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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000173-ME

M.G., A CHILD UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 04-J-00653

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: M.G. appeals from the Campbell Family Court's finding of truancy and commitment to the Cabinet for Health and Family Services (the Cabinet). For the reasons set forth below, we vacate and remand.

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

FACTS

M.G.'s parents are divorced. Although his parents have joint custody, M.G. lived with his father and younger brother. M.G.'s father is in the military reserve and works a first shift job that requires him to leave home by 5:00 a.m. each day. Although the father called home every morning at 6:00 a.m. to make sure the boys were awake to go to school, M.G. and his brother had difficulty making it to school.

On November 20, 2006, Rita Byrd (Byrd), the Director of Pupil Personnel at the Ft. Thomas schools, filed complaints against M.G. and his brother alleging that they were habitually truant.² Attached to Byrd's complaint was a copy of M.G.'s attendance records and recommendations from the court designated worker. The court designated worker noted that M.G. had been through "informal processing" on two prior occasions; therefore, she recommended referral to family court.

On November 29, 2006, M.G. and his court appointed attorney appeared before the family court. During an informal conference, Byrd advised the judge that M.G. had missed fifteen days of school and had been tardy ten times. Defense counsel advised the court that his client denied the charges and requested a date and time for a hearing to determine if M.G. was, in fact, a habitual truant. The judge asked Counsel why his client was denying the charges, noting that "this is not rocket science." Counsel told the judge that he needed time to consult with

² We note that the cases of M.G. and his brother were sometimes handled by the family court at the same time; however, we will only address M.G.'s case as that is the only one before us.

his client and to review Byrd's documentation in order to prepare an adequate defense. The judge stated that the purpose of juvenile proceedings is to serve the best interests of children and that delaying disposition of M.G.'s case would not serve that purpose. Therefore, the judge said that he would hold a hearing, "right now."

During the hearing, Byrd confirmed the number of times M.G. was absent and tardy. She also testified that personnel from the school system had attempted to contact M.G.'s father on a number of occasions; however, the father had not been cooperative. Byrd noted that M.G. had been transferred to an alternative school program several days before the hearing; however, he continued to have attendance problems with that placement.

During the hearing, M.G.'s cousin testified that M.G.'s mother was not present in court because she was in jail, although she was scheduled to be released that day. M.G.'s father was not present because he had been deployed three days earlier to a military base in another state for reserve training. Therefore, M.G. was temporarily residing with his cousin.

At the end of the hearing, the judge found that, because his parents were not available, M.G. was dependent. The judge awarded temporary custody to M.G.'s cousin and told M.G. that he needed to attend school regularly and cooperate with school personnel. Finally, the judge passed the issue of M.G.'s truancy until he could receive additional information and so that one of M.G.'s parents could also be present.

On December 6, 2006, M.G. and Counsel returned to court, accompanied by M.G.'s parents. Counsel stated that M.G. admitted to truancy. The judge accepted this "plea" from Counsel, without asking M.G. if that was his plea or advising M.G. of the implications of the plea. Because there had been some discussion that M.G. had admitted to using marijuana, the judge ordered drug testing and scheduled a disposition hearing for December 20, 2006. At that disposition hearing, the judge was advised that M.G. had tested positive for marijuana. Therefore, he ordered M.G. to undergo a drug court assessment. The judge then restored custody to M.G.'s father, ordered M.G. to attend school, and ordered random drug testing. Finally, the judge advised M.G. that he would be placed in detention if he violated any of the court's orders.

Throughout the next eleven and a half months, M.G. continued to miss school. The judge found him to be in contempt of the court's orders on a number of occasions and referred M.G. to drug court. We note that, according to the record, M.G. spent approximately two months in detention during this period.

On November 14, 2007, M.G. was not present at the beginning of a scheduled status hearing. M.G.'s mother advised the court that, although M.G. had been placed on "house arrest," he had been delayed because he was with one of his cousins who had been stopped for speeding in Ohio. When M.G. arrived, the judge stated he was ready to proceed with a commitment hearing. Defense counsel objected, stating he had not received adequate notice of the hearing or a copy of the reports regarding M.G.'s failure to successfully participate in drug court. The

judge then stated he would re-schedule the hearing for the next day to permit counsel to prepare. The prosecutor advised the judge that he had a scheduling conflict; however, the hearing remained as scheduled.

On November 15, 2007, the judge proceeded with the hearing, despite the fact that no county attorney was present to prosecute. M.G.'s counsel objected to this procedure, arguing that the judge could not act as both prosecutor and judge. The judge overruled that objection and proceeded to question various witnesses. After doing so, the judge committed M.G. to the Cabinet; however, he stated that he would suspend the commitment contingent upon M.G.'s compliance with drug court. M.G.'s mother stated that, because M.G. and his cousin had stolen from her, she did not want M.G. back in her house. Therefore, the judge committed M.G. to the Cabinet. It is from this order that M.G. appeals.

On appeal, M.G. argues that: (1) the truancy complaint should have been dismissed because it failed to comply with Kentucky Revised Statute (KRS) 630.060(2) and KRS 159.140; (2) he was deprived of due process; and (3) his guilty plea should be set aside because he was not advised of the potential consequences of that plea. The Commonwealth argues that the requirements of KRS 630.060(2) were met by Byrd's testimony; M.G. was sufficiently advised of the impact of his guilty plea; and M.G. received all the process he was due. We will address the issues raised by M.G. in the order set forth above.

STANDARD OF REVIEW

M.G. raises issues of law; therefore, our review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky. App. 1998); and *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

1. Sufficiency of Complaint

M.G. argues the truancy complaint was deficient because it did not contain the information required by KRS 630.060(2). M.G. concedes this issue was not preserved for review; however, he argues it is jurisdictional and therefore palpable error. Generally, the court will not review unpreserved errors.

Commonwealth v. Maricle, 15 S.W.3d 376, 379 (Ky. 2000). However, RCr 10.26 permits review of an unpreserved error if the error affects the substantial rights of an appellant. An error affects the substantial rights of an appellant if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Commonwealth v. Rodefer, 189 S.W.3d 550, 553 (Ky. 2006).

The Commonwealth concedes that the requirements of KRS 630.060(2) are mandatory, and we hold failure to comply with those requirements could have significantly affected M.G.'s substantial rights. Therefore, this issue is subject to review.

We begin our review by looking to the statutory plan for adjudicating truants. A truant is any student older than six and younger than eighteen “who has

been absent from school without valid excuse for three (3) or more days, or tardy without valid excuse on three (3) or more days[.]” KRS 159.150(1). A habitual truant is “any child who has been found by the court to have been reported as a truant . . . two (2) or more times during a one (1) year period[.]” KRS 600.020(28). Based on the record, M.G. fits within the definition of a truant and the court could have found that he was a habitual truant.

Pursuant to statutory and case law, Byrd and school personnel were required to take certain steps before filing a complaint of habitual truancy. To the extent possible, they were required to become familiar with the conditions of M.G.’s home, to determine the causes for M.G.’s truancy, to attempt to eliminate those causes, and to document the home conditions and what intervention strategies were attempted. KRS 159.140(1)(c), (d), (f) and (3). These statutory requirements are mandatory and, unless met, the family court does not have jurisdiction to hear the matter. *T.D. v. Commonwealth*, 165 S.W.3d 480, 482 (Ky. App. 2005).

M.G. argues that Byrd did not fulfill the preceding requirements as evidenced by the “barebones” complaint, and, therefore, the family court did not have jurisdiction. We do not disagree with our prior holding that meeting the statutory requirements is jurisdictional. However, we believe M.G. is misreading *T.D.* and the statutory requirements. The statutory provisions at issue do not require the complaint to reflect what actions were taken by school personnel. Furthermore, they do not require the complaining party to attach documentation to

the complaint reflecting what actions were taken. The statutes simply require school personnel to take certain actions and to document those actions. Whether school personnel complied with the statutes is a matter of proof which can be developed at the hearing. As noted by the Commonwealth in its brief, Byrd did set forth what actions school personnel took with regard to M.G.'s truancy. Those actions included several attempted home visits, telephone calls to the home, and placement of M.G. in an alternative program. Therefore, it appears that Byrd and other personnel of the Ft. Thomas schools took the appropriate and required actions. However, it is unclear from the record if Byrd possessed the required documentation. Therefore, we must remand this matter so that the family court can make a finding regarding the existence of that documentation.

We could end our analysis here. However, for the sake of completeness and, because the additional issues raised by M.G. may arise again on remand, we will address them.

2. Due Process

M.G. argues his commitment must be terminated because he was deprived of due process when he did not receive adequate notice that the November 14, 2007, hearing could result in commitment to the Cabinet. He also argues that he was deprived of due process when the judge conducted the November 15, 2007, hearing in the absence of a prosecutor. The Commonwealth argues M.G. had adequate notice of the potential consequences of his actions and a judge is permitted to question witnesses. Having reviewed the record, we hold that

M.G. did not receive adequate notice of the initial hearing; therefore, he was deprived of due process from the outset.

In *T.D.*, one of the juveniles argued that she was not given adequate notice of the absences that led to her charges of truancy. She noted that the director of pupil personnel testified regarding more absences than were listed on the complaint and she was not prepared to address those additional absences. In remanding that case, this Court held “that due process requires that notice be given sufficiently in advance of scheduled court proceedings that reasonable opportunity to prepare is afforded.” *T.D.*, 165 S.W.3d. at 484.

In this case, Counsel asked the family court at the initial hearing to give him sufficient time to prepare a defense. The court refused to grant Counsel’s request, except to the extent that he allowed Counsel to consult with his client for five minutes following the presentation of the prosecution’s proof. Although we agree with the family court that truancy proceedings may not be rocket science, they “can result in severe consequences to [the] child” in the form of “probation and detention for failure to meet the attendance terms.” *Id.* at 483. Therefore, M.G. and his counsel were entitled to sufficient notice to prepare a defense.

Having reviewed this matter, we hold that, as a matter of law, the notice given to M.G. and his attorney of the initial hearing was not sufficient. Because all that transpired after that hearing is tainted by that deficient notice, we must vacate the order of commitment and remand this matter to the family court for additional proceedings.

Based on the preceding holding, we need not address M.G.'s argument regarding the judge's decision to conduct the hearing on November 15th without a prosecutor. However, we will briefly do so.

KRE 614 (a) and (b) provide that a court "may, on its own motion . . . call witnesses . . . [and] may interrogate witnesses, whether called by itself or by a party." "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).

Based on our review of the record, it is apparent the family court judge had the primary and laudable goal of keeping M.G. in school and getting M.G. to stop using marijuana. Furthermore, it appears the judge went to great lengths to impress on M.G. the importance of doing those two things. However, it also appears M.G. was determined not to cooperate. While it would have been better to delay the commitment hearing until such time as a prosecutor could appear, we understand and sympathize with the judge's frustration and desire to find a viable placement/rehabilitation plan for M.G. Furthermore, we note the judge's questioning of witnesses consisted primarily of gathering facts regarding M.G.'s progress, or lack thereof. Taking those factors into consideration, along with the judge's lengthy history of dealing with M.G., we do not discern any reversible error in the judge's conduct of the November 15, 2007, hearing. However, we must emphasize that this holding is fact and case specific.

3. Guilty Plea

Although we need not address this issue, we will do so for the sake of completeness. M.G. argues that the family court improperly accepted a guilty plea without first making a determination that the plea was knowing and voluntary. The Commonwealth argues M.G. did not preserve for review any error regarding his guilty plea.

As set forth above, an unpreserved error may be reviewed if the error is one that affects the fairness, integrity, or public reputation of judicial proceedings. *Commonwealth v. Rodefer*, 189 S.W.3d 550, 553 (Ky. 2006). The consequences to a child of a finding of habitual truancy can be severe, including probation and detention. *T.D.*, 165 S.W.3d at 483. When an accused is facing imprisonment, the court must put forth the “utmost solicitude” in “canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1968).

Since pleading guilty involves the waiver of several constitutional rights, including the privilege against compulsory self-incrimination . . . and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record.

D.R. v. Commonwealth, 64 S.W.3d 292, 294 (Ky. App. 2001).

A juvenile's entry of a guilty plea, just as an adult's, goes to the heart of the matter before the court. Therefore, the circumstances surrounding the entry of that plea have an impact on the fairness of the proceedings at their core and any error in that regard is reviewable, whether preserved or not.

The Commonwealth argues the judge was in the best position to determine, from "the totality of [the] circumstances surrounding the [taking of the] plea," whether the plea was knowing and voluntary. *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990). While this is the law, there must be something in the record from which the judge can make that determination. A review of the record herein reveals no evidence from which the judge could have concluded M.G.'s plea was knowing or voluntary.

The first substantive error is that M.G. never actually pled guilty. M.G.'s counsel stated two different times that M.G. had agreed to plead guilty; however, the judge never actually asked M.G. if that was his plea. The second substantial error is that the judge did not advise M.G. of the potential consequences of his guilty plea or question M.G. to determine if M.G. understood what the plea connoted or the potential consequences of that plea. We cannot, and the judge could not, infer from this nearly mute record that M.G.'s plea was knowing or voluntary. Therefore, the family court's findings that were based on M.G.'s plea of guilty are null and void.

CONCLUSION

For the foregoing reasons we vacate the family court's order of commitment and remand this matter for additional proceedings consistent with this opinion. On remand, the family court shall hold a hearing to determine if the Ft. Thomas school personnel complied with the statutory requirements prior to filing their complaint. If the family court determines they did, the court shall give M.G. and his counsel adequate time to prepare for a hearing to determine if M.G. was a habitual truant. We will not specifically delineate what constitutes adequate time; however, the court should not ignore the considered opinion of counsel regarding what time is necessary to prepare. Finally, the family court, when conducting hearings in this matter, shall ensure a prosecutor is present to represent the Commonwealth's interests.

ALL CONCUR.

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