

[Cite as *In re D.C.*, 2016-Ohio-4571.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103854

IN RE: D.C.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Court Division
Case No. DL-14-101161

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

RELEASED AND JOURNALIZED: June 23, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} The appellant D.C. appeals his Tier II sexual offender classification and assigns five errors for our review.¹ Having reviewed the record and pertinent law, we affirm D.C.'s sexual offender classification. The apposite facts follow.

{¶2} A complaint was filed in the juvenile court against D.C. for four counts of rape and two counts of kidnapping with sexual motivation specifications. The matter proceeded to adjudicatory and dispositional hearings before the trial court.

{¶3} The trial court found D.C. delinquent for one count of rape and committed D.C. to the Ohio Department of Youth Services for a minimum period of one year, maximum to his twenty-first birthday. This court affirmed the juvenile court's finding of delinquency and disposition. *In re D.C.*, 8th Dist. Cuyahoga No. 102165, 2015-Ohio-4367. Approximately one week prior to D.C.'s release from the detention facility, the juvenile court conducted a sexual offender hearing at which it classified D.C. as a Tier II sex offender.

Waiver

{¶4} At the outset, we address the fact that although D.C. raises arguments relating to the constitutionality of the juvenile sex offender statute, no such arguments were raised during the juvenile court proceedings. Generally, the failure to raise the issue of the constitutionality of a statute or its application at the trial court level, which issue is apparent at the time of trial, constitutes a waiver of such issue and, therefore, is waived for purposes of appeal. *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. Because, however, D.C. ultimately challenges his counsel's effectiveness for failing to object to the constitutionality of the statute, we are compelled to consider whether the classification scheme at issue violates the Constitution.

¹See appendix.

Juvenile Sex Offender Classification Unconstitutional

{¶5} We will address D.C.’s first and second assigned errors together because they both raise arguments addressed in the recent Ohio Supreme Court decision *In re D.S.*, Slip Opinion No. 2016-Ohio-1027.

{¶6} In his first assigned error, D.C. argues that his sexual classification violated his constitutional protection against double jeopardy because the trial court classified D.C. at a hearing after the dispositional hearing. In *D.S.*, the Supreme Court held that determining the juvenile’s sexual offender classification separate from the dispositional hearing does not constitute double jeopardy. In so holding, the *D.S.* court distinguished *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, which is the case relied upon by D.C. The *D.S.* court concluded that *Raber*, which applied the adult sexual offender statute, only applies to adults. The court explained as follows:

We have held that the Double Jeopardy Clause barred the deferred sex-offender classification of an adult criminal defendant because registration and notification duties imposed criminal punishment and the defendant had a legitimate expectation of finality when the trial court entered its judgment of conviction and sentence. [*State v.*] *Raber*, [134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684] at ¶ 23, 26-27. But, as we determined above, *Raber* is inapposite here. The defendant in *Raber* was classified under R.C. 2950.03(A)(2), which required notice at sentencing to the defendant of the duty to register. For a delinquent juvenile, however, R.C. 2950.03(A)(3) provides that notice of a duty to register must be given at the time specified in the applicable section of R.C. Chapter 2152, which permits classification upon the juvenile’s release from a secure facility.

Additionally, because Raber had a legitimate expectation of finality when the trial court entered its judgment of conviction, the Double Jeopardy Clause prohibited the trial court from conducting a sex-offender-classification hearing. But D.S.'s disposition order expressly stated that classification was deferred until his release, which provided D.S. with notice at disposition that a classification hearing would occur in the future and that registration and notification requirements could be imposed at that time. Thus, D.S. had no legitimate expectation of finality at disposition. Accordingly, we conclude that classification upon release from a secure facility as permitted under R.C. 2152.83 does not violate the prohibition against double jeopardy.

Id. at ¶ 24-25.

{¶7} Here, the trial court in its dispositional entry expressly stated that the sexual offender classification would occur at a later date in order to allow for a “sex offender assessment” to be compiled to “assist the court in determining the appropriate classification.” Thus, like the juvenile in *D.S.*, D.C. had no expectation of finality when the disposition order was issued. Based on the Supreme Court’s decision in *D.S.*, the classification of D.C. a week prior to his release from detention, did not violate his protection against double jeopardy.

