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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001040-DG

T.R., A CHILD UNDER EIGHTEEN — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 09-XX-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: This matter is before us on discretionary review. The Barren District Court entered an order committing T.R., a child under eighteen, to the Department of Juvenile Justice (DJJ) for residential placement. The Barren Circuit Court affirmed the district court, and it is from the circuit court's order that T.R. appeals. For the reasons set forth below, we affirm.

FACTS

In October 2005, T.R. was convicted of first-degree sexual abuse for sexually assaulting his five-year-old brother and was committed to the custody of the DJJ. On October 22, 2007, T.R. completed residential sex offender treatment and was placed in a foster home. While in the foster home, T.R. continued to receive treatment. On December 26, 2008, and two weeks after being released from the custody of DJJ, T.R. reoffended. As a result, a juvenile complaint was generated on January 12, 2009, in the Barren District Court charging T.R. with first-degree sexual abuse. T.R. was detained that day. Following a detention hearing on January 13, 2009, the district court released T.R. to his foster parents' home pursuant to an order of house arrest. On July 28, 2009, T.R. entered an admission to second-degree sexual abuse.

For nine months, T.R. remained in his foster home until his dispositional hearing on September 8, 2009. Prior to that hearing, the DJJ prepared a Predisposition Investigation Report (PDI) and a Juvenile Sexual Offender Assessment (JSOA). Both reports recommended that T.R. be committed to the DJJ as a public offender as a result of his low IQ; placed in a residential facility; and ordered to complete a sex offender treatment program.

At the hearing, T.R.'s counsel argued that probation with outpatient treatment would be the least restrictive alternative. In support of her argument, T.R.'s counsel noted that the JSOA stated that T.R. had been doing well since being placed with his foster parents; that he had not committed any offenses since

living with his foster parents; and that he established a bond with his foster parents. The Commonwealth noted that this was T.R.'s second offense and argued that the trial court should follow the recommendations in the PDI and the JSOA. The district court agreed with the Commonwealth and entered a dispositional order committing T.R. to the DJJ for residential placement.

T.R. subsequently appealed to the Barren Circuit Court, and the circuit court affirmed the order of the district court. T.R. then filed a motion for discretionary review with this Court, which was granted by an order entered on January 10, 2011.

ANALYSIS

On appeal, T.R. argues that the district court erred when it committed him to the DJJ for residential placement because it violated the least restrictive alternative requirement of Kentucky Revised Statute (KRS) 600.010(2)(c). The Commonwealth argues that this issue is not properly preserved for review.

Having reviewed the record, we believe this issue was properly preserved. At the dispositional hearing, T.R.'s counsel argued against commitment to the DJJ. Specifically, T.R.'s counsel contended that T.R. was doing well in his foster home, and that T.R. should be placed on probation with outpatient treatment instead of being committed to the DJJ. Based on these arguments, we believe that this issue was preserved for review. Because this issue is preserved, we apply the abuse of discretion standard of review. *See C.W.C.S. v. Commonwealth*, 282 S.W.3d 818, 824 (Ky. App. 2009) (concluding that "[a] trial court has wide

discretion in sentencing, and sentencing decisions are only reviewed for an abuse of that wide discretion"). With this standard in mind, we address T.R.'s argument.

"[B]efore a juvenile offender is committed to the custody of the DJJ, the court must demonstrate compliance with KRS 600.010(2)(c)." *N.L. v. Commonwealth*, 323 S.W.3d 732, 738 (Ky. App. 2009). KRS 600.010(2)(c) provides that "[t]he court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary[.]"

Having carefully reviewed the record, including the JSOA, we conclude that the district court did show that other less restrictive alternatives were not feasible. As correctly noted by T.R.'s counsel at the hearing, the JSOA did provide that T.R. had done well following placement with his foster parents, and that he had been in the community for nine months pending adjudication and disposition without further problems. However, the JSOA provided that T.R. needed more intensive treatment than what could be provided in the community. This recommendation was based on T.R.'s failure to implement intervention strategies he learned from his previous sex offender treatment; his lack of insight into victim empathy; and his failure to recognize potential consequences of his actions.

At the dispositional hearing, the district court judge stated that he considered other alternatives but there was not another "rational, reasonable choice." The judge further noted that he did not feel that he could "do less than"

the treatment T.R. received for his first offense, because T.R. reoffended two weeks after being released from the DJJ. Thus, to the extent that less restrictive alternatives were available, they were considered by the district court and determined unfeasible. Therefore, we cannot say the district court's decision to commit T.R. to the DJJ was an abuse of discretion.

On appeal, T.R. makes two additional arguments: that the JSOA was inadequate; and that the trial court erred in committing him to the DJJ because he was not declared a juvenile sexual offender. Because these two arguments were not properly preserved for appellate review, we address them under Kentucky Rule of Criminal Procedure (RCr) 10.26, the palpable error rule. *See N.T.G. v. Commonwealth*, 185 S.W.3d 218, 220 (Ky. App. 2006). We note that, even if these issues were properly preserved, T.R. still would not prevail.

T.R. contends that because the JSOA was inadequate, the district court erred by relying on it. Specifically, T.R. contends that the JSOA failed to provide an explanation of its conclusion that residential treatment was necessary.

As set forth in KRS 635.505(3), a JSOA "shall be prepared in order to assist the courts in determining whether the child should be declared a juvenile sexual offender, and to provide information regarding the risk for reoffending and recommendations for treatment." Having reviewed the JSOA, we believe it adequately provided information regarding recommendations for treatment. The JSOA provided that T.R. was assessed to be moderate-high risk to reoffend sexually. The JSOA further provided that:

> Although he has completed sex offender counseling at one time, [T.R.] had demonstrated that he has not implement[ed] intervention strategies learned from previous providers. He also retained little information in other areas such as victim empathy and failed to recognize potential consequences of his actions. He will need more intensive treatment than what can be provided in the community. Therefore, it is suggested that [T.R.] be placed in a residential sex offender specific facility.

Based on the preceding, we believe that the JSOA adequately complied with KRS 635.505(3).

As noted above, T.R. also argues that the district court erred when it committed him to the DJJ because he was not adjudicated a juvenile sexual offender. It appears that T.R. is arguing that, absent a finding that he is a juvenile sexual offender, the district court could not commit him to the DJJ for residential placement. We disagree.

In this case, the district court did not make a finding that T.R. was a juvenile sexual offender. Instead, the district court found that T.R. was a "public offender" because his IQ was below 70. *See* KRS 635.505(2) and (4).[1] KRS 635.515(1) provides that "a child declared a juvenile sexual offender shall be committed to the custody of the Department of Juvenile Justice and shall receive sexual offender treatment." (Emphasis added). While there is not a similar statutory provision making it mandatory for a trial court to commit a child adjudicated a public

[1] KRS 635.505(2) provides that a "mentally retarded" child cannot be adjudicated a "juvenile sexual offender." KRS 635.505(4) defines "mentally retarded" as "a juvenile with a full scale intelligent quotient of seventy (70) or below."

offender to the DJJ, the trial court may do so if it is the least restrictive alternative. KRS 600.010(2)(c). As noted above, we do not believe the district court abused its discretion by committing T.R. to the DJJ. Thus, this argument also fails.

CONCLUSION

For the foregoing reasons, the order of the Barren Circuit Court affirming the Barren District Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dawn Fesmier
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Dennis Wilcutt
Special Assistant Attorney General
Glasgow, Kentucky