

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY, OHIO

IN RE BRYAN C. STURM, A MINOR : Case No. 05CA35
: :
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MEMORANDUM OF AMICUS CURIAE, THE JUSTICE FOR CHILDREN PROJECT,
SUPPORTING APPELLANT BRYAN C. STURM'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF APPLICATION FOR RECONSIDERATION

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AMICUS ARGUMENT IN RESPONSE TO REQUEST FOR SUPPLEMENTAL
BRIEFING

I. INTRODUCTION

On January 2, 2007, the appellant filed a timely application for reconsideration pursuant to App.R. 26(A) as to his eighth assignment of error, which argued that “[t]he trial court erred when it imposed a term of incarceration that exceeded the minimum term of incarceration. The serious youthful offender sentence was improperly based upon facts that were not found by the jury, in contravention of *Blakely v. Washington* (2004), 542 U.S. 296.” Following the filing of a response by the state, on April 17, 2007, this Court requested supplemental briefing on the following question:

In light of the differences between the adult and juvenile justice systems, including their purposes, history and structure, whether the juvenile court retains the authority to make factual determinations concerning dispositions in spite of the jury’s fact-finding responsibility under the Sixth Amendment to the Constitution of the United States.

The Court’s question is at once broader and narrower than the assignment of error presented by the appellant. The question is restricted to the validity of factfinding at disposition (as opposed to both adjudication and disposition), but appears to apply to both traditional juvenile dispositions as well as Serious Youthful Offender (SYO) dispositions. Moreover, the Court’s question specifically references only the Sixth Amendment to the United States Constitution.¹

¹ The Court may also be considering whether juvenile courts are still required to comply with the provisions of 146 Ohio Laws 7136, 1995 Am. Sub. S.B. 2 (“S.B. 2”) that were severed as an unconstitutional violation of the right to a jury trial in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 when choosing the adult sentence to be imposed on a Serious Youthful Offender pursuant to R.C. 2151.13. Cf. *In Re D.H.*, Franklin App. No. 06AP-250, 2006-Ohio-6953 at ¶¶69-73 (conflict certified and notice filed with Ohio Supreme Court). Amicus respectfully suggests that the Ohio Supreme Court’s language in *Foster* clearly states that those provisions have been completely severed from the

Amicus curiae respectfully suggest that while the Court's question can and ultimately should be answered in the negative regarding all juvenile dispositions, this Court need not go so far. Instead, because of the substantial differences between traditional juvenile proceedings (including both adjudications and dispositions) and discretionary SYO proceedings, this Court should conclude both that (1) SYO proceedings are "criminal proceedings" under the Sixth Amendment, and that as a result the judicial factfinding required to impose a discretionary SYO adult sentence is in direct violation of both *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296; and also that (2) the imposition of adult punishment by juvenile courts based upon judicial factfinding does not "measure up to the essentials of due process and fair treatment" required by the Fourteenth Amendment as described in both *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 533 and *In Re Gault* (1967), 387 U.S. 1, 30. Accordingly, this Court should at a minimum grant the appellant's application for reconsideration and sustain his appeal as to his eighth assignment of error.

Revised Code, and are no longer operative. *Foster*, 2006-Ohio-856 at ¶99. For that reason, any answer to this question would necessarily require speculation regarding subsequent legislative action.

Moreover, the analysis presented in the remainder of the instant memorandum regarding R.C. 2152.13 is applicable to any other judicial factfinding made to justify incarceration of a juvenile, and therefore applies to the severed sections of S.B. 2 with the same force as it applies to R.C. 2152.13 itself. Compare *In Re Hill*, Allen App. No. 01-05-65, 2005-Ohio-2504 at ¶21 with *In Re D.H.*, 2006-Ohio-6953 at ¶73.

II. THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO JURY TRIAL AND SERIOUS YOUTHFUL OFFENDER PROCEEDINGS

Admittedly, the leading United States Supreme Court case indicates both that the Sixth Amendment right to jury trial does not strictly apply to traditional juvenile court proceedings, and also that the Fourteenth Amendment Due Process Clause does not require trial by jury in traditional juvenile proceedings as a matter of “fundamental fairness.” *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 540-545 (Blackmun, J., plurality op.). See also *In Re Agler*, 19 Ohio St.2d 70, 78-79 (determining, prior to *McKeiver*, that “trial by jury, guaranteed by the federal and most state constitutions, is not an essential element of due process in all adjudicatory proceedings”). A mechanical application of these precedents to this Court’s question would result in the simplistic conclusion that juvenile courts do retain the authority to engage in factfinding that increases punishment at disposition, since there is no Sixth Amendment right to a jury trial precluding such factfinding.²

However, application of the *McKeiver* rule to *this* case would be thoughtless indeed, for any number of reasons. First, direct application of the *McKeiver* rule to discretionary SYO proceedings would constitute a significant broadening of that decision’s reach. *McKeiver*’s actual holding is that “trial by jury *in the juvenile court’s adjudicative stage* is not a constitutional requirement.” *McKeiver*, 403 U.S. at 545 (plurality op., emphasis added). Accord *Agler*, 19 Ohio St.2d at 79. *McKeiver* does not address the jury trial right at the dispositional stage of juvenile proceedings for the same

² It is worth noting that “[v]irtually all of the academic commentary on *McKeiver* has been critical of its analysis and constitutional ruling.” See Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements*

reason that Ohio courts have not traditionally addressed the right to jury at criminal sentencings: because “[i]t was not anticipated that jury rights may be implicated in sentencing until *Apprendi v. New Jersey*.” *Foster*, 109 Ohio St.3d at 4, 2006-Ohio-856 at ¶3.

Second, the reach of *McKeiver* is limited to traditional juvenile court proceedings. Application of the decision to SYO proceedings is not contemplated in the language of *McKeiver*, and SYO proceedings did not exist in Ohio or any other state at the time it was decided. See, e.g., Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle* (1999), 28 Hofstra L. Rev. 259, 277-79 (noting that Minnesota enacted the first SYO/blended sentencing statute in 1992, some twenty-one years after *McKeiver*). Moreover, SYO cases are hardly “traditional” juvenile proceedings because of the potential imposition of adult sanctions. For this reason, the Ohio legislature has required that the accused juvenile be given the same substantive protections as adults facing criminal charges. See R.C. R.C. 2152.13(C)(1) and (2) (stating that “the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of proceedings,” and that a juvenile in an SYO proceeding has “*all rights* afforded a person who is prosecuted for committing a crime”). It is beyond dispute that juveniles have a statutory right to a jury trial in Ohio SYO cases, and efforts to undermine that right by refusing to enforce a specific aspect of the right to jury trial afforded to adult criminal defendants violates the legislature’s command in R.C. 2152.13.

Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts (2003), 38 Wake Forest L. Rev. 1111, 1155 fn. 144 (collecting studies and law review articles).

Third, and more directly related to this Court's question, is the limited scope of the *McKeiver* Court's apparent holding that juvenile adjudicatory hearings do not constitute "criminal prosecutions" for purposes of the Sixth Amendment to the United States Constitution. See, e.g., *McKeiver*, 403 U.S. at 550-51 (plurality op.) and *id.* at 557 (Harlan, J., concurring in judgment). It would be an entirely new and different matter to conclude that SYO proceedings are not "criminal prosecutions" under the Sixth Amendment, as the punishment, procedures, and rights provided for in such proceedings are entirely different than those in traditional juvenile adjudications. Compare R.C. 2152.13 (requiring indictment, speedy trial, jury trial, open trial, transcript and counsel, and allowing for stayed adult punishment of punitive incarceration) with Paul C. Giannelli and Patricia McCloud Yeomans, *Ohio Juvenile Law* (2006 Ed.) at Secs. 28:1-20 ("Delinquent Child Dispositions"), Secs. 24:1-32 ("Adjudicatory Hearings"), Sec. 17:8 ("Delinquency Complaints"), and Secs. 4:1-7("Delinquent Child Jurisdiction").

