

[Cite as *State v. Webber*, 2015-Ohio-1953.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101875

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ANDRE WEBBER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580459-A

BEFORE: S. Gallagher, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: May 21, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant state of Ohio appeals the decision of the trial court that dismissed the indictment against appellee Andre Webber. Upon review, we affirm.

{¶2} On November 26, 2013, Webber was charged under a four-count indictment with aggravated burglary, two counts of rape, and kidnapping. The offenses were allegedly committed on November 27, 1993, when Webber was 14 years old. The victim, who was 29 years old at the time of the alleged offenses, did not know the perpetrator. The charges were brought after the rape kit was submitted for DNA analysis, which implicated Webber.

{¶3} Webber filed a motion to dismiss the indictment. He argued that prosecuting him as an adult for crimes allegedly committed when he was 14 years old violated the Due Process and the Ex Post Facto Clauses of the Ohio and United States Constitutions. The law in effect at the time of the incident precluded Webber's prosecution as an adult. *See* former R.C. 2151.26 (1993). Further, it was not until 1997 that the General Assembly amended R.C. 2151.26, which was later replaced by R.C. 2152.02(C)(3) and 2152.12(J), which would allow Webber to be treated as an adult.

{¶4} The state opposed the dismissal of the action and filed a motion to transfer jurisdiction to the juvenile division. Webber opposed the motion, arguing that the juvenile court lacked jurisdiction over Webber, who is now an adult. On August 5, 2014, the trial court denied the motion to transfer and granted Webber's motion to dismiss.

{¶5} The state filed a motion for leave to appeal the denial of its motion to transfer. This court denied the motion and also denied a motion to reconsider.

{¶6} The state also filed the instant appeal as of right from the judgment dismissing the action. Under its first assignment of error, the state claims the trial court erred in dismissing the indictment. The state argues that jurisdiction in the adult criminal court was proper and that Webber failed to establish prejudicial pre-indictment delay.

{¶7} The state refers to two Ohio Supreme Court cases, *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, and *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, 887 N.E.2d 1145, in which the Ohio Supreme Court rejected constitutional challenges to the changes to the statutory scheme that effectively removed anyone over the age of 21 from juvenile-court jurisdiction, regardless of their age at the time the acts were committed. However, those cases both involved offenders who were 15 years old at the time the offenses were committed and who could have been subject to a bindover proceeding in juvenile court to be transferred to the general division of common pleas court for trial as an adult. *See* former R.C. 2151.26(A).

{¶8} In *Walls*, the court held that retroactive application of the amended statutes did not impair any substantive rights when applied to conduct occurring before the effective date of the amendment because under either the former law or the amended law, Walls was on notice that the alleged offense could subject him to criminal prosecution as an adult in the general division of the court of common pleas. *Walls* at ¶ 17. Further, the court found no ex post facto violation after recognizing that Walls had virtually no

chance of being kept in the juvenile system because of his mature age and that “application of the amended statutes did not increase his available punishment in any manner other than a speculative and attenuated one.” *Id.* at ¶ 41.

{¶9} In *Warren*, the court found retroactive application of the amended statutes, which no longer required a bindover proceeding, did not affect a substantive right when Warren had notice that the crimes could subject him to prosecution as an adult, even had he been charged as a juvenile. *Warren* at ¶ 49. The court further rejected claims that application of the amended statutes violated his rights to due process and fundamental fairness because changing the jurisdiction from the juvenile court to the general division of the common pleas court did not involve any substantive right. *Id.* at ¶ 52.

{¶10} Unlike the defendants in *Walls* and *Warren*, Webber was only 14 years old at the time of the alleged crimes. Thus, Webber was not subject to a bindover proceeding and could not have been subjected to prosecution as an adult in the general division of the common pleas court under the law as it existed in 1993. In *Walls*, the court recognized that for the defendant to succeed on his ex post facto claim with regard to a law inflicting an increased punishment from the law annexed to the crime at its commission, “Walls must show that the amendments to the juvenile law applied in his case actually produced a sufficient risk of increasing the measure of punishment attached to his crime.” *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 30. In its analysis, the court referenced a Fourth Circuit case, *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir.1987), in which the court found the retroactive application of

juvenile legislation violated the Ex Post Facto Clause of the United States Constitution where there was absolutely no possibility that the defendant could be tried as an adult under the federal law in place at the time of the offense and application of the intervening statute would have subjected the defendant to a greater punishment that was not at all possible at the time of his offense. *Walls* at ¶ 47. The *Walls* court recognized there was nothing speculative about the effect of retroactively applying the amendment in *Juvenile Male*. *Walls* at ¶ 47.

{¶11} In this case, application of the amended statutes to Webber would violate the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions. Under the law in effect at the time of the alleged offenses, Webber was not eligible to be bound over to the general division of the common pleas court for trial as an adult. *See* former R.C. 2151.26(A). Thus, Webber’s only concern would have been a juvenile adjudication. There was no possibility he could be tried as an adult, and this was not a matter of speculation. Further, he had no notice he could be tried as an adult. As the trial court aptly recognized at the hearing in this matter, at the time the underlying criminal conduct occurred, “the legislature did not intend to punish delinquents under the age of 15 in Common Pleas Court.” Additionally, application of the amended statutes would clearly impose a greater penalty than the juvenile law in effect at the time of the alleged conduct and impair Webber’s substantive rights.

{¶12} We find the trial court did not err in dismissing the indictment. The first assignment of error is overruled. We need not address the issue of pre-indictment delay.

{¶13} Insofar as the second assignment of error challenges the trial court’s denial of the state’s motion to transfer the case to juvenile court, we note that we previously denied leave to appeal this ruling. Nonetheless, the state argues this ruling was intertwined with the trial court’s dismissal of the action and that the trial court should have transferred the action to juvenile court. We agree with Webber’s argument that the juvenile court lacks jurisdiction in this matter. *See In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, and R.C. 2152.02(C)(6).

{¶14} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR