

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

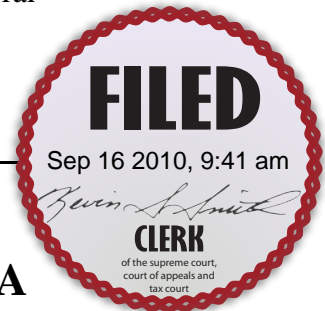
ELIZABETH HARDTKE
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



T.S.,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 71A04-1002-JV-91
)	
STATE OF INDIANA,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0910-JD-662

September 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, T.S., appeals the juvenile court's adjudication to commit him to the Indiana Department of Correction (DOC).

We affirm.

ISSUE

T.S. raises one issue for our review, which we restate as: Whether the juvenile court abused its discretion by committing him to the DOC.

FACTS AND PROCEDURAL HISTORY

On November 2, 2009, the State filed a delinquency petition alleging that T.S. had committed two Counts of child molesting, which would have been Class B felonies if committed by an adult, Ind. Code § 35-42-4-3. The petition alleged that T.S., who was fourteen-years old at the time, had molested his cousins who resided in the home with T.S.: L.B., who was ten-years old, and J.B., who was five-years old. T.S. molested both boys orally and anally on thirty different occasions. T.S. had previously been adjudicated on two Counts of child molesting in 2007 involving his five-year old half-brother, for which he underwent sexual offender treatment and was placed on probation.

On November 9, 2009, an initial hearing was held. T.S. accepted the State's plea offer and admitted to one Count of child molesting whereby the State agreed to dismiss the other Count. At the dispositional hearing on January 19, 2010, the juvenile court committed T.S. to the DOC for housing in a correctional facility or any community based correctional facility

for children. In its dispositional order, the juvenile court adopted as findings all statements and attachments from the probation officer's report, and stated the following, in relevant part:

Reasonable efforts were made to prevent or eliminate the need for removal, including: giving [T.S.] the opportunity at probation and outpatient sexual offender treatment in the past; allowing him the opportunity to complete a sexual history polygraph examination; and by having him participate in a psychosexual assessment in order to assess his treatment needs and risk to the community.

These efforts did not prevent removal of the child because [T.S.] sexually reoffended after receiving intensive sexual offender treatment. In addition, the Family and Children's Center has conducted numerous interviews and risk and needs assessments suggesting that [T.S.] is high risk to sexually re-offend, and that he should be placed at [the DOC].

These efforts were reasonable because: [T.S.] was provided the opportunity to prove that he could behave in a safe and appropriate manner during a previous term of probation. We also provided [T.S.] the opportunity to meet with a qualified therapist in order to have his risk and needs appropriately assessed prior to making any decision regarding his placement.

It is in the best interests of the child to be removed from the home environment and remaining in the home would be contrary to the health and welfare of the child because: [T.S.] has some serious sexual issues that need immediate attention. If [T.S.] does not receive the proper structure and intensity of treatment, he would likely fail in treatment and be facing more serious charges.

The court has investigated or has made provisions for the delivery of the most appropriate services from those available to prevent the child's placement out of the child's home or to reunify the child and family.

Said child is in need of supervision, care, treatment and services which are NOT available in the local community.

There is no available person or facility in St. Joseph County[,] Indiana which can provide the child with the necessary services.

This Dispositional Order is consistent with the safety and the best interest of the child and is the least restrictive and most appropriate setting available close to the parents' homes, least interferes with the family's autonomy, is least

disruptive of family life, and imposes the least restraint of the freedom of the child and the child's parent, guardian, or custodian; and provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

The [c]ourt further finds its Disposition is the least restrictive alternative to insure the child's welfare and rehabilitation and the safety and welfare of the community.

Suitable relative placement was explored and could not be found.

(Appellant's App. pp. 48-49). T.S. was transported from the Juvenile Justice Center to Indiana Boys School on January 20, 2010.

T.S. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

T. S. contends that the juvenile court abused its discretion by committing him to the DOC. Specifically, he argues that the trial court failed to order the least restrictive disposition pursuant to Indiana Code section 31-37-18-6, his custody is punitive rather than rehabilitative, and the juvenile court did not take into account the fact that he was sexually abused by his older cousin and that by being placed in the DOC, he will likely be victimized by other inmates. Instead, he argues that he should be placed in a residential treatment facility so that he can receive treatment as opposed to punishment.

The choice of the specific disposition of a juvenile adjudicated a delinquent child is a matter committed to the sound discretion of the juvenile court, subject to the statutory considerations of the welfare of the child, the safety of the community, and the policy of favoring the least harsh disposition. *J.S. v. State*, 881 N.E.2d 26, 28 (Ind. Ct. App. 2008); *see also* I.C. § 31-37-18-6. A juvenile disposition will not be reversed absent a showing of an

abuse of discretion. *Id.* An abuse of discretion occurs when the juvenile court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual inferences that can be drawn therefrom. *Id.* Thus, the juvenile court is accorded wide latitude and great flexibility in its dealings with juveniles. *Id.*

Indiana Code section 31-37-18-6 governs juvenile dispositional decrees and provides as follows:

If consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that:

(1) is:

(A) in the least restrictive (most family like) and most appropriate setting available; and

(B) close to the parents' home, consistent with the best interest and special needs of the child;

(2) least interferes with family autonomy;

(3) is least disruptive of family life;

(4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and

(5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

Although this statute generally requires placement in the least restrictive setting, it also contains language indicating that a more restrictive placement might be appropriate under certain circumstances. *J.S.*, 881 N.E.2d at 28. Placement in the least restrictive setting is required only "[i]f consistent with the safety of the community and the best interest of the child [.]" I.C. § 31-37-18-6. "Thus, the statute recognizes that in certain situations the best interest of the child is better served by a more restrictive placement." *K.A. v. State*, 775 N.E.2d 382, 387 (Ind. Ct. App. 2002), *trans. denied*.

T.S. relies on *E.H. v. State*, 764 N.E.2d 681 (Ind. Ct. App. 2002), *trans. denied*. In *E.H.*, the juvenile was adjudicated a delinquent for the theft of a necklace. *Id.* at 685. We vacated the juvenile court’s dispositional order placing E.H. in the wardship of the DOC for a period of one year because we concluded that in light of the recent stability and progress in rehabilitation efforts, “the one-year commitment imposed by the juvenile court conflicts with rehabilitative goals of the juvenile justice system.” *Id.* at 686. In coming to this conclusion, we noted that E.H. came from an abusive and unstable background and had recently been placed in a stable foster home and was making significant improvement with his adjustment issues. *Id.* Additionally, we noted that there was “no evidence . . . that E.H. is a threat to the community.” *Id.* at 686. The court concluded that in light of E.H.’s recent progress, a less restrictive placement would be to continue E.H. in foster care and with a rehabilitative program. *Id.*

We find *E.H.* to be distinguishable from the current case. Unlike E.H., who was showing signs of improvement and was not deemed to be a threat to the community, the juvenile court in this case found that efforts at a least restrictive means had failed in the past: probation and outpatient sexual offender treatment “did not prevent removal of the child because [T.S.] sexually reoffended after receiving intensive sexual offender treatment.” (Appellant’s App. p. 48). In 2007, T.S. was first adjudicated on two Counts of child molesting for molesting his five-year old half-brother. Even after completing a sex offender treatment program for nearly a year and a half, he went on to sexually abuse his younger cousins on thirty different occasions. Again, both victims were young and related to him—in

fact, one of the victims reported that T.S. began molesting him before his fifth birthday. According to T.S.'s Psychosexual Assessment, a test which assesses the risk for sexual recidivism, T.S. "**presents a HIGH risk to re-offend.**" (Appellant's App. p. 33). Based on the fact that a residential-type setting failed in the past, the severity of the crime and the potential to reoffend, a less restrictive means is inappropriate for T.S.

With respect to the best interest of the child, T.S. argues that the juvenile court ignored the fact that he was sexually abused and that sending him to the DOC presents the possibility that he will be victimized by other inmates. The juvenile court found that it is in his best interest to be removed from his home environment because he lacked proper adult supervision. T.S. was able to victimize the children while other adults were in the home. As a result of this, the juvenile court found that "[T.S.] has some serious sexual issues that need immediate attention. If [T.S.] does not receive the proper structure and intensity of treatment, he would likely fail in treatment and be facing more serious charges." (Appellant's App. p. 49). At the dispositional hearing, the juvenile court acknowledged T.S.'s history and stated "I am sorry for the circumstances that put you in this position. While you may not be totally to blame, you certainly have to assume some of the responsibility and only you can correct it." (Transcript p. 18). The juvenile court took into account T.S.'s own sexual abuse, but decided that it was in his own best interest to be placed in a more intensive and restrictive setting to prevent future occurrences, specifically, one with "supervision, care, treatment and services which are NOT available in the local community."

(Appellant's App. p. 48). Furthermore, as part of his permanency plan, T.S. will participate in sex offender treatment.

Although T.S. requests that we conclude that the juvenile court abused its discretion by placing him with the DOC because a less restrictive option was available, it is well-settled that there are times when commitment to a secure facility is in the best interest of the juvenile and society. *D.S. v. State*, 829 N.E.2d 1081, 1085 (Ind. Ct. App. 2005). This seems to be a case where it is in the best interest of both T.S. and society that he be immersed in treatment for his issues. The juvenile court, therefore, did not abuse its discretion in placing T.S. in the custody of the DOC.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in placing T.S. in the custody of the DOC.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.