Unfortunately, there is no coherent test regarding what proceedings constitute "criminal prosecutions" for purposes of the Sixth Amendment. Cf., e.g., *Lewis v. United States* (1996), 518 U.S. 322, 325-26 (describing so-called "petty offense" exception to the jury trial right) and *McKeiver*, 403 U.S. at 540-41 (noting that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution' within the meaning and reach of the Sixth Amendment"). *McKeiver* itself notes that the "civil" denomination of juvenile proceedings is neither binding nor particularly helpful to this analysis, see *id.* at 541, and amicus respectfully asserts that the restraints on liberty that constitute a potential result of SYO proceedings, as well as the attendant procedural and

substantive differences between those proceedings and traditional juvenile adjudications, make the former far more akin to “criminal prosecutions.”

However, even if SYO proceedings are not deemed to be “criminal prosecutions” that are directly within the purview of the Sixth Amendment, there is no persuasive reason to extend the *McKeiver* holding that due process and “fundamental fairness” does not require the full panoply of Sixth Amendment jury rights in such cases. The *McKeiver* court concluded that the failure to extend the right to a jury trial did not violate the Fourteenth Amendment Due Process Clause for two primary reasons. First, in the Court’s view, “[t]he imposition of the jury trial on the juvenile court would not strengthen greatly, if at all, the fact-finding function” *Id.* at 547. This rationale no longer has constitutional significance. The United States Supreme Court decisions in *Apprendi* and *Blakely* state that both the Fourteenth Amendment “proscription of any deprivation of liberty without ‘due process of law’” and the Sixth Amendment right to trial by jury are “constitutional protections of surpassing importance” that require any factfinding to be conducted by a jury. *Apprendi*, 530 U.S. at 476-8. See also *Blakely*, 542 U.S. at 306 (“Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary”) and *Feld*, *supra* at 1161 (noting that “*Apprendi* emphasized the importance of the jury to assure the constitutional reliability of fact-finding” and arguing that the “conclusion in *McKeiver* that states do not need to provide juries to assure accurate fact-finding . . . fails to take account of to the real differences in fact-finding processes between juries and judges”). In short, *McKeiver* rests on a claim that juries and adversarial factfinding are not necessarily more accurate than alternative means of truth-seeking. See, *e.g.*, *McKevier*,

403 U.S. at 547 (“We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial”). This may be empirically true, but as held in *Blakely*, “[o]ur Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.” *Blakely*, 542 U.S. at 313.

Second, the *McKeiver* court worried that the imposition of jury trials would completely destroy the distinctions between the criminal and juvenile systems. See *McKeiver*, 403 U.S. at 545 (“There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding”) and *id.* at 551 (“If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial”). Given that the Ohio legislature has specifically structured SYO proceedings as both public and “fully adversarial”, this second rationale simply does not and cannot hold in such cases.

When it enacted the SYO statutes, the Ohio legislature for the first time specifically authorized the use of a jury in juvenile court. Cf. *McKeiver*, 403 U.S. at 547-8. Based on the text of the statute it is logical to conclude that, had the legislature known that judicial factfinding would subject the statute to additional constitutional scrutiny, it would have instead required such factfinding to have been done by the jury. See, e.g., *Cunningham v. California* (2007) --- U.S. ---, 127 S.Ct. 856, 871 (noting that

“several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence”). It is hardly a stretch to conclude that had it been cognizant of the constitutional issues raised by *Blakely*, the legislature would have authorized that same jury to engage in specific factfinding to avoid any constitutional difficulties. Cf. *Foster* at ¶87 (“Certainly the General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to punishment in felony casesThe General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional”).

Simply put, based on the reasoning announced by the Supreme Court of the United States in *Blakely* and adopted by the Ohio Supreme Court Court in *Foster*, the discretionary SYO sentencing provisions of R.C. Chapter 2152 are unconstitutional under the Sixth Amendment to the United States Consitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all these reasons, the Court's question must be resolved in the negative insofar as it relates to Serious Youthful Offender proceedings. This Court should accordingly, reconsider its previously-released opinion and judgment in this case, and sustain the appellant's eighth assignment of error.

Respectfully submitted,

(Jason A. Macke, 04/30/2007)

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by hand delivery on this ____ day of May, 2007:

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