

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA07-972

March 5, 2008

N.V.

APPELLANT

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[JV-2004-614]

V.

HONORABLE RHONDA WOOD,
JUDGE

STATE OF ARKANSAS

APPELLEE

REVERSED AND REMANDED

Appellant, N.V., was fifteen years old in September 2004 when he pled “true” to two counts of rape (fondling, digital penetration, and oral sex) involving his sisters, who were seven and nine at the time. At first, he engaged in outpatient therapy, but after making little progress in that setting, although reoffending was never an issue, he was eventually placed with the Division of Youth Services for intensive in-patient training. He remained in that program for a little over a year. As the time drew near for him to be released, DYS requested a status hearing, which was held on April 5, 2007. At the conclusion of the hearing, the trial court took under advisement the issue of whether appellant would have to register as a sex offender. Appellant’s counsel asked the court to grant him a hearing “to present his side of the case,” if, after reviewing certain matters, the court was inclined to require registration.

The trial court agreed to do so. Yet, on April 30, 2007, without a prior hearing as promised, the trial court entered an order that required appellant to register as a sex offender. Appellant filed a post-trial motion, requesting a hearing on the registration issue and contending that the order was entered without him “having the benefit of an opportunity to be heard regarding reasons why he should not be required to register.” The trial court denied the motion. In this appeal, appellant challenges the trial court’s order to have him register as a sex offender, contending that his statutory and constitutional due-process rights to a hearing were violated. We agree, and, therefore, we reverse and remand this case for a hearing on the registration issue.

Appellant relies upon Arkansas Code Annotated section 9-27-356 (Repl. 2008), contending that the statute’s dictates were not followed because the prosecutor did not file a motion requesting that appellant be registered, a hearing was not held as required by the statute, and the trial court did not consider and make written findings regarding all seven of the statutory factors. We agree that appellant was denied his right to a hearing as contemplated by statutory and constitutional guarantees of due process; therefore, we find it unnecessary to address his other subpoints at great length.

Arkansas Code Annotated section 9-27-356 (Repl. 2008) provides in pertinent part:

(a) If a juvenile is an adjudicated delinquent for any of the following offenses, the court shall order a sex offender screening and risk assessment:

(1) Rape, § 5-14-103;

....

(b)(1) The court may order a sex offender screening and risk assessment if a juvenile is adjudicated delinquent for any offense with an underlying sexually motivated component.

(2) The court may require that a juvenile register as a sex offender *upon recommendation of the Sex Offender Assessment Committee and following a hearing as set forth in subsection (e) of this section.*

(c) The juvenile division of circuit court judge may order reassessment of the sex offender screening and risk assessment by the committee at any time while the court has jurisdiction over the juvenile.

(d) Following a sex offender screening and risk assessment, *the prosecutor may file a motion to request that a juvenile register as a sex offender* at any time while the court has jurisdiction of the delinquency case if a juvenile is found delinquent for any of the offenses listed in subsection (a) of this section.

(e)(1) *The court shall conduct a hearing within ninety (90) days of the registration motion.*

(2)(A) The juvenile defendant shall be represented by counsel, and the court shall consider the following factors in making its decision to require the juvenile to register as a delinquent sex offender:

(i) The seriousness of the offense;

(ii) The protection of society;

(iii) The level of planning and participation in the alleged offense;

(iv) The previous sex offender history of the juvenile, including whether the juvenile has been adjudicated delinquent for prior sex offenses;

(v) Whether there are facilities or programs available to the court that are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;

(vi) The sex offender assessment and any other relevant written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(vii) Any other factors deemed relevant by the court.

(B) However, under no circumstances shall the exercise by the juvenile of the right against self-incrimination, the right to an adjudication hearing or appeal, the refusal to admit to an offense for which he or she was adjudicated delinquent, or the refusal to admit to other offenses in the assessment process be considered in the decision whether to require registration.

(f)(1) *The court shall make written findings on all the factors in subsection (e) of this section.*

(2) *Upon a finding by clear and convincing evidence that a juvenile should or should not be required to register as a sex offender, the court shall enter its order.*

(g) When the juvenile division of circuit court judge orders a juvenile to register as a sex offender, the judge shall order either the Division of Youth Services of the Department of Human Services or a juvenile probation officer to complete the registration process by:

(1) Completing the sex offender registration form;

(2) Providing a copy of the sex offender registration order, fact sheet, registration form, and the Juvenile Sex Offender Rights and Responsibilities Form to the juvenile and the juvenile's parent, guardian, or custodian and explaining this information to the juvenile and the juvenile's parent, guardian, or custodian;

(3) Mailing a copy of the registration court order, fact sheets, and registration form to the Arkansas Crime Information Center, Sex Offender Registry Manager, One Capitol Mall 4D-200, LR, AR 72201;

(4) Providing local law enforcement agencies where the juvenile resides a copy of the sex offender registration form; and

(5) Ensuring that copies of all documents are forwarded to the court for placement in the court file.

(h) *The juvenile may petition the court to have his or her name removed from the sex offender register at any time while the court has jurisdiction over the juvenile or when the juvenile turns twenty-one (21) years of age, whichever is later.*

(i) *The juvenile division of circuit court judge shall order the juvenile's name removed from the sex offender register upon proof by a preponderance of the evidence that the juvenile does not pose a threat to the safety of others.*

(j) If the court does not order the juvenile's name removed from the sex offender register, the juvenile shall remain on the sex offender register for ten (10) years from the last date on which the juvenile was adjudicated a delinquent or found guilty as an adult for a sex offense or until the juvenile turns twenty-one (21) years of age, whichever is longer.

(k) Once a juvenile is ordered to register as a sex offender, he or she shall be subject to the registration requirements set forth in §§ 12-12-904, 12-12-906, 12-12-908, 12-12-909, and 12-12-912.

(Emphasis added.) Section 9-27-356, quoted at length above, clearly reflects the legislature's intention to provide a full and fair hearing to a juvenile before requiring him or her to register as a sex offender, even setting out the seven factors that the trial court is to consider in making its decision regarding registration.

Here, a form document entitled "Court Setting Sheet" was filed April 3, 2007. It was the vehicle by which the April 5, 2007 hearing was held, and it provided in pertinent part:

TYPE OF HEARING REQUESTED: Status

ESTIMATED TIME OF HEARING: 10 minutes Request for 4/5/07 @ 2:00 p.m.

SPECIAL NOTES: He's @ DYS @ Mansfield – They are ready to release him. Ct. Order status hrg 1st.

REQUESTED BY: DYS – Sheila Franklin

There is nothing in this document that would alert appellant that his registration as a sex offender would be at issue. Additionally, the request for a hearing was not prompted by a recommendation from the Sex Offender Assessment Committee nor by a motion from the prosecutor requesting that appellant register as a sex offender. The scheduled hearing was

what it purported to be—nothing more than a request for a ten-minute status hearing in order to see where things stood regarding appellant before he was released from inpatient treatment.

At the outset of the hearing, held two days later on April 5, 2007, the prosecutor explained:

This is a case in which [appellant] was sentenced to DYS. They indicate that they are ready to release him and we have some questions about what the conditions of that would be; whether or not another community notification risk assessment would need to be done since he was in there on charges of sexually abusing his two younger sisters. So, we'll need to know – one was done. We need to know whether another one needs to be done at this point. You will need to make a determination as to whether another one needs to be done at this point. *You will need to make a determination as to whether or not you think he needs to register as a sex offender.* We'll need to know whether or not he's going to be in the home with the victims; is there a safety plan; will he have aftercare treatment; if so, where, and those types of things.

(Emphasis added.) A DYS services manager assigned to appellant's case testified. She provided the court with information concerning appellant's status. During her testimony, it became clear that a 2005 community-notification-risk-assessment report was available to the court and parties, but that the more recent 2007 report was not. The trial court pointedly asked the witness if there was a recommendation for appellant to register as an offender. The witness replied:

It is not the recommendation that [appellant] register as a juvenile sex offender at this time. And what I personally have recommended to the Court in the past when I get recommendations like that is ask for a review a couple of months into his aftercare. And, if he has violated his after care plan then registration can be considered. But, at this point, instead of having him at a high risk in 2005—which they did—they have him at a lower risk of reoffending and do not recommend registration at this time.

The trial court then expressed its discomfort with “making any decision at all on this without having an opportunity to review [the more recent report].” Following these remarks, the

prosecutor stated, “I would think, at the very least, at this point we might do what she indicated was done in other cases; not make a decision today, set it out, see how he does on aftercare.” Finally, the following exchange took place:

[APPELLANT’S COUNSEL]: Judge, I guess what I would ask from his side is that I don’t – I’m not going to argue against you taking it under advisement today. Obviously, my preference would be that you follow the recommendation of the people who have been treating him and evaluating him and know this case better than anybody else at this point. If you choose not to follow that recommendation today and you take it under advisement, as strange as it may be, I would ask that if you are so inclined to order that he be allowed to go into the free world, follow the safety plan and not register, I don’t have any problem with that. *If you, however, decide that you want him to register, I would ask you to set it for a hearing and allow me to present his side of the case and why he should not be required to do that.*

THE COURT: *Fair enough. Okay. That’s fair. I’ll do so.*

. . . .

[DYS WITNESS]: So you will set another court date, then?

THE COURT: Well, if I decide that he does not need to be registered I will just issue a formal opinion and I will get it filed and send it out to everyone. *However, if I decide he will be, I’m going to allow [appellant’s counsel] an opportunity to be heard on that and we’ll come back in and let him argue his case and let him tell me why he thinks I’m wrong or maybe give me facts I don’t know.*

. . . .

[APPELLANT’S COUNSEL]: Judge, I believe I am right to say that as long as it’s open I guess I would ask for a new review date. That way if you —

THE COURT: I think either way we’re going — well, if he doesn’t get registered, it sounds like the recommendation is to have a review date. *And if he is, then we’re going to have a hearing.*

(Emphasis added.)

On this record, despite appellant's request for a hearing and the trial court's assurances that he would receive one, he did not. He was entitled to a hearing on this issue, and the State's contentions that the April 5, 2007 hearing satisfied both the statutory and constitutional requirements for a hearing or, in the alternative, that an additional hearing would be superfluous, are simply not convincing.

Having decided to reverse and remand this case for a hearing on the issue of registration, it is not necessary to address appellant's second point of appeal in which he challenges as clearly erroneous the trial court's decision to have him register as a sex offender.

Reversed and remanded.

PITTMAN, C.J., and MILLER, J., agree.