

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: D. F.

C.A. No. 25026

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DL02-09-4214

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

CARR, Judge.

{¶1} Appellant, D.F., appeals the judgment of the Summit County Court of Common Pleas, Juvenile Division. This Court affirms.

I.

{¶2} On March 25, 2003, the trial court journalized its disposition in this matter. At that time, D.F. admitted to three felonies including voluntary manslaughter in violation of R.C. 2903.03, a felony of the first degree if committed by an adult; felonious assault in violation of R.C. 2903.11(A), a felony of the second degree if committed by an adult; and grand theft of an automobile in violation of 2913.02(A)(1), a felony of the fourth degree if committed by an adult. D.F. received a commitment to the Ohio Department of Youth Services for a minimum term of one year and a maximum term through age twenty-one on the voluntary manslaughter and felonious assault convictions; and a minimum term of six months with a maximum term through age twenty-one for the grand theft of an automobile conviction.

{¶3} Based on D.F.'s age and the seriousness of the offense, the parties agreed that D.F. was a Serious Youthful Offender ("SYO"). On the SYO charges, the court ordered a suspended sentence of eight years in an adult facility for the voluntary manslaughter and felonious assault convictions, as well as eighteen months on the grand theft of an automobile conviction.

{¶4} On June 17, 2008, the State filed a motion seeking to invoke the adult portion of the SYO sentence. Following notice, a hearing was held on January 5, 2009. On August 6, 2009, the trial court issued a journal entry invoking the adult portion of D.F.'s SYO sentence. The State filed a motion to vacate the sentence on August 19, 2009, on the basis that the sentence did not properly impose post-release control pursuant to R.C. 2967.28(B). A sentencing hearing was held on September 17, 2009. Following this hearing, the trial court issued a journal entry imposing the adult portion of the SYO disposition. D.F. filed a notice of appeal on October 5, 2009.

{¶5} On appeal, D.F. raises two assignments of error.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DECIDING TO IMPOSE THE ADULT PORTION OF THE SERIOUS YOUTH OFFENDER (SYO) DISPOSITION ON THE APPELLEE."

{¶6} In his first assignment of error, D.F. argues that the trial court abused its discretion by invoking the previously suspended SYO portion of his sentence. This Court disagrees.

{¶7} D.F. makes three arguments in support of his first assignment of error. First, D.F. contends that the trial court erred by not conducting a second evidentiary hearing prior to making a determination regarding whether to invoke the adult portion of the SYO sentence after it

vacated the August 6, 2009 journal entry. Second, D.F. argues that the trial court erred in finding that he was unlikely to be rehabilitated during the remainder of his period of juvenile jurisdiction. Finally, D.F. contends that the trial court erred in finding he engaged in conduct that created a substantial risk to the safety or security of the community.

{¶8} R.C 2152.14(E)(1) states that “[t]he 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:

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

“(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.

“(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.”

{¶9} R.C. 2152.14(A)(2) states that “[t]he motion shall state that there is reasonable cause to believe that either of the following misconduct has occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

“(a) The person committed an act that is a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.”

“(b) The person has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.”

In its journal entry dated September 17, 2009, the trial court made the following findings:

“In this case, the evidence establishes, by clear and convincing evidence, that [D.F.] was nineteen years old at the time the State filed its Motion to invoke his adult sentence. R.C. [2152.14(E)(1)(b)]. At that time, he was on parole following a period of commitment to the Ohio Department of Youth Services. R.C. [2152.14(E)(1)(a) and (b)]. The evidence also established, by clear and convincing evidence, that, while on parole, [D.F.] was convicted on one Count of

Having a Weapon Under Disability (F3), in violation of R.C. [§]2923.13 and one Count of Carrying a Concealed Weapon (F4) in violation of R.C. [§]2923.12, in Case Numbers 08CR-07-5390 and 08CR-06-4408, both in the Court of Common Pleas of Franklin County, Ohio. One year in prison was imposed on each count to be served consecutively on October 10, 2008.

