

STATE OF OHIO                    )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

IN RE: T.M.

C.A. No.       22CA011868

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     20JD60578

DECISION AND JOURNAL ENTRY

Dated: August 14, 2023

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STEVENSON, Judge.

{¶1} Appellant, T.M., appeals from the judgment of the Lorain County Court of Common Pleas, Juvenile Division. We reverse and remand.

I.

{¶2} In April 2021, T.M. was indicted on one count of complicity to aggravated robbery, one count of aggravated burglary, and one count of kidnapping, all first-degree felonies carrying a three-year gun specification. The indictment also specified T.M. as a discretionary Serious Youthful Offender (“SYO”). As part of a plea agreement, T.M. pleaded guilty to one amended count of complicity to commit robbery in violation of R.C. 2911.02, a felony of the second degree, with an attendant one-year firearm specification as well as an SYO specification. The State dismissed the remaining charges.

{¶3} The SYO dispositional hearing took place in October 2021. On the juvenile portion of the disposition, T.M. was given a suspended commitment to the Ohio Department of Youth

Services and placed on probation. T.M.'s probation was ordered to be transferred to Cuyahoga County where she resided. On the adult portion of the sentence, T.M. received a stayed two to three-year sentence with an additional mandatory one-year for the gun specification to be served consecutively.

{¶4} After T.M. was placed on probation, she was charged with a series of offenses. On November 3, 2021, T.M. was charged with felonious assault, felony two, discharge of a firearm, felony three, both with one-year, three-year, and five-year firearm specifications, and improperly handling firearms in a motor vehicle, felony four. That case was dismissed but T.M. was adjudicated a delinquent in a separate case on the same date with a charge of unauthorized use of a motor vehicle, a first-degree misdemeanor. On November 30, 2021, T.M. appeared before the Cuyahoga County Juvenile Court for the disposition of the unauthorized use case. She was not placed on probation or given any supervision.

{¶5} On November 9, 2021, a warrant was issued by the Cleveland police for T.M.'s arrest concerning an alleged aggravated robbery on November 2, 2021. On November 12, 2021, a second warrant was issued out of the Berea Municipal Court for T.M.'s arrest concerning an alleged misdemeanor theft in Strongsville on October 6, 2021.

{¶6} On January 7, 2022, T.M. was indicted in Cuyahoga County for the murder of a Cleveland police officer during a carjacking that took place on December 31, 2021. On January 11, 2022, T.M. was indicted in Cuyahoga County for the alleged aggravated robbery that occurred on November 2, 2021, in Cleveland. The charges included aggravated robbery, kidnapping, felonious assault, having weapons under disability, and improperly handling firearms in a motor vehicle.

{¶7} On February 7, 2022, T.M. was indicted in Cuyahoga County for an alleged arson, felony four, that occurred on November 12, 2021, where she was accused of intentionally setting the victim's car on fire. On April 12, 2022, T.M. was indicted for an alleged robbery where the victim was held at gunpoint and struck by the vehicle that T.M. was driving as she fled. Charges included aggravated robbery, kidnapping, felonious assault, having weapons under disability, and improperly handling firearms in a motor vehicle.

{¶8} Regarding the transfer of T.M.'s probation, the Cuyahoga County Administrative Judge sent a letter dated December 6, 2021, to the Lorain County Juvenile Court stating that it received T.M.'s case, but that it would not be accepted for probation transfer under R.C. 2151.271 because T.M. did not have any pending cases in Cuyahoga County.

{¶9} On January 5, 2022, the juvenile court filed a judgment entry pursuant to R.C. 2152.14(B) requesting the State to file a motion to invoke the adult portion of T.M.'s SYO dispositional sentence. R.C. 2152.14(B) provides in relevant part that "the juvenile court that imposed the serious youthful offender dispositional sentence on the person \* \* \* may request the prosecuting attorney of the county in which is located the juvenile court to file a motion with the juvenile court to invoke the adult portion of the dispositional sentence."

{¶10} After the State declined to file the requested motion, the juvenile court filed another judgment entry on January 19, 2022, announcing its intent to sua sponte hold a hearing on the invocation of the adult sentence pursuant to R.C. 2152.14(C). Under R.C. 2152.14(C),

If the prosecuting attorney declines a request to file a motion that was made by the juvenile court under division (B) of this section or fails to act on a request from the court under that division within a reasonable time, the juvenile court may hold the hearing described in division (D) of this section on its own motion.

{¶11} On April 28, 2022, the juvenile court filed a notice pursuant to R.C. 2152.14(B), that the adult portion of T.M.’s SYO dispositional sentence may be invoked for the following reasons:

- (1) There is reasonable cause to believe that [T.M.] has committed an act that is a violation of the conditions of supervision and that could be charged as a felony if committed by an adult; and
- (2) [T.M.] has engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim.

{¶12} The juvenile court held a hearing on May 5, 2022. The State, T.M.’s counsel, the Guardian Ad Litem (“GAL”), T.M.’s mother, and T.M. were present. The juvenile court called George Harris, a member of the Lorain County Probation Department, to give a report. His report included a recitation of the aforementioned criminal offenses that T.M. had allegedly committed since the issuance of her SYO sentence. The GAL gave her recommendation that the court should not invoke the SYO portion of T.M.’s sentence. T.M.’s mother also addressed the court and requested that T.M. remain in the juvenile system in order to have access to mental health services. The juvenile court gave T.M. the opportunity to speak but she declined to do so. None of the testimony adduced during the hearing was made under oath.

{¶13} The juvenile court then announced its decision to invoke the adult portion of T.M.’s SYO dispositional sentence and imposed the stayed adult sentence of three to four years’ imprisonment. In so doing, the court told T.M. “you have violated the terms of your probation and serious youth offender juvenile disposition. You have double downed on your criminal behaviors, and you have shown this Court that you cannot be rehabilitated in the juvenile court system.”

{¶14} The juvenile court issued its written sentencing entry the same day, stating that it found by clear and convincing evidence that T.M. satisfied the factors set forth in R.C. 2152.14(E)(1)(a), (b), and (c), and invoked the SYO dispositional sentence.

{¶15} T.M. timely appeals and asserts four assignments of error for our review.

## II.

### **ASSIGNMENT OF ERROR I**

**THE LOWER COURT ERRED WHEN IT INVOKED T.M.'S ADULT SENTENCE BECAUSE IT LACKED STATUTORY AUTHORITY TO DO SO. FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE 1, SECTION 16, OHIO CONSTITUTION; AND R.C. 2152.14(E). (10.31.2019 ENTRY P. 3)**

{¶16} In her first assignment of error, T.M. argues the juvenile court lacked statutory authority to impose a SYO sentence because the requirements of R.C. 2152.14(E) were not met. T.M. asks this Court to vacate the trial court's order invoking her SYO sentence and remand the case for further proceedings. We agree.

#### **The SYO Statutory Scheme**

A juvenile charged as a potential serious youthful offender does not face bindover to an adult court; the case remains in the juvenile court. Under R.C. 2152.11(A), a juvenile defendant who commits certain acts is eligible for 'a more restrictive disposition.' That 'more restricted disposition' is a 'serious youthful offender' disposition and includes what is known as a blended sentence—a traditional juvenile disposition coupled with the imposition of a stayed adult sentence. R.C. 2152.13. The adult sentence remains stayed unless the juvenile fails to successfully complete his or her traditional juvenile disposition. R.C. 2152.13(D)(2)(a)(iii). Theoretically, the threat of the imposition of an adult sentence encourages a juvenile's cooperation in his own rehabilitation, functioning as both carrot and stick.

\* \* \*

R.C. 2152.13(D)(2)(a)(i) sets forth the factors a juvenile court must consider before imposing a discretionary blended sentence. Basically, if the court finds that a juvenile disposition alone would be inadequate to meet the statutorily enunciated

purposes of juvenile disposition, the court may impose an adult sentence, albeit stayed, on the child:

If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

R.C. 2152.13(D)(2)(a)(i) refers to R.C. 2152.01, which establishes the purposes of any juvenile disposition:

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

*State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶¶ 18, 25-28.

{¶17} R.C. 2152.14(E)(1) governs under what instances a juvenile court may invoke the adult portion of a serious youthful offender's sentence for failure to successfully complete the traditional juvenile disposition. R.C. 2512.14(E)(1) reads:

(E)(1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all 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.

{¶18} R.C. 2152.14(E)(1) is a conjunctive test, i.e., “all” of the factors must be found “on the record by clear and convincing evidence.” T.M. does not advance an argument regarding prong (b) of the statute. Assuming without deciding whether T.M. satisfies prong (a) and is “serving the juvenile portion of a serious youthful dispositional sentence,” we conclude that the outcome under prong (c) is dispositive of this entire matter and shall be the sole basis of this Court’s decision below.

{¶19} R.C. 2152.14(E)(1)(c) requires a finding by clear and convincing evidence that the juvenile has engaged in further bad conduct pursuant to R.C. 2152.14(A), (B), or (C), and is “unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

The [bad] conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. R.C. 2152.14(A)(2)(b) and (B)(2).

*D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9 at ¶ 36.

{¶20} Clear and convincing evidence under R.C. 2152.14(E)(1) is defined as:

Because the invocation proceeding is not a criminal proceeding, the fact-finding need not be according to the beyond-a-reasonable-doubt standard required in criminal trials. The clear-and-convincing standard allowed by R.C. 2152.14(E)(1) is less rigorous, though stronger than a mere preponderance-of-the-evidence standard. We have stated that clear and convincing evidence is that ‘which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’ The standard requires the judge to have a firm belief or conviction about the facts adduced.

(Internal citation omitted.) *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, ¶ 20.

{¶21} The juvenile court relied upon Mr. Harris’ unsworn testimony of T.M.’s pending felony charges, outlined above, and hearsay reports of her alleged confession as the basis for its decision to invoke T.M.’s adult sentence. Regarding the hearsay reports, Mr. Harris stated that

after learning of T.M.'s involvement in the shooting of the Cleveland police officer, the chief probation officer in Lorain County, not Mr. Harris himself, contacted the Cleveland police to inquire about the investigation. The chief probation officer was then informed by a Cleveland detective that during an interview with investigators following T.M.'s arrest, T.M. admitted to robbing and shooting the officer and to stealing his vehicle.

{¶22} Initially, we are not convinced the unsworn statements by Mr. Harris at the hearing qualifies as evidence to support invocation of the adult sentence. “Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.” Evid.R. 603. As set forth in this Rule, the oath serves an important reminder to secure the credibility of witnesses. Here, Mr. Harris was not required to take an oath that he was testifying truthfully. Therefore, his unsworn statements do not constitute evidence of the facts contained in those statements.

{¶23} As previously noted, in addition to being offered by unsworn testimony, T.M.'s alleged confession was based on hearsay reports. Hearsay is excluded when it is considered unreliable evidence. *State v. Kehoe*, 133 Ohio App.3d 591, 607 (12th Dist.1999); Evid. R. 802. “The rationale underlying the hearsay rule is the lack of trustworthiness of statements alleged to have been made outside the presence of the factfinder.” *Mastran v. Urichich*, 37 Ohio St.3d 44, 47 (1988). Under R.C. 2151.35(B)(2)(b), hearsay is admissible in juvenile court hearings. (“The court may admit any evidence that is material and relevant, including, but not limited to, *hearsay*, opinion, and documentary evidence[.]”) (Emphasis added.) *See also In re A.A.W.*, 8th Dist. Cuyahoga No. 101580, 2015-Ohio-1297, ¶ 13; Juv.R. 34(B)(2). Here, however, the question is whether the hearsay qualifies as clear and convincing evidence under the controlling statute, R.C.



2152.14(E), and has probative value concerning whether T.M.'s SYO sentence should be invoked. We believe it does not.

{¶24} Evid.R. 801 defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement.” The hearsay in this case is Mr. Harris’ report of T.M.’s alleged confession to the murder of the police officer and theft of his vehicle. That report was based on triple hearsay, even excluding T.M.’s statement to the investigator as a statement against interest and not hearsay: the statements from the investigator to the Cleveland police detective, the police detective to the Lorain County chief probation officer, and finally the chief probation officer to Mr. Harris.

{¶25} In the instant case, the conditions of cross-examination and oath, which are intended to minimize the dangers of hearsay, were completely lacking as to T.M.’s alleged confession. This is not to say that a confession to a crime in another matter cannot be the basis for imposing an adult sentence, only that the confession is not clear and convincing evidence when it is offered through unsworn testimony and triple hearsay as in this case.

{¶26} Lastly, the indictments on the pending charges were issued on the existence of probable cause, a lesser quantum of evidence than clear and convincing evidence. Pending charges, without some further evidence of guilt of those charges, are not clear and convincing evidence of: 1) acts that could be either charged as a felony or first degree misdemeanor or that create a substantial risk to the safety or security of the community; and 2) that the juvenile is unlikely to be rehabilitated. R.C. 2152.14(E)(1)(c). In this particular case, the unsworn hearsay evidence is not clear and convincing evidence of the additional indictments to support imposition of the adult sentence.

{¶27} Although the allegations charged against T.M. are egregious, and a tragedy has indeed occurred, we must recognize they were unsworn allegations at the time of the hearing. Thus, the unsworn allegations made against T.M. and T.M.’s alleged confession, which constituted the only testimony in this matter and was based on hearsay, do not, under these circumstances, establish by clear and convincing evidence that T.M. “engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and [that T.M.’s] conduct demonstrates that [she] is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.” R.C. 2152.14(E)(1)(c).

{¶28} Based on the foregoing, this Court concludes that the juvenile court erred in relying on pending charges and hearsay evidence to make the required findings by clear and convincing evidence under R.C. 2152.14(E)(1). T.M.’s first assignment of error is sustained. T.M.’s sentence is vacated and the case remanded to the trial court for further proceedings consistent with this opinion.

### **ASSIGNMENT OF ERROR II**

**THE TRIAL COURT ERRED [] IT ACTED AS BOTH PROSECUTOR AND TRIBUNAL AT T.M.’S HEARING TO DETERMINE WHETHER TO INVOKE THE ADULT PORTION OF A PERSON’S SERIOUS JUVENILE OFFENDER DISPOSITIONAL SENTENCE. FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTIONS 4(A), 5, AND 16 OF THE OHIO CONSTITUTION.**

### **ASSIGNMENT OF ERROR III**

**THE TRIAL COURT ERRED WHEN [] BROUGHT ITS OWN MOTION TO INVOKE THE ADULT PORTION OF T.M.’S DISPOSITIONAL SENTENCE UNDER THE UNCONSTITUTIONAL R.C. 2152.14. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTIONS 4(A), 5, AND 16 OF THE OHIO CONSTITUTION.**

**ASSIGNMENT OF ERROR IV**

**T.M. WAS DEPRIVED OF HER RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN JUVENILE COURT. FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.**

{¶29} We decline to address T.M.’s second, third, and fourth assignments of error since our disposition of her first assignment of error renders those assignments of error moot. App.R. 12(A)(1)(c).

III.

{¶30} The judgment of the Lorain County Court of Common Pleas, Juvenile Division, invoking the adult portion of T.M.’s sentence is reversed and remanded for further proceedings consistent with this opinion.

Judgement reversed and remanded

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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 Lorain, 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(C). 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 Appellee.

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SCOT STEVENSON  
FOR THE COURT

HENSAL, P. J.  
SUTTON, J.  
CONCUR.

APPEARANCES:

LAUREN HAMMERSMITH and VICTORIA FERRY, Assistant State Public Defenders, for Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and C. RICHLEY RALEY, JR., Assistant Prosecuting Attorney, for Appellee.