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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000673-ME

W.H., A CHILD UNDER EIGHTEEN — APPELLANT

v.

APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA NUNLEY FARRIS, JUDGE
ACTION NO. 04-J-00085-11

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE: This is an appeal from an order finding a juvenile in contempt for violating an order on a status offense, and committing the juvenile to the Cabinet for Health and Family Services for residential placement. None of appellant's assignments of error were preserved for review and none rise to the level of palpable error. Hence, we affirm.

[1] Senior Judge Joseph Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On April 1, 2004, W.H. was found to be a status offender (habitual runaway and beyond reasonable control of parents) and a dispositional order was entered setting forth a number of conditions that W.H. was to follow. One of the conditions was that W.H. was to obey all rules of his home, including a curfew which was 11:00 p.m. on weekends and 9:00 p.m. on weekdays. On February 14, 2005, W.H.'s mother, Eunice Hall, swore out a petition alleging that W.H. had violated the April 1, 2004, order by coming home past his curfew on two nights and not coming home at all one night. This was the eleventh (11th) violation petition filed since the dispositional order had been entered.

On February 15, 2005, W.H. was brought before the Henderson District Court for a detention/violation hearing wherein he was represented by counsel. During the hearing, the court located the April 1, 2004, dispositional order and, without objection from W.H., took judicial notice of it as a valid order. W.H.'s mother testified relative to W.H.'s curfew violations. Also, Kristi Raley, a worker from the Department of Community Based Services (DCBS), testified that W.H. had repeatedly violated conditions of the dispositional order. Further, Raley testified that all placements outside detention had been exhausted. W.H. put on no evidence. The district

court found that W.H. violated the April 1, 2004, order and passed disposition to the Family Court.

On February 17, 2005, W.H. came before the Henderson Family Court for disposition. The DCBS worker testified about all the services that had been offered to W.H. and recommended that W.H. be committed to them for residential treatment. W.H.'s counsel objected and asked for more time for the community services to work. The court noted that W.H. had a total of eleven violations, most for curfew violations and drug use, and that the court had already tried electronically monitoring W.H. and detaining W.H. for two weeks to control his conduct. Considering the totality of the circumstances, the court ordered that W.H. be committed to the Cabinet for Health and Family Services (the "Cabinet") for residential placement. W.H. now appeals.

W.H. first argues that the district judge in the detention and violation hearing should have recused himself because he was biased in favor of the Commonwealth from the outset. W.H. concedes that this issue was not preserved below. RCr 9.22. Nevertheless, he urges us to review the argument for palpable error under RCr 10.26. Under RCr 10.26, palpable error is error that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court. RCr 10.26. If upon consideration of the whole case, the

reviewing court does not conclude that a substantial possibility exists that the result would have been different, the error complained of will be held to be nonprejudicial. Jackson v. Commonwealth, 717 S.W.2d 511 (Ky.App. 1986); Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003).

W.H. alleges that certain comments made by the district judge at the beginning of the detention/violation hearing demonstrated that he had prejudged the case and had already determined W.H. to be guilty, citing SCR 4.300, Canon 3, Section E(1) which requires a judge to disqualify himself from any case wherein his impartiality might reasonably be questioned. The remark at issue was, "[W.H.], that's not all that hard of a case for me either. If he's got eleven status offenders and he's charged with being in contempt of court, he is staying in jail." The court and the two attorneys then engaged in a discussion about whether the court was going to conduct a violation/adjudication hearing at the same time, and the court stated:

> No, I'm going to adjudicate it as, as I read the statute, today. It's a contempt, isn't it? Well before you get too far ahead of me, it's a contempt on a valid order. I'm going to adjudicate it, set dispo on it. She can do whatever she wants with it then. That is if you can prove it.

While the court did state that if W.H. had eleven status disposition violations, he would find W.H. guilty, he did

go on to say that he would only find W.H. guilty if the Commonwealth proved their case. During the hearing, the judge heard the evidence and asked questions of the witnesses, and there was no appearance of bias in his conduct of the proceeding.

W.H. also claims that the court demonstrated its bias in favor of the Commonwealth by asking questions of the witnesses and essentially acting as prosecutor in the case. We would note that no objection to the court's questioning was made pursuant to KRE 614(d). W.H. cites Terry v. Commonwealth, 153 S.W.3d 794 (Ky. 2005), wherein the Supreme Court cautioned trial courts regarding the questioning of witnesses under KRE 614(b) to "use this power sparingly" so as to not "unduly influence the triers of fact." Id. at 802 (quoting KRE 614(b), Drafters' Commentary (1989)). Specifically, the Court warned against questioning a witness so as to indicate to the jury the trial court's opinion as to the credibility or veracity of the witness and warned against assuming the role of the prosecutor. Id. at 802-803. However, the hearing in the instant case was not before a jury; the judge was the trier of fact. "When the trial court acts as the trier of fact, the extent of examination of witnesses by the presiding judge is left to the trial judge's discretion." Bowling v. Commonwealth, 80 S.W.3d 405, 419 (Ky.

2002). There was no abuse of that discretion in this case and no error.

Next, W.H. argues that the district court improperly transformed the detention hearing into a violation/adjudication hearing. Again this alleged error was not preserved, but we are asked to review it under RCr 10.26. KRS 610.265(1) provides for a detention hearing for a child "who is accused of being in contempt of court on an underlying finding that the child is a status offender." Pursuant to KRS 610.265(2)(b)4.c. and KRS 630.080(3)(c), if the court has available an oral report from the appropriate public agency at the time of the detention hearing, "the violation hearing may be conducted at the same time as the detention hearing." In the present case, the oral report of Kristi Raley from DCBS was available and heard by the court. In addition, the court had before it the underlying valid order adjudging W.H. to be a status offender and heard evidence from W.H.'s mother regarding his violation of the order. KRS 630.080(3)(a) and (b). Accordingly, the court did not improperly hold the detention and violation/adjudication hearing at the same time.

W.H. also maintains that he did not receive adequate notice of the contempt charge. We disagree. The petition filed by W.H.'s mother on February 14, 2005, explicitly stated that it was a contempt petition for violation of the April 1, 2004,

order and alleged specific facts supporting the petition. The petition also clearly stated that the hearing on the motion would be on February 15, 2005. Further, as stated above, W.H.'s counsel did not raise the issue before the court on February 15, 2005, that she did not receive adequate notice to go forward on the violation/adjudication hearing that day. Accordingly, the issue was not preserved and there was no palpable error.

W.H. next complains that the February 15, 2005, hearing did not comport with KRS 610.060(1)(b) because W.H.'s mother, who testified against W.H., was not advised of her right to remain silent concerning the charges. KRS 610.060(1)(b) provides that at any formal hearing against the child, the court shall "[e]xplain the right against self-incrimination by saying that the child, parents, relative, guardian, or custodian may remain silent concerning the charges against the child, and that anything said may be used against the child." There was one objection to Eunice Hall's testimony made by W.H.'s counsel, and the stated grounds was that she could not testify against her son. There was no mention of the court's failure to advise Eunice Hall of her right to remain silent. The court overruled the objection and no further objection was made. Because Eunice Hall was the individual who swore out the petition against W.H., it is obvious that she would have testified against W.H. even if

the court had explained her right to remain silent. Hence, there was no palpable error.

W.H. also argues that the court did not have before it a valid order pursuant to KRS 630.080(3)(a) and KRS 600.020(60)(d) which requires, "before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States." W.H. claims that since he was not represented by counsel at the original adjudication hearing on the underlying status offense, the April 1, 2004, order was not valid. KRS 610.060(2)(a) provides:

> No court shall accept a plea or admission or conduct an adjudication hearing involving a child accused of committing any felony offense, any offense under KRS Chapter 510, or any offense for which the court intends to impose detention or commitment as a disposition unless that child is represented by counsel.

W.H. was not charged with a felony or an offense under KRS Chapter 510. His disposition on the April 1, 2004, order was not detention or commitment, and there was no indication that the court had the intent to impose detention or commitment. Accordingly, under the above statute, W.H. was not required to be represented by counsel on the underlying status offense for the April 1, 2004, order to be valid.

Finally, W.H. argues that commitment was not a possible disposition for contempt of court on an underlying

status offense. First, W.H. maintains that he was not given notice that commitment was a possible consequence of violation of the April 1, 2004, order as required by KRS 630.120(1)(a). The language of the April 1, 2004, dispositional order refutes this claim. The order states, "Failure to abide by this Order may result in a contempt finding being made against you by the court which could result in a fine and/or your being placed in secure detention or other alternative placement, and/or pickup order if violations." (Emphasis added). In our view, "other alternative placement" would certainly encompass commitment to the Cabinet for residential placement.

Secondly, W.H. argues that the punishment for contempt on a status offense is secure detention under KRS 630.070 and KRS 630.080(3), not commitment. According to W.H., commitment under KRS 630.120(6) is a possible disposition only for the status offense itself, not contempt on the status offense. Again, W.H. concedes the issue was not preserved and seeks review for palpable error.

Secure detention is certainly a possible disposition for contempt on a status offense upon a finding that the child has violated a valid court order. KRS 630.070; KRS 630.080(3). However, we believe that commitment is also a potential disposition for contempt on a status offense pursuant to KRS 630.120(6) which provides:

> (6) When all appropriate resources have been reviewed and considered insufficient to adequately address the needs of the child and the child's family, the court may commit the child to the cabinet for such services as may be necessary. The cabinet shall consider all appropriate local remedies to aid the child and the child's family subject to the following conditions:
>
> (a) Treatment programs for status offenders shall be, unless excepted by federal law, community-based and nonsecure;
>
> (b) The cabinet may place the child in a nonsecure public or private education agency accredited by the department of education;
>
> (c) The cabinet may initiate proceedings pursuant to KRS 610.160 when the parents fail to participate in the cabinet's treatment programs; and
>
> (d) The cabinet may discharge the child from commitment after providing ten (10) days' prior written notice to the committing court which may object to such discharge by holding court review of the commitment under KRS 610.120.

Although KRS 630.120(1) allows that any child violating a court order on a status offense "may be subject to the provisions of KRS 630.080(3)", there is nothing in KRS 630.120 excluding commitment pursuant to KRS 630.120(6) as another potential disposition for contempt on a status offense. (Emphasis added). Hence, we believe that commitment is an appropriate disposition for contempt on a status offense. Since

the court in the instant case heard evidence that other less restrictive resources and remedies had been exhausted (KRS 630.120(4) and (6)), the court did not err in ordering W.H. committed to the Cabinet.

For the reasons stated above, the order of the Henderson Family Court is affirmed.

ALL CONCUR.

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