IN THE COMMONWEALTH COURT OF PENNSYLVANIA

G.E.,	:	
Petitioner	:	
	:	
v.	:	No. 1896 C.D. 2010
	:	Submitted: March 18, 2011
Department of Public Welfare,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: July 12, 2011

G.E. petitions for review of an order of the Department of Public Welfare (DPW), Bureau of Hearings and Appeals (Bureau), which adopted the recommendation of an Administrative Law Judge (ALJ) to dismiss G.E.'s appeal from the decision of York County Children and Youth (C&Y) to file a founded report[1] of child abuse pursuant to the Child Protective Services Law (CPSL).[2] We affirm.

[1] While the ALJ's order references C&Y's filing of an indicated report, the ALJ's findings and the record herein establish that the subject of the matter *sub judice* is C&Y's founded report. See ALJ Adjudication at 2; Reproduced Record (R.R.) at 180a, 193a. This error is harmless.

[2] 23 Pa.C.S. §§6301-6386.

On June 13, 2006, C&Y received an oral report of child abuse implicating G.E. On July 23, 2006, C&Y completed an indicated report[3] of child abuse against G.E., stating:

> Allegedly the child was visiting and in the care of [G.E.] when he touched her vagina with his hands. There was skin-to-skin contact. [G.E.] kissed and hugged the child in a manner that made her feel uncomfortable.

Certified Record (C.R.) at Item 3. G.E. appealed the indicated report to the ALJ.

During the pre-trial conference before the ALJ, G.E.'s counsel conceded that G.E. had been charged with, and criminally convicted by a jury of, sexual assault involving the same child, and the same incident, that was the subject of the C&Y indicated report. C.R., Transcript of Proceedings of July 19, 2010 (hereinafter, C.R., Tr.) at 6, 12. Specifically, the jury found G.E. guilty of indecent assault of a child, corruption of minors, and unlawful contact, and on February 28, 2007, G.E. was sentenced to a jail term of 11½ months to 7 years. C.R. at Item 3.

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[3] An "indicated report" is defined as:

> A child abuse report made pursuant to this chapter if an investigation by the county agency or the [DPW] determines that substantial evidence of the alleged abuse exists based on any of the following:
>
> (1) Available medical evidence.
>
> (2) The child protective service investigation.
>
> (3) An admission of the acts of abuse by the perpetrator.

Section 6303(a) of the CPSL, 23 Pa.C.S. §6303(a).

On March 1, 2007, C&Y filed a founded report[4] of child abuse based on G.E.'s criminal conviction, and the Bureau thereafter issued a Rule to Show Cause as to why G.E.'s appeal should not be dismissed.

Before the ALJ, G.E. argued that his appeal was not a collateral attack upon the underlying criminal conviction because that criminal conviction was not final. G.E. asserted that his appeal of the conviction was pending before Superior Court, and relied in his argument upon our opinion in C.J. v. Department of Public Welfare, 960 A.2d 494 (Pa. Cmwlth. 2008), petition for allowance of appeal denied, 601 Pa. 698, 972 A.2d 523 (2009).

The ALJ disagreed with G.E.'s reading of our holding in C.J., noting that a founded report of child abuse could be based upon an underlying finding of criminal guilt pursuant to Section 6303(a) of the CPSL, 23 Pa.C.S. §6303(a). Additionally, the ALJ concluded that this Court had rejected the argument made by G.E. in our opinion in L.C. v. Department of Public Welfare, 982 A.2d 1040 (Pa. Cmwlth. 2009), petition for allowance of appeal denied, ___Pa.___, 9 A.3d 631 (2010). Concluding that a jury's guilty verdict cannot be collaterally attacked by a child abuse expunction appeal involving the same incident, notwithstanding

[4] A "founded report" is defined as:

> A child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that a child who is a subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.

Section 6303(a) of the CPSL, 23 Pa.C.S. §6303(a).

any pending appeal thereof, the ALJ recommended that G.E.'s appeal be dismissed by Adjudication and Recommendation dated August 13, 2010. The Bureau adopted the ALJ's Recommendation by order dated August 16, 2010. G.E. now petitions for review of the Bureau's order.

This Court's scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704; L.C.

G.E. first argues that the Bureau erred in dismissing his appeal in that the underlying criminal conviction is not final. There is no dispute in this matter that G.E.'s criminal appellate rights, in relation to the underlying criminal conviction, were reinstated *nunc pro tunc* due to alleged ineffectiveness of counsel, and that the appeal thereof is currently pending before Superior Court. In support of his argument that the pending appeal is not a final judgment, hence precluding any collateral attack thereon, G.E. cites to the following emphasized language in C.J., which we excerpt within its larger context:

> Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were litigated and necessary to a previous judgment. . .
>
> Applicable here, collateral estoppel bars a subsequent lawsuit where (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

> Unified Sportsmen of Pa. v. Pa. Game Comm'n, 950 A.2d 1120 (Pa. Cmwlth. 2008).
>
> Stepfather here is collaterally estopped from challenging OCY's founded child abuse report. In particular, in the dependency proceedings the trial court found Stepfather abused Child based on her credible testimony … The OCY indicated report reached the same legal conclusion based on the same facts. . . Thus, the dispositive legal and factual issues are identical in both proceedings.
>
> The remaining criteria of collateral estoppel are similarly met. **The Superior Court affirmed the trial court's finding Stepfather abused Child; therefore, the dependency proceedings resulted in a final judgment on the merits.**

C.J., 960 A.2d at 499 (emphasis added). G.E.'s entire argument on this issue consists of his reliance on the final, emphasized sentence above, which G.E. argues establishes that an appellate ruling on the underlying criminal matter is required before the underlying matter can be considered a final judgment. However, G.E. misreads that single sentence within our precedent in C.J., and fails to address our precedent in L.C., which disposes of this issue and was correctly relied upon by the Bureau.

In L.C., we wrote:

> L.C. argues that DPW erred by changing the "indicated report" to a "founded report" before the appellate courts have completely resolved his appeals from the criminal conviction. We disagree.
>
> Section 6303 of the Child Protective Services Law defines "founded report" as a child abuse report made pursuant to "any judicial adjudication" of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.[FN4] 23 Pa.C.S. § 6303. Thus, DPW was not required to wait until L.C.

> exhausted his appeals to change the "indicated report" to a "founded report."
>
> > FN4. In J.C. v. Department of Public Welfare, 980 A.2d 743 (Pa. Cmwlth., [] 2009), this court held that, for purposes of making a "founded report," a "judicial adjudication" occurs at sentencing. We also note that the burden of proof in a criminal proceeding is "beyond a reasonable doubt," a higher standard than that in an administrative hearing.

L.C., 982 A.2d at 1041. Thusly, G.E.'s argument on this issue is without merit, and the Bureau did not err in dismissing G.E.'s appeal at the pre-trial stage.

Next, G.E. argues[5] that the instant action does not challenge the convictions, but rather seeks a determination that C&Y's allegations differ from his criminal conviction, and therefore his appeal is not collaterally estopped. The gravamen of G.E.'s argument on this issue is that the factual details as recounted in C&Y's indicated report are contradicted by various testimony elicited during the underlying criminal trial, and would be further contradicted by various witnesses proffered by G.E. to be developed before the Bureau should we grant him a hearing thereon. See C.R. at Item 3.

[5] G.E. also argues that the charges on which he was convicted do not constitute "sexual abuse or exploitation" as defined in Section 6303(a) of the CPSL, 23 Pa.C.S. §6303(a). However, a "founded report," as defined in Section 6303(a), need only be based upon "any judicial adjudication based on a finding that a child who is a subject of the report has been abused." 23 Pa.C.S. §6303(a). G.E.'s conviction for "indecent assault of a child, corruption of minors, and unlawful contact" are unquestionably "abuse" of a child as that term is employed in Section 6303(a), and under any other definition of that word, and we will not entertain G.E.'s argument on that issue.

G.E.'s argument on this point is a mere attempt at relitigating the facts as found in the criminal proceedings below, and as such, constitute a collateral attack thereon that is estopped in this matter. As noted in our excerpt above, the trial court in the underlying criminal proceedings found that G.E. abused the child at issue based on her credible testimony, and C&Y's indicated report reached the same legal conclusion based on the same facts; thus, the dispositive legal and factual issues are identical in both proceedings, and G.E.'s attempted collateral attack upon those facts is estopped. C.J., 960 A.2d at 499. Notably, G.E.'s counsel, before the ALJ in this matter, admitted as much when questioned on the testimony at issue in the instant matter. C.R., Tr. at 6, 12. As such, G.E.'s argument on this issue is without merit, and the Bureau did not err.

Finally, G.E argues that the Bureau erroneously denied his request for a stay of this matter pending the determination of his criminal appeal pursuant to Section 3490.106a(i) of Title 55 of the Pennsylvania Code, which reads:

> Hearings and appeals proceedings for indicated reports received by ChildLine after June 30, 1995.
>
> * * *
>
> (i) An administrative appeal proceeding will be automatically stayed upon notice to the Department by any subject or the county agency that there is a pending criminal proceeding or a dependency or delinquency proceeding under the Juvenile Act including an appeal thereof, involving the same factual circumstances.

55 Pa. Code §3490.106a(i).

G.E.'s argument on this point is also without merit: the Bureau dismissed his appeal at the *pre-trial* conference, on the basis that L.C. controls this matter. The foundation of our holding in L.C. is that DPW has the authority to change an indicated report to a founded report based on a criminal conviction that involved the same factual circumstances, regardless of whether the alleged perpetrator has exhausted any existing appeal rights. L.C., 982 A.2d at 1041. Thusly, G.E. has no right to a hearing on the founded report filed by DPW. Id. As there was no proceeding to which G.E. had a right – as evidenced by the Bureau's proper dismissal at the *pre-trial* stage, and as held in our opinion in L.C. – there was no proceeding to which a stay could potentially be entered under 55 Pa. Code §3490.106a(i).

Additionally, and independently dispositive, 55 Pa. Code §3490.106a(i) on its face is applicable only to "Hearings and appeals proceedings for **indicated reports.**" (Emphasis added). As G.E.'s counsel admits in his Response to Rule to Show Cause, the instant appeal filed with the Bureau addresses a founded report of child abuse, and not an indicated report. R.R. at 180a. As such, by its own terms the regulation relied upon by G.E. is inapplicable.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 12th day of July, 2011, the order of the Department Of Public Welfare, Bureau of Hearings and Appeals, dated August 16, 2010, at Docket No. 021-10-0243, is affirmed.

JAMES R. KELLEY, Senior Judge