IN THE COURT OF APPEALS OF IOWA

No. 2-349 / 11-2031
Filed June 13, 2012

STATE OF IOWA,
Petitioner,

vs.

IOWA DISTRICT COURT FOR WARREN COUNTY,
Respondent.

Certiorari to the Iowa District Court for Warren County, Richard B. Clogg, District Associate Judge.

The State in a certiorari action challenges a consent decree issued by the juvenile court in a delinquency proceeding. **WRIT SUSTAINED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John Criswell, County Attorney, and Douglas A. Eichholz and Karla Fultz, Assistant County Attorneys, for petitioner.

Jane M. White of Pargulski, Hauser & Clarke, P.L.C., Des Moines, for minor child.

J.R., Guthrie Center, father.

D.R., Norwalk, mother.

Considered by Vogel, P.J., Tabor, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

TABOR, J.

This certiorari action calls us to interpret the consent decree provision in the juvenile justice chapter of the Iowa Code. The precise question is whether the juvenile court may order a juvenile to be placed in residential treatment as a term or condition of granting a consent decree under Iowa Code section 232.46 (2011). The State alleges the court acted illegally in withholding the adjudication of the juvenile as a delinquent, but ordering his placement in a residential treatment facility. Because we find that the consent decree statute does not contemplate placement outside of the juvenile's home, we sustain the writ of certiorari.

I. Background Facts & Proceedings

On March 31, 2011, the State filed a petition alleging that John, at age fifteen, committed the delinquent acts of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(b) (2009); and incest, in violation of section 726.2. The petition asserted that John had sexual contact with his sister, who was then twelve years old. The girl told forensic interviewers that John and another brother, then age thirteen, would masturbate in front of her and "made her" have oral sex with them. She also told investigators that John forcibly tried to have intercourse with her. On October 19, 2011, John entered an *Alford* plea[1] to the allegation of incest, and in exchange, the State agreed to dismiss the charge of third-degree sexual abuse.

[1] An *Alford* plea permits a defendant to plead guilty to a crime without admitting to the underlying facts that establish the crime. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

Mental health professionals have diagnosed John with Asperger's syndrome, which is a type of pervasive developmental disorder (PDD). Core symptoms of this disorder are impairment in social interactions and a failure to develop peer relationships at an appropriate developmental level.

At an adjudicatory hearing, the juvenile court officer recommended that John be adjudicated a delinquent and placed in a residential treatment program specifically for sex offenders. The juvenile court officer based his recommendation, in large part, on Dr. David Beeman's evaluation of John. Dr. Beeman reviewed police investigation records and interviewed John. John initially denied any inappropriate behavior with his siblings; when he eventually acknowledged performing some of the sex acts alleged by his younger sister, he insisted she was the instigator. Dr. Beeman also employed extensive inventories and questionnaires to determine John's risk to the community and appropriate treatment options. Dr. Beeman concluded that John was "highly in need of ongoing treatment with skilled providers." His recommendation continued:

> John is likely to need a residential treatment facility for sex offenders. His treatment will likely need to be individualized to address concerns related to his Asperger's, which will increase the complexity of his treatment. In addition to addressing sexual boundaries and healthy sexuality, more general social skills and boundaries need to be addressed.

Dr. Beeman did not consider John to be "safe in the community given his level of accepted responsibility, his impulsivity, and his general denial."

Dr. Kevin Took testified on John's behalf. The child psychiatrist opined that because of John's impaired social functioning, placing him in a facility that specializes in treating "sexual predators" would likely increase his risk for

inappropriate sexual behavior in the future. The psychiatrist recommended that John be returned to the custody of his parents or family members and would benefit from outpatient therapy to help him with socialization skills.

At the hearing, John requested a consent decree under section 232.46. The State argued that a consent decree was not a statutorily available alternative if John was placed outside the home, asserting that John should instead be adjudicated as a delinquent and placed in a residential treatment program.

