (3) of this section, based on the reclassification of the child pursuant to section 2152.84 or 21562.85 of the Revised Code***as a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender. In no case shall the lifetime duty to comply that is imposed under this division on an offender who is a tier III sex offender/child-victim offender be removed or terminated. A delinquent child who is a public registry-qualified juvenile offender registrant may have the lifetime duty to register terminated only pursuant to section 2950.15 of the Revised Code. (Footnote omitted.)

{¶26} R.C. 2152.84, under juvenile offender registrants, states the following in pertinent part

> (A)(1) When a juvenile court judge issues an order under section 2152.82 or division (A) or (B) of section 2152.83 of the Revised Code that classifies a delinquent child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.041, 2950.05, and 2950.06 of the Revised Code, upon completion of the disposition of that child made for the sexually oriented offense or the child-victim oriented offense on which the juvenile offender registrant order was based, the judge or the judge's successor in office shall conduct a hearing to review the effectiveness of the disposition and of any treatment provided for the child, to determine the risks that the child might re-offend, to determine whether the prior classification of the child as a juvenile offender registrant should be continued or terminated as provided under division (A)(2) of this section, and to determine whether its prior determination made at the hearing held pursuant to section 2152.831 of the Revised Code as to whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender should be continued or modified as provided under division (A)(2) of this section.

{¶27} It is appellant's position that his trial counsel was deficient in failing to argue that he should have been classified under R.C. 2950.01(M) (juvenile offender registrant) instead of R.C.2950.01(G) (Tier III). As a juvenile offender registrant, the trial court would have had discretion in determining his tier level, and he could have had the opportunity to petition the trial court to have his classification reviewed, modified, and possibly terminated. R.C. 2152.83(D); R.C. 2152.831; R.C. 2152.84; R.C. 2152.85.

{¶28} In support of this argument, appellant advances the two most recent United States Supreme Court decisions on life imprisonment without parole for juvenile offenders treated as adults. Appellant likens the reasoning in these two cases to the mandatory lifetime registration requirements of R.C. 2950.07(B)(1).

{¶29} In *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011 (2010), the United States Supreme Court held a juvenile nonhomicide offender should not be punished with life without parole at 74-75 and 82, respectively:

> In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently

> culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper,* 543 U.S., at 574, 125 S.Ct. 1183.
>
> ***
>
> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

{¶30} Two years later, in *Miller v. Alabama,* 132 S.Ct 2455 (2012), the United States Supreme Court addressed whether mandatory life without parole for a juvenile homicide offender constitutes cruel and unusual punishment at 2469 and 2475, respectively:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham,* 560 U.S., at ——, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making youth (and all that accompanies

it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper,* 543 U.S., at 573, 125 S.Ct. 1183; *Graham,* 560 U.S., at ——, 130 S.Ct., at 2026–2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.***

***

Graham, *Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration

> without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

{¶31} In the case of *In Re: C.P.,* 131 Ohio St.3d 513, 2012-Ohio-1446, the Supreme Court of Ohio reviewed the case of a juvenile who was not bound over to adult court and was found to be a juvenile offender registrant. The court held the following at syllabus:

> To the extent that it imposes automatic, lifelong registration and notification requirements on juvenile sex offenders tried within the juvenile system, R.C. 2152.86 violates the constitutional prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 9, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 16.

{¶32} Writing for the court, Justice Pfeifer explained the following at ¶ 84 and 85:

> Again, we are dealing with juveniles who remain in the juvenile system through the decision of a juvenile judge—a decision made through the balancing of the factors set forth in R.C. 2152.12(B)—that the juvenile

> at issue is amenable to the rehabilitative purpose of the juvenile system. The protections and rehabilitative aims of the juvenile process must remain paramount; we must recognize that juvenile offenders are less culpable and more amenable to reform than adult offenders.
>
> The requirement in R.C. 2152.86 of automatic imposition of Tier III classification on a juvenile offender who receives an SYO dispositional sentence undercuts the rehabilitative purpose of Ohio's juvenile system and eliminates the important role of the juvenile court's discretion in the disposition of juvenile offenders and thus fails to meet the due process requirement of fundamental fairness. In *D.H.,* 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 59, we held that because of the central role of the juvenile judge in a juvenile's rehabilitative process, fundamental fairness did not require the same jury-trial rights for juveniles as we required for adults in *Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. In this case, we determine that fundamental fairness is not a one-way street that allows only for an easing of due process requirements for juveniles; instead, fundamental fairness may require, as it does in this case, additional procedural safeguards for juveniles in order to meet of the juvenile system's goals of rehabilitation and reintegration into society.

{¶33} As Justice Pfeifer definitively stated, the *C.P.* case applied to juveniles deemed juvenile offender registrants who remained in the juvenile system. Such is not the case sub judice. In this case, appellant was bound over to adult court pursuant to

R.C. 2152.10(B) and 2152.12, a discretionary procedure by the juvenile court. The juvenile court provided appellant with due process, holding a probable cause hearing and amenability hearings before making its determination. The bind over has not been challenged. Once the bind over occurred, appellant was no longer a "child" pursuant to R.C. 2152.02(C)(4). We decline to extend the reasoning in *Graham, Miller,* and *C.P.* to the facts of this case.

{¶34} Upon review, we find appellant's trial counsel was not deficient and therefore, do not find any ineffective assistance of counsel.

{¶35} Assignment of Error IV is denied.

{¶36} The judgment of the Court of Common Pleas of Coshocton County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, J. and

Wise, J. concur.

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