

[Cite as *In re B.J.S.*, 2017-Ohio-1258.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:

B.J.S.

)
)
)
)
)
)

CASE NO. 15 BE 0057

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas, Juvenile Division, of
Belmont County, Ohio
Case No. 14 JA 052

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Daniel P. Fry
Belmont County Prosecutor
Atty. Scott A. Lloyd
Assistant Prosecuting Attorney
147-A West Main Street
St. Clairsville, Ohio 43950

For Defendant-Appellant:

Atty. Timothy Young
Ohio Public Defender
Atty. Brooke M. Burns
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: March 27, 2017

[Cite as *In re B.J.S.*, 2017-Ohio-1258.]
WAITE, J.

{¶1} Appellant B.J.S., a delinquent child, appeals his adjudication and disposition entered by the Belmont County Court of Common Pleas, Juvenile Division. The sole issue on appeal is whether the trial court erred and violated Appellant's due process rights when it denied the motion to vacate his adjudication for rape in violation of R.C. 2907.02(A)(1)(b). Based on a review of the record, we find the trial court did not err, as the record demonstrates Appellant was thirteen years of age when the offense occurred. Because Appellant's assignment of error is without merit his adjudication order is affirmed.

Factual and Procedural Background

{¶2} On January 21, 2014, a complaint was filed in the Belmont County Juvenile Court alleging that (then) 14-year-old Appellant (D.O.B. 02/05/1999), was a delinquent by means of one count of rape, in violation of R.C. 2907.02(A)(1)(b). The complaint alleged that Appellant engaged in sexual conduct with his half-sister E.S. (D.O.B. 09/13/2005) between September 13, 2011 and July 29, 2013.

{¶3} A plea hearing was held on February 10, 2014, at which time Appellant appeared. The court ordered that counsel for Appellant be appointed. On July 1, 2014, Appellant admitted to the allegations contained in the complaint. The trial court adjudged Appellant delinquent, advised him of his rights pursuant to Juv.R. 29, and set the matter for a dispositional hearing.

{¶4} A dispositional hearing was held on September 9, 2014, where the parties discussed the results of the court-ordered evaluation of Appellant and his treatment options. The court ordered Appellant committed to the Ohio Department of

Juvenile Services for a minimum of one year with a maximum term to last until his twenty-first birthday, and recommended that he be placed at Paint Creek Youth Center, a non-secure residential treatment facility.

{¶15} On September 23, 2014, a classification hearing was held so that Appellant could be transferred to Paint Creek Youth Center for treatment. At the hearing the trial court determined that, based on his offense, Appellant was an automatic tier III juvenile sex offender registrant, finding that Appellant was between twelve and fourteen years of age at the time of his offense.

{¶16} Appellant filed two motions to vacate and void this judgment in the trial court on May 20, 2015. In the first motion, Appellant argued his adjudication for rape pursuant to R.C. 2907.02(A)(1)(b) should be vacated because the state failed to prove he was at least thirteen years old at the time of the rape. In the second motion, he argued that the order classifying Appellant as a tier III juvenile sex offender should be vacated, because the state failed to prove Appellant was age-eligible for registration at the time of the rape. Oral arguments on both motions were heard on June 30, 2015. The trial court issued a judgment entry on August 12, 2015 overruling Appellant's motion regarding his adjudication. The court found that the record established Appellant was thirteen at the time of the rape. In the same judgment entry, the trial court voided its previous order classifying Appellant as a tier III juvenile sex offender because the record demonstrated Appellant was under fourteen when the rape occurred.

{¶17} Appellant timely appeals from that judgment.

ASSIGNMENT OF ERROR

The Belmont County Juvenile Court violated B.J.S.'s right to due process when it denied his motion to vacate his adjudication for rape under the authority of *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, because the State did not prove and the court did not find that B.J.S. was at least 13 at the time of the offense at adjudication. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article 1, Section 16. (A-1).

{¶18} Appellant contends the trial court misapplied the Ohio Supreme Court's holding in *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, when overruling Appellant's motion to vacate his adjudication for rape.

{¶19} In *In re D.B.*, the Ohio Supreme Court was asked to determine whether R.C. 2907.02(A)(1)(b), the statutory rape provision, was unconstitutional as applied to a child under the age of thirteen who is alleged to be the perpetrator of sexual misconduct. *Id.* at ¶ 1. In that case, two minor boys under the age of thirteen engaged in sexual activity. One child was twelve years of age and the other was eleven. The twelve year old, D.B., was charged with forcible rape and statutory rape. The trial court held that D.B. was not capable of force, but adjudicated D.B. delinquent based on statutory rape. The appellate court upheld the trial court's decision. In a unanimous decision, the Ohio Supreme Court reversed the matter, deciding that application of R.C. 2907.02(A)(1)(b) to a child under thirteen years of age violated due process. *Id.* at syllabus.

{¶10} Regarding due process violation, the Court held:

As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

Id. at ¶ 24.

{¶11} The Court also explained that the case provided an example of the temptation for a prosecutor to label one child as an offender and the other child as a victim. *Id.* at ¶ 25. Such labelling was especially problematical because the case involved an eleven year old and twelve year old engaging in sexual conduct, and there was no force found.

{¶12} Appellant also cites a Fifth Appellate District case, *In re S.L.*, 5th Dist. No. 2013CA0016, 2014-Ohio-2485. In *in re S.L.*, the complaint similarly alleged that the offense occurred during a range of time wherein the perpetrator was between the ages of twelve and thirteen (the alleged perpetrator was born on January 4, 1996, and the date range alleged in the complaint was November 1, 2008 to February 28, 2009.) The court noted that the alleged perpetrator was under the age of thirteen

during most of the alleged time frame. The Fifth District reversed the trial court and concluded that, pursuant to *In re D.B.*, the alleged perpetrator's due process rights were violated when he was adjudicated delinquent for rape in violation of R.C. 2907.02(A)(1)(b), because he was twelve years old during most of the time the violations were alleged to have occurred and the victim was also under the age of thirteen.

{¶13} The case *sub judice* is easily distinguishable from *In re D.B.* and its progeny. Although the complaint does allege a range of time during which Appellant was from twelve to fourteen years old and his half-sister was from five to seven years old, due to the great difference in the ages of the children, it is unlikely that the older child is not the perpetrator. The record, here, includes at least one specific instance where Appellant has admitted to conduct which occurred when he was fourteen years of age. In an Ohio Uniform Incident Report, drafted by the Belmont County Sheriff's Office and contained in the record, Appellant's grandmother in July of 2013 discovered him with his pants down, lying on top of E.S. on the floor with his penis in E.S.'s anus. (12/10/13, Belmont County Sheriff's Office, Ohio Uniform Incident Report, p. 6.) The record establishes that Appellant's date of birth is 02/05/1999. Hence, Appellant was clearly fourteen years old at the time of this offense, and clearly outside the age parameters of the holding in *In re D.B.* Again, Appellant admitted to this specific conduct according to the report, which states:

[Appellant] stated that he had [E.S.] lay on her stomach and he was behind her. * * * [Appellant] explained that he did penetrate inside of

[E.S.'s] anus with the head of his penis. * * * Detective Gatti asked [Appellant] what made this activity stop. [Appellant] stated because he was done and then stated he just stopped because his Grandmother walked in and made him stop.

Id. at p. 6-7. Further, at the July 1, 2014 pretrial hearing, Appellant changed his plea to an admission. Appellant's counsel acknowledged at the time that he had explained to Appellant all of his rights under the law, including all the possible consequences of his plea and the maximum possible penalty. Appellant acknowledged his plea was made knowingly and intelligently without coercion or duress. There was never any objection raised by Appellant or his counsel regarding his age at the time of the offense during the plea hearing.

{¶14} In *In re D.B.*, the juveniles at issue were both under the age of thirteen, precluding either from being charged with statutory rape. In the context of statutory rape, the ages of the alleged victim and alleged perpetrator do not make a difference when both are under thirteen, as even an alleged perpetrator who is under the age of thirteen is incapable of consenting:

It must be emphasized that the concept of consent plays no role in whether a person violates R.C. 2907.02(A)(1)(b); children under the age of 13 are legally incapable of consenting to sexual conduct.

* * *

The plain language of the statute makes it clear that every person who engages in sexual conduct with a child under the age of 13 is strictly liable for statutory rape, and the statute must be enforced equally and without regard to the particular circumstances of an individual's situation. R.C. 2907.02(A)(1)(b) offers no prosecutorial exception to charging an offense when every party involved in the sexual conduct is under the age of 13; conceivably, the principle of equal protection suggests that both parties could be prosecuted as identically situated.

Id. at ¶ 27, 30.

{¶15} A hearing on the motion to vacate the adjudication was held on June 30, 2015. The trial court subsequently issued a judgment entry dated August 12, 2015, stating:

The discovery, which is part of the Court's record and was available to defense counsel at trial, clearly establishes an offense which occurred after the juvenile was over the age of 13. In the dialogue by the Court with the Juvenile and the Juvenile's attorney at the time of the admission to the charge, all Juvenile Rule 29 Rights were explained to the juvenile and the Juvenile acknowledged the dates within which the offense occurred and specifically acknowledged that the offense could have happened as late as July 29, 2013. The Court is convinced there was no misunderstanding as to when the Juvenile's offense occurred.

(8/12/15 J.E.)

{¶16} The analysis and holding in *In re D.B.* does not apply in this instance where the complaint alleges specific conduct which is demonstrated in the record to have occurred while Appellant was over the age of thirteen. Appellant acknowledged and admitted to that conduct when his grandmother discovered him during commission of the offense and immediately brought an end to the incident. Moreover, no objections were made at the plea hearing regarding Appellant's age at the time of the offense. The trial court concluded in its judgment that Appellant was over the age of thirteen at the time he committed the offense to which he admitted. Regarding the offense of rape to which Appellant made an admission, there was no nebulous timeframe. A specific instance involving his grandmother discovering him committing the act against his half-sister is contained within the record and Appellant was over the age of thirteen at that time.

{¶17} As the record clearly shows Appellant was over the age of thirteen when he committed a rape offense, his reliance on *In re D.B.* is misplaced. Appellant's assignment of error is without merit and is overruled. The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.