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IN THE COURT OF APPEALS OF INDIANA

C.M.E.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0707-JV-00342
	)	
STATE OF INDIANA	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0601-JD-000147

August 15, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

C.M.E. was adjudicated a delinquent child for committing disorderly conduct, a Class B misdemeanor if committed by an adult. He raises three issues, which we restate as:

I. Whether the juvenile court abused its discretion when it placed C.M.E. in the Department of Correction;

II. Whether C.M.E.'s due process rights were violated when Judge Nemeth engaged in *ex parte* communication with the executive director of the Juvenile Justice Center; and,

III. Whether the juvenile court abused its discretion when it quashed a subpoena issued to a South Bend Tribune reporter.

We affirm.

Facts and Procedural History

On September 30, 2005, C.M.E. fought with another student at school, and during the confrontation, punched the other boy in the back. As a result of the incident, a petition was filed alleging that C.M.E. was a delinquent child. C.M.E. entered an admission to the allegation, and he was initially committed to the St. Joseph County Juvenile Justice Center for thirty days.

C.M.E. was later placed in the care of the Central Academy, a private facility at the Juvenile Justice Center. On December 12, 2006, the probation department filed a petition to modify, and after a hearing on that petition, the court placed C.M.E. at the Safe State facility. Shortly thereafter, another petition to modify was filed, and as a result of that petition C.M.E. was placed in Madison Residential Center.

On June 7, 2007, the probation department filed yet another petition to modify, and a hearing on that petition was held four days later. At the hearing, C.M.E.'s therapist

testified that C.M.E. had not progressed in the prior six months, and that he had damaged property at Madison Residential Center. The court ordered C.M.E. committed to the Juvenile Justice Center for seven days and set the matter for a status hearing on June 18, 2007.

At the June 18 hearing, C.M.E.'s probation officer described three different incident reports that had been issued as a result of C.M.E.'s conduct. The probation officer also informed the court that C.M.E. had threatened another detainee. Therapist Tina Barton testified that C.M.E. had anger management issues, and while he had shown some progress, he still "has a lot more to do." June 18, 2007 Tr. p. 5. The magistrate ordered C.M.E. placed on electronic home monitoring for a period of time not to exceed 90 days and ordered him to participate in out-patient therapy.

However, Judge Nemeth did not approve the magistrate's order, and held a hearing the next day. At that hearing, C.M.E's probation officer again discussed his incident reports, case history, and the threat C.M.E. made to another detainee. The probation department recommended placement in the Department of Correction and the Rite of Passage transition program. The hearing was continued until June 26, 2007.

At the June 26 hearing, therapist Barton stated that C.M.E.'s main issues were anger management and impulsivity. The case manager from the Madison Residential Center testified that C.M.E. had failed their program because of his minimal behavioral changes and destruction of property. The Madison Residential staff agreed that C.M.E. "didn't try very hard to help himself" and determined that he was "placement failure." June 26, 2007 Tr. p. 15. The court agreed with the probation department's

recommendation and ordered C.M.E. placed in the Department of Correction and the Rite of Passage transition program.

C.M.E. appealed the court's order, but later filed a petition to stay the appeal, which our court granted to allow C.M.E. to file a belated motion to set aside the court's June 26, 2007 order. C.M.E. then filed his motion to set aside and a motion for change of judge. In support of his motions, C.M.E. cited a newspaper article written by reporter Nancy Sulok that appeared in the South Bend Tribune. In the article, Surlok reported that Judge Nemeth's decision to review C.M.E.'s case was influenced by Dr. William Bruinsma, the Executive Director of the Juvenile Justice Center. The article also reported that Bruinsma met with Judge Nemeth outside of court and the presence of C.M.E. to ask Nemeth to review C.M.E.'s case.

A hearing was held on C.M.E.'s motions on January 17, 2008. Bruinsma testified that he met with Judge Nemeth, and asked him to review the case. However, he did not discuss his own feelings about the matter and did not try to influence the judge's decision. January 17, 2008 Tr. pp. 13-14. The court denied C.M.E.'s motions, and C.M.E. filed his amended notice of appeal on February 11, 2008.

I. Disposition

First, C.M.E. argues that the juvenile court abused its discretion when it committed him to the Department of Correction and the Rite of Passage transition program. The choice of a specific disposition of a juvenile adjudicated a delinquent child is generally within the discretion of the juvenile court, subject to the statutory considerations of the welfare of the child, the community's safety, and the policy of

favoring the least-harsh disposition. R.S. v. State, 796 N.E.2d 360, 364 (Ind. Ct. App. 2003), trans. denied. 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 against the reasonable, probable, and actual deductions to be drawn therefrom. Id.

Indiana Code Section 31-37-18-6 (1998) delineates the factors the juvenile court must consider in making a juvenile disposition:

> 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.

We have previously noted that section 31-37-18-6 requires the juvenile court to select the least restrictive placement in most situations. K.A. v. State, 775 N.E.2d 382, 386 (Ind. Ct. App. 2002), trans. denied. "However, the statute contains language which reveals that under certain circumstances a more restrictive placement might be appropriate." Id. at 386-87. Placement in the least restrictive setting is required only if such a placement is "consistent with the safety of the community and the best interest of the child." Ind. Code § 31-37-18-6 (2006); see also D.B. v. State, 842 N.E.2d 399, 405-

06 (Ind. Ct. App. 2006). In other words, "the statute recognizes that in certain situations the best interest of the child is better served by a more restrictive placement." K.A., 775 N.E.2d at 387.

In this case, C.M.E.'s therapist testified that he has made some progress in therapy and "minimal progress" in controlling his impulsivity and anger. June 26, 2007 Tr. p. 7. She also stated that C.M.E. would benefit from a therapeutic setting, but could give no opinion on whether placement in the Department of Correction was the best place for him. C.M.E.'s case manager at Madison Residential Center testified that C.M.E. made minimal improvement in his placement there, but C.M.E. did not successfully complete the Center's program. Id. at 14. While at the Center, C.M.E. destroyed a window and desk drawer. The Center's staff came to a consensus that C.M.E. "didn't try very hard to help himself," and that he "was a placement failure." Id. at 15.

During the week prior to the June 18, 2007 modification hearing, C.M.E. had the following three incident reports: 1) C.M.E. gave his phone number to another detainee, was confronted about it, and lied to a staff member, 2) he was caught "talking in a place he wasn't supposed to be talking in", and 3) he failed to follow staff instructions. June 18, 2007 Tr. p. 3. Also, a week prior to the hearing C.M.E. told another detainee that "when he got out of here he was going to take a baseball bat and break the kid's legs and then beat him down with the bat." Id.

Due to those incidents, C.M.E.'s destruction of property, his minimal progress in therapy, and his inability to successfully complete the Madison Residential Center program, the probation department recommended placement in the Department of

Correction. July 19, 2007 Tr. pp. 3-4. The trial court adopted the probation department's recommendation. Although a less restrictive placement was available, the testimony of C.M.E.'s therapists, case manager and probation officer, supports the juvenile court's determination that C.M.E.'s best interests are better served with a more restrictive placement. Accordingly, we affirm the juvenile court's decision to place C.M.E. in the Department of Correction and the Rite of Passage transition program.

II. C.M.E.'s Due Process Arguments

Next, C.M.E. argues that his right of confrontation was violated when Judge Nemeth and Bruinsma, the executive director of the Juvenile Justice Center, met on June 18, 2007, and discussed C.M.E.'s case. In support of his argument, C.M.E. notes:

> At the heart of our adversarial system of justice is the opportunity for both sides of a controversy to be fairly heard. "Improper ex parte communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge. [Such communications] threaten[] not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice."

In re Ettl, 851 N.E.2d 1258, 1260 (Ind. 2006) (quoting In re Anonymous, 729 N.E.2d 566, 569 (Ind. 2000)).

C.M.E. argues that his right to confrontation was violated because in a private meeting with Judge Nemeth, Bruinsma used his influence to convince the judge that he should not approve the magistrate's placement of electronic monitoring and instead place C.M.E. in the Department of Corrections. C.M.E. claims that "any facts of which the trial judge was privately made aware should have been disclosed to counsel for C.M.E. who should have been given an opportunity to refute them." Br. of Appellate at 16.