“The Court finds that convictions for these felonies indicated that [D.F.] has engaged in conduct that creates a substantial risk to the community. R.C. [§]2152.14(A)(2)(b). Further, as his term of incarceration extends beyond his twenty-first birthday, he cannot be rehabilitated in the juvenile justice system within the time remaining. The evidence indicated that [D.F.] was in the Ohio Department of Youth Services from March 26, 2003, until March 5, 2007, yet continued his criminal behavior while on parole. The State has demonstrated, by clear and convincing evidence, that he cannot be rehabilitated in the juvenile system in the time remaining.”

{¶10} The record reveals that on January 5, 2009, the trial court conducted a hearing on the State’s motion to impose the adult portion of the SYO sentence upon D.F. At the outset of the hearing, the trial court took judicial notice of D.F.’s date of birth which was contained in the findings of the court at the time of the initial disposition. Neither party objected to the trial court taking judicial notice of this fact. Furthermore, two certified copies of journal entries in the Franklin County Court of Common Pleas were admitted as exhibits. The journal entries indicated that on October 9, 2008, D.F. had pleaded guilty to having a weapon while under disability in violation of R.C. 2929.13, a felony of the third degree, and carrying a concealed weapon in violation of R.C. 2923.12, a felony of the fourth degree. D.F. was willing to stipulate to the convictions but not that the convictions alone were sufficient to satisfy the statutory requirements to invoke the adult portion of the SYO sentence. The parties further stipulated that D.F. was on parole at the time the offenses occurred.

{¶11} The State proceeded to call four witnesses at the hearing. Tiffany Knight, a parole officer with the Ohio Department of Youth Services, supervised D.F. beginning in April 2008. Ms. Knight testified that D.F. was aware that, in addition to abiding by all federal, state,

and local laws, he could not possess or have under his control any weapons, such as firearms. Ms. Knight testified that D.F. did not meet with her as scheduled, he was never home when she conducted a home visit, and he obtained new criminal charges while on parole. Ms. Knight further testified that D.F. tested positive for illegal substances while on parole.

{¶12} Sergeant Richard Ketchum also testified on behalf of the State. Sergeant Ketchum testified that on June 5, 2007, he responded to the area of Heyl Avenue and Columbus Street in Columbus, Ohio, on a report that gunshots had been fired. Upon arriving in the area, Sergeant Ketchum and several other officers observed from their police cruisers two individuals riding on bicycles southbound on Heyl Avenue. Sergeant Ketchum flashed his spotlight over them and asked them to stop. While one individual stopped, D.F. began to pedal faster away from the officers. As D.F. turned eastbound into an alley, he continuously reached toward the front of his waistband. Sergeant Ketchum testified that this behavior is usually indicative of somebody possessing contraband or some type of firearm. As D.F. proceeded down the alley, he jumped off the bicycle and fled on foot southbound between houses. D.F. proceeded to cross a street and run behind another group of houses. At this point, Sergeant Ketchum and a second officer ordered him to the ground at gunpoint and then took him into custody. Sergeant Ketchum testified that they did not find a firearm in his possession at that time. Sergeant Ketchum testified that a firearm was later found at the point where D.F. had jumped off of his bicycle. Sergeant Ketchum stated that he had not seen D.F. holding a gun. On cross-examination, Sergeant Ketchum testified that no testing was done to determine whether D.F. had fired the weapon. Sergeant Ketchum also testified on cross-examination that D.F. used his right arm to reach toward his waistband during the chase and that D.F. only had a partial right arm and right hand.

{¶13} Detective Robert Vass also testified on behalf of the State at the hearing on the subject of the chase which occurred on June 5, 2007. Detective Vass testified that at the outset of the chase, D.F. was “pedaling right next to me and increasing his speed.” At that point, Detective Vass yelled, “Columbus Police. Stop your bike.” D.F. then made an eastbound turn into an alley. Detective Vass followed in the vehicle for approximately 100 yards. Detective Vass observed D.F. “pulling and tugging at his waistband.” Detective Vass testified that, “right before [D.F.] bailed off his bike, he managed to remove a black colored handgun, and then he jumped off his bike.” Detective Vass could not recall which hand D.F. used to hold the gun. Detective Vass testified that the handgun was recovered “approximately 3 to maybe 4 feet to the north of where the defendant bailed off of his bicycle.” Detective Vass testified the gun was recovered in a populated area. On cross-examination, Detective Vass clarified that he was not claiming that D.F. aimed or fired the gun at anyone.