On October 21, 2011, the juvenile court entered an order, concluding "[w]hile the child in interest did engage in delinquent conduct, an adjudication that the child did commit a delinquent act should be withheld at this time." The court placed John under the supervision of juvenile court services, upon its terms and conditions, to include mental health treatment. The order continued John's placement at a youth shelter. The court determined that entry of a consent decree for a period of twelve months would be in the child's best interests.

The State filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), reiterating its position that a consent decree precluded John's placement outside the home. The court granted the motion in part, but rejected the State's premise. The reconsideration order stated: "placement outside of the family home is an option which should be considered at the disposition, including placement in a P.M.I.C. [psychiatric medical institute for children]."

The juvenile court held a dispositional hearing on December 5, 2011. A behavioral report reflected that John was doing "very well," earned the highest level of performance, offered assistance to others, and assumed extra chores.

The juvenile court issued a consent decree, which provided that residential treatment was warranted and in the child's best interests. The court stated: "The child requires consistent supervision and monitoring while receiving specialized treatment to protect himself and others. This form of supervision is not possible in the parental home while allowing distance from the victim." The court acknowledged that reasonable efforts were made, including detention, psychological evaluation, and shelter care. The court directed John to be "placed in the temporary legal custody of Juvenile Court Services, with the Department of Human Services as payment agent, for the purposes of placement in residential treatment," and ordered that he remain in shelter care pending that placement.

The State filed a petition for writ of certiorari, claiming the juvenile court could not properly place the child in residential treatment as a condition of a consent decree given the language and previous interpretations of section 232.46. The Iowa Supreme Court granted the writ of certiorari. The supreme court transferred the matter to this court for disposition.

II. Standard of Review

A party may commence a certiorari action when it claims a court exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401; *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996). The court is considered to have acted illegally if it has "not acted in accordance with a statute; if its decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious." *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 64 (Iowa 2001) (citation omitted).

We consider a writ of certiorari for the correction of legal error. *Dep't of Pub. Safety v. Iowa Dist. Ct.*, 801 N.W.2d 544, 547 (Iowa 2011). We also review statutory construction issues for errors at law. *Reilly v. Iowa Dist. Court*, 783 N.W.2d 490, 493 (Iowa 2010). In determining the propriety of the juvenile court's underlying decision to enter a consent decree, our review is de novo, "but only to the extent of examining all the evidence to determine whether the juvenile court abused its discretion." *See In re J.J.A.*, 580 N.W.2d 731, 737 (Iowa 1998).

III. Merits

The State contends the juvenile court overstepped its authority under chapter 232 by granting a consent decree to John and then ordering that he be placed in residential treatment. The State interprets section 232.46[2] as providing for release of a juvenile into the community with "supervision"—but precluding placement outside the community in a residential treatment facility.[3] For its position that section 232.46(1) precludes an out-of-home placement, the State

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[2] Iowa Code section 232.46 provides, in relevant part:

> 1. At any time after the filing of a petition and prior to entry of an order of adjudication pursuant to section 232.47, the court may suspend the proceedings on motion of the county attorney or the child's counsel, enter a consent decree, and continue the case under terms and conditions established by the court. These terms and conditions may include prohibiting a child from driving a motor vehicle for a specified period of time or under specific circumstances, or the supervision of the child by a juvenile court officer or other agency or person designated by the court, and may include the requirement that the child perform a work assignment of value to the state or to the public or make restitution consisting of a monetary payment to the victim or a work assignment directly of value to the victim. . . .

[3] The State suggests that residential treatment is also known as "group foster care." *See In re C.S.*, 516 N.W.2d 851, 858–60 (Iowa 1994) (using terms interchangeably).

relies on two cases: *In re C.D.P.*, 315 N.W.2d 731 (Iowa 1982) and *In re Rousselow*, 341 N.W.2d 760 (Iowa 1983).

