

RENDERED: MAY 2, 2003; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002411-DG

A.W., A CHILD UNDER EIGHTEEN

APPELLANT

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
v. HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 01-XX-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: This matter is on discretionary review from an order of the Campbell Circuit Court which affirmed an order by the juvenile division of the Campbell District Court holding a public offender in contempt for violation of the conditions of her probation. Although we agree with the circuit court that the juvenile court was within its authority to impose contempt, we conclude that the juvenile court's exercise of this authority

did not afford basic due process to the child. Hence, we reverse and remand for further proceedings.

The underlying facts of this action are not in dispute. In February of 2001, A.W., a juvenile (d.o.b. February 4, 1987), came before the juvenile division of the Campbell District Court charged with one count of terroristic threatening,¹ and two counts of fourth-degree assault.² She admitted to the charges, and her case was continued for disposition. On March 21, 2001, A.W. again appeared before the court. At that time, the Department of Juvenile Justice (DJJ) submitted the following recommendations, which the juvenile court adopted:

[A.W.] will attend and complete anger management counseling through Family Services of Northern Kentucky.
[A.W.] will receive no new charges: public status or curfew.
[A.W.] will abide by curfew. 8 PM during the week and 9 PM on weekends, to be reviewed at a later date by her worker.
30 days probated detention until the age of 18.
All parties to cooperate with the Department of Juvenile Justice.

In May of 2001, A.W. was charged with an additional count of harassment,³ to which she admitted. On June 24, 2001,

¹ KRS 508.080.

² KRS 508.030.

³ KRS 525.070.

the DJJ filed an affidavit alleging that A.W. had failed to abide by her curfew, in violation of the conditions of her probation. The following day, the juvenile court held a hearing, at which the court advised A.W. that it was a contempt hearing for violation of her probation conditions. A.W. admitted to the violations. The juvenile court found A.W. in contempt and imposed sixty days of detention, but it probated all but fifteen days for the contempt of court.

A.W. then appealed from this ruling to the Campbell Circuit Court, arguing that the juvenile court lacked the authority to sentence her to sixty days in detention for contempt of court. She asserted that the juvenile court was limited to revoking her probation and imposing no more than forty-five days of detention. In an order entered on October 24, 2001, the circuit court rejected these arguments, and held that the juvenile court has the authority to punish violations of probation conditions through its contempt powers. This Court accepted A.W.'s motion for discretionary review.

A.W. concedes that she did not object to the juvenile court treating her probation violation as a contempt. Furthermore, and contrary to the argument in her brief, the juvenile court clearly informed A.W. at the start of the hearing that this matter would proceed in that manner. Consequently, she failed to properly preserve the issue for appellate review.

Nevertheless, A.W. contends that the juvenile court's action in holding her in contempt amounted to palpable error. Under RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." A.W. primarily argues that the juvenile court lacked the authority to punish her violation of probation conditions as contempt. Even if the juvenile court had such authority, A.W. further asserts that the juvenile court violated her due process rights by failing to follow the proper procedures for a finding of criminal contempt. In either case, A.W. contends that the juvenile court's action rises to the level of palpable error. We agree.

It is well established that the juvenile court has the inherent authority to punish violations of its orders as contempt.⁴ Furthermore, there is express statutory authority which anticipates that a juvenile court has the power to hold a child in contempt. Indeed, KRS 610.010(10) specifically provides that "[n]othing in this chapter shall prevent the District Court from holding a child in contempt of court to enforce valid court orders previously issued by the court." KRS

⁴ Young v. Knight, Ky., 329 S.W.2d 195, 200 (1959).

610.265(1), KRS 610.265(5) and KRS 635.055 each set out provisions for the detention of a juvenile who is charged with being in contempt of court. Finally, KRS 635.083(1) gives the juvenile court continuing jurisdiction over a juvenile who is convicted or adjudged delinquent of three or more offenses. "This jurisdiction shall continue even after the service of incarceration or other court-ordered punishment in the form of conditional discharge. Violation of the terms and conditions of conditional discharge shall be punished as contempt of court." Based upon these statutes, we conclude that the General Assembly clearly intended for the juvenile court to exercise its inherent contempt powers.

A.W. concedes that the juvenile court has the inherent authority to punish violations of its orders as contempt. However, she asserts that it was inappropriate for the court to use that authority to punish her violations of the conditions of her probation. Furthermore, A.W. contends that the juvenile court circumvented the probation process by finding her in contempt. Rather, she asserts that the juvenile court was limited to revoking her probation.

A.W. notes that KRS 635.060 sets out the options available to a juvenile court at a dispositional hearing regarding a public offense, including (1) restitution or reparation, (2) probation, home incarceration, or supervision,

(3) commitment to the custody or guardianship of the Department of Juvenile Justice or another suitable child-caring facility or person, and (4) confinement in an approved juvenile detention program or facility. A juvenile court may order any combination of such dispositions.⁵

Because the statute does not list contempt as a permitted disposition for violations of conditions of probation, A.W. argues that the General Assembly did not intend for the juvenile court to exercise such powers. But as noted by the circuit court, KRS 635.060 merely addresses the dispositional alternatives which are available to the juvenile court when a child is adjudicated as a public offender. That statute does not address the court's contempt powers.

A.W. also cites authority from other jurisdictions which hold that contempt of court should not be superimposed as an additional remedy in a probation violation setting if the act that occasions the violation itself is not otherwise criminal.⁶ These cases all deal with the use of criminal contempt to sanction an adult's violation of the conditions of his or her probation. As noted above, there is specific statutory

⁵ KRS 635.060(6).

⁶ People v. Johnson, 20 Cal.App.4th 106, 24 Cal. Rptr.2d 628 (Cal. Ct. App. 1993); State v. Williams, 560 A.2d 100, 104, 234 N.J. Super. 84 (N.J. Super. App. Div., 1989); Alfred v. State, 758 P.2d 130 (Alaska App., 1988); Williams v. State, 72 Md. App. 233, 528 A.2d 507 (1987).

authority which recognizes that a juvenile court may use its contempt powers to punish violations of its orders.

Furthermore, the juvenile court's relationship with a public offender is significantly different than a court's relationship with an adult offender. In the adult context, probation is essentially an agreement between the court and the defendant. The defendant agrees to be supervised and to live under the conditions imposed by the court in exchange for the court's agreement to suspend imposition of the defendant's sentence. If the defendant is not willing to accept the court's conditions, the defendant is free to refuse probation and insist on a normal sentence.⁷ If a defendant violates the conditions of probation and the violation is not a separate criminal offense, the court may not impose any additional sentence; it is limited to revoking probation and imposing the probated sentence.⁸

In contrast, public offender dispositional provisions are intentionally more lenient than the youthful or adult offender provisions.⁹ But at the same time, the juvenile system is much more focused on treatment and rehabilitation than is the

⁷ See State v. Aulilye, 57 P.3d 711 (Alaska App., 2002).

⁸ Commonwealth v. Tiryung, Ky., 709 S.W.2d 454, 456-57 (1986).

⁹ Commonwealth v. W.E.B., Ky., 985 S.W.2d 344, 345 (1998).

adult system.¹⁰ To this end, the juvenile court has much broader and longer-lasting authority over a public offender than a court could exercise over an adult offender. As noted above, KRS 635.083 authorizes a juvenile court to retain jurisdiction over certain minors even after the service of incarceration or other court-ordered punishment.

Thus, juvenile probation does not precisely mirror adult probation. While, in theory, a juvenile could refuse to accept the court's conditions of probation and insist upon detention, the court has the authority, in certain circumstances, to impose conditions on the juvenile's release even after the period of detention is served. In sum, juvenile probation is not a contract between the court and the defendant, but it is an extension of the court's *parens patriae* authority over a child who has been committed to the care of the Commonwealth.

Consequently, we hold that a court may impose contempt upon a juvenile who has violated the court's orders, including conditions of probation.¹¹ Nonetheless, A.W. raises a legitimate

¹⁰ Jefferson County Dept. for Human Services v. Carter, Ky., 795 S.W.2d 59, 61 (1990).

¹¹ We have found authority from other jurisdictions which has allowed a juvenile court to punish violations of conditions of probation as contempt, subject to various statutory and due process limitations. See In the Interest of Jane Doe, 96 Haw. 255; 30 P.3d 269 (2001); In re Michael G., 44 Cal. 3d 283, 747 P.2d 1152, 243 Cal. Rptr. 224 (1988); In the Interest of D.L.D., 110 Wis.2d 168, 327

point about the juvenile court's use of its contempt powers in this case. As long as she is on probation, the juvenile court has the authority to revoke her probation upon a finding that she failed to comply with the conditions which the court has imposed on her. In addition, if the probation violations amount to a separate offense, A.W. may be charged accordingly.

