

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MANNY ZARLENGO,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 20 MA 0036**

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Criminal Appeal from the  
Court of Common Pleas of Mahoning County, Ohio  
Case No. 14 CR 637

**BEFORE:**

Carol Ann Robb, Cheryl L. Waite, Judges. Michael D. Hess, Judge of the  
Fourth District Court of Appeals, Sitting by Assignment.

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**JUDGMENT:**

Affirmed.

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*Atty. Ralph Rivera*, Assistant Chief, Criminal Division, Office of the Mahoning County Prosecutor, 21 West Boardman St., 6th Floor, Youngstown, Ohio 44503, *Atty. Edward A. Czopur*, Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, Youngstown, Ohio 44503 for Plaintiff-Appellee and

*Atty. James R. Wise, Hartford & Wise, Co., LPA, 91 W. Taggart, PO Box 85, East Palestine, Ohio 44413 for Defendant-Appellant.*

Dated: December 15, 2021

**Robb, J.**

{¶1} Defendant-Appellant Manny Zarlengo appeals after an agreed sentence was imposed in the Mahoning County Common Pleas Court following his guilty plea to multiple counts of aggravated robbery with firearm specifications. Appellant challenges the juvenile court's mandatory bindover decision by arguing the state's probable cause evidence was insufficient to prove his identity as a participant in each of the robberies and lacked credibility. We agree with the state's assertion that these probable cause arguments are non-jurisdictional and are thus waived when a defendant pleads guilty. The trial court's final judgment imposing sentence is therefore affirmed.

STATEMENT OF THE CASE

{¶2} Appellant was charged in the juvenile court with eleven counts of aggravated robbery with firearm specifications for armed robberies occurring at five Youngstown stores in October 2013. To accomplish mandatory bindover for trial as an adult, the preliminary hearing to determine probable cause was held on June 10, 2014. The child stipulated he was sixteen at the time of the alleged acts. The state presented testimony from a detective, some of the store employees, a neighbor to a store, and a juvenile who was one of Appellant's co-defendants (J.M.).

{¶3} On October 4, 2013, the police were advised Dollar General on McGuffey Road was robbed by two men with guns while a driver of a gold vehicle waited for them. According to a detective's testimony, the manager opened the safe for the robbers. (Tr. 147-148). The store's video portrayed the two robbers pointing guns at the manager and filling a black bag. J.M. testified he traveled with Appellant and "Slim" to a location near Dollar General on the east side in Slim's "tannish" colored Chevy (with Slim driving). (Tr. 110-111). They had a plan to rob the Dollar General. (Tr. 111-112). He said Slim and Appellant both had guns, and he was unsure which direction they went when they exited the car. (Tr. 111-113). J.M. drove them away from the scene after they ran back to the car with a black bag. (Tr. 111-112). When they returned to his house, he observed money

in the bag which he believed came from Dollar General “because that was the plan.” (Tr. 112). J.M. claimed he did not know Slim’s real name. (Tr. 110).

{¶4} On October 8, 2013, the police were advised Family Dollar was robbed by two men with guns and bandanas on their faces. The store’s video confirmed there were two men. The detective testified: a shot was fired down an aisle; a bullet was recovered from a cooler; and a neighbor informed the police a gold or tan Chevy had been parked in a lot behind the store. (Tr. 147). J.M. testified Appellant fired a .32 caliber revolver into the air after they entered Family Dollar. (Tr. 119-121). J.M. admitted they took money from the register and the safe. (Tr. 120). He also confirmed they fled to Slim’s car which was on a side street but claimed Slim was not waiting in the car.

{¶5} On cross-examination, defense counsel asked J.M. if he told the police there was a third individual waiting in the car and J.M. alternatively said: he did not say this; he did not remember so stating; and this portion of his statement was untrue. (Tr. 125-126, 131-133). A neighbor (who was the block watch captain) testified an older goldish car (similar to a Chevy Nova) aroused his suspicions due to where it was parked (at the lot where he mowed). He testified two young and unfamiliar males walked past him while he was going to cut grass and a third male remained in the vehicle. He soon heard sirens and reported the sighting when the police asked if he saw anything suspicious. (Tr. 84-89).

{¶6} On October 12, 2013, the police were advised Taco Bell was robbed by two men with guns who were wearing bandanas on their faces. The detective said the initial report described a gold or tan Chevy. (Tr. 148). A Taco Bell employee testified there were three employees present when two males entered wearing bandanas up to the nose and hats; they appeared to be 16 to 20 years old. (Tr. 54). He saw a gun pointed at his manager and identified Appellant in court as the person who threatened to start shooting if the safe was not opened. (Tr. 55, 57-58). Taco Bell’s assistant manager testified the robbery occurred at 2:40 p.m. He pointed out the perpetrators’ faces were visible from nose to forehead and one robber was wearing an orange Texas Longhorns hat. He immediately went to open the safe upon hearing the demand and noticed a gun in his peripheral vision. (Tr. 68-69). J.M. confirmed he and Appellant entered Taco Bell with

masks on their faces with a joint plan to commit a robbery. (Tr. 114-115). He said Appellant used a .32 caliber revolver and Slim was not with them. (Tr. 115-116).

{¶7} On October 17, 2013, the police were advised of a robbery at Subway by two men with guns. The detective testified radio traffic reported a gold or tannish Chevy was involved. (Tr. 149). The owner of the store testified he was present with two employees and customers when two young males (aged 15 to 20 years old) entered the store with guns and their faces covered below the nose. (Tr. 30-31, 34, 40). The owner said he hit the silent panic button and then opened the register after a gun was pointed at his head. (Tr. 30-32). The perpetrators put the cash register drawer in a bag they brought with them. When they demanded the money in the safe, the owner informed them it was on a time delay. The perpetrators were upset and threatened to start shooting people; the owner saw a gun pointed at a female employee and “heard the gun click as if they pulled the trigger but it didn’t fire.” (Tr. 32). This female employee’s testimony confirmed a perpetrator held a gun to her head while another retrieved the register drawer. (Tr. 44). She said threats were made to kill her if the safe was not opened. (Tr. 45). When the perpetrators realized the safe would not open, they robbed the customers at gunpoint. (Tr. 33).

{¶8} J.M. testified he and Appellant committed the Subway robbery, confirming they took wallets because the safe was taking too long. J.M. said he had a .32 caliber revolver during the robbery. (Tr. 118). He initially testified Slim was not involved; however, he later acknowledged Slim (who used his own gun for the Dollar General robbery) was involved as the driver for the Subway robbery.

{¶9} After the robbery, the owner of Subway found Appellant’s Facebook page and concluded this was the individual who robbed him. (Tr. 37). He identified Appellant at the hearing and said having a gun pointed at his head helped imprint the memory; he said he recognized him by the eyes and nose, noting he could also see his forehead. (Tr. 33-34, 40). The store video confirmed a gun was pointed at the owner’s face prior to the gun being pointed at the female employee’s head.

{¶10} On October 18, 2013 (the day after the Subway robbery), witnesses reported to police at approximately 4:00 p.m. three individuals robbed McDonald’s in a similar manner while another individual waited in a car fitting the description from the

other robberies. The clothes and bandanas were also described as similar to the other robberies. (Tr. 150). J.M. testified he was not involved in the McDonald's robbery. (Tr. 118). The manager of McDonald's testified she was in the back room when the robbers entered the store. When she came out, a male came behind the counter, pointed a gun at her face, and demanded she open the safe. (Tr. 77). She kept her head down while waiting for the employee with the combination to open the safe. She noticed this gunman lowered his gun to put the drawers from the safe into a bag while he was yelling to his two accomplices about the other drawers. (Tr. 77-78). She noted customers in the parking lot called the police and employees said there was a fourth accomplice. (Tr. 78-79). She only saw one gun; she started to indicate others were armed but was not permitted to testify as to what she learned about other guns. (Tr. 80).

{¶11} The detective testified "wanted posters" were produced from the Family Dollar video, which generated tips providing various names, including Appellant's name; one of the other names also led the officers to a woman who identified Appellant. (Tr. 151). She said Appellant was staying with J.M. and directed the officers to a house on Midlothian Boulevard. (Tr. 152). A gold Chevy was parked in the drive of the house. Appellant, J.M., and Joseph Mascarella were in the house. The car was registered to Joseph Mascarella's relative, and J.M.'s testimony indicated the car belonged to Mascarella.

{¶12} J.M.'s mother gave the police consent to search the house. The police recovered hats and sweatshirts matching the clothing used in the robberies; they also discovered the cash drawers from all of the robberies. (Tr. 152). The three males were arrested. The detective testified that J.M. commented "we had gotten the right three guys." During an interview on October 19, 2013, J.M. refused to give a further statement against the other two males while admitting to his own participation in some of the robberies. (Tr. 130, 153).

{¶13} The detective opined Mascarella was the adult involved in the robberies as opposed to J.M.'s attribution of certain roles to Slim. (Tr. 158, 160). At the probable cause hearing, J.M. acknowledged he had been spending a lot of time with Mascarella (and Appellant) during this time period; however, J.M. claimed Mascarella was not the person he called Slim. (Tr. 122). J.M. admitted to using Mascarella's car to retrieve the

Taco Bell register drawers from a vacant house by the store where he and Appellant hid them. (Tr. 123, 128).

{¶14} The state presented the surveillance videos from the first four robberies, which the juvenile court agreed to review. (Tr. 20-21); (St. Ex. 2-5). The state also presented as an exhibit a letter Appellant wrote to the court on May 19, 2014, wherein he: accepted responsibility for his actions; said he made bad decisions because he needed money; and acknowledged he never should have had a gun. (St. Ex. 1). The court had previously provided the letter to both sides. At the probable cause hearing, the chief probation officer testified he was asked to retrieve the letter from Appellant at the juvenile justice center for Appellant's probation officer; he briefly observed the letter appeared to be an admission and then stopped reading as he noticed it was addressed to the judge. Defense counsel argued the letter could not be used as a statement against interest because it was associated with plea negotiations and also suggested it was not trustworthy. The court agreed the letter would not be considered.<sup>1</sup>

{¶15} The juvenile court found probable cause to believe Appellant committed the acts charged and recited the counts in the entry. (6/25/14 J.E.). The case was transferred to the general division where the grand jury indicted Appellant on the eleven counts of aggravated robbery with firearm specifications: Counts 1 and 2 represented two victims from Family Dollar; Count 3 represented a victim at Dollar General; Counts 4, 5, and 6 represented three victims from Taco Bell; Counts 7, 8, 9, and 10 represented four victims from Subway; and Count 11 represented one of the victims from McDonald's. (7/24/14 Ind.). The trial court joined Appellant's case with the case against Mascarella.

{¶16} Appellant subsequently pled guilty as charged. At sentencing, Appellant apologized for his mistake. The trial court imposed a jointly recommended sentence:

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<sup>1</sup> We note the Rules of Evidence do not apply at a juvenile court probable cause hearing. *In the Matter of B.W.*, 2017-Ohio-9220, 103 N.E.3d 266, ¶ 48 (7th Dist.). Regardless, a statement offered against a party is not hearsay if it is his own statement. Evid.R. 801(D)(2)(a). When this exclusion applies, there is no need to analyze the hearsay exception for a declaration against interest in Evid.R. 804(B)(3) (which evaluates trustworthiness). As for the rule on statements during plea negotiations, the current and applicable version does not apply to a letter written to a judge on the defendant's own initiative. See Evid.R. 410 (A)(5) (defendant's statement is not admissible if it was made "in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant"); *State v. Frazier*, 73 Ohio St.3d 323, 336, 652 N.E.2d 1000 (1995) (the current version protects "plea bargaining statements involving an attorney in order to promote the disposition of criminal cases by compromise" and statements to detectives would not be excluded unless the prosecutor was present).

three years on each count to run concurrent with each other but consecutive to the three-year firearm specifications applicable to each of the five locations robbed, for a total prison term of eighteen years. A delayed appeal was granted.

ASSIGNMENT OF ERROR: PROBABLE CAUSE

{¶17} Appellant's sole assignment of error provides:

"THE JUVENILE COURT DID NOT HAVE PROBABLE CAUSE IN WHICH TO BIND THE DEFENDANT/APPELLANT OVER TO THE COMMON PLEAS COURT TO BE TRIED AS AN ADULT."

{¶18} "No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been transferred as provided in division (A) or (B) of this section or [the over 21 provision applies]." R.C. 2152.12(H). In pertinent part, the cited division in the mandatory bindover statute requires "probable cause to believe that the child committed the act charged." R.C. 2152.12(A)(1)(b). A corresponding rule provides: "In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult." Juv.R. 30(A).

{¶19} At this preliminary hearing, the state has the burden to provide "sufficient credible evidence" on the elements to warrant going forward with the charge. *A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629 at ¶ 46, 52. The juvenile court's function is not to determine whether the juvenile is guilty of the charge but is to determine whether there is probable cause to believe he committed the offense. *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). To satisfy the probable cause standard, the state must produce evidence that raises "more than a mere suspicion of guilt." *A.J.S.*, 120 Ohio St.3d 185 at ¶ 41, quoting *Iacona*, 93 Ohio St.3d at 93. Probable cause is a flexible concept grounded in fair probabilities which can be gleaned from considering the totality of the circumstances. *See Iacona*, 93 Ohio St.3d at 93, 752 N.E.2d 937. *See also Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (probable cause is a flexible, common-sense standard which does not demand any showing that the belief is correct or more likely true than false). Underlying "all the definitions" of

probable cause is “a reasonable ground for belief of guilt.” *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). “[A]s the very name implies, we deal with probabilities.” *Id.* at 174-175.

{¶20} There is a mixed standard of review applied to a juvenile court's probable cause determination at a mandatory transfer proceeding. *A.J.S.*, 120 Ohio St.3d 185 at ¶ 51. The sufficiency of the evidence presented by the state at the preliminary hearing held prior to a juvenile bindover involves a legal question to be independently reviewed with no deference given to the decision of the juvenile court. *Id.* at ¶ 47, 51, citing, *e.g.*, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). “[W]hether the state has produced sufficient evidence to support a finding of probable cause in a mandatory-bindover proceeding is a question of law, and we review questions of law de novo.” *Id.* at ¶ 47.

{¶21} A sufficiency review asks whether *any* rational trier of fact could have found the essential elements of the crime proven by the relevant standard. See *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). The evidence is viewed in the light most favorable to the state as are reasonable inferences. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). Circumstantial evidence carries the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). “[W]hen the state relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction.” *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), overruling *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974), syllabus.

{¶22} As to credibility and weight, a juvenile court has a limited role and is not to discount testimony presented by the state so as to intrude on the role of a jury at a later trial. *A.J.S.*, 120 Ohio St.3d 185 at ¶ 43-44, 46, 60-61 (finding the juvenile court exceeded the scope of its review when it found probable cause lacking after it weighed conflicting evidence on trajectory). “[T]he resolution of conflicting theories of evidence, both of which are credible, is a matter for the trier of fact at a trial on the merits of the case, not a matter for the exercise of judicial discretion at a bindover hearing in the juvenile court.” *Id.* at ¶ 64. “The trier of fact is free to believe all, part, or none of the testimony of any witness.”



See generally *State v. Chambers*, 179 Ohio App.3d 770, 2008-Ohio-6973, 903 N.E.2d 709, ¶ 29 (7th Dist.). A reviewing court defers to a trial court's factual determinations on credibility and in doing so applies an abuse of discretion standard of review. *Id.* at ¶ 1, 51.

{¶23} Appellant contests whether the state demonstrated probable cause as to his identity as a participant in the robberies at all five locations, presenting arguments sounding in sufficiency and weight of the evidence. He challenges the credibility of the witnesses and argues “the lack of identification that the Defendant committed the robberies in question” resulted in the state’s failure to establish probable cause. For instance, he argues the state failed to present sufficient evidence to connect him to the McDonald’s robbery notwithstanding the similarities with the other robberies,<sup>2</sup> such as: a gold colored Chevy as the get-away car; bandanas as masks and similar clothing; entry behind the counter; cash register drawers deposited into a bag; targeting the safe after the drawers; pointing guns directly at the heads of employees; the discovery of evidence related to all five robbery locations at J.M.’s house where Appellant was staying while J.M. and Appellant were present hours after McDonald’s robbery; and the condensed time period.

{¶24} However, before we can analyze the sufficiency and weight of the evidence used to show Appellant’s identity as a participant in each robbery, we must address the state’s threshold argument. The state contends Appellant’s guilty plea waived the alleged issue with the evidence on probable cause because the issue was non-jurisdictional.

#### GUILTY PLEA WAIVES PROBABLE CAUSE ON APPEAL

{¶25} We begin by acknowledging it has been observed a juvenile cannot immediately appeal a bindover decision but can generally appeal the bindover decision when it becomes final after conviction and sentence. *In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17, 95 N.E.3d 389, ¶ 8, 21-22; *In re Becker*, 39 Ohio St.2d 84, 314 N.E.2d 158

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<sup>2</sup> In a case where there was accomplice testimony stating the defendant participated in three of the charged robberies but no accomplice testimony regarding his participation in a fourth robbery, the defendant argued there was insufficient evidence of his involvement in the fourth robbery which his accomplices committed without him. The Tenth District found sufficient evidence upon emphasizing the proof the defendant committed three similar robberies and his possession of stolen property from the fourth location. See *State v. Davis*, 10th Dist. Franklin No. 87AP-1112 (Sep. 29, 1988) (evaluating the trial evidence where the state had the burden of proof beyond a reasonable doubt and at a time when there was a stricter test for circumstantial evidence).

(1974). However, we are asked to consider the effect of a guilty plea on the alleged errors in bindover after the Supreme Court’s 2020 decision in *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, which held not all bindover errors are jurisdictional.

{¶26} The standard rule is that a defendant who enters a valid guilty plea while represented by competent counsel waives any *non-jurisdictional* defects in the prior stages of the proceedings. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78, citing *Ross v. Common Pleas Court of Auglaize Cty.*, 30 Ohio St.2d 323, 323–24, 285 N.E.2d 25 (1972). See also *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105 (“guilty plea waived any complaint as to claims of constitutional violations not related to the entry of the guilty plea”), citing *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992), paragraph two of the syllabus (a guilty plea waives a defendant’s right to challenge the deprivation of counsel at the preliminary hearing stage).<sup>3</sup> Similarly, a juvenile who enters an admission in juvenile court waives earlier non-jurisdictional errors, such as suppression issues. *In the Matter of D.Y.*, 2020-Ohio-3758, 156 N.E.3d 310, ¶ 16-19 (7th Dist.).

{¶27} In stating a proper “plea of guilty waives all non-jurisdictional errors that may have occurred during trial,” we pointed out the surviving errors are only jurisdictional errors which would make a conviction void and which could be raised at any time and thus could not be waived. *State v. Parks*, 7th Dist. Carroll No. 11 CA 873, 2012-Ohio-3011, ¶ 21-22. This is distinct from a lack of authority in a particular case due to an erroneous decision made while exercising jurisdiction which would merely make an order voidable. *Id.* at ¶ 22, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 10-12, 21 (suggesting the word jurisdiction is overused).

{¶28} In the past, the waiver via guilty plea principle was not discussed often in the juvenile bindover context because courts proceeded under the theory that any or most defects in the bindover process affected subject matter jurisdiction. This was partly based on broad statements such as: “without a proper bindover procedure under R.C. 2151.26,

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<sup>3</sup> In an adult criminal proceeding, an issue with the preliminary hearing is moot or cured after indictment and is not jurisdictional. *State v. Thomas*, 7th Dist. Mahoning No. 18 MA 0132, 2020-Ohio-3637, ¶ 48-50, citing *Dowell v. Maxwell*, 174 Ohio St. 289, 290, 189 N.E.2d 95 (1963) (“The jurisdiction of the court is invoked by the return of a valid indictment and is not based on \* \* \* the findings made on the preliminary examination. Any defect or irregularity in either the arrest or preliminary examination does not affect the validity of the accused’s conviction.”).

a juvenile court's jurisdiction is exclusive” and “when a court's judgment is void because it lacked jurisdiction, habeas is still an appropriate remedy despite the availability of appeal.” *Gaskins v. Shiplevy*, 74 Ohio St.3d 149, 151, 656 N.E.2d 1282 (1995) (*Gaskins I*) (remanding to allow amendment of habeas petition to add claim of improper bindover where petitioner alleged he was not provided with counsel or a mental and physical examination), citing *State v. Wilson*, 73 Ohio St.3d 40, 652 N.E.2d 196 (1995).

{¶29} However, in the cited *Wilson* case, the juvenile never appeared before the juvenile court and was directly charged in adult court. Moreover, the *Wilson* Court relied on the provision in the bindover statute which specifically said: “Any prosecution that is had in a criminal court on the mistaken belief that the child was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity.” *Wilson*, 73 Ohio St.3d at 44.

{¶30} “The *Gaskins I* court was wrong in adopting the broad rule that any deviation from the statutory bindover procedure renders the adult court's judgment void. The *Gaskins I* court should have examined the statute's text concerning the specific error alleged to determine whether the statute clearly established a barrier to the adult court's obtaining jurisdiction.” *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, ¶ 28.

{¶31} In *Gaskins II*, the Supreme Court found there was full compliance with the bindover procedure where a juvenile court entry said the juvenile was present with counsel and the statutory bindover requirement of a mental and physical examination had been expressly waived. *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 382, 667 N.E.2d 1194, 1196 (1996) (*Gaskins II*). The Court later held the juvenile may waive the right to an amenability hearing. *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 21. Those holdings essentially concluded “the mandates of the bindover statute were not jurisdictional after all.” *Smith*, 159 Ohio St.3d 106 at ¶ 25-26, 33.

{¶32} In a direct appeal prior to the *Smith* clarifications, a defendant was bound over by the juvenile court and then pled guilty. She argued the juvenile court should have appointed a guardian ad litem under a safe harbor provision meant to assist certain human trafficking victims. The Ninth District held the defendant waived the argument by pleading guilty as the bindover issue did not affect the trial court's jurisdiction. The

Supreme Court affirmed on other grounds, specifically declining to address this waiver holding at issue herein. Instead, the Court applied a different waiver doctrine (failure to object) and concluded the defendant failed to show plain error. *State v. Martin*, 154 Ohio St.3d 513, 2018-Ohio-3226, 116 N.E.3d 127, ¶¶ 14-17, citing *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶¶ 23, 53, 56 (juvenile court violated mandatory duty to appoint a guardian ad litem for a juvenile who appeared at the amenability without parents as they were deceased; however, the juvenile failed to object in juvenile court and failed to show prejudice on appeal to support plain error). The application of the plain error doctrine implicitly meant the issue was not jurisdictional.

{¶33} In the more recent *Smith v. May* case, the Supreme Court expressly overruled the broad statement in *Gaskins I* (and some subsequent cases) which had suggested *any* defect in the “proper bindover procedure” is jurisdictional. *Smith*, 159 Ohio St.3d 106 at ¶¶ 20-28. It was pointed out the jurisdictional problem in *Wilson* “was that a juvenile-court proceeding had never happened at all” and the state failed to use the only method for transfer. *Id.* at ¶ 22. This was “quite different from *Gaskins I*, in which the subject-matter jurisdiction of a juvenile court was invoked, a bindover proceeding was held, and subject-matter jurisdiction ostensibly was transferred to an adult court.” *Id.* The *Gaskins I* case also failed to focus on the statutory language to ascertain if subject matter jurisdiction was affected as in the *Wilson* case where the statute specifically eliminated jurisdiction to convict in adult court. *Id.* at ¶ 23.

{¶34} To be jurisdictional, the statute must make clear the specific requirement at issue is a barrier to the transfer of jurisdiction. *Id.* at ¶¶ 28, 32, 34. If a requirement is jurisdictional, the conviction could be challenged years in the future (without a delayed appeal). Merely because a certain bindover requirement is mandatory does not mean it is jurisdictional. *Id.* at ¶ 31. See also *Steele v. Harris*, 161 Ohio St.3d 407, 2020-Ohio-5480, 163 N.E.3d 565, ¶¶ 14-15 (explaining the transferee court’s judgment is no longer considered void merely because a juvenile court failed to comply with the mandatory requirements of the bindover statute).

{¶35} For instance, even though an amenability hearing is one of the “key parts” and “central to any discretionary bindover procedure,” the juvenile can waive it. *Smith*, 159 Ohio St.3d 106 at ¶ 18, 26. The *Smith* Court then found the bindover statute’s

mandate that a written notice shall be provided to the parents three days before a hearing was not jurisdictional and the juvenile could express waiver of a parent's presence after the court violated the provision. *Id.*, applying R.C. 2152.12(G). The Court reasoned, "if the requirements are waivable, they are not jurisdictional" because the juvenile court's exclusive subject matter jurisdiction cannot be waived or forfeited and can be raised at any time. *Id.* at ¶ 26.

{¶36} In an earlier habeas case, the Court said the express waiver of the juvenile court's probable cause hearing could not be raised in a habeas corpus proceeding as it could have been raised in the ordinary course of an appeal and there was no "patent and unambiguous lack of jurisdiction." *Smith v. Bradshaw*, 109 Ohio St.3d 50, 2006-Ohio-1829, 845 N.E.2d 516, ¶ 10. The defendant in that case had been convicted after a trial. Notably: "When a court's judgment is void because the court lacked subject-matter jurisdiction, habeas corpus is generally an appropriate remedy despite the availability of appeal." *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001), quoting *Rash v. Anderson*, 80 Ohio St.3d 349, 350, 686 N.E.2d 505 (1997).

{¶37} The state asks this court to adopt the Fourth District's position in *Powell* which is directly on point. In that case, the defendant argued his due process rights were violated when the juvenile court found probable cause to believe he committed offenses subject to mandatory bindover, and the Fourth District concluded the defendant waived this non-jurisdictional issue by pleading guilty. *State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 2, 55 (the plea waived other arguments raised on appeal as well).

{¶38} The *Powell* court reviewed the observations in *Smith* such as: not all mandatory bindover procedures are jurisdictional; if the procedure is waivable, it is not jurisdictional as subject matter jurisdiction cannot be waived; and an amenability hearing is waivable even though it is a key component of a discretionary bindover. *Id.* at ¶ 28-29, 55. The court noted just as an amenability hearing can be waived, a probable cause hearing can be waived or a juvenile can stipulate to probable cause. *Id.* at ¶ 55, citing *State v. J.T.S.*, 10th Dist. Franklin No. 14AP-516, 2015-Ohio-1103, ¶ 20.

{¶39} The Fourth District emphasized the clarity in the law after the Supreme Court issued *Smith*. *Powell*, 4th Dist. No. 20CA3 at ¶ 54 (pointing out the district had previously expressed it would await further guidance from the Supreme Court before

finding a challenge to probable cause raised only a non-jurisdictional issue). The court concluded: “Because probable cause hearings are waivable, they are not jurisdictional” which means the guilty plea waived the issue of whether the state presented sufficient credible evidence demonstrating probable cause. *Id.* at ¶ 55.

{¶40} Various courts have reviewed a juvenile court’s probable cause determination without addressing the issue of whether a guilty plea after bindover waives the right to challenge the probable cause decision. Where the topic was not raised or addressed, the cases are not particularly persuasive authority on the topic.

{¶41} Some courts have specifically opined a guilty plea does not waive the right to appeal the probable cause determination. The First District concluded a defendant’s appellate arguments contesting the juvenile court’s probable cause and amenability decisions related to the common pleas court’s subject matter jurisdiction and were not waived by the guilty plea. *State v. Amos*, 1st Dist. Hamilton No. C-150265, 2016-Ohio-1319, ¶ 28. Yet, that court relied on *Gaskins I*, which has since been overruled. The court also cited appellate cases in support. *Id.*, citing, e.g., *State v. Riggins*, 68 Ohio App.2d 1, 5, 426 N.E.2d 504 (8th Dist.1980) (stating the plea did not waive arguments on the sufficient and admissibility of evidence at the probable cause hearing but the defendant failed to provide a transcript); *State v. Talbott*, 7th Dist. Mahoning No. 07 MA 225, 2008-Ohio-6300, ¶ 17. Some other cases cited in *Amos* did not involve probable cause or did not specifically address the issue of waiver by a guilty plea.

{¶42} In the cited Seventh District case, this court was conducting a review after a no merit brief was filed by counsel. We observed the review after a guilty plea is normally limited to an examination of the plea and sentencing because a defendant who pleads guilty “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Talbott*, 7th Dist. No. 07 MA 225, ¶ 17, quoting *State v. Spates*, 64 Ohio St.3d 269, 272,595 N.E.2d 35 (1992). However, we then opined “we may also review the bindover proceedings from juvenile court, as it is a jurisdictional issue which is not waived by the guilty plea.” *Talbott*, 7th Dist. No. 07 MA 225, ¶ 17. We then found the defendant properly waived a probable cause hearing and stipulated to probable cause in the juvenile court. *Id.* at ¶ 27.

{¶43} The Tenth District engaged in a discussion of whether an allegation of insufficient probable cause before bindover was a jurisdictional issue or whether it was waived by the guilty plea after bindover. *State v. E.T.*, 2019-Ohio-1204, 134 N.E.3d 741, ¶¶ 37-44 (10th Dist.). The state argued the allegation “is not a jurisdictional error [but is merely an allegation the juvenile court] committed a legal error by relying on insufficient evidence to find that probable cause existed.” *Id.* at ¶ 42. However, the court concluded a *finding* of probable cause cannot be waived as the sufficiency of the probable cause evidence is jurisdictional, relying on the broad statement requiring the juvenile court’s use of “proper bindover procedure” to relinquish exclusive jurisdiction. *Id.* at ¶¶ 38, 43-45 (and then found there was probable cause).

{¶44} As the Fourth District pointed out, the Tenth District’s *E.T.* case was issued before the Supreme Court’s 2020 clarifications in *Smith. Powell*, 4th Dist. No. 20CA3 at ¶ 54. Likewise, our *Talbott* case was issued in 2008 without the benefit of *Smith* or other more recent pronouncements.

{¶45} Lastly, as an out-of-state example, the Iowa Supreme Court found a juvenile court’s probable cause decision was waived upon a guilty plea after bindover. *State v. Yodprasit*, 564 N.W.2d 383, 386 (Iowa 1997). Recognizing the difference between subject matter jurisdiction and a court’s authority within a case, it was observed, “The insufficiency of the evidence to support the waiver order might be an impediment to the district court’s authority, but such an impediment \* \* \* can be obviated by consent, waiver, or estoppel.” *Id.* at 386. The court explained: “A juvenile court might enter an erroneous order waiving jurisdiction. For example, there may not exist sufficient evidence to support the juvenile court’s fact-findings on the criteria for the waiver. Such an order, however, does not undermine the district court’s subject matter jurisdiction to conduct the criminal proceedings, accept a plea of guilty, and sentence the defendant-juvenile. In short, the error is judicial, not jurisdictional.” *Id.*

{¶46} Relying on the explanation in the Supreme Court’s 2020 *Smith* case that a waivable item is not jurisdictional and the Fourth District’s 2021 position in *Powell*, we conclude a defendant who pleads guilty in the general division of the common pleas court waives the ability to contest the sufficiency and weight of the evidence presented at the

probable cause hearing in the juvenile court. Accordingly, Appellant's assignment of error is overruled, and the trial court's sentencing judgment is affirmed.

Waite, J., concurs.

Hess, J., concurs.



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For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**