

[Cite as *In re J.S.*, 2009-Ohio-3470.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92504**

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**IN RE: J.S.**  
**A Minor Child**

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL-07106424

**BEFORE:** Rocco, P.J., Dyke, J., and Jones, J.

**RELEASED:** July 16, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Appellant, J.S.<sup>1</sup>, appeals from the judgment of the juvenile court that found him to be a delinquent child for committing an offense, which, if he were an adult, would constitute the crime of robbery.<sup>2</sup>

{¶ 2} Appellant presents three assignments of error. He claims the juvenile court should have dismissed the case upon determining there was no probable cause to bind him over to “adult” court. He further claims the juvenile court should have not have permitted the state to introduce identification testimony that related to a videotape that was neither provided to the defense nor introduced at trial. Finally, he claims his delinquency adjudication is not supported by the manifest weight of the evidence.

{¶ 3} This court has reviewed the record in light of appellant’s claims, and finds that the juvenile court was not required to dismiss the case. However, the court erred in permitting the witnesses to identify appellant as the perpetrator

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<sup>1</sup>In accordance with this court’s policy of non-disclosure of identity in juvenile cases, this opinion refers to the child by initials.

<sup>2</sup>This is appellant’s second appeal in this case. In his first, *In re: J.C.S.*, Cuyahoga App. No. 91121, 2008-Ohio-4712, this court did not reach the merits surrounding appellant’s adjudication; instead, upon finding that the juvenile court neglected to make a transcript of the dispositional hearing, this court remanded appellant’s case to the juvenile court with an order to conduct one anew.

of an offense based upon their observation of a videotape that was not provided to the defense and was not introduced into evidence at trial.

{¶ 4} Since this compels the reversal of the judgment, it renders appellant's final assignment of error moot. Appellant's adjudication is reversed, and this case is remanded for further proceedings.

{¶ 5} The record reflects appellant's case resulted from a complaint filed on July 24, 2007. Therein, a Cleveland police officer stated that appellant had committed aggravated robbery in violation of R.C. 2911.01(A)(1); with two firearm specifications. The state subsequently filed a motion to relinquish jurisdiction pursuant to R.C. 2152.10(B). This is commonly referred to as a "bindover"; the state requested a hearing on the motion.

{¶ 6} Prior to the hearing, the defense filed a motion for discovery; in pertinent part, appellant sought "permission to inspect and copy \*\*\* tangible objects \*\*\* available to \*\*\* the State and which are material to the preparation of Defendant's defense or are intended to be used as evidence at the trial." This motion was supplemented by a "preliminary motion to suppress" evidence. Appellant informed the court therein that, as of September 25, 2007, he had "not received full discovery in this matter," and sought to preserve his right to challenge the legality of the state's evidence.

{¶ 7} The juvenile court held the “bindover” hearing on October 9, 2007. At the outset, the parties stipulated that appellant’s birth date was May 8, 1992. The state presented the testimony of two witnesses.

{¶ 8} Kalid Awad stated he owned a convenience store located at 5346 Dorloff Road in Cleveland. He testified that his “employees” informed him that appellant “forced his way in[to]” the store on July 18, 2007. Over the objection of defense counsel, Awad indicated that, after viewing the store’s videotape of that night, he filed a report with the Cleveland police. Awad testified that on the videotape he “saw [appellant] coming in the store \*\*\*, grab a juice, put it in his pocket, and the clerk walking by \*\*\*.” Awad stated that appellant “flashe[d] a gun and kept on walking, walking out.” On cross-examination, however, Awad admitted that he could not actually observe a weapon on the videotape.

{¶ 9} Officer Frank Wyoma also testified. Wyoma stated that he received a report of a “male with a gun in the parking lot on the 19<sup>th</sup>.” Upon responding to the store, Wyoma spoke to the owner, who “advised us that the store had been robbed the night before by the same male who’s in the parking lot with the gun on the day we were there.”

{¶ 10} Wyoma testified that he and his partner at that time reviewed a security tape, then his partner “took information and wrote a report.” After “recognizing the male as being a juvenile we had stopped for a curfew violation

earlier in the year,” they went to appellant’s home, but were unable to find him. Wyoma admitted on cross-examination that the videotape was too “small” to display details; therefore, he based his belief that the youth carried a weapon “from the way his hand was being held and how the pocket was \*\*\*” rather than from an actual sighting of a gun.

{¶ 11} At the conclusion of the hearing, the juvenile court found that, although there was “probable cause to believe that the child was 15 years of age at the time of the act alleged,” there was “not probable cause to believe that an aggravated robbery took place along with [the] stated firearm specifications.” Thus, the state’s “motion for order to relinquish jurisdiction [was] denied,” and the case would “proceed to adjudication pursuant to Juv.R. 30(E)\*\*\*.”

{¶ 12} The court’s journal entry stated there was “insufficient evidence presented to show probable cause to believe that the child committed an act that would be the crime of Aggravated Robbery, in violation of R.C. 2911.01(A)(1) \*\*\* and classified as a felony of the first degree if committed by an adult.”

{¶ 13} Appellant’s case proceeded to an adjudicatory hearing on January 28, 2008. At the outset of the hearing, the defense moved for an order in limine to prevent the state from referring in any manner to the “alleged” surveillance videotape, since no such tape had ever been produced. The juvenile court indicated it would rule on the motion “as it arises.”

{¶ 14} The state presented the testimony of three witnesses. The first, by videotaped deposition, was the clerk who worked in the store on the night of July 18, 2007.<sup>3</sup> The clerk testified that “the young boy \*\*\* [came in at] 10, 10:30. He walked straight through,” even as the clerk told the boy that the owner did not want him inside. The “boy” ignored him, walking to the cooler. The clerk continued, “And he take something, \*\*\* and put it in his hand. He told me, you know, leave me alone before I shoot you in your ‘A,’ you know? But I don’t see the gun, \*\*\* He put his hand in his pocket. \*\*\*”

{¶ 15} During the direct examination, the prosecutor continually asked the clerk if he were “referring to [appellant],” over objection. The court sustained appellant’s objection. The clerk indicated that he did not know the boy’s name; he simply described the boy as “black, big eyes.” The item taken from the cooler was “some juice,” and the boy left without paying for it. The clerk informed Awad about the incident the following day.

{¶ 16} Wyoma testified that he and his partner were at the store on July 19, 2007 when the owner told them “his store had been robbed the night before and that he had not made a report yet. So we took a report and reviewed a videotape \*\*\*.” The juvenile court permitted Wyoma to state that he “recognized

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<sup>3</sup>At the time of the adjudicatory hearing, the former clerk was in the state of Arizona in the custody of immigration officials.

the male on the tape.” Wyoma additionally was permitted to testify that, after viewing the videotape, Awad also “knew his name.”

{¶ 17} Wyoma further testified that appellant was “apprehended” several days later; appellant was one of several people the police detained after they responded to a report of “shots fired” during a “fight going on” in the vicinity of “East 55<sup>th</sup> and Broadway.” Over objection, Wyoma answered affirmatively when asked if the videotape provided “probable cause to believe that a robbery took place,” due to “what [he] had seen on the video” and “from the statements the store owner had made to me.” Wyoma admitted on cross-examination that he never spoke to the clerk about the incident, and that he never asked the clerk to identify appellant.

{¶ 18} Awad also testified. The juvenile court permitted him to state, over objection, that he recognized appellant from the videotape. Awad further was permitted to make an in-court identification of appellant as the young man he had seen on the videotape.

{¶ 19} Over objection, the court additionally allowed Awad to testify that his clerk “told me that [appellant] entered the store and he forced—[the clerk] tried to stop him right on the door, and he forced his way—he pushed [the clerk], and he forced his way all the way to the store and he grabbed the juice, put it



down in his coat, and [the clerk] tried to stop him. He flashed a gun on [the clerk]. And that's what happened."

{¶ 20} On redirect examination, the prosecutor tried to rehabilitate Awad's admission that he had not actually seen a gun on the videotape. When the defense objected, the court stated, "This goes to consistency of statements between the probable cause hearing and today. I realize that there is some rule with regard to impeaching your own direct witness, but I think it serves the best interest of justice to hear the testimony. Overruled."

{¶ 21} At the conclusion of the state's case, the juvenile court granted appellant's motion for acquittal with respect to the firearm specifications. At the conclusion of the proceeding, the court rendered its decision, stating in pertinent part as follows:

{¶ 22} "[B]ased on the testimony of the victim, I do believe there were adequate contacts with the suspect which would lead to reliable albeit circumstantial evidence with regard to the suspect.

{¶ 23} "[T]he court does find that the owner testified credibly that he recognized the person on the videotape, and from that recognition directed the \*\*\* officers to the home of the suspect.

{¶ 24} “I don’t know that that’s much different from a bank robbery where someone is videotaped, \*\*\* [and] after review of the videotape and with some investigation, it is later learned the identification \*\*\* of the suspected person.”

{¶ 25} The juvenile court found the evidence proved appellant committed “the lesser included offense of robbery” as defined in R.C. 2911.02(A)(2), and, thus, appellant was adjudicated to be delinquent. After the court determined appellant’s disposition, appellant filed the instant appeal.

{¶ 26} He presents three assignments of error.<sup>4</sup> The first two state:

**“I. The trial court committed reversible error when it did not dismiss the charges against J.S. after finding no probable cause at the discretionary bindover hearing. Fifth and Fourteenth Amendments to the United States Constitution, Sections 10 and 16, Article I of the Ohio Constitution.**

**“II. The failure of the trial court to preclude identification testimony surrounding a surveillance tape, which was never viewed by defense counsel or played for the trial court, denied J.S. his rights to a fair trial, due process and a reliable determination that the offense was committed as guaranteed by the Fifth, Sixth**

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<sup>4</sup>His third presents a challenge to the manifest weight of the evidence underlying his adjudication. In view of this court’s disposition of his second assignment of error, his third is moot. App.R. 12(A)(1)(c).

**and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution, and Juv.R. 24.”**

{¶ 27} Appellant first argues that the juvenile court should have dismissed the case upon a finding that the state failed to present sufficient evidence to warrant a bindover to adult court.

{¶ 28} The state filed its motion pursuant to R.C. 2152.10(B), which provides:

{¶ 29} “(B) Unless the child is subject to mandatory transfer, if a child is fourteen years of age or older at the time of the act charged and if the child is charged with an act that would be a felony if committed by an adult, the child is eligible for discretionary transfer to the appropriate court for criminal prosecution. In determining whether to transfer the child for criminal prosecution, the juvenile court shall follow the procedures in section 2152.12 of the Revised Code. If the court does not transfer the child and if the court adjudicates the child to be a delinquent child for the act charged, the court shall issue an order of disposition in accordance with section 2152.11 of the Revised Code.” (Emphasis added.)

{¶ 30} Appellant does not assert that the juvenile court failed to “follow the procedures” set forth in R.C. 2152.12. Cf., *In re: Stanley*, 165 Ohio App.3d 726,

2006-Ohio-1279. Rather, he simply asserts that, since the court decided the state did not present sufficient evidence to support a “probable cause” finding for aggravated robbery, it was mandated to dismiss the case. This court disagrees.

{¶ 31} A juvenile court enjoys wide latitude to retain or relinquish jurisdiction. *State v. Watson* (1989), 47 Ohio St.3d 93, 95. A decision regarding a bindover should not be reversed absent an abuse of discretion. *State v. Golphin*, 81 Ohio St.3d 543, 546, 1998-Ohio-336. “Abuse of discretion” connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 32} Under R.C. 2152.12(B), the juvenile court has discretion to transfer its jurisdiction over a juvenile to the adult court for further proceedings if the juvenile court finds all of the following: 1) the juvenile was at least 14 years old at the time of the act charged; 2) probable cause exists that the juvenile committed the act charged; and, 3) the juvenile is not amenable to care or rehabilitation within the juvenile system and the safety of the community may require that the juvenile be subject to adult sanctions. Appellant’s challenge focuses on the second finding.

{¶ 33} This court has previously observed that a “juvenile court at a bindover hearing need not find as fact that the accused minor is guilty of the

offense charged. It simply finds the existence of probable cause to so believe.” *State v. Bishop*, Cuyahoga App. No. 89184, 2007-Ohio-6197, quoting *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292. Accordingly, in determining the existence of probable cause the juvenile court must 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.

{¶ 34} In *Iacona*, the supreme court explained that “the state must 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) [currently R.C. 2152.10(A)]. \*\*\* In meeting this standard the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt.” (Emphasis added.)

{¶ 35} It follows that, if waiver of jurisdiction is discretionary with the juvenile court, the state also need not prove guilt beyond a reasonable doubt. In this case, the juvenile court decided not to bindover appellant because the state failed to provide credible evidence of every element of aggravated robbery. The juvenile court clearly determined, however, the evidence was sufficient to establish probable cause to believe appellant committed a lesser offense. Since

the juvenile court should consider “alternate theories of the case” in determining whether probable cause exists, it does not abuse its discretion in exercising jurisdiction despite its finding that the evidence was insufficient to establish the crime charged. *In re: A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶61.

{¶ 36} Appellant’s first assignment of error is overruled.

{¶ 37} Appellant next asserts that the juvenile court erred when it permitted the state’s witnesses to refer to their observations of a videotape of the alleged incident when the videotape was neither provided to the defense nor introduced into evidence. This assertion has merit.

{¶ 38} Juv.R. 24(A) provides in pertinent part:

{¶ 39} “Upon written request, each party of whom discovery is requested shall, to the extent not privileged, produce promptly for inspection, copying, or photographing the following information, documents, and material in that party’s custody, control, or possession:\*\*\*

{¶ 40} “(5) Photographs and any physical evidence which a party intends to introduce at the hearing;

{¶ 41} “(6) \*\*\* In delinquency and unruly child proceedings, the prosecuting attorney shall disclose to respondent’s counsel all evidence, known or that may become known to the prosecuting attorney, favorable to the respondent and material either to guilt or punishment.” (Emphasis added.)

{¶ 42} It is clear from the record that the state's case was based in large part upon the videotape, since both Awad and Wyoma, neither of whom was present at the time of the incident, testified they made their identification of appellant upon viewing it. It is also clear that prior to the adjudicatory hearing appellant had notified the juvenile court at least twice that he had not received discovery of the videotape from the state.

{¶ 43} When the hearing took place, appellant informed the court yet again, and requested the court to exclude any reference to the videotape as a sanction for the state's failure to provide the videotape. The juvenile court, however, declined to make a decision.

{¶ 44} Although a juvenile court faced with a failure to provide discovery is granted discretion pursuant to Juv.R. 24(C), that discretion must be exercised in light of the materiality of the evidence. *In re Johnson* (1989), 61 Ohio App.3d 544. In this case, the clerk could not provide an in-court identification of appellant, and only he directly provided proof of the use of force during the incident.

{¶ 45} Moreover, generally, when proving the contents of a recording, the original recording is required. Evid.R. 1002, which is referred to as "the best evidence rule," provides:

{¶ 46} “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required \*\*\*.”

{¶ 47} Evid.R.1004 sets forth an exception to the best evidence rule. It provides:

{¶ 48} “The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

{¶ 49} “(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith \*\*\*.”

{¶ 50} As the court observed in *State v. Spradlin*, Pike App. No. 04CA727, 2005-Ohio-4704, “[t]he Due Process Clause protects a criminal defendant from being convicted where the state has failed to preserve materially exculpatory evidence or, in bad faith, has destroyed potentially useful evidence. [Citations omitted.] In order to be materially exculpatory, ‘evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.’” (Emphasis added.)

{¶ 51} The materiality of the videotape in this case became obvious at the probable cause hearing. By the time of the adjudicatory hearing, the state had neither produced it, nor presented any explanation for its absence. Under these



circumstances, the juvenile court abused its discretion in failing to press the state to account for the evidence.

{¶ 52} The record reflects appellant's counsel could neither adequately cross-examine the witnesses who purported to have viewed the videotape, nor present a defense against a recording that was not introduced at trial. *In re Johnson*, supra; cf., *State v. Fitzgerald*, Summit App. No. 23072, 2007-Ohio-701; *State v. Patterson*, Pickaway App. No. 05CA34, 2006-Ohio-4439; *In the Matter of Jerome D.* (Nov. 30, 2000), Lucas App. No. L-00-1030. In fact, the juvenile court occasionally sustained references to the videotape, but more often permitted the witnesses to offer their opinions about what it portrayed. Opinion testimony is "limited" pursuant to Evid.R. 701.

{¶ 53} Additionally, the juvenile court based its finding of delinquency on the videotape, despite never having seen it. The court determined that, since Awad "recognized the person on the videotape," the situation presented to the court was similar to the investigation of a "bank robbery" based upon a videotape. The court completely overlooked the failure of the state to present "the best evidence" available to establish each element of an offense.

{¶ 54} For the forgoing reasons, the juvenile court erred when it permitted the state to introduce evidence concerning a videotape which was never produced.

{¶ 55} Appellant's second assignment of error is sustained.

{¶ 56} The judgment of the juvenile court is reversed, and this case is remanded for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

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KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., and  
LARRY A. JONES, J., CONCUR