However, we caution that a contempt proceeding under these circumstances is not the functional equivalent of a probation revocation. The juvenile court should refrain from using its contempt authority to punish violations of probation conditions unless it finds that the other options are either inappropriate or unavailable. Clearly, the court may use its contempt authority to sanction a juvenile's repeated defiance of the court's orders. And as we have already noted, the juvenile court has the authority to punish violations of its orders as contempt, even after she completes her period of probation. But using contempt as the first sanction for a probation violation diminishes the effectiveness of the threat of revoking probation and may undermine the credibility of the court with the juvenile.

N.W.2d 682 (1983); In the interest of Darlene C., 278 S.C. 664, 301 S.E.2d 136 (1983); State v. Norlund, 31 Wash. App. 725, 644 P.2d 724 (1982); State ex rel. L.E.A. v. Hammergren, 294 N.W.2d 705 (Minn. 1980). See also Maggie L. Hughey, Note, Holding a Child in Contempt, 46 Duke L.J. 353 (1996).

Moreover, there are significant due process considerations when a juvenile court chooses to impose contempt instead of merely revoking the juvenile's probation. Although A.W. did not object at the hearing, we find that the procedures which the court followed in finding A.W. in contempt did not comply with her substantive due process rights.

Before a guilty plea or an admission by a juvenile in a juvenile proceeding may be accepted by the court, it must be determined that the plea was voluntarily and intelligently made by a competent person.¹² In fact, RCr 8.08 states that the court "shall not accept the plea without determining that the plea is made voluntarily with understanding of the nature of the charges." Pleading guilty involves a waiver of significant constitutional rights, and a waiver of these rights may not be presumed from a silent record.¹³ "The court must question the accused to determine if he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record."¹⁴ There is no indication in

¹² See Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990).

¹³ Centers, *supra*.

¹⁴ *Id.*, citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The principles of Boykin v. Alabama apply to juvenile adjudications. D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292, 294, n. 2 (2001).

the record that the court explained to A.W. the consequences of her admission to the facts alleged in the DJJ's affidavit.

Furthermore, KRS 610.080(1) requires that an adjudication "shall be made on the basis of an admission or confession of the child to the court or by the taking of evidence." A review of the transcript shows that A.W. did not speak at the contempt hearing except to state her name and birth date. Thereafter, her attorney stated that he had reviewed the DJJ's affidavit with A.W., and while A.W. "does not admit each and every allegation, . . . she substantially admits at [sic] the contempt." Although the juvenile court could have been authorized to accept counsel's statement as a stipulation to a probation violation, the court was not authorized to accept it as A.W.'s admission of guilt to contempt of court.

In addition, contempt of court involves more than a mere violation of a court directive. Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court.¹⁵ And criminal contempt, which has as its purpose to punish noncompliance rather than to coerce compliance, is conduct "which amounts to an obstruction of justice, and which tends to bring the court into disrepute."¹⁶ Furthermore,

¹⁵ Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1996).

¹⁶ Id.

indirect criminal contempt, which is committed outside the presence of the court, may be punished only in proceedings that satisfy due process.¹⁷ The juvenile court failed to make any finding that A.W.'s conduct amounted to indirect criminal contempt.

Consequently, the juvenile court's order finding A.W. in contempt must be set aside and this matter must be remanded for a new hearing. In addition to affording A.W. the rights to which she is entitled, the court should also make it clear that less restrictive alternatives were considered and rejected.¹⁸

Finally, we come to A.W.'s argument that the juvenile court sentence of sixty days for contempt exceeds the forty-five day maximum sentence allowed by KRS 635.060(4). On the one hand, KRS 635.060(4) provides that a juvenile offender who is older than age fourteen but younger than age sixteen may be confined for a period not to exceed forty-five days. On the other hand, KRS 600.060 states that "[n]otwithstanding any other provision of KRS Chapter 600 to 645, the inherent contempt power of the court shall not be diminished." Because KRS 600.060 specifically addresses the juvenile court's contempt powers, we conclude that it controls over the more general

¹⁷ Id., citing Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

¹⁸ See KRS 600.010(2)(c).

limitation on sentencing of public offenders contained in KRS 635.060(4).¹⁹ Therefore, we conclude that the juvenile court had the authority to order A.W. placed in juvenile detention for up to sixty days upon a proper finding of contempt of court.

Accordingly, the order of the Campbell Circuit Court is reversed, and this matter is remanded to the juvenile division of the Campbell District Court for further proceedings consistent with this opinion.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

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¹⁹See Commonwealth v. Phon, Ky., 17 S.W.3d 106, 107 (2000).