

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In re: M.K.

Court of Appeals No. E-12-025

Trial Court No. 2011 JF 114 (FB)

DECISION AND JUDGMENT

Decided: May 17, 2013

* * * * *

Matthew A. Craig, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney,
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} M.K., appellant, is a juvenile and appeals May 1, 2012 judgments of the disposition/sentence issued by the Juvenile Division of the Erie County Court of Common Pleas in proceedings against M.K. as a serious youthful offender (“SYO”). The judgments imposed dispositions/sentences against M.K. under R.C. 2152.13 based upon

adjudications of delinquency for acts constituting (1) complicity to attempted felonious assault (in violation of R.C. 2923.03(A)(2), 2923.02(A), and 2903.11(A)(2) and a third degree felony) and (2) aggravated riot (in violation of R.C. 2917.02 and fourth degree felony).

{¶ 2} M.K. pled guilty to the charges on March 12, 2012 under a plea agreement. He was age 14 at the time of the offenses.

{¶ 3} Appellant was originally charged under a six count indictment. Counts One and Two of the indictment charged complicity to commit attempted murder in violation of R.C. 2923.03(A)(2), first degree felonies. Counts Three and Four charged complicity to commit felonious assault in violation of R.C. 2923.03(A)(1) , second degree felonies. Count Five charged inciting to violence in violation of R.C. 2917.01(A)(2), a third degree felony. Count Six charged participating in a criminal gang, a violation of R.C. 2923.42(A), a second degree felony. The indictment included an R.C. 2152.11 serious youthful offender specification on all counts and an R.C. 2941.142 participating in a criminal gang specification on the first five counts.

{¶ 4} Under the plea agreement, Counts Two and Six of the indictment were amended to charges of complicity to attempted felonious assault and aggravated riot. M.K. pled guilty to the amended charges. The state dismissed the remaining counts and gang specification. The parties also agreed to an adult SYO prison sentence of imprisonment for two-years, stayed pending successful completion of a traditional juvenile dispositional sentence.

Disposition/Sentence

{¶ 5} The trial court issued orders of disposition/sentence on May 1, 2012. On both delinquency adjudications the court ordered M.K. committed to the legal custody of the Department of Youth Services for a minimum period of six months and a maximum period not to exceed the child's attainment of the age of 21 years. The court also ordered that the commitments to DYS run consecutively to each other.

{¶ 6} The court ordered a serious youthful offender adult sentence on the complicity to attempted felonious assault adjudication. The adult SYO sentence was imprisonment for two years in a penal institution with three years postrelease control, suspended on condition of "OK" completion of juvenile disposition. The court did not order an SYO adult sentence with respect to the aggravated riot adjudication.

{¶ 7} M.K. asserts one assignment of error on appeal:

Assignment of Error

I. The trial court committed prejudicial error in contravention of Ohio Revised Code § 2941.25 and M.K.'s rights under the double jeopardy clauses of the federal and state constitutions by refusing to merge allied offenses of similar import for the purpose of disposition/sentencing.

{¶ 8} At the hearing on M.K.'s guilty plea, the prosecutor stated that had the case proceeded to trial the evidence would have demonstrated that on or about July 16, 2011, M.K. knowingly aided or abetted another in committing a felonious assault of Rocco Marinucci, causing serious physical harm to him. The prosecutor also stated that the

evidence would have demonstrated that M.K. participated with four or more other persons in a course of disorderly conduct with purpose to commit or facilitate the commission of an offense of violence, namely, the felonious assault against Mr. Marinucci.

Merger of Allied Offenses of Similar Import

{¶ 9} Prior to the disposition/sentencing hearing, appellant filed a motion for the trial court to merge the complicity to attempted felonious assault and aggravated riot delinquency adjudications as a serious youthful offender to a single offense for purposes of disposition/sentence. Appellant contended that the adjudications were for allied offenses of similar import and that multiple dispositions/sentences were prohibited by R.C. 2941.25 and by state and federal constitutional protections against double jeopardy. On appeal, appellant argues that the trial court erred in overruling the motion and by imposing multiple punishments for a single offense.

{¶ 10} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution applies to juvenile proceedings. *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 23-24, citing *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). “R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23.

{¶ 11} A longstanding series of appellate court decisions, including a decision of this court, has held R.C. 2941.25 does not apply to juvenile delinquency proceedings. In 1982, the Tenth District Court of Appeals decided the case of *In re Skeens*, 10th Dist. Nos. 81AP-882, 81AP-883, 1982 WL 3994 (Feb. 25, 1982). In the decision, the court identified the rationale for holding that R.C. 2941.25 does not apply:

R.C. 2941.25(A) does not apply to situations where a minor is alleged to be a delinquent minor since, under our Juvenile Code, such a minor is not charged with a crime. While the commission of acts which would constitute a crime if committed by an adult sets the machinery of the Juvenile Court in motion, the issue before the court is whether or not the minor has engaged in the kind of conduct that constitutes delinquency and will therefore justify the intervention of the state to assume his protection and custody. Evidence that the minor committed acts that would constitute a crime if committed by an adult is used only for the purpose of establishing that the minor is delinquent, not to convict him of a crime and to subject him to punishment for that crime. *Id.* at * 2.

{¶ 12} In the decision of *In re Lugo*, 6th Dist. No. WD-90-38, 1991 WL 106085, * 8 (June 14, 1991), this court agreed with the reasoning in *Skeens* and held that R.C. 2941.25(A) does not apply to juvenile delinquency proceedings. Other appellate courts have also followed the analysis in *Skeens*. See *In re Bowers*, 11th Dist. No. 2002-A-0010, 2002-Ohio-6913, ¶ 23; *In re J.H.*, 8th Dist. No. 85753, 2005-Ohio-5694, ¶ 15-20;

In re H.F., 8th Dist. No. 94840, 2010-Ohio-5253, ¶ 13-15; *In re S.S.*, 4th Dist. No. 10CA682, 2011-Ohio-4081, ¶ 29.

{¶ 13} Appellant argues that the juvenile justice system has evolved to become more punitive since *Skeens* and now often embodies many of the characteristics of adult sentencing. Appellant argues that distinctions between treatment of juvenile offenders in juvenile court and adult criminal defendants generally have diminished and removed the underlying basis for the *Skeens* holding.

{¶ 14} The Tenth District Court of Appeals decided *Skeens* in 1982 and has subsequently questioned whether the rationale behind decision still exists in view of changes to the juvenile justice system since. *In re B.O.J.*, 10th Dist. Nos. 09AP-600, 09AP-601, 09AP-602, 2010-Ohio-791, ¶ 22-23; *In re Durham*, 10th Dist. Nos. 97APF12-1653, 97APF12-1654, 1998 WL 635107, *3 (Sept. 17, 1998). The court, however, has not decided the issue, ruling on the unavailability of R.C. 2941.25 relief on alternative grounds in cases where the issue has been raised. *In re B.O.J.* at ¶ 23-24; *In re Durham* at *4.

{¶ 15} In 2009 in *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, the Ohio Supreme Court considered and compared treatment of juveniles as serious youthful offenders in the juvenile courts in Ohio to prosecution of adults in criminal cases generally. The court recognized that SYO cases do not involve a bindover to an adult court and that the juvenile remains under the continuing jurisdiction of the juvenile judge.

Id. at ¶ 18. Any adult sentence imposed by the juvenile judge is only a “potential sentence.” *Id.* at ¶ 30.

{¶ 16} “Theoretically, the threat of the imposition of an adult sentence encourages a juvenile’s cooperation in his own rehabilitation, functioning as both carrot and stick.” *Id.* at ¶18. To invoke the adult portion of an SYO sentence, R.C. 2152.14(E) “requires a finding by clear and convincing evidence that the juvenile is ‘unlikely to be rehabilitated during the remaining period of juvenile jurisdiction’ and that the juvenile has engaged in further bad conduct pursuant to R.C. 2512.14(A) or (B).” *Id.* at ¶ 31. Where the adult sentence is invoked, the juvenile judge retains the discretion to impose a less severe adult sentence than the original stayed adult sentence. *Id.* at ¶ 37.

{¶ 17} After reviewing the SYO statutory scheme in *State v. D.H.*, the Ohio Supreme Court concluded that in SYO cases, “[t]he aims of the juvenile system—and its heightened goals of rehabilitation and treatment, control * * * [the juvenile offender’s] disposition.” *Id.* at ¶ 38. The Ohio Supreme Court reaffirmed in *State v. D.H.* that juvenile court proceedings and adult criminal trials are “fundamentally different.” *Id.* at ¶ 50. The court reaffirmed that juvenile and adult prosecutions serve different purposes:

Juvenile courts are unique and are tied to the goal of rehabilitation.

The contrast between the purposes of juvenile sentencing and criminal sentencing is illustrative. R.C. 2152.01(A) states that the overriding purposes for juvenile dispositions “are to provide for the care, protection, and mental and physical development of children subject to this chapter,

protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." The purposes of felony sentencing, on the other hand, "are to protect the public from future crime by the offender and others and to punish the offender."

R.C. 2929.11(A). In *Agler*, this court stated that "the decided emphasis [of juvenile courts] should be upon individual, corrective treatment." *Agler*, 19 Ohio St.2d at 72, 48 O.O.2d 85, 249 N.E.2d 808. *Id.* at ¶ 54.

{¶ 18} In our view, the differences between the juvenile justice system and adult criminal justice system recognized by the Ohio Supreme Court in *State v. D.H.* and the scope of juvenile court authority over SYO proceedings demonstrate that a continuing basis exists to treat juvenile court proceedings differently than adult criminal cases with respect to merger of allied offenses.

{¶ 19} We acknowledge appellant's argument that *Skeens* and many cases holding that R.C. 2941.25 does not apply to juvenile court delinquency proceedings are of limited precedential value because they also are based on alternative grounds. Nevertheless we find the arguments in *Skeens* persuasive. Accordingly, we reaffirm our holding in the case of *In re Lugo* that R.C. 2941.25(A) does not apply to juvenile court delinquency proceedings.

{¶ 20} We do not decide whether R.C. 2941.25 applies to the adult SYO part of appellant's sentence. Even were R.C. 2941.25 to apply, the record discloses that the juvenile court did not impose multiple adult SYO sentences against appellant. The court

imposed a potential adult SYO sentence only on the complicity to attempt felonious assault delinquency adjudication

{¶ 21} Accordingly, we conclude that the trial court did not err in denying appellant's motion to merge appellant's adjudications for purposes of sentencing. We find appellant's Assignment of Error not well-taken.

Justice having been provided the party complaining, we affirm the judgment of the Juvenile Division of the Erie County Court of Common Pleas. Pursuant to App.R. 24, we order appellant to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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