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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000305-ME

D. S., A CHILD — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 06-J-502254

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: D. S. appeals the Jefferson Family Court's order revoking his probation concerning his status offense for habitual truancy. After a careful review of the record, we reverse the family court's order because D. S. was not provided notice of his revocation hearing, in violation of his procedural due process rights.

I. FACTUAL AND PROCEDURAL BACKGROUND

D. S., a child, was charged with habitual truancy and at his dispositional hearing, the family court placed D. S. on probation as a status offender. The conditions of his probation were as follows: (1) D. S. was ordered to attend school daily and on time, unless he had a medical excuse; (2) he was ordered to be in each class daily; and (3) he was ordered to comply with assessment and attend counseling. During that dispositional hearing, which D. S. attended, the family court scheduled a status review hearing for December 9, 2008. Thus, D. S. was aware that he had another hearing on December 9, 2008.

On December 5, 2008, the Commonwealth, through the county attorney, moved the family court to issue a "pickup order" for D. S. because D. S. had been missing for several days. The family court issued the order on that date.

The status conference previously scheduled for December 9, 2008, was held, even though D. S., who remained missing, did not attend. His grandmother, with whom D. S. had been living before he ran away from home, informed the court that D. S. ran away because he was afraid that he would be picked up by authorities for violating his probation. He had violated his probation by getting suspended from school. The grandmother testified that she did not know where D. S. was, but she said that he called her occasionally to let her know he was alright. The family court noted that D. S. was "AWOL," and the court also noted that the Cabinet for Health and Family Services (CHFS) indicated it intended to file a motion to revoke D. S.'s probation. However, the court stated that it

would not hold a probation revocation hearing until CHFS had filed a written motion, as opposed to making an oral motion, to revoke D. S.'s probation.

On January 13, 2009, the Commonwealth filed its written motion to revoke D. S.'s probation on the basis that he had been missing since December 2, 2008, and he had not been attending school as required. The certificate of service for the written motion stated that a copy of the motion was sent to D. S.'s mother and to his grandmother, who was his temporary custodian.

A week later, a hearing was held on the Commonwealth's motion to revoke D. S.'s probation. D. S.'s attorney moved for a continuance of the probation revocation hearing on the bases that D. S. was still missing and counsel had not had an opportunity to speak with D. S. The Commonwealth opposed the motion for a continuance, arguing that if the Commonwealth was successful in convincing the court to revoke D. S.'s probation and commit D. S. to CHFS, then when he was found, he would immediately be turned over to CHFS. On the other hand, the Commonwealth asserted that if D. S.'s probation was not revoked and he was not committed to CHFS, the authorities would not be permitted to detain him when he was found because children who are status offenders may not be "securely detained." KRS[1] 630.100. Thus, the Commonwealth contended that there was a risk of D. S. running away again under those circumstances.

The family court concluded that D. S. was aware that he needed to come to court for the December 9, 2008 status hearing, but he failed to attend that

[1] Kentucky Revised Statute.

hearing. Thus, because D. S. already missed one court date and his attorney had been given a chance to locate and bring D. S. to the probation revocation hearing, the court overruled D. S.'s motion for a continuance of the probation revocation hearing.

At the probation revocation hearing, the CHFS worker assigned to D. S.'s case testified about D. S.'s absences from school. As previously explained, D. S. did not attend the hearing, and neither did his mother or grandmother. The court concluded that D. S. had violated his probation because he had failed to attend school; he had not attended counseling; and he had been "AWOL" since December 2, 2008. The family court then revoked D. S.'s probation and committed D. S. to CHFS. The court also noted that the pickup order remained outstanding, and the court ordered for D. S. to be released to CHFS for placement as a committed status offender once he was found. The family court further recommended that D. S. be placed at a location "far away from Louisville" because the child was "an extreme AWOL risk in that [the] child has been AWOL since 12/2/08."

D. S., through his attorney, now appeals, contending that his federal and state constitutional rights to due process were violated when his probation was revoked at a hearing that was held in his absence.

II. ANALYSIS

Certain due process requirements must be met before a defendant's probation may be revoked. "Although the State has a great interest in reincarcerating those individuals who are unable to meet the conditions of their

probation, it may not do so without first affording an individual the minimum requirements of due process." *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002).

> [T]hese requirements include: (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

Robinson, 86 S.W.3d at 56 (internal quotation marks omitted).

Because D. S. was missing, he was not personally served with written notice before his probation revocation hearing, but his attorney was apparently served. This Court has held that serving written notice upon a defendant's counsel does not satisfy the notice requirement for revoking that defendant's probation because notice must be served upon the defendant himself. *See Keith v. Commonwealth*, 689 S.W.2d 613, 616 (Ky. App. 1985). Thus, although D. S. was aware of the initial status review hearing on December 9, 2008, which he did not attend, he was not provided notice of the January 2009 probation revocation hearing.

In *Commonwealth v. B. J.*, 241 S.W.3d 324 (Ky. 2007), a child alleged to be a habitual truant entered a not guilty plea at the initial hearing in the

matter. Neither he nor his mother attended the subsequent adjudication hearing, despite having been placed on prior notice of the adjudication hearing. The child was determined by the court to be a habitual truant. Approximately two months later, a disposition hearing was held, which B. J. did not attend, but his mother did. At that hearing, B. J. was probated to CHFS. The child appealed, arguing that his due process rights were violated when the family court "conducted his adjudication and disposition hearings in his absence." *B. J.*, 241 S.W.3d at 326.

The Kentucky Supreme Court noted that status offenses, such as habitual truancy, "are neither criminal nor delinquent." *B. J.*, 241 S.W.3d at 327. The Court continued, stating that

> this is not to diminish the import of the proceedings. "A proceeding against a child for the status offense of habitual truancy under Chapter 630 . . . can result in severe consequences to that child. *T. D. v. Commonwealth*, 165 S.W.3d 480, 483 (Ky. App. 2005).
>
> In light of these potentially severe consequences to the child, due process must be afforded, despite the non-criminal nature of juvenile proceedings. "[W]here the fault of the child is at issue and penalties, including loss of liberty, may attach, criminal protections provided by the constitution apply." *Id*.

B. J., 241 S.W.3d at 327.

The Kentucky Supreme Court then held that there was

> no reason that a juvenile should not be permitted to waive his right to be present at a critical stage of the proceedings. Where a juvenile makes such a waiver knowingly, voluntarily and intelligently, the basic requirements of due process and fairness required of juvenile proceedings are satisfied. . . . [A]lthough the

> [C]ommonwealth has the burden of proving that a defendant's absence from trial was intentional, knowing, and voluntary, it may be inferred that a defendant's absence met this standard where it is shown that such defendant had knowledge of the trial date and failed to appear.

B. J., 241 S.W.3d at 328 (internal quotation marks omitted). The Court in that case found that "[a]t his arraignment, B. J. was informed of his future court dates. Likewise, B. J.'s mother made representations to counsel that B. J. was aware of the hearing and chose not to attend. . . . No evidence was presented that B. J.'s absence was involuntary." *B. J.*, 241 S.W.3d at 328. Thus, the Court concluded that the family court "did not abuse its discretion in concluding that B. J. validly waived his right to appear at both his adjudication and disposition hearings." *B. J.*, 241 S.W.3d at 328.

Although a child may waive his right to appear at such hearings, he must be provided written notice in order to validly waive this right. Unlike the circumstances in the *B. J.* case, in the present case, D. S. was missing at the time the written notice of the revocation hearing was sent to his home, and he continued to be missing through the time of the hearing. The Commonwealth did not present evidence that D. S. had notice of the hearing and voluntarily waived his constitutional right to be present at it. Thus, D. S.'s due process rights were violated.

We pause to address an argument the Commonwealth first raised in the family court. There, the Commonwealth opposed the motion for a continuance

of the probation revocation hearing brought by D. S.'s counsel by arguing that the hearing should be held in D. S.'s absence because, if the Commonwealth successfully convinced the court to revoke his probation and commit him to CHFS, then when he was found, he would immediately be turned over to CHFS. The Commonwealth continued, asserting that if D. S.'s probation was not revoked and he was not committed to CHFS, then when D. S. was found, the authorities would not be permitted to hold him because, pursuant to KRS 630.100, children who are status offenders may not be "securely detained." Thus, the Commonwealth contended that they would run the risk of D. S. running away again if his probation was not revoked and he was not committed to CHFS prior to D. S. being found.

KRS 630.100 provides as follows: "*Except as otherwise provided in this chapter and KRS Chapter 610*, no child alleged to be or adjudicated as a status offender shall be securely detained." (Emphasis added). But, pursuant to KRS 610.265,

> (1) Any child who . . . is accused of being in contempt of court on an underlying finding that the child is a status offender may be detained in a nonsecure facility, a secure juvenile detention facility, or a juvenile holding facility for a period of time not to exceed twenty-four (24) hours, exclusive of weekends and holidays, pending a detention hearing. . . .
>
> (2) Within the period of detention described in subsection (1) of this section, exclusive of weekends and holidays, a detention hearing shall be held by the judge or trial commissioner of the court for the purpose of determining whether the child shall be further detained. At the hearing held pursuant to this subsection, the court shall consider the nature of the offense, the child's background

and history, and other information relevant to the child's conduct or condition.

Thus, contrary to the Commonwealth's argument, if D. S.'s probation had not been revoked, as it should not have been without providing written notice to him prior to the revocation hearing, KRS 610.265 permitted authorities to detain him once he was found for a period of up to twenty-four hours, excluding weekends and holidays, pending a detention hearing. Further, once a detention hearing was held, D. S. could have been "placed in a secure juvenile detention facility or juvenile holding facility" if it was found that he had "violated a valid court order." KRS 630.070. Therefore, the Commonwealth's assertion that D. S. could not have been held unless his probation was first revoked and he was committed to CHFS lacks merit.

Accordingly, the Jefferson Family Court's order revoking D. S.'s probation is reversed.

CLAYTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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