

[Cite as *In re M.S.*, 2010-Ohio-2101.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93550

IN RE: M.S.

A Minor Child

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case Nos. DL 07105630 and DL 07107597

BEFORE: Rocco, P.J., Blackmon, J., and Jones, J.

RELEASED: May 13, 2010

JOURNALIZED:

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ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113-1901

ATTORNEYS FOR APPELLEE, STATE OF OHIO

William D. Mason
Cuyahoga County Prosecutor

BY: Catana Deskins
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Appellant M. S.¹ appeals from the decision of the Cuyahoga County Court of Common Pleas, Juvenile Division, to invoke the adult portions of sentences imposed upon him pursuant to the “Serious Youth Offender” statute (“SYO”), R.C. 2152.14, in two cases.

{¶ 2} Appellant presents two assignments of error. He claims the juvenile court’s decision is unsupported by either sufficient evidence or the weight of the evidence adduced at the hearing.

{¶ 3} Upon a review of the record, this court disagrees. Consequently, the juvenile court’s decision is affirmed.

{¶ 4} The record reflects the Cleveland police filed a delinquency complaint in June 2007 against appellant in the juvenile court that alleged he committed, inter alia, aggravated robbery and failure to comply with the signal or order of a police officer, with firearm specifications. This became Case No. DL 07105630.

{¶ 5} As the case proceeded, the state agreed to proceed with “discretionary bindover” in exchange for appellant’s stipulation to a probable cause determination. The juvenile court accepted the parties’ agreement.

¹Appellant’s birth date is December 23, 1989. Since it is this court’s policy to protect the identity of juveniles, he is referred to by only his initials.

{¶ 6} The transcripts of the subsequent hearings held in this case reflect that thereafter, appellant had additional complaints filed against him. One of these was Case No. DL 07107597, which apparently charged him with, inter alia, possession of and trafficking in over ten grams of crack cocaine.² The juvenile court ultimately set all of appellant's cases for a single amenability hearing.

{¶ 7} By the time of the hearing, the parties had reached a plea agreement. The state informed the court it had filed an amended complaint in this case that charged appellant on 14 counts, including four counts of aggravated robbery with firearm specifications, four counts of failure to comply with signal or order of a police officer with firearm specifications, two counts of receiving stolen property, two counts of carrying concealed weapons, and two counts of having a weapon while under disability. Each count also contained at least one SYO specification. In exchange for appellant's guilty plea to seven of the charges contained in the amended complaint and to two charges in the drug case, the state would permit appellant to have "the SYO sentence rather than being bound over as an adult."

{¶ 8} The juvenile court proceeded to clarify the sentence the parties were asking for it to impose. According to the agreement, appellant would remain in the custody of the Ohio Department of Youth Services ("ODYS") until the age of

²The juvenile court's case file is not included in the record on appeal.

21, and then, only “if he made a mistake,” he would serve an eight-year prison term. After conducting a thorough colloquy with appellant, the juvenile court accepted his admissions to the charges, found him delinquent, and adopted the proposed sentence.

{¶ 9} The resulting journal entry filed on November 20, 2007 reflects that appellant admitted to two counts of aggravated robbery, two counts of failure to comply, and one count of receiving stolen property, all with firearm specifications, and to one count of carrying a concealed weapon and one count of having a weapon while under disability. He received a sentence of commitment to ODYS until the age of 21, together with SYO sentences as follows: a prison term of three years on the firearm specifications, prior to and consecutive with concurrent terms of three years on all of the counts in the instant case, and consecutive with a term of two years in the drug case, for a total adult term of eight years. The SYO sentences were stayed “pending successful completion of the juvenile disposition.”

{¶ 10} On September 11, 2008, the state filed a motion seeking to invoke the SYO portion of appellant’s sentence. The state alleged that in May and August, 2008, appellant had committed two assaults and had attempted to obstruct official business. The juvenile court set the matter for a hearing, which it conducted on April 23, 2009.

{¶ 11} At the conclusion of the hearing, the juvenile court found that appellant committed an assault on a teacher and his conduct demonstrated he was unlikely to be rehabilitated during the remainder of his period of juvenile commitment. The court ordered the stay of appellant's prison sentence lifted, but modified it to a total term of six years, with credit for time served.

{¶ 12} Appellant appeals from the juvenile court's decision with two assignments of error.

"I. The state failed to present sufficient evidence to justify invoking the adult portion of appellant's serious youthful offender sentence.

"II. Invoking the adult portion of appellant's serious youthful offender sentence is against the manifest weight of the evidence."

{¶ 13} Appellant argues the juvenile court's findings made pursuant to R.C. 2152.14 are unsupported by either sufficient evidence or by the manifest weight of the evidence presented at the hearing. This court does not agree.