{¶14} The final witness to testify at the hearing was Detective Frederick Hannah. Detective Hannah interviewed D.F. after he was taken into custody. Detective Hannah informed D.F. of his *Miranda* rights prior to the interview. Detective Hannah testified that D.F. indicated during the interview that he was heading to his home in the Lincoln Park Village in Columbus. During the interview, D.F. admitted to having a gun in his possession at the time of the chase. D.F. indicated he was carrying the gun for protection reasons because he had recently been confronted at gunpoint. D.F. also indicated that he was aware that the gun was loaded.

{¶15} D.F. argues that the trial court erred in not conducting a second hearing prior to invoking the adult portion of the SYO sentence. The evidence discussed above was presented at a hearing which occurred on January 5, 2009. The trial court journalized the invocation of the adult portion of the SYO sentence on August 6, 2009. On August 19, 2009, the State moved to

vacate the sentence on the basis that the trial court did not properly impose a period of post-release control pursuant to R.C. 2967.28(B). A second hearing was held on September 17, 2009. At this hearing, the trial court properly put D.F. on notice of post-release control. D.F. correctly notes in his merit brief that no evidence was presented and no witnesses were called at the second hearing. On the same day as the hearing, the trial court issued a journal entry which invoked the adult portion of the SYO sentence. D.F. argues that without any witnesses being called and absent any other evidence at the second hearing, the State could not prove by clear and convincing evidence the mandates found in R.C. 2152.14.

{¶16} The purpose of the hearing held on September 17, 2009, was to comply with statutory sentencing requirements. This hearing was necessary because the trial court did not comport with statutory mandates regarding the imposition of post-release control in its August 6, 2009 journal entry. The fact that the September 17, 2009 hearing was necessary, however, does not mean that the trial court could not consider the testimony and evidence presented at the hearing held on January 5, 2009. The trial court did not invoke the adult portion of the SYO sentence at the January 5, 2009 hearing. Instead, the trial court allowed the parties to present evidence on the subject of whether it was appropriate to invoke the adult portion of the SYO sentence. The trial court then informed the parties that it would delay its decision on the matter until the Supreme Court of Ohio resolved *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9. Because the trial court's subsequent journal entry did not comply with statutory mandates, the State moved to vacate the sentence. The trial court then conducted a sentencing hearing and issued a journal entry which contained findings relating to the adult portion of the SYO sentence, pursuant to R.C. 2152.14(E)(1), and complied with the post-release control requirements in R.C. 2967.28(B). D.F. has not pointed to any authority to support his contention that the trial court

was barred from considering evidence presented at the evidentiary hearing on the State's motion due to the fact that a subsequent sentencing hearing was necessary. It follows that his argument regarding the need for a second evidentiary hearing is without merit.

{¶17} D.F. also argues that there was no evidence presented at either hearing to support the trial court's finding that he was unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. In support of this argument, D.F. argues that the State did not call any psychologists or counselors to testify as to whether D.F. was amenable to juvenile rehabilitation. D.F. was nineteen years old at the time D.F. committed the offenses which took place in Franklin County. D.F. engaged in criminal conduct involving a loaded firearm despite the fact that he had been in the Ohio Department of Youth Services from March 26, 2003, until March 5, 2007. The testimony of Ms. Knight revealed that D.F. did not satisfy the terms of his parole. In addition to missing scheduled meetings, D.F. tested positive for drug use and committed subsequent felony offenses. The testimony of the officers detailed an attempt to evade law enforcement in which D.F. maneuvered through a residential neighborhood on a bicycle while possessing a loaded firearm. Based on this evidence, the trial court did not abuse its discretion by finding that D.F. was unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶18} D.F.'s final argument in support of his first assignment of error is that the trial court erred in finding that D.F. created a substantial risk to the safety or security of the community. As noted above, the testimony of the officers revealed that D.F. attempted to evade law enforcement by cycling between houses while possessing a loaded firearm. In addition to defying the orders of law enforcement, D.F. was responsible for the creation of a situation that put members of the community at risk. While there was no evidence that D.F. discharged the firearm, his behavior was inherently dangerous. In light of this evidence, the trial court did not

abuse its discretion in determining that D.F. created a substantial risk to the safety or security of the community.

