RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000559-MR

I.K., A MINOR CHILD, BY AND THROUGH
HIS NEXT FRIEND AND FATHER, B.K.[1] APPELLANT

ON APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CI-00051

JUDGE MICHAEL FOELLGER,
CAMPBELL DISTRICT JUDGE;
ORA COBB, SUPERINTENDENT,
BELLEVUE INDEPENDENT SCHOOLS; APPELLEES
AND GARY TAYLOR, SUPERINTENDENT,
CAMPBELL REGIONAL JUVENILE DETENTION
CENTER, DEPARTMENT OF JUVENILE JUSTICE;
AND COMMONWEALTH OF KENTUCKY

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE, JOHNSON AND KNOPF, JUDGES.

KNOPF, JUDGE: I.K., a minor child, by and through his next friend and father, B.K., appeals from an order of the Campbell Circuit Court denying his petition for a writ of prohibition against Judge D. Michael Foellger, presiding judge of the

[1] In the interest of the parties' privacy, and in accordance with this Court's policy, the child and his parent shall be referred to only by their initials.

juvenile session of the Campbell District Court. I.K contends that the district court exceeded its authority by entering an order requiring him to have no contact within 250 feet of the victim. I.K. contends that the district court's order impermissibly conflicts with the conditions of placement imposed upon him by the Department of Juvenile Justice. He also argues that the order requires him to leave his local high school, thus depriving him of his right to a free public education. We agree with the circuit court that the district court was acting properly and within its authority by entering the no-contact order. However, in the absence of sufficient factual findings, we are unable to determine if the no-contact order impermissibly conflicts with the placement and treatment conditions imposed on I.K. by the Department of Juvenile Justice. Therefore, while we vacate the circuit court's order denying the petition for a writ of prohibition, we remand this matter to the circuit court for further findings of fact and conclusions of law.

On October 12, 2001, I.K., (d.o.b. February 25, 1988) appeared before the juvenile division of the Campbell District Court, and admitted to one count of sodomy in the first degree. Subsequently, on November 21, 2001, I.K. again appeared in juvenile court for a disposition hearing. In the pre-disposition investigation report, the court-appointed psychologist and the Department of Juvenile Justice (DJJ) had

recommended that I.K. be allowed to remain in the community, subject to certain conditions. Among the conditions of supervision imposed by the DJJ was a requirement that I.K. maintain his current status at Bellevue High School. However, in a calendar-order entered that day, the juvenile court ordered that I.K. be committed to the DJJ pursuant to KRS 635.515, that he serve sixty-days in detention and that he have "no contact with the victim @ *[sic]* all including attending different school."

Apparently, the juvenile court believed that I.K. was fifteen years old. Upon learning that I.K. was thirteen-years old, and thus ineligible for detention,[2] the court amended its detention order to allow for home-incarceration with electronic monitoring. Thereafter, the court learned that I.K. was attending the same school as the victim, and in January of 2002, it entered a series of *sua sponte* orders addressing the situation. First, on January 2nd, the court entered an order stating that I.K. "shall transfer from the Bellevue School System to the Campbell County Care School Program per recommendation of this Court."

[2] KRS 635.060(4) allows a child who is fourteen years of age but less than sixteen years of age to be confined in an approved secure juvenile detention facility for a period of time not to exceed forty-five days. The statute does not provide for post-disposition detention of a child who is under the age of fourteen.

I.K. filed this original action for a writ of prohibition on January 11th, seeking to prevent the trial judge from enforcing his orders of November 21, 2001, and January 2, 2002. Among other things, I.K. argued that these orders exceeded the scope of the district court's authority, violated the separation-of-powers doctrine, and impermissibly denied I.K. his right to a free public education. On January 15th, the trial judge personally filed a response to I.K.'s petition. In that response, Judge Foellger admitted that he had erred by ordering I.K. to serve sixty days in detention.[3] Judge Foellger stated that he had entered orders on January 15th setting aside the

[3] Judge Foellger's response specifically states:

> The respondent recognizes that a mistake was made at the disposition hearing when the juvenile was ordered to serve 60 days in detention. The Court, as well as others, were of the impression that the juvenile herein was age 15. Furthermore, at that time, the Court was of the mistaken belief that a juvenile age 14 or older could be given up to 90 days for a felony offense (and 45 days for a misdemeanor). It should be noted that the Court's decision to impose days in detention was somewhat spontaneous and in response to a victim's impact statement which was submitted to the Court just minutes before the hearing, and which described two separate violent acts of sodomy by forceable *[sic]* compulsion. Under the circumstances, detention seemed appropriate, if not imperative.

November 21, 2001, detention order.[4] However, Judge Foellger defended his use of the no-contact order, and added that "if there is any conflict between the Court's order of no contact and the conditions of supervision of the Department of Juvenile Justice, then the Department of Juvenile Justice can amend its conditions to comply." Finally, Judge Foellger added that he regarded the Bellevue School Board as being uncooperative in seeking an alternative education for I.K. Judge Foellger also stated that "[t]hrough independent inquiry, this court has determined that this juvenile could enroll in a parochial school for one semester for a tuition in the amount of approximately $1,250.00."

The circuit court conducted a hearing and on February 14, 2002, entered an order denying I.K.'s petition for a writ of prohibition, finding as follows:

> The court-appointed psychologist stated in his report that "At no time should [I.K.] be left alone with any child in the home or otherwise." The disposition and investigation report by the Department of

[4] The district court's order, entered on January 15, 2002, set aside the detention order of November 21, 2001 and the home-incarceration order of December 12. The court amended the November 21 order to provide that I.K. was to have no contact and remain at least 1,000 feet away from the victim. In addition, the court ordered I.K. to serve sixty days of home-incarceration, KRS 635.060(2). Lastly, the court committed I.K. to the DJJ as a juvenile sexual offender, pursuant to KRS 635.515. On January 30, 2002, the district court amended the no-contact order to require I.K. to remain at least 250 feet away from the victim.

Juvenile Justice recommended to the Respondent District Court that constant monitoring of Petitioner is essential.

The Superintendent of Bellevue Independent Schools testified that the 250 foot no contact restriction is feasible and could be accomplished with reasonable efforts. The Superintendent acknowledged that the school system could not totally prevent the Petitioner and the victim from having contact within 250 feet of each other while on the school premises.

There was testimony on behalf of the victim that there is ongoing harassment at the Bellevue School by other students. The ongoing harassment could not be specifically linked to Petitioner. The victim's family wants to get their child out of the Bellevue School system. The victim is a special needs child.

The problem with the court-ordered psychologist's recommendation and the recommendation from the Department of Juvenile Justice is that they placed Petitioner into community placement rather than institutional placement. The court-ordered psychologist and the Department of Juvenile Justice should have reasonably foreseen that it would be impossible to place Petitioner in the same school as the victim without creating conflict between them. Certainly, this recommendation has created a serious problem for the Bellevue School System and the victim and his family.

Based upon the seriousness of the offense and Petitioner's conduct, the District Court's order of no contact within 250 feet is fair and reasonable.

This case presents to the Court two competing interests. The interests of the victim and his family and the educational interests of Petitioner. If someone is prejudiced or suffers as a result of this unique situation, it should not be the victim and/or his family. The Petitioner and his family should bear the responsibility for the current situation.

I.K now appeals from the denial of his petition for a writ of prohibition. Extraordinary relief in the form of a writ of prohibition is normally available only upon a showing that the petitioner has no adequate remedy by appeal and: (1) the lower court is proceeding or about to proceed outside of its jurisdiction; or (2) the lower court is about to act incorrectly, although within its jurisdiction, and great injustice and irreparable injury will result from the trial court's imminent erroneous actions.[5] The decision to grant or deny the petition is committed to the sound discretion of the court.[6] If the lower court's decision presents only a question of law, this court may review that decision *de novo*. However, where the challenge involves matters of fact, or application of law to facts, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule.[7]

Initially, it is not clear what the district court ordered I.K. to do. Contrary to the statements in the Attorney

[5] Kentucky Labor Cabinet v. Graham, Ky., 43 S.W.3d 247, 251 (2001).

[6] Haight v. Williamson, Ky., 833 S.W.2d 821, 823 (1992).

[7] Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199-200 (1997).

General's brief, the circuit court did not hold that the district court's orders supercede any policy of the DJJ, or that the district court could require I.K. to transfer to another school.[8] Furthermore, a court speaks through the language of its orders and judgments. When there is an inconsistency between oral statements of the presiding judge and an order or judgment reduced to writing, the written order or judgment prevails.[9] Therefore, we are not bound to consider any oral statements made by the trial judge, his comments in his reply to the petition for a writ of prohibition, or language used in the district court's superceded orders.

Most of I.K.'s brief concerns his allegation that the district court exceeded its authority by ordering him to transfer to another school. But as the record now stands, the only order which is currently in effect is the January 15, 2002,

[8] In its order of January 17, 2002, the circuit court recommended that "if there is any conflict between the [district] Court's Order of no contact and the conditions of supervision of the Department of Juvenile Justice, then the Department of Juvenile Justice must review the matter and amend its conditions to comply with the Juvenile Court Order." However, the circuit court made this statement in its order denying I.K.'s motion for a stay of the no-contact order pending the ruling on his petition for a writ of prohibition. This order was superceded by the circuit court's final order of February 14, 2002, which did not contain this language.

[9] RCr 13.04; CR 54.01; Commonwealth v. Taber, Ky., 941 S.W.2d 463, 464 (1997); Commonwealth v. Hicks, Ky., 869 S.W.2d 35, 37-38 (1994).

no-contact order, as subsequently amended, to require I.K to remain at all times at least 250 feet away from the victim. KRS 635.060(2) authorizes the district court to impose such conditions on a juvenile placed upon probation, home incarceration, or supervision of the DJJ.[10] If I.K. violates the no-contact order, the district court may hold him in contempt, and the DJJ may take steps to revoke his supervised release.[11] The circuit court noted that the Bellevue Independent Schools could accommodate this no-contact restriction in most circumstances. To this extent, we agree with the circuit court that the district court was not acting outside of its jurisdiction, and the no-contact restriction was fair and reasonable under the circumstances.

Had the circuit court stopped at this point, we would unequivocally affirm its decision to deny I.K.'s petition for a writ of prohibition. However, it is not clear from the circuit court's order that it confined itself to this narrow holding. While the court noted the Superintendent's testimony that the school could accommodate the no-contact restriction, the court

[10] At the evidentiary hearing before the circuit court, I.K.'s counsel agreed that the district court had the authority to enter the no-contact order, and that the distance requirement was reasonable except as applied to I.K.'s presence on the school grounds.

[11] KRS 635.060(2) & (3).

did not find whether the school could actually accommodate the restriction. Indeed, the circuit court also noted the Superintendent's testimony that the school could not totally prevent I.K. and the victim from having contact within 250 feet of each other while on the school premises.[12] Furthermore, the circuit court's comments imply that if the school cannot accommodate the restriction, then I.K. and his family should bear the "prejudice" from this situation.

The district court acting in its juvenile session is limited to the powers provided to it by the legislature.[13] The district court clearly has jurisdiction over I.K. – a juvenile charged with a public offense.[14] As noted above, the district court had jurisdiction to place conditions on I.K.'s supervised release.[15] Likewise, the district court had the authority to commit I.K. to the DJJ.[16] However, the court does not have

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[12] At the evidentiary hearing, there was hearsay testimony that the victim was being harassed at school by I.K.'s "friends". This conduct allegedly occurred while I.K. was out of school, and there was no evidence that I.K. had instigated this harassment. Although the circuit court sustained the objection to the hearsay, the circuit court's order does refer to this testimony.

[13] Jefferson County Department for Human Services v. Carter, Ky., 795 S.W.2d 59, 61 (1990).

[14] KRS 610.010(1).

[15] KRS 635.060(2).

[16] KRS 635.060(3).

jurisdiction over the treatment and placement decisions of the DJJ, except as provided in KRS 635.060(3).[17] Therefore, to the extent that the conditions imposed by the district court are incompatible with the treatment and placement conditions imposed by the DJJ, the DJJ's decisions must prevail.

Furthermore, KRS 635.060(2) contemplates that the juvenile court can place conditions upon the *child's* supervised release. The statute does not contemplate that the court would impose conditions which are contingent upon the actions of third parties who are outside the court's jurisdiction. While the juvenile court may be within its authority to order I.K. to apply for a transfer, it does not have the authority to order the Bellevue School Board to pay for I.K.'s alternate education,[18] nor can it order any other school system to admit him. We also question the trial judge's suggestion that I.K's

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[17] KRS 610.010(11). *See also* Commonwealth v. Partin, Ky. App., 702 S.W.2d 51 (1985). In that case, the Campbell District Court committed Partin as a delinquent to the Cabinet for Human Resources (CHR) and ordered CHR to place the juvenile "at camp." CHR appealed the placement order, arguing that the language of the juvenile code precluded the court from issuing binding placement orders. This Court agreed, holding that the dispute was governed by the separation of powers doctrine. Citing § 27 and § 28 of the Kentucky Constitution, we held that the district court was precluded from exercising the executive powers of government -- including and encompassing the placement of children committed to the custody of an executive agency. Id. at 53.

[18] *See* KRS 158.120.

family enroll him at a private school.[19] We find no authority for the district court to require them to do so.[20]

In conclusion, we sympathize with what the district court was trying to accomplish in this case. Upon reading the victim's impact statement, the trial judge attempted to impose detention and other conditions on I.K. which would protect the victim. However, every court is constrained by the extent of its jurisdiction. Furthermore, judges must guard against the temptation to abandon settled rules of law to accommodate their sense of justice in a particular case.[21] Consequently, we agree that the juvenile court properly imposed a no-contact condition on I.K.'s supervised release. However, the court did not have

[19] At the evidentiary hearing, the Bellevue Superintendent testified that the system did not have the funds to pay for I.K.'s placement outside of the district, and that he had not been able to find any other school system willing to accept I.K. B.K., I.K.'s father, testified that the family did not have the funds to send I.K. to a private school. Although he admitted that he was currently sending I.K.'s sister to a private school, he stated that the family was having financial difficulties and was behind on her tuition payments.

[20] KRS 635.060(1) allows the district court to order the child or his parents or guardian to make restitution to any injured person in certain circumstances. In addition, KRS 610.180 allows the district court to assess financial penalties against a parent or any other person exercising custodial control or supervision over a child when the child is adjudicated a public offender and placed on probation. However, that penalty is limited to forfeiture of a bond of no more than $500.00 and only if the child violates the conditions of his or her probation.

[21] Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 546 (1993).

the authority to require I.K. to comply with conditions which are contingent upon the actions of third parties who are outside of its jurisdiction.

Because the circuit court's order does not clearly set out whether I.K. can comply with the juvenile court's no-contact order and with the DJJ's conditions of supervision, we must vacate its order denying the writ and remand this matter for additional findings of fact. If the circuit court finds that the juvenile court's order and the DJJ's conditions are compatible, then it shall deny the petition. However, to the extent that the juvenile court has attempted to direct the placement and treatment of a child committed to the custody of the DJJ, then the juvenile court exceeded its authority and the petition for a writ of prohibition should be granted.

Accordingly, the order of the Campbell Circuit Court is vacated, and this matter is remanded for additional findings of fact, conclusions of law and an order consistent with this opinion.

ALL CONCUR.

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