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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002202-ME

K.A.C., A MINOR CHILD — APPELLANT

v.

APPEAL FROM BOYLE FAMILY COURT
HONORABLE BRUCE PETRIE, JUDGE
ACTION NO. 05-J-00009

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: McANULTY[1] AND SCHRODER, JUDGES; ROSENBLUM,[2] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: K.A.C, born April 26, 1991, appeals from a Juvenile Status Disposition Order of the Boyle Family Court adjudging her beyond control, in contempt of the terms and conditions of a previously imposed Juvenile Status Offender

[1] Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge John W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Order, and committing her to the custody of the Cabinet for Health and Family Services (Cabinet) until age 18. For the reasons stated below, we affirm.

On January 13, 2005, K.A.C.'s father executed a Juvenile Complaint alleging that K.A.C. had committed the juvenile status offense of being beyond the control of her parents and school officials in violation of Kentucky Revised Statutes (KRS) 630.020(2). The complaint was filed in Boyle Family Court on January 17, 2005. The petition stated K.A.C. had been having boys at her home while the father was at work; that the father feared that the juvenile was involved in sexual activity and drug use; that K.A.C. had been disobedient and disrespectful to her parents; and that K.A.C. had cursed her parents at times.

On January 17, 2005, a Juvenile Petition was filed by Jason P. Warinner of the Danville Police Department charging K.A.C. with felony custodial interference, see KRS 509.070, based upon the allegation that she had enticed another juvenile to leave her custodial parents and remain away from home. As a result of the custodial interference charge, K.A.C. was taken into detention.

A hearing on the pending petitions was held on January 19, 2005. At that time, the custodial interference charge was dropped, and K.A.C. was released to her mother under the terms

and conditions of a Juvenile Status Offender Order. Pursuant to the order, among other things, K.A.C. was not to leave home without custodial permission; was to obey all rules of her home; was to attend all school sessions on time, have no unexcused absences, and have no behavior problems at school; was to violate no law; was not to consume, use or possess any alcohol, tobacco products, or illegal drugs; and was to submit to random drug testing to be administered by the Cabinet. A review hearing was scheduled for February 23, 2005.

At the February 23, 2005, hearing K.A.C. admitted to the beyond control allegation as contained in the Juvenile Status Offender Complaint filed by her father. K.A.C. waived separate disposition; the family court probated her to the court, and entered a new Juvenile Status Offender Order. The conditions contained in the new order were substantially the same as those contained in the order entered on January 19, 2005.

On May 9, 2005, K.A.C.'s mother filed an affidavit stating that the previous night K.A.C. had asked if she could go out and was told that she could not. The affidavit stated that K.A.C. then "got horribly irate, punched holes in her bedroom walls, [and] pulled her hair[.]" On May 19, 2005, K.A.C.'s father filed an affidavit stating that he was concerned about K.A.C.'s welfare because she was staying out and sometimes

spending the night with a seventeen-year-old boyfriend. The affidavit also stated that the father suspected drug use. On May 20, 2005, Dana Stigall, Counselor at the Bruce Hall Day Treatment Center, the school K.A.C. was then attending, filed a letter into the record stating that on May 10, 2005, K.A.C. had tested positive for marijuana and benzodiazepines.

As a result of the foregoing, on May 20, 2005, the family court entered an order directing that K.A.C. be taken into custody for contempt of court for failure to comply with the terms and conditions of the previously imposed Juvenile Status Offender Order. A contempt hearing was set for May 23, 2005.

At the conclusion of the hearing the family court determined that K.A.C. was in contempt of court on the basis that she had "violated most" of the terms and conditions of the previously imposed Juvenile Status Order. Specifically, the family court found that K.A.C. had violated terms and conditions of the order by staying overnight at her boyfriend's house without permission; by having unexcused absences from school; by violating school rules; by using tobacco products; and by using illegal drugs. The court sentenced K.A.C. to 30 days of detention - seven to serve with the balance probated. K.A.C. was further committed to the temporary custody of the Cabinet. A disposition hearing was scheduled for June 22, 2005.

In connection with the June 22, 2005, disposition hearing the Cabinet prepared a Predispositional Investigation Report. At the conclusion of the disposition hearing the family court adopted the recommendations of the Cabinet, including the requirements that K.A.C. complete a program at Kentucky Methodist Homes for Children and Youth in Versailles, Kentucky; that K.A.C. submit to drug screens without question; that K.A.C. remain drug and alcohol free; that K.A.C. respect all parental, custodial, out of home care, and law enforcement authority at all times; that K.A.C. maintain a "C" average or better in her academics and have no unexcused absences when school is in session; that her parents submit to drug screenings without question; and that K.A.C. have no contact with the 17 year-old juvenile she had been dating. The family court further ordered that K.A.C. be committed to the custody of the Cabinet until age 18. This appeal followed.

First, K.A.C. contends that the family court erred in permitting the introduction of drug screen test results at the May 23, 2005, evidentiary hearing and relying upon those results to, in part, find K.A.C. in contempt and sentence her to detention.

Prior to the May 23, 2005, court date, Dana Stigall of Bruce Hall Day Treatment School, the school K.A.C. was then attending, wrote a letter to the family court, which was placed

in the court file. The letter advised the court that K.A.C. had been screened on May 10, 2005, and had tested positive for marijuana and benzodiazepine. At the May 23, 2005, hearing, over K.A.C.'s objection, the results of the drug screen were introduced through Stigall. K.A.C. contends that the drug screen results were introduced in violation of Kentucky Rules of Evidence (KRE) 602, KRE 701, and KRE 702, and the due process guarantees of the 6th and 14th Amendments of the United States Constitution and Sections 2 and 11 of the Kentucky Constitution.

KRE 702, which governs testimony by expert witnesses, provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may provide opinion testimony if scientific, technical, or specialized knowledge will assist the trier of fact. A trial court's determination as to whether a witness is qualified to give expert testimony under KRE 702 is subject to an abuse of discretion standard of review. Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 378 (Ky. 2000); Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 935 (1999); Murphy by Murphy v. Montgomery Elevator Co., 957 S.W.2d 297, 299 (Ky.App. 1997). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" Farmland Mut. Ins. Co., 36 S.W.3d at 378 (quoting Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000)).

In this case, Stigall provided testimony which included technical matters relating to the administration and interpretation of a drug screening test administered to K.A.C. Based upon this test, Stigall expressed her opinion that the testing produced a positive result for marijuana and benzodiazepine. Because of the technical aspects of this test, we believe that testimony expressing an opinion concerning test results requires some modicum of training and education in order to comply with KRS 702. While Stigall has a Masters Degree in Counseling Psychology, is Certified as a Psychological Associate, and is a Qualified Mental Health Professional, we believe that Stigall's admission that she has no training in administering and interpreting the test fails to demonstrate the requisite training and knowledge to qualify as an expert witness with regard to the test under KRE 702.

Stigall admitted that she had no training or certification to perform the test. She also admitted that she did even not know the name of the test or how the test kits were stored. Because Stigall failed to demonstrate a minimum level of training and knowledge concerning the administration and interpretation of the test, we conclude that the family court abused its discretion by permitting the drug test results to be introduced through Stigall.

Notwithstanding the foregoing, however, we believe that the admission of the drug screening was harmless error. An error is deemed harmless if, upon consideration of the entire case, there appears to be no likely possibility that the result would have been different in the absence of error. Scott v. Commonwealth, 495 S.W.2d 800, 801-02 (Ky. 1972). First, there was testimony that K.A.C. had made admissions that she used marijuana. Further, K.A.C. was not found in contempt solely for using and or/possessing illegal drugs. She was also found in contempt for leaving home without parental permission; for unexcused absences from school; for failure to follow school rules; and for use of tobacco. As such, even if the drug screen results had not been admitted, we do not believe that, upon exclusion of this evidence, there is a substantial possibility that the outcome of the proceedings would have been different. As such, any error in admitting the results of the drug screen test was harmless.

Next, K.A.C. contends that the detention sentence imposed by the family court did not constitute the least restrictive alternative, and was thereby improper. The procedures for the detention of a Juvenile are addressed in KRS 630.080 and KRS 630.070. KRS 630.080 provides as follows:

> (1) In order for the court to detain a child after the detention hearing, the Commonwealth shall establish probable cause

at the detention hearing that the child is a status offender and that further detention of the child is necessary for the protection of the child or the community. If the Commonwealth fails to establish probable cause that the child is a status offender, the complaint shall be dismissed and the child shall be released. If the Commonwealth establishes probable cause that the child is a status offender, but that further detention of the child is not necessary for the protection of the child or the community, the child shall be released to the parent or person exercising custodial control or supervision of the child. If grounds are established that the child is a status offender, and that further detention is necessary, the child may be placed in a nonsecure setting approved by the Department of Juvenile Justice;

(2) A status offender may be securely detained if the cabinet has initiated or intends to initiate transfer of the youth by competent document under the provisions of the interstate compact pursuant to KRS Chapter 615;

(3) A status offender who is subject to a valid court order may be securely detained upon a finding that the child violated the valid court order if the court does the following prior to ordering that detention:

(a) Affirms that the requirements for a valid court order were met at the time the original order finding the child to be a status offender was issued;

(b) Makes a determination during the detention hearing that there is probable cause that the child violated the valid court order; and

(c) Within seventy-two (72) hours of the initial detention of the child, exclusive of weekends and holidays,

> receives an oral report in court and on the record delivered by an appropriate public agency other than the court or a law enforcement agency, or receives and reviews a written report prepared by an appropriate public agency other than the court or a law enforcement agency that reviews the behavior of the child and the circumstances under which the child was brought before the court, determines the reasons for the child's behavior, and determines whether all dispositions other than secure detention have been exhausted or are inappropriate. If a sufficient prior written report is included in the child's file, that report may be used to satisfy this requirement. The child may be securely detained for a period not to exceed seventy-two (72) hours pending receipt and review of the report by the court. The court shall conduct a violation hearing within twenty-four (24) hours of the receipt of the report, exclusive of weekends and holidays. If the report is available at the time of the detention hearing, the violation hearing may be conducted at the same time as the detention hearing. The hearing shall be conducted in accordance with the provisions of KRS 610.060. The findings required by this subsection shall be included in any order issued by the court which results in the secure detention of a status offender.

KRS 630.070 provides that "[n]o status offender shall be placed in a secure juvenile detention facility or juvenile holding facility as a means or form of punishment except following a finding that the child has violated a valid court order."

KRS 630.070 and KRS 630.080 do not contain the standard that detention be the "least restrictive alternative." It appears that K.A.C. may be confusing the standards relating to a detention proceeding with the standards applicable to a final disposition. KRS 630.120, which addresses final dispositions, requires application of the "least restrictive alternative" in connection with dispositional hearings. See KRS 630.120(4) ("The court shall affirmatively determine that all appropriate remedies have been considered and exhausted to assure that the least restrictive alternative method of treatment is utilized.") As this standard was not applicable to the May 23, 2005, contempt proceedings, however, this argument is based upon an erroneous premise, and the family court did not err by failing to apply the "least restrictive alternative" standard in connection with its decision to enter a detention order against K.A.C.

Next, K.A.C. contends that family court erred in committing K.A.C. to the Cabinet for contempt since she had already been sentenced to 30 days in detention for the same conduct. We construe this as an argument that the family court's ordering of the detention of K.A.C. and the subsequent ordering that she be committed to the Cabinet constitutes multiple punishment for the same conduct in violation of double jeopardy principles.

The Fifth Amendment to the U.S. Constitution and Section 13 of the Kentucky Constitution contain double jeopardy provisions which, among other things, proscribe multiple punishments for the same offense. Commonwealth v. Ray, 982 S.W.2d 671, 673 (Ky.App. 1998). However, K.A.C.'s argument that this prohibition was violated by the family court's sentencing her to detention for contempt and committing her to the Cabinet for contempt is based upon an erroneous premise. On May 23, 2005, K.A.C. was sentenced to detention for contempt based upon a finding by the family court that she had violated the provisions of the family court's previously imposed Juvenile Status Offender Order. Based upon the unsatisfactory results of the prior disposition, however, as demonstrated by K.A.C. continuing unacceptable conduct, a further dispositional hearing was undertaken not for the purpose of punishing K.A.C., but, rather, to consider the appropriate continuing disposition to effect the rehabilitation of K.A.C. It follows that the June 22, 2005, disposition committing K.A.C. to the Cabinet was not punishment cumulative to the prior detention. In addition, we note that the June 22, 2005, disposition hearing arose out of a juvenile status offender petition. Such a petition is in the nature of a civil action and, as such, does not implicate double jeopardy principles.

Next, K.A.C. contends that the family court erred in committing K.A.C. to the Cabinet because commitment is not a possible sentence for contempt. Again, we believe that this argument is based upon an erroneous premise. We do not construe the family court's decision to commit K.A.C. to the Cabinet as based merely upon its finding of contempt. We, rather, construe the disposition as having been made in light of K.A.C.'s continuing out of control conduct, the entire record, and all of the circumstances involved. Again, K.A.C.'s commitment to the Cabinet was not as punishment for K.A.C.'s violation of the previously imposed Juvenile Status Order.

Next, K.A.C. contends that the family court erred in committing K.A.C. to the Cabinet because commitment was not the least restrictive alternative.

KRS 600.010(2)(c) provides "[t]he court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary[.]" KRS 600.020(35) defines "least restrictive alternative" as follows:

> "Least restrictive alternative" means, except for purposes of KRS Chapter 645,[3] that the program developed on the child's behalf is no more harsh, hazardous, or intrusive than necessary; or involves no

[3] KRS Chapter 645 is concerned with the Mental Health Act of The Unified Juvenile Code.

> restrictions on physical movements nor requirements for residential care except as reasonably necessary for the protection of the child from physical injury; or protection of the community, and is conducted at the suitable available facility closest to the child's place of residence[.]

A family court is obligated to make specific findings addressing its conclusion that its deposition is the least restrictive alternative. See X.B. v. Commonwealth, 105 S.W.3d 459 (Ky.App. 2003). At the conclusion of the June 22, 2005, hearing, the family court discussed in detail its rationale for committing K.A.C. to the Cabinet and why it was the court's determination that this was the least restrictive alternative and in the best interest of K.A.C. The family court noted that this was the next step along an escalating level of dispositions, and that the prior dispositions had not succeeded in resolving K.A.C.'s irresponsible conduct. The family court assigned blame to K.A.C., but particularly in regard to why it considered placement with the Cabinet the least restrictive disposition, the family court cited to the irresponsible conduct of the parents, particularly the mother. The family court noted the mother's failure to attend counseling meetings, failure to take a drug screen, and her transporting of the seventeen-year-old boyfriend to a visitation with K.A.C. at the Kentucky Methodist Homes for Children and Youth in Versailles, Kentucky.

Under Kentucky Rules of Civil Procedure (CR) 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). An appellate court, however, reviews legal issues de novo, see, e.g., Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001); Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003).

While the family court did not make specific written findings concerning least restrictive measure issues, it did make findings at the conclusion of the June 22, 2005, hearing which, we believe, sufficiently complies with its obligation under KRS 600.010(2)(c). Moreover, those findings were supported by substantial evidence, and hence are binding upon our review.

Having carefully reviewed the record, we cannot conclude that the family court was clearly erroneous or abused its discretion in its decision to order K.A.C.'s commitment to the Cabinet.

Finally, K.A.C. contends that the family court's order of May 23, 2005, converted the proceedings into a dependency proceeding. This argument is based upon the entry of an order on May 23, 2005, captioned "Order Granting Temporary Custody in a Dependency, Neglect, Abuse Action." This argument was not raised before the family court, and, accordingly the issue is not preserved. We accordingly review the issue pursuant to RCr 10.26.

The order upon which K.A.C. relies is a preprinted form order which, based upon its caption, is designed to be used in dependency, abuse and neglect cases. In awarding temporary custody to the Cabinet, it appears that the family court used the wrong form. The case at the time the order was entered was a juvenile status offender proceeding, and while the family court entered an order designed for a dependency, abuse and neglect case, the order does not purport to "convert" the matter to that type of proceeding. We accordingly do not believe that there was any such "conversion" of the case. In summary, there was no manifest injustice under RCr 10.26.

For the foregoing reasons the judgment of the Boyle Family Court is affirmed.

ALL CONCUR.

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