{¶8} In his second assigned error, D.C. argues that the juvenile court’s classification violated his due process rights by imposing a sanction that extends beyond the age jurisdiction of the juvenile court. The Supreme Court addressed this argument in *D.S.* and held as follows:

The differences between the statutory scheme at issue here and the one in [*In re*] *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729,² demonstrate that

²In *C.P.*, the juvenile was subjected to lifelong registration and notification requirements pursuant to R.C. 2152.86.

D.S.'s due-process rights are not offended. The imposition of juvenile-offender-registrant status under R.C. 2152.82 or 2152.83(B) with corresponding duties lasting beyond age 18 or 21 includes sufficient procedural protections to satisfy the due-process requirement of fundamental fairness. And, given the allowance for periodic review and modification, it is consistent with the rehabilitative purpose of the juvenile system.

Id. at ¶ 37. *See also In re R.A.H.*, 8th Dist. Cuyahoga No. 101936, 2015-Ohio-3342 (rejecting this same argument).

{¶9} In the instant case, like the offender in *D.S.*, D.C. was classified as a Tier II sex offender, not a Tier III sex offender that would require mandatory lifelong registration. Thus, according to *D.S.*, the statutory scheme allows the juvenile court the discretion to periodically consider whether to continue, terminate, or modify the juvenile's classification, which affords due process to *D.S.* Accordingly, following the precedent established by the Supreme Court's decision in *D.S.*, D.C.'s first and second assigned errors are overruled.

Mandatory Classification

{¶10} We will address D.C.'s third and fourth assigned errors together because they both concern the constitutionality of the statute requiring mandatory classification for 16- and 17-year old juveniles who have committed sexually oriented crimes.

{¶11} D.C. argues that R.C. 2152.83(A) violates the equal protection clauses of the U.S. and Ohio Constitutions by classifying juvenile offenders differently based on their age at the time of the offense and also violated his right to due process because the classification is mandatory. He contends that 16- and 17-year old juveniles are required to register solely based on their age, while children 13 years or younger at the time of the offense are not subject to sexual offender registrant classification, and the juvenile court has discretion to classify children who are 14 and

15 at the time of the offense. This court addressed these exact arguments in *In re R.A.H.*, 8th Dist. Cuyahoga No. 101936, 2015-Ohio-3342.

{¶12} Relying on the Seventh District case *In re M.R.*, 7th Dist. Jefferson No. 13 JE 30, 2014-Ohio-2623, we concluded that the juvenile’s equal protection rights were not violated, explaining as follows:

Relying on decisions from the third and fourth districts, the court in *M.R.* held that due to the legislative concern for sex offender recidivism and public safety, the legislature rationally concluded that the lower the age of the offender, the reduced likelihood of recidivism, thereby granting the juvenile court discretion in determining whether a sex offender classification is necessary with younger offenders. *Id.* at ¶ 39 and 40, citing to *In re J.M.*, 3d Dist. Wyandot No. 16-12-01, 2012-Ohio-4109, ¶ 32. *See also In re Forbess*, 3d Dist. Auglaize No. 2-09-20, 2010-Ohio-2826, ¶ 56; *In re C.P.*, 4th Dist. Athens No. 09CA41, 2010-Ohio-1484, ¶ 25, reversed on other grounds, *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729. The court in *M.R.* went on to explain as follows:

“Appellant essentially states there is no scientific evidence that a 16 year old is more likely to reoffend than a 14 or 15 year old. However, this validly enacted statute is presumed constitutional, and the state need not present such evidence. *See [Ohio Apt. Assn. v.] Levin*, 127 Ohio St.3d 76, [936 N.E.2d 919, 2010-Ohio-4414] at ¶ 34. Rather, the court is to evaluate whether the line drawn bears any conceivable rational relation to the state’s legitimate goals. [*State v.] Thompkins*, 75 Ohio St.3d 558, 561, [664 N.E.2d 926 (1996)].

“The state cites many laws that draw age-based lines for juveniles based upon legislative decisions. *See, e.g.*, R.C. 5139.05(A) (10 year old can be held in DYS custody for certain offenses, but those 9 and under cannot); R.C. 2152.10 (discretionary bindover for juveniles 14 and over but not for those 13 and under; mandatory bindover for juveniles 16 and 17 for certain offenses but not for those

14 and 15 unless certain priors; and no mandatory bindover for those under 16 for category 2 offenses). Legislatures regularly classify juveniles based upon age; this is the function of the legislature.