{¶ 14} In *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, at ¶31-34, the Ohio Supreme Court stated as follows:

{¶ 15} "R.C. 2152.14(E) governs under what instances a juvenile court may invoke the adult portion of a serious youthful offender's sentence for failure to successfully complete the traditional juvenile disposition. The statute 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). R.C. 2512.14(E) reads:

{¶ 16} “(E)(1) The juvenile court may invoke the adult portion of a person’s serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

{¶ 17} “(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

{¶ 18} “(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

{¶ 19} “(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.’

{¶ 20} “The conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. R.C. 2152.14(A)(2)(b) and (B)(2).”

{¶ 21} Thus, contrary to the arguments appellant raises in his assignments of error, the juvenile court’s analysis of the evidence presented at the hearing in this case was not whether it was “sufficient” or its weight “manifestly” supported imposition of the adult sentence, but whether the evidence “clearly and convincingly” supported the necessary findings. *In re: D. H.*, 169 Ohio App.3d 798, 2006-Ohio-6953, 865 N.E.2d 90, ¶45.

{¶ 22} At the outset of the hearing, appellant stipulated that he was at least 14 years old, he was serving part of an SYO sentence, and he currently was in the custody of “an ODYS facility.” Thus, pursuant to R.C. 2512.14(E), the juvenile court needed to determine two factors, viz., 1) whether appellant either committed a violation of the rules that could be charged as an offense of violence, or engaged in conduct that created a substantial risk to the safety or security of the institution; and, 2) whether his conduct demonstrated he was unlikely to be rehabilitated during the remaining portion of his juvenile term.

{¶ 23} The juvenile court heard the teacher, Frederick Cox, testify that on May 29, 2008 the facility issued an “All Available Code” due to the occurrence of a disturbance in the hallway. Cox stated the code meant that all the staff members needed to report to the area to “do whatever intervening that is necessary to bring the * * * situation back to * * * normal * * *.”

{¶ 24} Upon his arrival in the hallway, Cox saw that a youth, whom Cox identified as being a leader of one of the facility’s illegal “gangs,” was resisting a

directive to the point of being placed in handcuffs, and that other youths were emptying out of the classrooms. Cox stated that “no youth is supposed to enter the hallway” at such a time, therefore, the staff began to direct the young men to return to their classrooms, but several of them refused to obey. Instead, the young men went “towards the scene where the individual was being handcuffed.”

{¶ 25} Since the youths were not listening to the verbal directives, some staff members were required to begin attempting “physically” to prevent their approach. Additional resistance from the youths led to “tussling and wrestling” among a group of staff and students. Cox described it as a “crisis situation.”

{¶ 26} Cox testified that, “[a]t that point, * * * the classroom [the group was] in front of, the door opened and there were two youths that exited.” One of these was appellant. Although Cox approached appellant and told him to return to the room, appellant refused the verbal directive.

{¶ 27} Cox indicated he sought to push appellant back into the room, but appellant “got hot real quick”; he “was like, Man, don’t touch me.” Cox testified the situation “became a wrestling and tussling” match between them, and Cox “ended up on the ground from that.” Cox stated the incident aggravated a back injury he had sustained a few days previously at the facility in a similar situation, so he “went to the Urgent Care” for medical treatment.

{¶ 28} The juvenile court also heard testimony from Tyler Hitzfield, the facility’s “social work supervisor.” Hitzfield testified that appellant’s record at the

institution showed he was “associated with a known group” that Hitzfield described as a “gang,” and had been involved in several other incidents of assault in 2008. Hitzfield indicated that in February, appellant had “picked up a chair and hit another youth who was sitting down.” In August, appellant struck a student in the print shop, and continued to kick the student in the head after he fell; the student was known to be a member of the opposing gang.

{¶ 29} Moreover, in February 2009, after the state filed its motion to invoke the adult portion of appellant’s sentence, appellant “decided to hit the wall and set off the fire alarm” in the facility because he was “mad.” Hitzfield stated that it was only since that time, a short time before the hearing, that appellant began to behave in a more appropriate fashion.

{¶ 30} Based upon Cox’s testimony, the juvenile court found that appellant engaged in behavior that constituted an assault. In addition, based upon appellant’s “numerous incidents at OYDS” and his “lengthy juvenile record” of escalating offenses, the court found appellant was unlikely to be rehabilitated.

{¶ 31} Since the record reflects both that the juvenile court applied the correct standard of proof and that the court’s decision is supported by clear and convincing evidence, appellant’s assignments of error are overruled.

{¶ 32} The juvenile court’s order is, accordingly, affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
LARRY A. JONES, J., CONCUR