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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000566-ME

H.C., A CHILD UNDER EIGHTEEN — APPELLANT

v.

APPEAL FROM BULLITT FAMILY COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 00-J-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, H.C., a minor under eighteen, appeals from an order of the Bullitt Family Court requiring her to serve fifteen days of previously conditionally discharged detention time in the Lincoln Village Detention Center (LVDC) for habitual truancy. Finding no error, we affirm.

H.C. has a lengthy history in the juvenile system. In March 2007, when H.C. was only a twelve-year-old middle school student, the Commonwealth filed a petition for habitual truancy in the Bullitt Family Court alleging excessive unexcused absences for the 2006-2007 school year. H.C. was placed under a Standard School Attendance Order (SSAO), which subjected her to detention for any of the following infractions: unexcused absences or tardies as determined by school officials; bus, ISAP or office referrals; or substance violations. On May 31, 2007, H.C. entered a plea of true to the habitual truancy charge and was ordered by the family court to write a 250 word essay.

On December 12, 2007, the Commonwealth filed a motion for contempt alleging that H.C. had violated the terms of the SSAO after being suspended from school for threatening physical harm to another student over the internet, harassing students in class, and failing to serve detention. H.C. stipulated to the charge and was given the opportunity to purge the contempt by enrolling in counseling and having no further violations of the SSAO. The court further sentenced H.C. to four days in LVDC, which were conditionally discharged.

In May 2008, H.C. was again before the court having violated the SSAO by having eight unexcused absences, ISAP, and cutting classes. By agreement of counsel, H.C. stipulated to contempt and agreed to serve two of the four days detention that was previously discharged. Nevertheless, just one month later, the Commonwealth filed a motion for contempt due to additional violations of the SSAO. However, the trial court delayed further proceedings for a period of one

year to allow for Individualized Education Program (IEP) testing under federal and state law pursuant to the Individuals with Disabilities Education Act (IDEA). The court further noted that H.C. was being placed in a different school and it wanted to give her time to adjust. On June 10, 2009, a hearing was held on the June 2008 contempt motion. At that time it was determined that the testing results indicated no disabilities and that H.C. did not qualify for an IEP. She thereafter stipulated to violations of the SSAO and was ordered to serve the remaining two days detention.

On October 14, 2009, the Commonwealth moved for contempt based upon seven additional unexcused absences and five discipline referrals. Again, H.C. stipulated to the contempt and agreed to a sentence of thirty days detention at LVDC. She served fifteen days, with the remaining fifteen being conditionally discharged.

The instant appeal arises from the Commonwealth's February 2011 motion for contempt based upon eleven unexcused absences, fourteen unexcused tardies, and five discipline referrals. The Commonwealth's motion for contempt was subsequently amended to a motion to revoke the conditionally discharged sentence.

At a March 2011 hearing, H.C.'s assistant principal testified that although H.C. had improved her behavior and grades at the beginning of the school year, both had declined by December 2010, and she was failing all classes at the time of the hearing. He further stated that she had had twelve absences and five discipline referrals since the last court date. H.C. also testified, claiming that she believed

that her decline in school was related to a change in the medications she was prescribed for ADHD and depression. However, H.C. stated that she had not skipped any school days or classes, despite what the school's attendance records indicated.

At the conclusion of the hearing, the family court expressed concern over H.C.'s long history of SSAO violations, and the failure of anyone to suggest a viable alternative to detention than to just "let it ride." In fact, the court commented that it was prepared to commit H.C. to the Cabinet, since H.C. would not accept responsibility for her actions and no previous orders had reflected any positive effect on her behavior. The family court further ruled that the school district had complied with all state and federal testing mandates under the IDEA. As a result, H.C. was ordered to serve the remaining fifteen days in detention at LVDC. She now appeals to this Court.

Pursuant to CR 52.01, factual findings of the family court must be upheld unless clearly erroneous. Factual findings are not clearly erroneous if they are supported by substantial evidence. *W.D.B. v. Commonwealth*, 246 S.W.3d 448, 452–53 (Ky. 2007). With that standard of review in mind, we undertake to resolve the issues herein.

H.C. first argues that the family court erred in finding that the Bullitt County School District complied with all federal and state mandates before bringing an action to revoke the conditionally discharged time. Specifically, H.C. argues that because school personnel were aware of the decline in her grades and behavior,

they should have again tested her for potential disabilities to see if she qualified for an IEP under the IDEA. We disagree.

The IDEA, 20 U.S.C.A. § 1400 *et seq.*, requires state educational agencies receiving federal assistance to establish and maintain procedures to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education . . . ." 20 U.S.C.A. § 1415(a). The IDEA and its implementing regulations establish a comprehensive scheme by which evaluations are conducted and educational programs are implemented. As part of providing a free appropriate public education, the school district must establish an IEP for each child identified with a disability.

707 KAR 1:300 sets forth the required procedures in Kentucky for identifying and evaluating a child that is suspected of needing services under the IDEA. There is no dispute that H.C. was tested in 2009 and found not to qualify for an IEP or be in need of any special education programs. H.C. does not challenge the testing methods nor did she appeal from the 2009 finding that she did not qualify for services. Nevertheless, she hinges her claim that the school had knowledge that she had a disability on 707 KAR 1:340 Section 16 (1), which states:

> (1) An LEA [Local Education Authority] shall be deemed to have knowledge that a child is a child with a disability if:

> (a) The parent of the child has expressed concern in writing (or orally if the parent cannot express it in writing) to supervisory or administrative personnel of the appropriate LEA or to the teacher of the child, that the child is in need of special education and related services;
>
> (b) The parent of the child has requested an evaluation pursuant to the requirements in 707 KAR 1:300; or
>
> (c) **The teacher of the child, or other personnel of the LEA, has expressed concern about a pattern of behavior or performance of the child directly to the director of special education or other supervisory personnel of the LEA.** (Emphasis added).

We find H.C.'s reliance on the above provision unpersuasive. H.C.'s parents neither appealed the findings of the first test nor requested retesting. Further, given H.C.'s truancy history, we simply cannot impute knowledge to the school district's supervisory personnel that her decline in grades and discipline again warranted testing. Significantly, an LEA "shall not be deemed to have knowledge that a child is a child with a disability if, after receiving information that the child may have a disability: (a) The LEA conducted an evaluation and determined the child was not a child with a disability[.]" 707 KAR 1:340 Section 16 (2)(a).

H.C. was tested under the IDEA and found not to be in need of special education services. As such, we must agree with the family court that the school district complied with all state and federal IDEA mandates before seeking to impose the fifteen-day sentence.

Next, relying upon *X.B. v. Commonwealth*, 105 S.W.3d 459 (Ky. App. 2003), H.C argues that her fifteen-day detention sentence was erroneous because it was not the least restrictive alternative available. The Commonwealth responds that numerous alternatives were attempted, all of which were unsuccessful. We agree.

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[.]" A program is the "least restrictive alternative" when:

> [it] is no more harsh, hazardous, or intrusive than necessary; or involves no restrictions on physical movements nor requirements for residential care except as reasonably necessary for the protection of the child from physical injury; or protection of the community, and is conducted at the suitable available facility closest to the child's place of residence[.]

KRS 600.020(35). Thus, the family court's decision must be upheld if there is substantial evidence in the record to support a finding that either: (1) all less restrictive alternatives were attempted, or (2) no feasible alternative to commitment existed.

In *X.B. v. Commonwealth*, a thirteen-year-old stipulated to a charge of second-degree burglary. The trial court thereafter rejected the caseworker's recommendation that X.B. be probated to the Department of Juvenile Justice (DJJ) and allowed to continue living with his grandfather, and instead ordered that X.B. be committed to the Cabinet. *Id.* at 460. On appeal, a panel of this Court reversed

the trial court, finding that it failed to show that any less restrictive alternatives were attempted or were not feasible, as is required by KRS 600.020(35):

> There was no indication in the record that X B. had ever been adjudicated delinquent of any offense or that he had been subjected to any form of treatment or probation by the juvenile justice system prior to the court committing him to DJJ in this case.
>
> X.B. was only thirteen years old when he appeared before the court, and he apparently had never been subjected to any sort of punishment or treatment by the juvenile justice system. We conclude that, before X.B. could be taken from his family and placed with DJJ, the court should have at least stated its reasons for doing so. The statute requires as much.

Id. at 461. Importantly however, the panel further noted, in dicta, "Had the record clearly indicated that X.B. had been before the court on previous occasions and that the court had attempted lesser restrictive alternatives, then the result herein may have been different." *Id.* at n.3.

Herein, there is no question that the family court expended a tremendous amount of time and effort conducting numerous court proceedings over several years in an attempt to resolve H.C.'s issues, albeit to no avail. H.C. repeatedly violated various orders and conditions imposed upon her as a result of her habitual truancy. The family court, during the March 3, 2011, hearing even commented that it believed the best solution was probably to commit H.C. to the Cabinet. Given H.C.'s history and flagrant disregard for prior orders, we simply cannot envision any other less restrictive alternatives the family court could have imposed.

As such, the court did not err in requiring H.C. to serve the fifteen-day conditionally discharged sentence.

The order of the Bullitt Family Court is affirmed.

ALL CONCUR.

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