“The purpose of sex offender registration is ultimately to protect the public. *See* R.C. 2950.02 (including by exchanging information between agencies). As the state argues, it is a core premise of the juvenile system that as a juvenile matures, he becomes more responsible and thus more accountability can be expected. The state urges that the prohibition on classifying those 13 and under, the discretionary classification of those 14 and 15, and the mandatory classification of sex offenders who are 16 and 17 evinces a rational common sense adoption of the theory that younger children are less culpable, less accountable, and less dangerous. It is not unreasonable to act under the belief that it is easier to reform, retrain, and rehabilitate a younger child than an older child. As the state points out, an older juvenile will also “age out” of the system sooner than a younger juvenile and thus there is less time available to provide the older juvenile with rehabilitative services, making registration for tracking and agency coordination purposes more desirable.

“As appellant’s studies suggest, juvenile sex offenders are more responsive to treatment than adult sex offenders. And, this is reflected in the deferred classification until release after treatment in the secure facility, the review at final disposition, and the ability to seek declassification three years later and again thereafter. It is not irrational for legislators to conclude that the farther a juvenile is from adulthood, the more responsive he will be to treatment. From this, the legislature could reason that the lower the age of the offender, the reduced likelihood of recidivism and thus the decreased need for tracking. *Id.* at ¶ 42-45.”

We agree with the above sound analysis and conclude that there is a rational basis for making the sexual classification of 16- and 17-year-old sex offenders mandatory. Thus, we conclude the statute does not violate the Equal Protection Clause in this regard.

R.A.H. at ¶ 24-25.

{¶13} In *R.A.H.*, we also concluded that the sexual offender statute did not violate the due process rights of juveniles who are subject to the mandatory classification. We held:

We conclude the statute does not violate the due process clause. The trial court has discretion in deciding which tier applies to the 16- or 17-year-old sex offender, who can present evidence at a hearing in support of a lower tier. R.C. 2152.83(A)(2). Moreover, the classification can be reduced once the juvenile completes disposition (R.C. 2152.84(A)(1), (2)(c)) and can be eliminated three years after final disposition. R.C. 2152.85(A)(1)-(3), (B)(1)-(3). Accordingly, we conclude that the mandatory provision does not violate the due process clause.

Id. at ¶ 28.

{¶14} The *R.A.H.* and *M.R.* decisions are currently pending before the Ohio Supreme Court. *In re R.A.H.*, 144 Ohio St.3d 1475, 2016-Ohio-467, 45 N.E.3d 243; *In re M.R.*, 140 Ohio St.3d 1521, 2014-Ohio-5251, 20 N.E.3d 729. Until the Supreme Court rules otherwise, we will continue to follow the precedent set forth in *R.A.H.* Accordingly, D.C.'s fourth assigned error is overruled.

Ineffective Assistance

{¶15} In his fifth assigned error, D.C. argues that his counsel was ineffective for failing to object to the constitutionality of the juvenile sex offender statute during the juvenile court proceedings.

{¶16} We have found no merit to D.C.'s constitutional arguments. Therefore, we cannot conclude that D.C. received ineffective assistance by counsel's failure to raise these issues during the proceedings before the juvenile court. Based on the analysis above, D.C. cannot demonstrate that the results of the proceedings would have been different but for counsel's failure to object. Accordingly, D.C.'s fifth assigned error is overruled.

{¶17} Judgment 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 the Cuyahoga County Common Pleas Court, Juvenile Division, 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.

PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Assignments of Error

- I. The juvenile court violated D.C.'s right to double jeopardy protections when it imposed multiple punishments for the same offense, in violation of *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684; Fifth and Fourteenth Amendments to the U.S. Constitution.
- II. The juvenile court erred when it classified D.C. as a Tier II juvenile offender registrant because the classification period extends beyond the age jurisdiction of the juvenile court, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution; and Article I, Sections 9 and 16, Ohio Constitution.
- III. The juvenile court erred when it classified D.C. as a juvenile offender registrant because D.C.'s status as a mandatory registrant under R.C. 2152.83(A) violates the Equal Protection Clauses of the U.S. and Ohio Constitutions.
- IV. The juvenile court erred when it classified D.C. as a Tier II juvenile offender registrant pursuant to R.C. 2152.83(A) because the statute violates D.C.'s right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution; and Article I, Section 16, Ohio Constitution.
- V. D.C. was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution; and Article I, Section 10, Ohio Constitution.