

[Cite as *In re T.T.*, 2010-Ohio-5148.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94829

**IN RE: T.T.
A MINOR**

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 10100173

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Edward D. Brydle
Nicole M. Ellis
Assistant County Prosecutors
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Chief Public Defender

BY: Erika B. Cunliffe
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

MELODY J. STEWART, P.J.:

{¶ 1} The state of Ohio appeals from a juvenile division order that denied its motion for a mandatory bindover of child T.T. on grounds that the state failed to offer sufficient proof of the child's age at the time of offense and that the state failed to offer sufficient evidence to prove a firearm specification as a predicate for bindover. The state's two assignments of error challenge the court's findings.

{¶ 2} The complaint filed in the juvenile division alleged that the child committed acts which, if committed by an adult, would constitute the crime of aggravated robbery under R.C. 2911.01(A)(1). The complaint also contained one and three-year firearm specifications. The state filed a notice of mandatory bindover and requested a preliminary hearing to determine whether there was probable cause for mandatory bindover under Juv.R. 30(A). The court conducted a hearing and concluded that “there was insufficient evidence presented to find probable cause that the child was 17 years of age at the time of the conduct charged and that he had a firearm on or about his person or under his control.” The court concluded that mandatory bindover was not required and denied the state’s motion.

{¶ 3} As relevant here, R.C. 2152.10(A)(2)(b) states that a child who is alleged to be a delinquent child is eligible for mandatory bindover to the general division if (1) the child is charged with a category two offense other than kidnapping, (2) the child is 16 years of age or older at the time of the commission of the act charged, and (3) the child is alleged to have had a firearm on or about the child’s person while committing the act charged and displayed, brandished, indicated possession of or used the firearm to facilitate the act charged.

{¶ 4} Aggravated robbery as charged in the complaint against the child is a category two offense. See R.C. 2152.02(CC)(1). The only matters for

resolution in the bindover hearing were the age of the child at the time of the robbery and whether he possessed and brandished or used a firearm to facilitate the robbery.

{¶ 5} In *In re M.P.*, 124 Ohio St.3d 445, 2010-Ohio-599, 923 N.E.2d 584, the supreme court stated:

{¶ 6} “When the state requests a mandatory bindover, the juvenile court determines whether the child is eligible for mandatory bindover according to the child’s age, the nature of the act, and other circumstances, and whether probable cause exists to believe that the juvenile committed the act charged. R.C. 2152.10(A) and 2152.12(A)(1); Juv.R. 30(A). If the child is eligible for mandatory bindover and if probable cause exists to believe that the juvenile did commit the acts charged, the only procedural step remaining is for the court to enter the order of transfer. Juv.R. 30(B).” *Id.* at ¶11.

{¶ 7} The probable cause standard for mandatory bindover requires the state to “provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction pursuant to R.C. 2151.26(B).” *State v. Iacona*, 93 Ohio St.3d 83, 93, 2001-Ohio-1292, 752 N.E.2d 937. Probable cause in this context is not guilt beyond a reasonable doubt — it is evidence that raises more than a suspicion of guilt. See *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d

629, at ¶16. This standard requires the juvenile court to “evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.” *Iacona*, 93 Ohio St.3d at 93. Our review of the juvenile division’s decision is mixed: we defer to the court’s credibility determinations by reviewing for an abuse of discretion, but we conduct a de novo review of the legal conclusion whether there was probable cause to believe that the juvenile committed the charged acts. *A.J.S.*, 120 Ohio St.3d 185, at ¶1.

{¶ 8} The offense allegedly occurred on January 7, 2010. The only evidence of the child’s age was contained in testimony by a police officer. When asked whether the child was an adult or juvenile, the officer replied: “He was a juvenile. I believe his birth date was 12-18 of ‘92. I’m not exactly positive.”

{¶ 9} Establishing proof of a child’s age should not be a difficult task for the state in bindover proceedings — it need only offer a certified copy of a child’s birth certificate as prima facie proof of age. See R.C. 3705.23(A)(3); *Perry v. Indus. Comm.* (1954), 160 Ohio St. 520, 117 N.E.2d 34, paragraph one of the syllabus. The state did not do so in this case nor did it obtain a stipulation from the defense. Instead, it relied solely on the testimony of a police officer who qualified his testimony by saying that he was “not exactly positive.” The court was entitled to give little, if any, weight to the officer’s

testimony in light of this concession and the other means available to the state for proving the child's age.

{¶ 10} We therefore find no error with the court's legal conclusion that the state failed to establish sufficient evidence to believe the child was 16 years of age or older at the time of the offense. Testimony that was qualified by the caveat that the witness was "not exactly positive" did not make it more probable than not that the child was more than 16 years old at the time he allegedly committed the offense. This constituted a failure of proof and barred mandatory bindover under R.C. 2152.10(A)(2)(b). The court did not err by finding there was no probable cause to justify bindover. ¹

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas – Juvenile Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

¹Our conclusion necessarily moots consideration of the state's assignment of error relating to the court's finding on the firearm specification. R.C. 2152.10(A)(2)(b) is written in the conjunctive so the failure to prove one factor is not enough to deny mandatory bindover. See App.R. 12(A)(1)(c).

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR