[Cite as *In re C.A.*, 2010-Ohio-3508.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93525

IN RE: C.A.

A Minor Child

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Juvenile Division
Case No. DL 08129739

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

RELEASED AND JOURNALIZED: July 29, 2010

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MARY J. BOYLE, J.:

{¶ 1} Appellant, C.A., appeals from the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, finding him to be delinquent on the charge of rape, in violation of R.C. 2907.02(A)(1)(c). He raises the following three assignments of error:

{¶ 2} "[I.] The trial court erred and violated appellant's constitutional rights when it sua sponte amended the forcible rape charge and convicted appellant of an offense of which he was not charged.

{¶ 3} "[II.] Appellant's delinquency adjudication under R.C. 2907.02(A)(1)(c) is not supported by legally sufficient evidence as required by state and federal due process.

{¶ 4} "[III.] Appellant's adjudication under R.C. 2907.02(A)(1)(c) is against the manifest weight of the evidence."

{¶ 5} For the reasons discussed below, we find merit to the first assignment of error and reverse.

Procedural History and Facts

{¶ 6} In November 2008, a complaint was filed against C.A., age 15, alleging a single count of rape, in violation of R.C. 2907.02(A)(2). The complaint specifically alleged that C.A. engaged in sexual conduct with M.K., the victim, "by purposely compelling her to submit by the use of force or the threat of force." The victim was also 15 years old at the time of the offense.

{¶ 7} C.A. denied the charge, and the matter proceeded to trial. At the conclusion of trial, the trial court found that the state had failed to prove the crime charged. But the trial court sua sponte amended the charge to a different subsection of rape, R.C. 2907.02(A)(1)(c), which prohibits engaging in sexual conduct with another when "[t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * *, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a

mental or physical condition." The defense objected to the sua sponte amendment and filed a written motion to dismiss the amended charge, which was denied by the court. The court ultimately found C.A. delinquent on the amended charge, finding that C.A. knew the victim was "drunk" when he engaged in sexual conduct with her.

{¶ 8} The court subsequently held a dispositional hearing and imposed a stayed commitment to the Ohio Department of Youth Services of one year and placed C.A. on probation.

Juv.R. 22 and Due Process

{¶ 9} In his first assignment of error, C.A. argues that the trial court's sua sponte amendment of the charge after the conclusion of trial violated Juv.R. 22 and his due process rights.

{¶ 10} Juv.R. 22(B) governs amendments of pleadings and provides in relevant part:

{¶ 11} "A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult."

{¶ 12} Under this provision, an original complaint can be amended during trial if the amended charge is a lesser included offense of the original charge.

See *In re Reed*,147 Ohio App.3d 182, 2002-Ohio-43, 769 N.E.2d 412.[1] C.A. argues that the offense of rape as defined under R.C. 2907.02(A)(1)(c), i.e., substantial impairment rape, is not a lesser included offense of rape as defined under R.C. 2907.02(A)(2), i.e., forcible rape, and therefore the amendment should not have been allowed. The state concedes that the amended charge is not a lesser included offense. But relying on the Ohio Supreme Court's decision in *State v. Campbell*, 100 Ohio St.3d 361, 2003-Ohio-6804, 800 N.E.2d 356, the state argues that the amendment is proper "because the amendment * * * was made within the same code section, from one subparagraph to another subparagraph," and therefore "the name and identity of the offense did not change." We disagree and find the state's reliance on *Campbell* misplaced.

{¶ 13} In *Campbell*, the court held that a pretrial amendment of a criminal charge from one subparagraph of former R.C. 4511.19(A) to another subparagraph of the same subsection does not change the name and identity of

[1] In *Reed*, this court observed that Juv.R. 22 is intended only to allow amendments that both conform to the evidence presented at trial and constitute a lesser included offense. Specifically, we noted: "In the comment following Juv.R. 22(B), the Supreme Court Rules Advisory Committee has explained that the court can change the charge only to a 'lesser included offense.' It stated as follows: 'The revision to Juv.R. 22(B) prohibits the amendment of a pleading after the commencement or termination of the adjudicatory hearing unless the amendment conforms to the evidence and also amounts to a lesser included offense of the crime charged. * * *' Juv.R. 22(B) 1994 Staff Note." Id. at ¶21. See, also, *In re Hutchinson*, 7th Dist. No. 07-BE-28, 2008-Ohio-3237 (applying our decision in *In re Reed*).

the charged offense within the meaning of Crim.R. 7(D).[2] Campbell was charged with driving under the influence under former R.C. 4511.19. The arresting officer indicated in the citation that a specified concentration of alcohol was determined via a breath test, which indicates that Campbell violated former R.C. 4511.19(A)(6). The officer, however, mistakenly indicated that the charge was for violation of R.C. 4511.19(A)(5), which may be charged following a blood test. The state recognized the mistake prior to trial and moved to amend the charge to reflect the correct statutory provision, which was allowed over the defense's objection.

{¶ 14} In upholding the amendment and finding it not to violate Crim.R. 7(D), the Supreme Court reasoned that Campbell had been apprised from the outset of the true charge, even if erroneously indicated on the citation, noting that "the substantive information provided on the citation provided ample warning to Campbell that he was charged with violating R.C. 4511.19(A)(6)." Id. at ¶6. Under such circumstances, "[t]here is no prejudice to the defendant and no surprise, undue or otherwise." Id. The court further reasoned that the two offenses have the same name and identity: "driving with specified concentrations of alcohol in bodily substances." Id. at ¶7. The court explained

[2]Crim.R. 7(D), the adult counterpart to Juv.R. 22(B), provides in part that "[t]he court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

that the "only difference" between the two offenses is "the method by which evidence is obtained to prove the offense."

{¶ 15} Here, we find the amendment in this case from R.C. 2907.02(A)(2) (forcible rape) to R.C. 2907.02(A)(1)(c) (substantial impairment rape) to be completely different from the facts in *Campbell*. First, this case does not involve the mere correction of a clerical mistake. Nor was C.A. ever apprised that the state intended to pursue a delinquency finding under R.C. 2907.02(A)(1)(c). To the contrary, both the state and the defense proceeded during the adjudicatory hearing with the belief that the single charge was R.C. 2907.02(A)(2) — forcible rape. Further we cannot say these offenses have the same identity; they involve proving completely different elements, i.e., force as opposed to substantial impairment.

{¶ 16} As for the state's contention that C.A. cannot claim prejudice or surprise by the amendment in light of the trial court continuing the case after the amendment was made, we find this argument misplaced. Notably, the trial court sua sponte amended the charge only after finding C.A. not delinquent of forcible rape. In essence, the court gave the state a "second chance" to obtain a delinquency finding. This is clearly not the intent of Juv.R. 22, and such practice implicates a juvenile's Fifth Amendment rights under the Double Jeopardy Clause. See, generally, *Breed v. Jones* (1975), 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.Ed.2d 346 (jeopardy attaches in a delinquency proceeding

when the juvenile court begins to hear evidence as the trier of fact).

{¶ 17} Accordingly, C.A.'s first assignment of error is sustained. We further find that his remaining two assignments of error challenging the delinquency finding on sufficiency and manifest weight of the evidence grounds to be moot.

Judgment reversed and case remanded for the trial court to vacate delinquency adjudication.

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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR