

[Cite as *In re Moore*, 2010-Ohio-3991.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE DEJUAN MOORE : APPEAL NOS. C-090576
 : C -090577
 : C-090578
 :
 : TRIAL NOS. 09-8080Z
 : 09-8525Z
 :
 : *DECISION.*

Criminal Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Cause Remanded in C-090577; Appeals
Dismissed in C-090576 and C-090578

Date of Judgment Entry on Appeal: August 27, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman
Curran*, Assistant Prosecuting Attorney, for Appellant State of Ohio,

Timothy A. Smith, for Appellee Dejuan Moore.

Please note: This case has been removed from the accelerated calendar.

J. HOWARD SUNDERMANN, Judge.

{¶1} In these two cases, the state of Ohio appeals, pursuant to R.C. 2945.67(A), from three separate judgment entries of the Hamilton County Juvenile Court that collectively (1) refused to bind over Dejuan Moore, a juvenile, to the common pleas court on charges involving the attempted murder of Dionvontrae Harris and the felonious assault of Harold Martin, (2) sua sponte amended the attempted-murder charge to a charge of attempted manslaughter on the basis that the state had failed to show probable cause for the attempted-murder charge, and (3) retained jurisdiction over the two charges following an investigation and an amenability hearing.

{¶2} After reviewing the record, the parties' arguments, and the applicable law, we conclude that we have jurisdiction, pursuant to R.C. 2945.67(A) and *In re A.J.S.*,¹ to review only the juvenile court's entry determining that there was no probable cause to believe that Moore had committed attempted murder and that sua sponte amended that charge to attempted manslaughter. Based on that review, we conclude that the juvenile court erred as a matter of law in failing to transfer Moore's case to the general division of the common pleas court, when the state had presented sufficient evidence to show probable cause that Moore had purposely tried to kill Harris, and when the other requirements for a mandatory bindover had been met under R.C. 2152.12(A)(1)(a) and 2152.10(A)(1)(b).

II. The Complaint and the Bindover Proceedings

¹ 120 Ohio St.3d 185, 2008-ohio-5307, 897 N.E.2d629, syllabus.

{¶3} In June 2009, Cincinnati police officer Michael Morrissey filed a complaint in the Hamilton County Juvenile Court charging 14-year-old Dejuan Moore with committing acts that constituted the felonious assault of Dionvontrae “Trey” Harris, another 14-year-old boy, and the felonious assault of Harold LeMar Martin, an adult. Both charges also contained firearm specifications. The charges were set for a probable-cause hearing for the possible relinquishment of jurisdiction.

{¶4} Roughly one week later, Morrissey filed a second complaint charging Moore with the attempted murder of Harris arising out of the same incident. The charge was accompanied by firearm specifications. That same day, the state dismissed the felonious-assault charge involving Harris. As a result, the juvenile court continued the probable-cause hearing for another two weeks.

{¶5} At the probable-cause hearing, Moore stipulated that his date of birth was March 7, 1995, which made him 14 years old at the time of the alleged offenses. The state then presented testimony from Harris and Martin. Harris testified that on the evening of June 19, 2009, he had been dancing at a friend’s birthday party when Moore elbowed him. He and Moore exchanged words, and he encouraged Moore to go outside. Moore followed him outside, where they exchanged more words.

{¶6} Harris then took his shirt off to fight Moore. Just as he was about to hit Moore, Martin came up from behind him, grabbed him by the chest, and pulled him away. As Martin was pulling him away, Moore pulled out a gun from his pocket, pointed it at Harris’s chest, and fired. The bullet hit Martin’s hand, which was in front of Harris’s chest. Harris began to run away. He testified that he had been five to six feet away from Moore when Moore fired the gun at him and that he had sustained burn marks on his chest from the gunshot.

{¶7} Martin testified that he had been chaperoning his daughter's birthday party, which was inside a friend's garage, when he saw everyone rushing outside. When he followed the crowd, he saw Harris and Moore squaring up to fight. He did not want any fights, so he ran toward the two boys. He grabbed Harris from behind, crossing his left hand over Harris's chest, and snatched him away from the impending fight.

{¶8} When he put his hand over Harris's chest, he heard a gun fire. He looked down and saw that his left hand was bleeding. He told Moore that Moore had just shot him. Harris and Moore then ran in separate directions from the party. Emergency assistance was called, and Martin was taken by ambulance to a hospital where he underwent surgery to remove the bullet fragments from his left hand and arm. During the surgery, doctors also removed the knuckles from his left hand and inserted metal pins in his left arm. Martin testified that he was still wearing a cast because most of "the bones had been blown out of his hand."

{¶9} At the conclusion of the hearing, the juvenile court found probable cause to believe that Moore had committed acts constituting the felonious assault of Martin, but that the state had failed to establish probable cause for the attempted murder of Harris because it had not shown that Moore had the specific intent to kill Harris. As a result, it sua sponte amended the attempted-murder charge to a charge of attempted manslaughter. The court then continued the proceedings for a full investigation and hearing. Following the hearing, the juvenile court determined that Moore was amenable to care and rehabilitation in the juvenile system. As a result, it denied the state's motions for bindover and retained jurisdiction over both charges. The state filed a motion for reconsideration, which the juvenile court denied. These appeals followed.

II. The State's Appeals

{¶10} The state has filed three separate notices of appeal based upon the Ohio Supreme Court's decision in *In re A.J.S.*² In that case, the Ohio Supreme Court held that an order of a juvenile court denying a motion for a mandatory bindover is "the functional equivalent of a dismissal of a criminal indictment and constitutes a final order from which the state may appeal as a matter of right" under R.C. 2945.67(A).³

III. Dismissal of Two of the State's Appeals

{¶11} The state has appealed from (1) the juvenile court's entry of July 30, 2009, retaining jurisdiction over the felonious-assault charge following an amenability hearing;⁴ (2) the juvenile court's entry of July 17, 2009, finding probable cause to support the felonious-assault charge, but no probable cause to support the attempted-murder charge, and sua sponte amending that charge to attempted manslaughter;⁵ and (3) the juvenile court's entry of July 30, 2009, retaining jurisdiction, following an amenability hearing, over the attempted-manslaughter charge.⁶

{¶12} After the state filed its appeals, the Ohio Supreme Court decided *In re M.P.*⁷ In that case, the Ohio Supreme Court expressly declined to extend its holding in *In re A.J.S.* to discretionary bindover proceedings.⁸ The court held that "[a]n order of a juvenile court denying a motion for a discretionary juvenile bindover in a delinquency proceeding because the court finds that the child is amenable to care or

² 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629.

³ Id. at syllabus.

⁴ Appeal No. C-090576.

⁵ Appeal No. C-090577.

⁶ Appeal No. C-090578.

⁷ 124 Ohio St.3d 445, 2010-Ohio-599, 923 N.E.2d 584.

⁸ Id. at ¶10-16.

rehabilitation within the juvenile system is not a final order from which the state may appeal as a matter of right [under R.C. 2945.67(A)].”⁹ As a result, any appeal for a discretionary bindover ruling must be by leave of court pursuant to App.R. 5(C).¹⁰

{¶13} Following the supreme court’s decision in *In re M.P.*, the state admits that it cannot appeal as a matter of right from the juvenile court’s decisions on July 30, 2009, to retain jurisdiction, following an amenability hearing, over the felonious-assault and attempted-manslaughter charges. As a result, it has filed motions for leave to appeal pursuant to App.R. 5(C). “App.R. 5(C) provides in pertinent part that ‘[w]hen leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed * * *. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals.’ ”¹¹

{¶14} Moore argues that this court lacks jurisdiction to entertain the state’s appeals from the July 30, 2009, entries, because the state has not complied with the requirements of App.R. 5(C). We agree. The state’s motions were not filed within 30 days of the entries being appealed and were not filed concurrently with its notices of appeal. Because the state has not complied with the requirements of App.R. 5(C), we have no jurisdiction to entertain these appeals,¹² and we, therefore, dismiss them.¹³

⁹ Id. at syllabus.

¹⁰ Id. at ¶16.

¹¹ See *State ex rel. Steffen v. Judges of the Court of Appeals for the First Appellate District*, ___ Ohio St.3d ___, 2010-Ohio-2430, ___ N.E.2d ___, at ¶27-28

¹² Appeal Nos. C-090576 and C-090578.

¹³ See id.; see, also, *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, at ¶55.

