

RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000485-ME

A.M., A CHILD

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 08-J-02217-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND KELLER, JUDGES.

KELLER, JUDGE: A.M., a child under the age of eighteen, appeals from an order of the Fayette Family Court committing him to the custody of the Cabinet for Health and Family Services (Cabinet), as a status offender. For the reasons stated below, we affirm.

FACTS

A.M. was born on February 16, 1995. On November 6, 2008, A.M.'s mother filed a juvenile complaint with the Fayette County Court Designated Worker alleging that A.M. was beyond her reasonable control as defined in Kentucky Revised Statute (KRS) 630.020(2). More specifically, the complaint alleged that:

during the period of [sic] 11/06/2006 through 11/06/2008, that for the past two years, [A.M.] refuses to follow his mothers [sic] rules/directives, leaves home without permission, is using illegal substances, skips school, is sexually active, makes threats to others, and is affiliated with the Latin Kings Gang.

Based on the juvenile complaint, A.M. was placed on diversion on November 15, 2008. During the period of diversion, A.M. received services from Lexington Day Treatment and was placed in M.A.S.H.,¹ an emergency shelter for youth in Fayette County. However, A.M. failed to comply with his diversion agreement by running away from home, school, and his M.A.S.H. placement; by continuing to use drugs; and by being physically aggressive at school and at M.A.S.H.

A.M.'s case was subsequently referred to the Fayette Family Court for adjudication. On December 16, 2008, A.M. failed to appear for his initial hearing and A.M.'s mother informed the court that A.M. ran away from home on the preceding day. Accordingly, the family court issued a pick-up order for A.M. After being taken into custody on December 17, 2008, A.M. appeared before the family court. At this appearance, the family court considered whether to place

¹ Metro Alternative Shelter House.

A.M. in juvenile detention pending further proceedings, whether to place A.M. in a detention alternative, or whether to allow A.M. to return home to his mother. The family court ordered A.M. to be placed in a foster home as a detention alternative.

On December 23, 2008, A.M. stipulated that he was beyond the control of his parents. The family court released A.M. into the custody of his mother and allowed him to return home. On December 26, 2008, A.M. ran away from home again and did not return until December 29, 2008. On December 30, 2008, A.M. stipulated to contempt of court and the family court placed A.M. in juvenile detention pending his disposition.

At the scheduled January 6, 2009, dispositional hearing, the family court discovered that a written dispositional report had not been prepared. As a result, the family court decided to place A.M. in a detention alternative, NECCO,² pending his disposition. On January 14, 2009, A.M. ran away from the NECCO offices. Because A.M. failed to appear for his dispositional hearing on February 3, 2008, the family court issued a pick-up order. A.M. was arrested on February 16, 2009 and appeared for a detention hearing on the following day. At that hearing, A.M. stipulated to another charge of contempt of court, and the family court placed A.M. in juvenile detention pending his disposition.

At A.M.'s dispositional hearing held on March 3, 2009, the Cabinet submitted a dispositional report with the recommendation that A.M. be committed

² NECCO is a private organization that was started by the Necco family and provides services to at-risk youth in Kentucky, Ohio, Georgia, and West Virginia.

to its care and custody. This report provided a history of A.M.'s behavioral problems in school and at home. The report further explained that A.M. had been placed on diversion but that A.M. failed to comply with his diversion agreement. The dispositional report also explained that A.M. engaged in risky behaviors, such as running away, using drugs and alcohol, participating in criminal activities, and engaging in sexual activities with a twenty-eight-year-old woman. Additionally, the report indicated that A.M. was being threatened by two different gangs. The social worker who created the report expressed her concern as well as the concerns of A.M.'s mother that A.M. would continue to place himself in dangerous situations and might ultimately lose his life unless committed to the Cabinet.

A.M., through his counsel, filed an alternative dispositional report. After considering the dispositional report, the alternative dispositional report, comments from A.M.'s mother, and the arguments of counsel, the family court committed A.M. to the Cabinet as a status offender. This appeal followed.

ANALYSIS

A.M. contends that the family court erred in committing him to the Cabinet because the information contained in the dispositional report was not adequate to make a finding that commitment was the least restrictive alternative. For the reasons stated below, we disagree.

We comment first on whether this matter is preserved for review. The Commonwealth argues that this issue was not preserved because A.M.'s counsel did not voice a specific objection that the dispositional report submitted by the Cabinet was lacking in any respect. Therefore, the Commonwealth contends that this Court should engage in the palpable error standard of review under Kentucky Rules of Criminal Procedure (RCr) 10.26.

KRS 610.100(1) instructs that “objections by counsel at the dispositional hearing to portions of the dispositional report shall be noted in the record.” After reviewing the dispositional hearing and the alternative dispositional report submitted by A.M.'s counsel, we are convinced that the family court knew or should have known that A.M.'s counsel opposed the court's reliance on the Cabinet's dispositional report as a basis for commitment. Although it would have been more appropriate for A.M.'s counsel to make a formal objection, the submission of the alternative dispositional report combined with the arguments made by A.M.'s counsel in support of such report at the hearing were sufficient to place the family court on notice that A.M. found the Cabinet's report to be inadequate. Thus, this matter is preserved for review and we need not engage in the palpable error standard of review.

Because this issue is preserved, we apply the clearly erroneous standard of review under Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding of the family court is clearly erroneous if not supported by substantial evidence. *W.D.B. v. Commonwealth*, 246 S.W.3d 448, 453 (Ky. 2007).

Substantial evidence is evidence sufficient to induce conviction in the mind of a reasonable person. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Prior to committing a child to the Cabinet, “[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 600.010(2)(c). Therefore, the court must “determine that all appropriate remedies have been considered and exhausted to assure that the least restrictive alternative method of treatment is utilized.” KRS 630.120(4). “Least restrictive alternative” is defined in KRS 600.020(35) 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 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[.]

While the court must impose the least restrictive method of treatment,

[w]hen 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 [C]abinet for such services as may be necessary.

KRS 630.120(6).

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

A court is, however, obligated to make specific findings addressing its conclusion that its disposition is the least restrictive alternative. *See X.B. v. Commonwealth*, 105 S.W.3d 459 (Ky. App. 2003). In *X.B.*, this Court vacated a commitment to the Department of Juvenile Justice because the lower court did not affirmatively state why it felt commitment was the only recourse or what less restrictive alternatives had been tried. Specifically, this Court stated that “[h]ad the record clearly indicated that X.B. had been before the court on previous occasions and that the court had attempted lesser restrictive alternatives, then the result herein may have been different.” *Id.* at 461 n.3.

Unlike in *X.B.*, the family court in this case noted that it considered all of A.M.’s options, but that the only way to keep A.M. safe and away from gang influence was to commit A.M. to the Cabinet. Further, it is clear from reviewing the dispositional hearing that the family court considered the dispositional report, the alternative dispositional report submitted by A.M.’s counsel, arguments made by counsel at the dispositional hearing, as well as comments made by A.M.’s mother. Accordingly, the record shows that the family court reviewed the appropriate resources and, after doing so, determined that commitment to the Cabinet was the most appropriate way to adequately address the needs of A.M. Thus, we cannot say that the family court’s determination to commit A.M. to the Cabinet was clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Family Court is affirmed.

ALL CONCUR.

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