RENDERED: APRIL 22, 2005; 2:00 p.m.
MODIFIED: JUNE 3, 2005
ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT: DECEMBER 14, 2005 (2005-SC-0389-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000745-ME

S.L., A CHILD UNDER EIGHTEEN — APPELLANT

v.

APPEAL FROM CARTER FAMILY COURT
HONORABLE KRISTI HOGG-GOSSETT, JUDGE
ACTION NO. 02-J-00079-01

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: S.L., a child under 18, has appealed from the order of the Carter Family Court entered on March 12, 2004, wherein she was committed to the Department for Community Based Services (DCBS), with recommended placement at Ramey-Estep Homes.[1] Having concluded that S.L. failed to properly preserve

[1] The profile of clients at Ramey-Estep Homes is dependent/neglected children, status and public offenders and mild SED youth ages 9-18.

the issue for our review and finding no palpable error by the family court, we affirm.

On April 18, 2002,[2] the Commonwealth filed a petition against S.L. alleging she was a habitual truant as described in KRS[3] 630.020(3).[4] As grounds for this claim, the Commonwealth stated that, as of January 28, 2002, S.L. had missed 16 days of the school year in Carter County without a valid excuse and had 10 unexcused tardies. A summons was served on S.L.'s mother, G.L., on April 19, 2002, and S.L. was arraigned on April 25, 2002. While her adjudication hearing was pending, S.L. was ordered to have no unexcused absences or tardies, and ordered to obey all laws and school rules. She was also allowed to attend Ashland Day Treatment. A review hearing was held on May 23, 2002, and on September 5, 2002, the family court held an adjudication hearing and ordered G.L. to enroll S.L. in school. The family court reviewed the case on both September 19, 2002, and October 3, 2002, and found S.L. had poor attendance, sent

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[2] S.L. was 13 years old at the time.

[3] Kentucky Revised Statutes.

[4] KRS 630.020(3) provides, in part, as follows:

> The court shall have exclusive jurisdiction in proceedings concerning any child living, or found within the district, who allegedly:
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> . . .
>
> (3) Has been [a] habitual truant from school.

her to detention, and ordered S.L. to be moved to a different school.

Following negative reports from the school, a contempt hearing was scheduled in S.L.'s case. Upon finding that S.L. had missed 21 days of the past 40 days of school and had a bad attitude, the family court entered a juvenile detention order for status offense on November 14, 2002, ordering S.L. to detention at the Breathitt County Juvenile Detention Center from November 14, 2002, through December 13, 2002.[5] At the scheduled adjudication hearing on January 9, 2003, S.L. admitted her truancy, and the family court ordered S.L. to attend school every day, all day.

A disposition hearing was held on March 20, 2003, at which time the family court ordered S.L. to attend the Ramey-Estep Diversion Program and to begin alternative schooling.[6] On March 26, 2003,[7] the family court entered an order which required S.L. to do the following:

> Attend all school sessions on time, have no unexcused absences and you are to have no behavior problems at school.

[5] On November 14, 2002, a report from New South Psychological Resources dated September 28, 2001, was filed of record indicating that S.L. had a verbal IQ of 73, performance IQ of 86, and full scale IQ of 77.

[6] At this time, S.L. was 14 years old and in the sixth grade for the third time.

[7] On March 26, 2003, two letters from Pathways, Inc. were filed of record noting that S.L. should do her schoolwork alongside her age-group peers.

> You are to violate no law.
>
> You are to obey all reasonable commands of your parents, guardian/other _____.
>
> . . .
>
> You are to maintain at least passing grades in school.
>
> . . .
>
> Not withdraw from school for any reason.
>
> Other[:] Complete Ramey Estepp [sic] Diversion Program.

A review of S.L.'s case was held on April 3, 2003, at which time the family court found S.L. to be in contempt of court and ordered her to detention for 10 days at the Breathitt County Juvenile Detention Facility.[8] On May 1, 2003, another case review was held and the family court committed S.L. to the DCBS with placement at Ramey-Estep Homes, finding this to be in S.L.'s best interest and there being no less restrictive alternatives. The family court further ordered G.L. to pay $169.00 to the Carter County school system by August 1, 2003, for S.L.'s unexcused absences. An e-mail from Ramey-Estep employee Paul Moore was filed of record on May 13, 2003, which stated that S.L. was allegedly enrolled in West Carter Middle School, not alternative school, and was still missing school.

[8] S.L. was finally enrolled in alternative school on April 30, 2003.

On August 26, 2003, S.L. filed a motion to dismiss, vacate, or review and to probate her current habitual truancy status, stating it was flawed because she had not admitted the petition was true. On September 4, 2003, the family court sustained S.L.'s motion and vacated the adjudication. An agreement was reached between S.L. and the Commonwealth that there would be a 12-month diversion of the habitual truancy petition. During this time, S.L. would be released to G.L., would attend alternative school, and would be monitored by Ramey-Estep Homes.

On November 6, 2003, the Commonwealth filed ex parte a motion for an order for S.L. to show cause why she should not be held in contempt of court. A supporting affidavit filed by Judy Roark, director of pupil personnel with the Carter County Board of Education, stated that since the September 4, 2003, hearing, S.L. had failed or refused to attend regularly scheduled school classes as previously ordered by the family court. Attached to the affidavit was a history of S.L.'s school attendance since September 4, 2003, showing one and one-half unexcused tardies and 10 and one-half unexcused absences and a one-day detention for smoking. On November 6, 2003, the family court entered an order granting the Commonwealth's motion and ordering G.L. and S.L. to show cause why they should not be held in contempt of court for failing to comply with court orders

requiring S.L. to attend all school classes, have no unexcused absences, and cooperate with school officials. On November 19, 2003, S.L. filed a response stating that since the diversion agreement was never reduced to writing, it was no more than an informal adjustment of her current habitual truancy status, and therefore, S.L. could not be held in contempt of court and sent to detention, but rather the remedy was reinstatement of the habitual truancy petition. On November 20, 2003, the petition was reinstated, as amended by Roark's affidavit, and temporary orders were entered pending an adjudication.

By order entered November 24, 2003, an adjudication was scheduled for December 4, 2003, and until then, S.L. was required to do the following:

> Attend all school sessions on time, have no unexcused absences and you are to have no behavioral problems at school.
>
> You are to violate no law.
>
> You are to obey all reasonable commands of your parents, guardian/other_____.
>
> . . .
>
> You are to maintain at least passing grades in school.

By order entered on December 5, 2003, the family court found the petition admitted at the adjudication hearing on December 4, 2003, and it found that S.L. was educationally neglected. S.L. was allowed to remain in G.L.'s home, pending

disposition. A predispositional report was filed on December 16, 2003, by the DCBS indicating that while there did not appear to be a further history of domestic violence within G.L.'s home, S.L. was not in a strict environment with set rules and consequences and it did not appear that G.L. would follow through with discipline. A hearing was held on December 18, 2003,[9] and pursuant to an order entered on December 31, 2003, the family court vacated the December 5, 2003, order as the case was not an educational neglect case, but rather a habitual truancy case, and the family court then rescheduled the disposition hearing. While the hearing was pending, S.L. was ordered to attend school everyday, unless she had a valid excuse, and G.L. was ordered to secure S.L.'s attendance or she would be held in contempt of court.

On February 6, 2004, the family court entered an order requiring S.L. and G.L. to appear for a contempt hearing on March 3, 2004. A petition for neglect had been filed in February 2004; however, it is not a part of the record, as it was a separate case. Nevertheless, an adjudication hearing was held on the neglect case on the morning of March 3, 2004, and

[9] At this hearing, the Commonwealth did state that G.L. was the problem, but there was not a neglect petition before the family court. Further, the family court ruled out homebound schooling, despite evidence presented by S.L. that her physician recommended it.

S.L. was determined to be neglected.[10] A disposition hearing on the neglect case was scheduled for a later date. On the afternoon of March 3, 2004, a disposition hearing was held in the habitual truancy case. The family court then entered an order on March 12, 2004, committing S.L. to the DCBS with recommended placement at Ramey-Estep Homes. The family court found that based on the history of S.L.'s truancy, this disposition was in her best interest and the least restrictive alternative for S.L.'s treatment. The family court noted that S.L. had previously been released from a commitment with the DCBS and allowed to enter alternative school, and in a two-month period had been suspended for three days and had 26 and one-half unexcused absences. Since that time, S.L. had been in the emergency custody of the DCBS and had 14 unexcused absences from school. The family court acknowledged in its order that S.L. had been adjudicated as neglected or abused prior to the disposition hearing on her habitual truancy conviction. The family court stated its decision was reinforced by the fact that S.L. was allowed to date a 26-year old man when she was just 15, the fact that she was smoking marijuana on a daily basis, and because she had had basically no education for two years. This appeal followed.

[10] See KRS 600.020(1).

The issue in this appeal arises from matters under district court jurisdiction,[11] and, had those issues been appealed from an order entered by the Carter District Court,[12] the Carter Circuit Court would have been vested with appellate review.[13] However, Carter County has a family court and its family court judge heard the matters of issue and entered the March 12, 2004, order. Thus, pursuant to KRS 22A.020,[14] as

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[11] KRS 610.010(1) provides, in part, as follows:

> [T]he juvenile session of the District Court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his or her eighteenth birthday . . . who allegedly:
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> . . .
>
> (c) Is a habitual truant from school; [or]
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> . . .
>
> (e) Is dependent, neglected, or abused[.]

Further, "[a] dependency, neglect, or abuse action may be commenced by the filing of a petition by any interested person in the juvenile session of the District Court." KRS 620.070(1). KRS 24A.020 provides that "[w]hen jurisdiction over any matter is granted to District Court by statute, such jurisdiction shall be deemed to be exclusive unless the statute specifically states that the jurisdiction shall be concurrent."

[12] While this case originated in the Carter District Court, a family court was established in the county and took over the case prior to the March 12, 2004, order being entered.

[13] See KRS 610.130.

[14] KRS 22A.020 states, in pertinent part, as follows:

> (1) Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, including a family court division of Circuit Court, unless such conviction, final judgment, order,

amended, jurisdiction is vested in this Court to review S.L.'s appeal.

While we have jurisdiction to hear the issues raised by S.L., as she acknowledges in her brief, she failed to properly preserve them for our review. S.L. had cases pending for both habitual truancy and neglect on March 3, 2004. The family court had previously adjudicated the habitual truancy case. Prior to disposing of this habitual truancy case on March 3, 2004, the family court adjudicated the neglect case. S.L. argues that by disposing of the habitual truancy case the family court acted incorrectly because once the family court found S.L. to be neglected or abused, KRS 610.010(12)[15] required it to dispose of the neglect case before disposing of the habitual truancy case. S.L. argues that the error committed by the family court was palpable error under RCr[16] 10.26,[17] since even

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> or decree was rendered on an appeal from a court inferior to Circuit Court.

[15] KRS 610.010(12) states as follows:

> Unless precluded by KRS Chapter 635 or 640, in addition to informal adjustment, the court shall have the discretion to amend the petition to reflect jurisdiction pursuant to the proper chapter of the Kentucky Unified Juvenile Code.

[16] Kentucky Rules of Criminal Procedure.

[17] RCr 10.26 provides:

> 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

though it was insufficiently preserved for review, it affected her substantial rights and resulted in a manifest injustice.[18] S.L. further claims that the failure to properly preserve the issue on appeal may have resulted from the confusion created by different attorneys representing S.L. in the two cases and that she should not be penalized for this error.[19]

We agree that S.L. did not properly preserve this issue for review on appeal, as she failed to object to the family court's disposition of the habitual truancy case prior to the disposition of the neglect case. A party must "make known to the court the action which that party desires the court to take or any objection to the action of the court[.]"[20] "Failure to comply with this rule renders an error unpreserved."[21]

S.L. argues that these matters were handled informally by the family court and that this Court should review significant issues of juvenile cases even if they are not

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> granted upon a determination that manifest injustice has resulted from the error.

[18] RCr 10.26.

[19] S.L. provides no proof that this fact caused any confusion leading to failure to preserve the alleged error, nor does she cite any law to support this consideration.

[20] RCr 9.22; see also Kentucky Rules of Civil Procedure (CR) 46.

[21] Renfro v. Commonwealth, 893 S.W.2d 795, 796 (Ky. 1995) (citing Bowers v. Commonwealth, 555 S.W.2d 241 (Ky. 1977)). See also West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989).

perfectly preserved by circuit court standards.[22] We are not persuaded by S.L.'s contention that KRS 610.150 somehow creates a "broad right of review on appeal in juvenile cases." We agree with the Commonwealth's response that KRS 610.150 gave the circuit court, when serving as an appellate court, the right to protect the best interest of a child by monitoring and adjusting the current treatment of the child during the appellate process, as the district court would at that time be without jurisdiction to make any necessary changes to placement, custody, or continued participation in court ordered programs. However, we do not find this remedy to extend to review of unpreserved errors.

Because we find that S.L. failed to adequately preserve the issue in this case, we review the issue under the palpable error rule. According to RCr 10.26, we may reverse the family court only if an obvious error is found that affects the "substantial rights" of S.L. such "that manifest injustice has resulted from the error."[23]

[22] See Commonwealth v. M.G., 75 S.W.3d 714, 722 (Ky.App. 2002).

[23] RCr 10.26.

There is no doubt under KRS 620.025[24] that the filing of a petition under KRS Chapter 620 for neglect does not prevent the filing of a petition under KRS Chapter 630 for a status offense. However, KRS Chapter 620 does take jurisdictional precedent over KRS Chapter 630 in an attempt to prevent a child from being found a status offender,[25] when the cause of his actions stems from underlying abuse or neglect. We agree with S.L. that jurisdictional issues cannot be waived, and thus, it was error for the family court not to dispose of the neglect case prior to disposing of the truancy case.[26]

The family court's unpreserved error in disposing of the habitual truancy case[27] prior to the disposition of the neglect case will entitle S.L. to relief under RCr 10.26, only if upon considering the whole case, this Court finds there is a substantial probability that the result would have been

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[24] KRS 620.025 states as follows:

> A finding of jurisdiction under this chapter shall not necessarily preclude a finding of jurisdiction under KRS Chapters 625, 630, or 635; however, jurisdiction under this chapter shall take precedence. No child shall be released from the jurisdiction of the court under this chapter if concurrent complaints under KRS Chapters 630 or 635 are pending.

[25] A child found to be a status offender can be held in contempt and placed in detention for violating a court order. KRS 630.080(3).

[26] Johnson v. Bishop, 587 S.W.2d 284, 286 (Ky.App. 1979).

[27] S.L. was found to be a habitual truant on April 25, 2002. Once S.L. was found to be a habitual truant, the family court had jurisdiction over her until she reached 18 years of age. See KRS 610.010(13).

different absent the error.[28] It is interesting to note that while S.L.'s truancy had been apparent since 2002, the record is void of any assertions of parental neglect under KRS Chapter 620 until February 2004. The basis for the neglect petition filed in February 2004 was S.L.'s social worker's knowledge that S.L. was allowed to date a 26-year-old man, who at one point she planned to marry. This event, however, did not occur until two years after the truancy problem arose. The record is full of evidence showing that, even when S.L. was not under G.L.'s direct care, she was failing to attend school. S.L. argues that if the neglect case had been disposed of first, she would have been treated as a victim, not an offender, and perhaps would not have been committed to the DCBS. S.L. further argues that a disposition under the neglect case would have probably resulted in her being placed in a foster home, instead of an institutional setting. She contends that this disposition would have revealed whether G.L.'s neglect was the cause of S.L.'s school absences, or if the absences were a direct result of S.L.'s own actions. We are not persuaded by this argument.

The family court spent the two years prior to entering its March 12, 2004, order trying to find a way to keep S.L. from missing school. The family court was careful to point out in

[28] See Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). See also Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

its opinion a history of the many alternatives that had been attempted to improve S.L.'s habitual truancy. We cannot find, based on the overwhelming evidence of record, that there was a substantial likelihood that the decision of the family court would have been different if it had first disposed of S.L.'s neglect case. S.L. had clearly shown that she could not be trusted to attend school, regardless of where she lived. Thus, the error by the family court did not result in manifest injustice.

Accordingly, the order of the Carter Family Court is affirmed.

ALL CONCUR.

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