C.M.E. only became aware of Bruinsma's meeting with Judge Nemeth after an article was published in the South Bend Tribute discussing C.M.E.'s case. In the article, reporter Nancy Sulok wrote that Bruinsma "had a private talk with Nemeth and persuaded him to intervene. Nemeth agreed that Bruinsma used his influence to change the sentence." Appellant's App. p. 186.

While this appeal was stayed, C.M.E. was able to question Bruinsma during the hearing held on his motion to reconsider. Bruinsma testified that C.M.E.'s probation officer told him that C.M.E. had been placed on electronic monitoring by the magistrate, which was not the placement recommendation by probation. Therefore, Bruinsma asked Judge Nemeth to review the case. Bruinsma did not discuss his own feelings about the case, and stated that Judge Nemeth did not ask him "anything about the nature of the case." January 17, 2008 Tr. pp. 13-14. Bruinsma testified that he did not attempt to influence the judge to overrule the magistrate's decision. Bruinsma and Judge Nemeth stated that the reporter inaccurately reported their statements about what occurred during their meeting. Id. at 14, 19, 31, 34.

Upon review of the record, we believe that Judge Nemeth should have advised C.M.E. that Bruinsma had met with him and asked him to review C.M.E.'s case. C.M.E.'s counsel did not become aware of the meeting until after Sulok's article was published over a month after Judge Nemeth had issued the dispositional order. Yet, C.M.E. did eventually have the opportunity to confront Bruinsma, and there is nothing in the record that suggests that Bruinsma and Judge Nemeth discussed the facts of C.M.E.'s case. From Bruinsma's testimony, we can only conclude that he simply asked Judge

Nemeth to review C.M.E.'s case because the probation department's recommendation was not followed. For these reasons, we cannot conclude that C.M.E. has established reversible error on this issue.

III. Motion to Quash

Finally, C.M.E. argues that the trial court abused its discretion when it quashed the subpoena for reporter Nancy Sulok. "Indiana Rule of Trial Procedure 45(B) provides that the trial court may 'quash or modify the subpoena if it is unreasonable and oppressive.'" We will reverse a trial court's decision to quash a subpoena if the trial court abuses its discretion. Strodtman v. Integrity Builders, Inc., 668 N.E.2d 279, 285 (Ind. Ct. App. 1996), trans. denied.

In support of his argument, C.M.E. claims, "[i]t is quite clear that only Ms. Sulok's testimony could have shed light on the true nature of conversation between the Judge and Bruinsma." Br. of Appellant at 25. Therefore, by quashing the subpoena, C.M.E. was "denied his constitutional right to compulsory process[.]" Id. at 23.

As guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution, a criminal defendant has the right to present witnesses in his favor, require their attendance through compulsory process, and receive a fair trial. When we review a decision denying a defendant the right to call a witness, we must determine: (1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness, and (2) whether the witness is competent to testify and whether his testimony would have been relevant and material to

the defense. Davis v. State, 529 N.E.2d 112, 114-15 (Ind. Ct. App. 1988) (citing Washington v. Texas, 388 U.S. 14, 23 (1967)).

While Sulok's testimony may have been relevant to the proceedings, C.M.E. was given the opportunity to question Bruinsma at the hearing on the motion to reconsider. Therefore, as the State notes in its brief, Sulok's "testimony would have been nothing more than a hearsay version of what Bruinsma" testified to in court. Br. of Appellee at 17. Moreover, Sulok's testimony had no bearing on whether C.M.E.'s best interests would be served by placement in the Department of Correction. We therefore conclude that the juvenile court did not abuse its discretion when it quashed the subpoena for Sulok.

Conclusion

C.M.E.'s placement in the Department of Correction is in his best interests. With regard to the issues C.M.E. has raised that arise from the meeting between Judge Nemeth and Bruinsma, C.M.E. has not established any reversible error.

Affirmed.

MAY, J., and VAIDIK, J., concur.