

[Cite as *In re V.D.*, 2010-Ohio-4148.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: :

V.D., JR. : C.A. CASE NO. 23869

: T.C. CASE NO. JC-A095647(01)

: (Criminal Appeal from
Common Pleas Court,
Juvenile Division)

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O P I N I O N

Rendered on the 2nd day of September, 2010.

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GRADY, J.:

{¶ 1} Vincent D., a minor, appeals from his adjudication and
disposition as a delinquent child for having committed the offense
of robbery, which is a felony of the second degree when committed
by an adult.

{¶ 2} On Sunday, June 21, 2009, fifteen year old Vincent D.

and his friend, Demetreus spent time with Vincent D.'s three friends, Ricky, Rickena, and Juriah B., at their home on Taylorsville Road in Huber Heights. Vincent D. and Demetreus discussed robbing a store to obtain money that Demetreus could use to buy marijuana. Ricky gave Vincent D. a single-barreled sawed-off shotgun, and Vincent D. and Demetreus went to the home of another friend, Victor, to discuss the robbery. Vincent D., Demetreus, and Victor later left Victor's home and went to the United Dairy Farmers (UDF) store located at 7224 Taylorsville Road in Huber Heights. They had the shotgun and a bag to put money in. Demetreus stayed outside the store to act as a lookout.

{¶ 3} Officer Ronald Settich of the Huber Heights police was dispatched to the UDF store on Taylorsville Road shortly after midnight. A patron inside the store had called 911 and reported that three suspicious looking black youths wearing dark clothes and toboggans were outside. When Officer Settich drove by the store he observed only two youths standing outside. Vincent D. and Victor then exited the store and stood at the side of the building. When Officer Settich pulled into the UDF parking lot, Vincent D. and Victor ran. Officer Settich followed them on foot, but lost them. Nothing was taken from the UDF store.

{¶ 4} Officer John Savard received the same dispatch as Officer Settich and arrived at the UDF shortly after Settich. Officer

Savard saw two youths running from the store. He could not see their faces. Officer Savard followed them in his cruiser until they jumped over a privacy fence at Cambridge Academy, a childcare center at 7140 Taylorsville Road in Huber Heights. Officer Savard exited his cruiser with his canine and followed the two youths on foot.

{¶ 5} Officer Savard looked over the privacy fence and saw a shotgun in the grass. Savard sent his canine into the yard while he waited for other officers to arrive. When back-up arrived, Officer Savard searched the fenced yard but found no one. Savard did find two winter knit caps and a drawstring bag. Officer Hansen seized the shotgun. It was not loaded, but was operable. Vincent D. returned to his friends' home out of breath, and he asked Ricky and Juriah to watch out the windows for police. Demetreus arrived thirty minutes later and asked for band-aids for cuts on his hands and arms.

{¶ 6} On Monday, June 22, 2009, Sarah Keen, a childcare worker at Cambridge Academy, heard from a co-worker that something had happened the night before at the UDF store across the street, and that the childcare center might have been involved. At around 1:15 p.m. on that date, Keen saw two teenage youths walking around the childcare center. At around 4:00 p.m. that same day Keen saw two youths leaning over the childcare center's privacy fence,

looking in the grass. Keen went outside and asked them, "Why do you keep coming back? What are you doing?" The two left without responding. While Keen was calling 911, she noticed that the police were at the UDF store across the street, and she went there and told Officer Hansen about the two youths she saw. Officer Hansen called for back-up and searched the neighborhood. Within an hour both Vincent D. and Demetreus were arrested.

{¶ 7} Vincent D. was charged by complaint filed in Montgomery County Juvenile Court with one count of robbery, R.C. 2911.02(A)(1), with a one year firearm specification, R.C. 2941.141. An adjudicatory hearing was held on October 27, 2009 and December 21 2009. Vincent D. testified in his own behalf at the hearing and admitted engaging in a conversation with Demetreus about a robbery and going with Demetreus to Cambridge Academy to look for Ricky's shotgun. Vincent D. claimed, however, that when Demetreus and Victor went to the UDF store he did not go but instead went back to the home of his friends. Following the hearing the trial court found Vincent D. to be delinquent by reason of having committed robbery with a firearm.

{¶ 8} A dispositional hearing was held on January 4, 2010. The trial court committed Vincent D. to the Department of Youth Services for a minimum of one year up to a maximum of age twenty-one on the robbery charge, and for an additional period of one year

on the firearm specification, to be served consecutively.

{¶ 9} Vincent D. timely appealed to this court from his delinquency adjudication and disposition.

FIRST ASSIGNMENT OF ERROR

{¶ 10} "THE JUVENILE COURT ERRED WHEN IT ADJUDICATED VINCENT D. DELINQUENT OF ROBBERY WITH A FIREARM SPECIFICATION WHEN NO EVIDENCE WAS PRESENTED THAT VINCENT COMMITTED OR ATTEMPTED TO COMMIT A THEFT OFFENSE, OR THAT HE HAD A FIREARM ON HIS PERSON OR UNDER HIS CONTROL DURING THE COMMISSION OR ATTEMPT OF A THEFT OFFENSE. VINCENT'S ADJUDICATION VIOLATED HIS RIGHT TO DUE PROCESS, AS IT WAS OBTAINED IN THE ABSENCE OF SUFFICIENT, CREDIBLE, COMPETENT EVIDENCE OF EVERY ELEMENT OF ROBBERY."

{¶ 11} A sufficiency of the evidence argument challenges whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 12} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of

the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 13} "Any child . . . who violates any law of this state . . . that would be an offense if committed by an adult" is a delinquent child. R.C. 2152.02(F)(1). Vincent D.'s adjudication of delinquency was founded on his commission of an offense of robbery in violation of R.C. 2911.02(A)(1), which provides:

{¶ 14} "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 15} "Have a deadly weapon on or about the offender's person or under the offender's control."

{¶ 16} Vincent D. argues that his delinquency adjudication based upon having committed robbery with a firearm is not supported by legally sufficient evidence because the evidence presented by the State at the adjudicatory hearing on his charge of delinquency failed to demonstrate that Vincent D. or any of his companions committed or attempted to commit a theft offense at the UDF store.

{¶ 17} Theft is defined in R.C. 2913.02:

{¶ 18} "(A) No person, with purpose to deprive the owner of

property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 19} "(1) Without the consent of the owner or person authorized to give consent;

{¶ 20} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶ 21} "(3) By deception;

{¶ 22} "(4) By threat;

{¶ 23} "(5) By intimidation."

{¶ 24} Attempt is defined in R.C. 2923.02:

{¶ 25} "(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 26} In *State v. Woods* (1976), 48 Ohio St.2d 127, syllabus, the Ohio Supreme Court stated that criminal attempt occurs when a defendant "purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose."

{¶ 27} To prove robbery in violation of R.C. 2911.02(A)(1), the State had the burden to prove that Vincent D. attempted or

committed a theft offense. The evidence was sufficient to prove that Vincent D. and his associates planned to commit a theft offense and left the residence with a gun and a bag in which to put money the offense produced. However, the evidence was insufficient as a matter of law to prove that the conduct in which they in fact engaged involved knowingly obtaining or exerting control over property or services owned by another, R.C. 2913.02(A), or was conduct which, if successful, would have had that result. R.C. 2923.02(A). The evidence presented by the State is therefore insufficient as a matter of law to prove one of the essential elements of robbery: that Vincent D. attempted or committed a theft offense. Accordingly, Vincent D.'s adjudication of delinquency for having committed that offense must be reversed. *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527; *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed,2d 368.

{¶ 28} Vincent D.'s first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶ 29} "THE JUVENILE COURT VIOLATED VINCENT D.'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT ADJUDICATED HIM DELINQUENT OF ROBBERY WITH A FIREARM SPECIFICATION WHEN ITS DECISION WAS BASED ON THE UNRELIABLE TESTIMONY OF VINCENT'S CODEFENDANT, WHO HAD A

DEMONSTRATED MOTIVE TO PROVIDE THE COURT WITH FALSE INFORMATION.”

THIRD ASSIGNMENT OF ERROR

{¶ 30} “VINCENT D. WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO RAISE A RULE 29 MOTION AT THE END OF THE STATE’S CASE, AND WHEN COUNSEL FAILED TO OBJECT TO THE ADMISSION OF THE 911 CALLER’S STATEMENT THAT THREE SUSPICIOUS BLACK BOYS WERE LOITERING OUTSIDE UDF.”

{¶ 31} Our disposition of Vincent D.’s first assignment of error renders these assignments of error moot. Accordingly, we will not address them. App.R. 12(A)(1)(c).

Conclusion

{¶ 32} Having sustained the first assignment of error, we will reverse and vacate Vincent D.’s adjudication of delinquency and the disposition that was ordered on that adjudication, and order him discharged with respect to the offense for which he was charged.

DONOVAN, P.J., And BROGAN, J., concur.

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