While those cases offer some insight into how our supreme court has interpreted section 232.46 when faced with different issues, they only nibble at the edges of the instant question—whether residential treatment is an available disposition following entry of a consent decree. To make that determination, we look to the language of the particular statute and its interaction with analogous criminal sentencing statutes, as well as other provisions governing juvenile delinquency proceedings.

The legislature first made consent decrees available to juveniles in 1978. 1978 Iowa Acts, ch. 1088. The *Rousselow* court described this alternative to delinquency adjudication:

> A "consent decree" for the purposes of section 232.46 is a juvenile court decree whereby the case may be continued, the child placed on probation under supervision, with the child being required to make restitution to the victim or performing a work assignment of equivalent value for the victim or state. Iowa Code section 232.46(1) (1983). If the county attorney objects to the entry of such decree, the court under section 232.46(2) shall determine the appropriateness of such decree after consideration of the objections thereto. If the child complies with the terms of the consent decree, the original petition may not be reinstated. Iowa Code § 232.46(4). The result of a successful probation under a consent decree would be that the case be dismissed without an adjudication of delinquency against the child.

Rousselow, 341 N.W.2d at 762.

The instant appeal revolves around the phrase "terms and conditions" as used in section 232.46(1). The provision lists permissible "terms and conditions" of a consent decree as including: (1) prohibiting the child from driving a motor

vehicle; (2) placing the child under the "supervision" of a juvenile court officer, other agency, or person designated by the court; and (3) requiring the child to perform a work assignment or make restitution. Iowa Code § 232.46(1). The list is not exhaustive.

The attorney for the child argues that the phrase "terms and conditions" is ambiguous and that nothing in the list provided by the legislature prohibits the juvenile court from ordering placement in a residential treatment facility as a condition of the juvenile's probation under the consent decree.

We agree the statutory language is ambiguous. But we disagree that the ambiguity leads to the conclusion that placement in a residential treatment center is comparable to the examples of permissible terms and conditions listed in section 232.46(1). In construing ambiguous language in statutes, our courts have previously followed the rule of statutory construction known as "ejusdem generis."[4] *De More by De More v. Dieters*, 334 N.W.2d 734, 738 (Iowa 1983). The rule provides that when specific words follow general words in a statute, the general term is construed to embrace only objects similar in nature to those objects enumerated in the subsequent specific terms. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:17, at 188 (5th ed. 1992).

The specific examples of "terms and conditions" listed in section 232.46 are all restrictions that may be placed on juveniles who are living at home or who are otherwise on probationary status in their own communities. Those restrictions include limits on driving a car, assignments to perform work or make

[4] Ejusdem generis is a Latin phrase meaning "of the same kind or class." *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 n.4 (Iowa 2005).

monetary payments to a victim, and supervision by a juvenile court officer or other agency or person designated by the court. Ordering a child to serve supervised probation is different in kind from transferring legal custody of the child for placement in a residential treatment facility, outside community setting. *Compare* Iowa Code § 232.46(1) (supervision pursuant to a consent decree) and § 232.52(2)(c) and (d)(2)(probation or other supervision following adjudication) *with* § 232.52(2)(d)(3) and (4) (contemplating placement in group foster care).

Moreover, when words are not defined in a statute, as is the case with "terms and conditions" in section 232.46, we may seek to determine legislative intent by looking to prior judicial decisions and similar statutes. *See State v. Soboroff,* 798 N.W.2d 1, 6 (Iowa 2011). When we take that path here, we find it helpful to compare the definition of the phrase "conditions of probation" as used in Iowa Code section 907.3—the provision addressing deferred judgments, deferred sentences, and suspended sentences. We believe that this comparison is especially apt because our supreme court has recognized similarities between juvenile consent decrees and deferred judgments in a criminal prosecution, noting that both involve a period of "'probation' under which the juvenile or defendant must comply with certain terms and conditions for a specified period of time." *J.J.A.*, 580 N.W.2d at 735.