III. State's Appeal From the Mandatory Bindover Proceedings

{¶15} We now turn to the state's appeal from the juvenile court's July 17, 2009, entry, which determined that the state had failed to establish probable cause for the attempted-murder charge and which sua sponte amended that charge to attempted manslaughter. Because this entry prevents the state from seeking a criminal indictment and trying Moore as an adult, we have jurisdiction to entertain its appeal as a matter of right based upon the Ohio Supreme Court's decision in *In re A.J.S.*¹⁴

{¶16} In two interrelated assignments of error, the state argues (1) that the juvenile court erred as a matter of law when it denied the state's motion for a mandatory bindover on the basis that it had failed to show probable cause for the attempted-murder charge, and (2) that it exceeded the scope of the mandatory-bindover proceedings when it sua sponte amended the attempted-murder charge to a charge of attempted manslaughter.

{¶17} In this case, the state sought a mandatory bindover of Moore pursuant to R.C. 2152.12(A)(1)(a), which provides that "the juvenile court * * * shall transfer the case at a hearing if the child was fourteen or fifteen years of age at the time of the act charged, if section 2152.10 of the Revised Code provides that the child is eligible for mandatory transfer, and if there is probable cause to believe that the child committed the act charged."

{¶18} R.C. 2152.10(A)(1)(b) provides that a child who is alleged to be delinquent is eligible for mandatory transfer and shall be transferred as provided in R.C. 2152.12 if (1) the child is charged with a category-one offense; (2) the child was

¹⁴ *In re A.J.S.*, supra, at syllabus.

14 or 15 at the time of the act; (3) the child was previously adjudicated a delinquent child for committing an act that was a category-one or category-two offense; and (4) the child was committed to the legal custody of the department of youth services upon the basis of that adjudication. R.C. 2152.02(BB)(2) provides that attempted murder is a category-one offense.

{¶19} The record reveals that Moore met all of the requirements for a mandatory bindover under R.C. 2152.10(A)(1)(b). He had stipulated that he was 14 years old at the time of the offenses. He had been charged with attempted murder, a “category one offense” under the statute; he had been previously adjudicated a delinquent child for committing aggravated robbery, which is a category-two offense;¹⁵ and he had been given a suspended commitment to the department of youth services on the basis of that adjudication. Thus, to mandate Moore’s transfer to the general division of the common pleas court, the state only needed to show probable cause that he had committed attempted murder.¹⁶

{¶20} The juvenile court, in rendering its decision not to bind over Moore to the common pleas court, held that the state had not made the necessary showing of probable cause for the attempted-murder charge. Rather, it found that the state had proved probable cause only for the crime of attempted manslaughter. The juvenile court based its decision on the fact that Moore had not formed the requisite intent to kill, an element of attempted murder. The state disagrees with the juvenile court’s determination and argues that it had shown probable cause for the crime of attempted murder.

¹⁵ R.C. 2152.02(CC)(1).

¹⁶ R.C. 2152.12(A)(1)(a).

{¶21} The Ohio Supreme Court has held that because a juvenile court’s probable-cause determination in a mandatory bindover proceeding involves questions of both fact and law, an appellate court must defer to the juvenile court’s determinations regarding witness credibility and review its factual findings for an abuse of discretion, but it must review de novo its legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile had committed the acts charged.¹⁷

{¶22} To establish probable cause for the attempted-murder charge in this case, the state had the burden to provide credible evidence that Moore had purposely engaged in conduct that if successful would have caused the death of another.¹⁸ To meet this standard, the state had to produce evidence that raised more than a mere suspicion of guilt, but it did not have to produce evidence proving guilt beyond a reasonable doubt.¹⁹

{¶23} In its entry, the juvenile court found that the state had proved the following facts: Moore had bumped into Harris while dancing at a party; an argument had ensued, and both Moore and Harris went outside to fight; just as they were about to fight, Martin, an adult chaperone, intervened; Martin reached over Harris’s back and placed his arm on Harris’s chest; simultaneously, Moore pulled out a gun, pointed it at Harris’s chest, and fired; the bullet hit Martin’s finger, injuring him; some particles from the bullet or powder struck Harris’s chest, causing slight prickling; if Martin’s finger had not blocked the bullet, it would have struck Harris “in the vital chest area where it was pointed.”

¹⁷ *In re A.J.S.*, supra, at ¶1 and 51.

¹⁸ See R.C. 2903.02 and 2923.02.

¹⁹ *In re A.J.S.*, supra, at ¶62.

{¶24} The state argues that these facts were sufficient to show that Moore had acted purposely. We agree. A person’s “ ‘intent to kill may be presumed where the natural and probable consequences of the wrongful act done is to produce death.’ ”²⁰ Here, Moore stood five feet away from Harris when he pointed a gun directly at his chest and fired it. Moore and Harris had been arguing, and Moore had told Harris that he was the boss and could do whatever he wanted. The juvenile court itself recognized that the natural consequence of Moore shooting Harris in the chest would have been his death by acknowledging that this area was vital, and by stating that “at least somebody’s not dead.”

{¶25} By determining that the state had not met its burden to show probable cause on the attempted-murder charge and then amending the attempted-murder charge to a charge of attempted manslaughter, the juvenile court in effect imposed a higher burden than was proper on the state. The state did not need to prove beyond a reasonable doubt that Moore had purposely tried to kill Harris.²¹ Nor did the state need to disprove any mitigating factors or alternate theories raised during the hearing.²² The state only needed to produce evidence that raised more than a mere suspicion of Moore’s guilt.²³

{¶26} The juvenile court, moreover, exceeded the scope of a bindover hearing when it went beyond determining whether the state had presented evidence of probable cause for the attempted-murder charge and sua sponte amended that charge to attempted manslaughter. Juv.R. 30(A) expressly provides that when the court is considering relinquishment of jurisdiction, it “shall hold a preliminary

²⁰ Id. at ¶53, quoting *State v. Robinson* (1954), 161 Ohio St. 213, 218, 118 N.E.2d 517.

²¹ Id. at ¶62.

²² Id. at ¶61.

²³ Id. at ¶62.

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.” Thus, the juvenile court’s decision in this case should have been limited solely to whether there was probable cause to believe that Moore had committed attempted murder.

{¶27} Because the state presented sufficient evidence to establish probable cause that Moore had purposely engaged in conduct that, if successful, would have caused Harris’s death, and because the remaining statutory requirements for transfer had been met, the juvenile court erred as a matter of law by failing to transfer Moore’s case to the general division of the common pleas court. We, therefore, sustain the state’s first and second assignments of error, reverse the juvenile court’s July 17, 2009, order concerning probable cause for the charge of attempted murder, and remand this case to the juvenile court for the entry of an appropriate bindover order on that charge in accordance with this decision and the law.

Judgment reversed and cause remanded;
appeals dismissed in C-090576 and C-090578.

CUNNINGHAM, P.J., concurs.
HENDON, J., concurs separately.

HENDON, J., concurring separately.

{¶28} I write separately from the perspective of one who not only served on the juvenile bench, but was a member of the Supreme Court Sentencing Commission during the period in which the relevant code sections governing the case at bar were suggested to the Ohio legislature.

{¶29} The overall governing purposes of R.C. Chapter 2152, the portion of the Revised Code addressing delinquent children, can be found in the first sentences of R.C. 2152.01. It is no accident of wording that the statute lists five very distinct

purposes for juvenile dispositions, and that the first purpose is “to provide for the care, protection, mental and physical development of children subject to this chapter.” This verbal recognition of the very reason juvenile courts were established is then followed by the legitimate public safety and rehabilitative goals of the dispositions to follow.

{¶30} Whenever a juvenile court judge’s discretion is removed in favor of mandatory judicial action, there is the possibility for consequences that contradict the stated purpose of the very law that judge is sworn to uphold. It is considerably less difficult for an appellate court to apply the formula provided in R.C. 2152.10(A)(1)(b) in the context of a record containing a complaint and a written transcript than it is for a trial court as it tries to balance the realities of a very young offender, the seriousness of the offense, and the evidence bearing upon the mental and physical characteristics of the offender.

{¶31} Therefore, it is with some reluctance that I must concur in the holding of the majority that the evidence in this case supported a finding of probable cause for the crime of attempted murder. Once probable cause is established in a case like this, the juvenile court is stripped of any other option that might be more appropriate given the individual circumstances of the youth involved, and it must relinquish jurisdiction over the juvenile, thereby transferring the juvenile to the general division of the court of common pleas for prosecution as an adult.

Please Note:

The court has recorded its own entry this date.