{¶19} The first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“OHIO’S SERIOUS YOUTH OFFENDER STATUTE IS UNCONSTITUTIONAL BASED ON THE UNITED STATES SUPREME COURT’S HOLDING IN APPENDI V. NEW JERSEY (2000), 530 U.S. 466 AND BLAKELY V. WASHINGTON (2004)[,] 542 U.S. 296.”

{¶20} D.F. argues that the invocation of the adult portion of his SYO sentence was unconstitutional because it required judicial fact-finding which contravened the United States Supreme Court’s holdings in *Appendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296, as interpreted and applied by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. This Court disagrees.

{¶21} This Court has previously addressed the question of “whether the Ohio Legislature’s mandate that the trial court find certain facts by clear and convincing evidence prior to invoking the adult portion of a blended sentence is constitutional given the holding in *Foster* prohibiting fact-finding by a judge as being a violation of the Sixth Amendment right to trial.” *In re T.F.*, 9th Dist. No. 23979, 2008-Ohio-3106, at ¶22. This Court answered that question in the negative and held that “invoking the adult portion of a blended sentence after making findings pursuant to R.C. 2152.14 does not violate the holding in *Foster*.” *Id.* at ¶25. The Supreme Court of Ohio has held that, “although modern juvenile proceedings share common indicia of the criminal courts, juvenile proceedings are not considered criminal prosecutions for the purposes of Sixth Amendment analyses.” *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, at ¶79, citing *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 553. The Supreme Court has yet to extend its holding in *Foster* to juvenile proceedings. In *State v. D.H.*, 120 Ohio St.3d 540,

2009-Ohio-9, at ¶17, the Supreme Court held that “constitutional jury trial rights do not apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio’s adult felony sentencing statutes when the juvenile court imposed the adult portion of a serious-youth-offender dispositional sentence pursuant to R.C. 2152.13.” While D.F.’s assignment of error deals with the invocation of the adult portion of his SYO sentence pursuant to R.C. 2152.14, we decline D.F.’s invitation to extend the logic of *Foster* to a juvenile proceeding.

{¶22} We note, furthermore, that the trial court in this case simply invoked the adult portion of the SYO sentence that was imposed and suspended as a result of D.F.’s plea agreement. Whether or not to impose an SYO sentence was never an issue that went to a jury. Thus, while the trial court did conduct a hearing to determine if the adult portion of D.F.’s SYO sentence should be invoked pursuant to R.C. 2152.14(E)(1), the trial court did not impose an original or new sentence. Rather, it invoked the adult portion of the Serious Youth Offender sentence which had already been imposed and suspended on March 25, 2003.

{¶23} D.F. further contends that Ohio’s Serious Youthful Offender Statute violates the Equal Protection guarantees of the United States and Ohio Constitutions because the statute permits a trial court to make findings of fact in order to place a juvenile in an adult prison with adult offenders who had the right to have a jury make those same findings pursuant to *Foster*, *Apprendi*, and *Blakley*.

{¶24} Under Ohio’s statutory scheme, D.F. had the right to a jury trial on the SYO charges. Pursuant to R.C. 2152.13(C)(1), “[a] child for whom a serious youthful offender dispositional sentence is sought has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence.” The statute further provides that “[o]nce a child is indicted, or

charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings.” *Id.* As noted above, the parties reached an agreement in this case that D.F. was a Serious Youthful Offender. In March 2003, D.F. entered an admission to three delinquency charges and a plea of guilty to the SYO charges. In pleading guilty to the SYO charges, D.F. waived his right to a jury trial on those charges. The adult portion of the SYO sentence was imposed by the juvenile court and then subsequently suspended on the condition that D.F. “successfully complete his juvenile sentence including any and all terms of any probation or parole.” Thus, this case does not involve a situation where an original adult sentence was imposed upon D.F. absent the right to a jury trial. By pleading guilty, D.F. waived his right to a jury trial on the charges for which a serious youthful offender dispositional sentence could be imposed.

{¶25} D.F.’s second assignment of error is overruled.

III.

{¶26} D.F.’s assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.