In *State v. Tensley*, 334 N.W.2d 764, 765 (Iowa 1983), the supreme court found a sentence was illegal under section 907.3 when the trial court ordered the defendant to serve jail time as a condition of probation. The *Tensley* decision relied on *State v. Harris*, 251 N.W.2d 483, 483 (Iowa 1977), which held that in the

absence of a specific statute authorizing confinement as a condition of probation, "[g]ranting probation and imposing confinement constitute a contradiction."

An analogous contradiction arises from entering a juvenile consent decree and ordering the child to be placed in a residential treatment facility. The purpose of a consent decree is to allow a child who has committed a delinquent act to be released into the community before being adjudicated as a delinquent—with appropriate supervision, driving restrictions, and other consequences—so the child has the opportunity to demonstrate accountability for his or her actions and ultimately avoid a record of adjudication. *See* Iowa Code § 232.46(5). Placement of a child in a residential treatment facility is mutually exclusive of releasing the child under probationary conditions. The disposition ordered by the juvenile court in the consent decree would only be a viable option after a section 232.50 dispositional hearing, following an adjudication of delinquency.

While we disagree with the State that this conclusion is preordained by our supreme court's decision in *C.D.P.*, we do find language in that case to support our belief that placement in residential treatment requires an adjudication of delinquency. *See C.D.P.*, 315 N.W.2d at 733. In *C.D.P.*, no adjudication of delinquency was made. Pursuant to a consent decree, the juvenile court granted custody of the child to the mother "with placement at Three Crosses Boys Ranch," supervised by the juvenile probation officer. 315 N.W.2d at 732. The court subsequently transferred the child's custody to the Department of Human Services (DHS) under Iowa Code section 232.52(2)(d)(3). *Id.* That section allows a juvenile court to enter an order transferring the legal custody of a child,

subject to the continuing jurisdiction of the court, to the DHS "for purposes of foster care and prescribing the type of placement which will serve the best interests of the child and the means by which the placement shall be monitored by the court." Iowa Code § 232.52(2)(d)(3).

The court in *C.D.P.* held that section 232.52(2)(d)(3), which allows the court to direct *the type of placement*, did not authorize the juvenile court to make *a specific placement*. 315 N.W.2d at 733. The juvenile court "could have awarded custody to the department and directed that the child's best interest demanded placement in a facility meeting the general description of the Three Crosses Boys Ranch. But it was improper to specifically place the child there." *C.D.P.*, 315 N.W.2d at 733. The supreme court went on to explain that the DHS was not a party to the consent proceedings under section 232.46 and "[t]he disposition to the department was made under the express provisions of section 232.52, subd. 2(d)(3)." *Id*. The court agreed with the DHS argument that the placements in section 232.52(2)(d)(3) "can be invoked only after a section 232.50 dispositional hearing, following an adjudication of delinquency. Upon remand the county, if it wishes to pursue the proceeding, must secure an adjudication of delinquency in order to support the disposition." *Id*.

The attorney for the child contends this passage speaks only to DHS's funding concerns regarding transfer of C.D.P to its custody and not the foundational question whether section 232.46 allowed the out-of-home placement. But if that were true, the supreme court would not have directed the county to "secure an adjudication of delinquency" upon remand to obtain the out-

of-home disposition. The consent decree could have supported placement at a facility of the same type as initially ordered by the juvenile court, as long as the juvenile court did not specifically place the child at a particular facility. *See C.D.P.*, 315 N.W.2d at 733.

The child's brief also notes that numerous statutory options for payment for placement in foster care can be found at Iowa Code sections 234.35 and 234.39. But neither of those statutory provisions mentions placement in foster care pursuant to section 232.46. Rather, the DHS is responsible for payment "when a court has entered an order transferring the legal custody of the child to a foster care placement pursuant to section 232.52, subsection 2, paragraph 'd'." Iowa Code § 234.35(1)(e). If consent decrees could result in foster care placement, then the legislature presumably would have included them in this payment provision.

In the instant case, the juvenile court ordered legal custody of John to juvenile court services with the DHS "as payment agent" for purposes of placement in residential treatment. This disposition is not permissible under section 232.46. Accordingly, we sustain the writ of certiorari.

We decline the State's invitation to adjudicate John a delinquent and order placement in residential treatment. Given the passage of time since the grant of certiorari in this case, we find it best to remand the matter to the juvenile court for a new dispositional hearing where the juvenile court may consider continuation of the consent decree without placing John outside the home or, alternatively, a

delinquency adjudication with the placement that the court determines to be currently in John's best interests.

WRIT SUSTAINED.

Vogel, P.J., concurs; Schechtman, S.J. dissents.

SCHECHTMAN, S.J. (dissents)

I disagree for multiple reasons.

The majority concludes that a consent decree via section 232.46, in a delinquency proceeding, does not permit the juvenile court to remove the child from the home and place him in residential treatment, unless there is an adjudication of delinquency. Applying the rule of statutory construction *ejusdem generis*, the majority reasons the statute's phrase, "terms and conditions established by the court," limits those terms and conditions to (1) limitations on driving, (2) victim restitution, (3) work assignments, or (4) giving "supervision" to the juvenile court officer or other agency or person; and, that granting temporary legal custody to Juvenile Court Services for placement in a residential treatment facility, though agreeable with John and his parents, was illegal. It is noteworthy the issue of ambiguity and statutory construction was never introduced at the district court level. The State relied solely on the two cases recited in the majority opinion—*In re C.D.P.*, 315 N.W.2d 731 (Iowa 1982) and *In re Rousselow*, 341 N.W.2d 760 (Iowa 1983). The sole and only brief point proposed by the State is that "[c]ase law establishes a consent decree would preclude the teenager's entry into residential treatment and would, instead, require his return to the community."

I agree the State's reliance on the aforementioned cases is misplaced and does not support their certiorari plea. But it is fundamental law that appellate review is limited to the issues raised and decided by the district court. *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 404 (Iowa 2008). Though the issue of the

legality of using a consent decree without an adjudication of delinquency was raised, the issue of the limitations on the court's "terms and conditions" was not, nor was the doctrine of statutory construction. Yet, since the majority is relying on statutory interpretation to sustain the writ, it will be addressed.

The opening salvo of the introductory section of chapter 232, entitled "Rules of Construction," states, in no uncertain terms, that "[t]his chapter shall be liberally construed to the end that each child . . . shall receive . . . the care, guidance and control that will best serve the child's welfare and the best interest of the state." Iowa Code § 232.1. This section sends a plain legislative message that each child is unique and shall be treated as separate and distinct from another; that those involved in juvenile justice and its sensitive venue should be enablers, not strict constructionists.

"Delinquency proceedings are not criminal prosecutions but are special proceedings that serve as an alternative . . . with the best interest of the child as the objective." *In re J.A.L.*, 694 N.W.2d 748, 751 (Iowa 2005).[5]

"Liberal" and "strict," when used in statutory construction, do characterize attitudes; "liberal" signifies an interpretation that produces broader coverage and is more inclusive of statutory concepts, while "strict" is one that limits the application by the words used. Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutory Construction*, § 58.2 (7th ed. 2011).

Black's Law Dictionary equates liberal construction with equitable construction; it

[5] An adjudication of delinquency is no small matter and should not be minimized as it may prompt a sex offender registry, residency restrictions, fingerprinting, and DNA sampling. *See, e.g.*, Iowa Code §§ 692A.102, .103(1), (3), .114, .118.

> expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law . . . provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts of the applicability of the statute to the particular case. It means, not that the words should be forced out of their natural meaning, but simply they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument [statute].

Black's Law Dictionary 283 (5th ed. 1979).

It appears that a fair synopsis of the plethora of cases and writings on this subject is that the range of implications and/or inferences, under a statute directed to be liberally construed, is greater; that there is more "elbow room" to achieve the statutory purpose and goals.[6]

The majority opinion does not reference section 232.1 at all. It concludes that "supervision by a juvenile court officer" does not include supervision in a residential treatment facility outside the home. That leads to the unique qualities of John and the facts. John has been diagnosed with Pervasive Developmental Disorder NOS (PDD), its degree being between Asperger's Syndrome and Autism. A child psychiatrist, a veteran of seventeen years as the medical director of Child and Adolescent Psychiatry at Blank Children's Hospital, opined that placing John in a sexual predator program, as recommended by the juvenile court officer, is "the worst possible treatment of choice in this case . . . carrying a high risk of being sexually abused himself." Some of John's other symptoms include difficulties with reciprocal communication and social interactions, having few friends, doing activities alone, and problems adjusting to any new

[6] See Morell E. Mullins Sr., *Coming to Terms with Strict and Liberal Construction*, 64 Alb. L. Rev. 9 (2000), for an exhaustive study (92 pages) on the subject of statutory interpretation.

environment. The psychiatrist observed that John had no other criminal history, no history of other inappropriate sexual activity, aggression, or drug abuse. His recommendation was a mental treatment program focusing on appropriate boundaries for social and sexual settings.

The juvenile court had little option in not returning John to the home, as the twelve-year-old sister resided there and a protective order was in place. His thirteen-year-old brother, an alleged co-offender, was granted a consent decree (from which there was no appeal) and placed with a relative. No foster home suitable for John was identified. At the time of the dispositional hearing, John had been in two different shelters, outside his community, without any treatment or therapy, for sixteen months. Behavioral reports were superb. To make this disposition even murkier, John entered an *Alford* plea to the charge of incest without any recitation of the facts or his awareness of the elements of a "sex act" whatsoever.[7] The related facts of the sexual incident are clouded, inconsistent, and inconclusive at best, coming from the mouths of the involved adolescents. John admitted to the psychiatrist his involvement and remorse, but does not admit to any aggression or coercion on his part, which fits with the symptoms of his affliction.

There was literally "no room at the inn" for John.[8] The State opted for a delinquency proceeding, rather than a child-in-need-of-assistance proceeding,

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[7] Most courts will not accept an *Alford* plea in a sexual abuse prosecution, as sexual abuse treatment presumes the recipient has committed a sex act of some variety; without an admission, there is little to treat.

[8] His father agreed to take John, but he worked nights and there was no overseer for those times; his sister lived with his mother; the relative agreed, but there were

which has more flexibility. Temporary legal custody was transferred to require the State to pay for the care and treatment.[9] The case, upon which the State relies for a writ, is rather a strong, implicit authority for the appropriateness of the juvenile court's placement, when it said, "The order here was proper only in part. It could have awarded custody to the department and directed that the child's best interest demanded placement in a facility meeting the general description of the Three Crosses Boys Ranch. But it was improper to specifically place the child there." *C.D.P.*, 315 N.W.2d at 733. John's temporary custody was placed with juvenile court services, under supervision by the juvenile court officer, with placement in a residential facility, without designating a certain one. It appears evident that the juvenile court had read *C.D.P.* in modeling its consent order. As is so true, when the responsibilities are both grave and awesome, "one size does not fit all." John's best interests require a liberal interpretation of the statute on consent decrees, which is what the legislature intended when it mandated a liberal application of chapter 232 dealing with juvenile justice. Allowing the court to establish the "terms and conditions" is sufficiently broad to deny the writ of certiorari.[10] The juvenile court's decision is supported by substantial record evidence.

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reservations about putting the two brothers together. Foster homes for boys with PDD are rare.

[9] See Iowa Code § 234.35.

[10] The rule of *ejusdem generis* is not applicable, as the specific words do not precede the general words, and, in any event, are not of the same class. *See Federated Mutual Implement & Hardware Ins. Co. v. Dunkelberger*, 172 N.W.2d 137, 140 (Iowa 1969) *overruled on other grounds by Lewis v. State*, 256 N.W.2d 181 (Iowa 1977). They are also not "specific words," as they read "may include" as opposed to "shall include."

I would annul the writ and remand to the juvenile court for further directions.