RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002272-ME

C.R. (A CHILD UNDER EIGHTEEN) APPELLANT

APPEAL FROM WEBSTER CIRCUIT COURT
FAMILY DIVISION
v. HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 09-J-00078

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: C.R., a juvenile, appeals from an adjudication in the Webster Family Court finding him guilty of contempt and committing him to custody of the Cabinet. Following our review, we vacate and remand.

C.R.'s mother filed a petition alleging that he was beyond control, a status offense. C.R. had not been attending school and had failed two drug tests. On November 23, 2009, C.R. and his mother appeared in Webster Family Court for his

arraignment. The family court explained to C.R. that if he denied the allegations in the petition, he would receive a hearing at which he would be entitled to: representation by counsel; the right to remain silent; cross-examination of witnesses; and the right to appeal. The court then issued a juvenile status offender order, mandating C.R. to follow several rules of good behavior and setting the adjudication date.

On December 7, 2009, C.R. and his mother appeared in court along with counsel for C.R.'s adjudication. The court swore in C.R. and his mother. C.R.'s attorney told the court that C.R. wanted to admit the allegation in the petition that he was beyond control. The court reviewed the good behavior terms enumerated in the previous order and reminded C.R. that if he violated any of the terms, he could be held in contempt and possibly be remanded to detention. The court did not review any of C.R.'s rights when it accepted his admission.

On January 4, 2010, C.R. again appeared in family court for his disposition. The Cabinet presented a pre-disposition report, and the court ordered C.R. to follow the good-behavior guidelines in the original order and again advised him that if he violated them, he would be subject to punishment for contempt -- possibly including detention.

On April 9, 2010, C.R. appeared in court as a result of a motion to hold him in contempt. He had been involved in a car accident, and there was evidence that he had been drinking alcohol. One of the guidelines in the court order explicitly prohibited C.R. from using alcohol. He admitted to the violation, and the court

sentenced him to serving thirty days in detention. The court probated twenty-eight of the days, and C.R. served two days during the weekend following his court appearance.

On June 21, 2010, C.R. again appeared in court to respond to a motion for contempt. The Commonwealth asked the court to revoke C.R.'s probation. C.R. admitted to the violation, and the court imposed a penalty of two days served in detention, probating the new balance of twenty-six days.

On November 8, 2010, C.R. admitted to a third motion of contempt, acknowledging that a potential consequence was detention. At the disposition that followed on November 15, 2010, the court committed C.R. to the Cabinet for Health and Family Services (the Cabinet). The court stated that it did not have any choice other than commitment to the Cabinet since C.R. had violated the order multiple times. This appeal follows.

C.R. argues that his admission to being in contempt was improperly accepted by the trial court. C.R. admits that the error was not preserved and asks us to examine the issue for palpable error according to Kentucky Rule(s) of Criminal Procedure (RCr) 10.26. The rule defines *palpable error* as one that has affected the substantial rights of a party, resulting in manifest injustice. A palpable error is one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997).

Although C.R.'s brief primarily contends that the admission to contempt is improper, we must also examine the underlying admission to being a status

offender in order to correctly analyze the latter plea. Kentucky Revised Statute[s] (KRS) 610.010(11) authorizes the court to hold "a child in contempt of court to enforce **valid court orders** previously issued by the court[.]" (Emphasis added). KRS 600.020(61)(d) defines a *valid court order* in part as being one issued to a child "[w]ho received, before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States."

Due process demands that in order to be valid, a guilty plea:

> must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. . . . 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.

Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky. 1990) (citations omitted). Courts ensure that defendants' pleas are voluntary by engaging in "an affirmative showing, on the record, that a guilty plea is voluntary and intelligent." *Boykin v. Alabama*, 395 U.S. 238, 241-42, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). This discussion between the court and the defendant ascertains that the defendant has a clear mind, understands his other options, understands the waiver of his rights, and is satisfied with the representation provided by his counsel. Upon review, we must examine the totality of circumstances surrounding the plea. *Centers, supra*. (citations omitted). In addition to the colloquy, those circumstances include the defendant's demeanor, background, and experience. *D.R. v. Commonwealth*, 64 S.W.3d 292, 294 (Ky. App. 2001).

Our courts have acknowledged that because of their minority status, children should be granted a heightened assurance of the protection of their constitutional rights within the justice system. *Humphrey v. Commonwealth*, 153 S.W.3d 854, 858-59 (Ky. App. 2004). Guilty pleas are of special concern because they inherently include the waiver of several constitutional rights. *D.R.*, *supra*. Therefore, a trial court may not accept a guilty plea from a juvenile without carefully informing the juvenile of the rights that he is waiving. *Kozak v. Commonwealth*, 279 S.W.3d 129, 134 (Ky. 2008).

The *Boykin* colloquy is required to take place at the time that the court accepts the juvenile's admission. *N.K. v. Commonwealth*, 324 S.W.3d 438, 443 (Ky. App. 2010). This court previously has vacated an admission of guilt by a juvenile based on the failure of the trial court to explain the consequences of the admission prior to accepting it. *D.R., supra*.

We are persuaded that neither C.R.'s initial admission of being out of control nor his admission of contempt was properly taken by the trial court. At C.R.'s arraignment, the court explained what rights would be exercised if he had a hearing. However, at no time during any of C.R.'s admissions did the court ascertain that C.R. made his admissions voluntarily. Nor did the court explain the important rights being waived by the act of admission.

C.R. was not experienced in the judicial system; he was fifteen years of age and was engaged in his first dealings with the court system. At the adjudication for his original plea, C.R. looked to his attorney for assistance when the court asked if

he wished to admit to the offense. His attorney counseled him to make an admission if he did not want to go through a hearing. Upon that advice alone, C.R. made his admission to the court. The court did not ask C.R. any questions concerning his state of mind or his understanding of the implications of his admission.

We cannot conclude that C.R. received due process; *i.e.*, that he entered a voluntary and intelligent plea. We agree that the court committed palpable error (as is contemplated by RCr 10.26) by failing to engage C.R. in a meaningful discussion about his admissions **at every point** in the proceedings. Therefore, we hold that the underlying order is invalid and that the admissions of contempt were improperly entered. We vacate the family court's finding of contempt and its order of commitment to the Cabinet as well as its initial determination of C.R.'s being beyond control.

C.R. has raised a final argument that merits discussion. He contends that the court erred when it committed him to the Cabinet instead of finding a less restrictive alternative.

KRS 600.010(2)(c) provides that "the court shall show that other less restrictive alternatives have been attempted or are not feasible" before it removes a child from his family. In this case, the court stated that in the course of one year, C.R. had already been subject to three motions for contempt in response to which less restrictive alternatives were utilized. Therefore, it did not believe that it had any choice beside commitment to the Cabinet.

We have closely examined the record, which reveals that throughout C.R.'s interaction with the court, the court consistently reminded C.R. that detention would be a possible consequence if he violated the terms of his juvenile status offense order. By his habitual violation of the order, C R. demonstrated that a less restrictive alternative was ineffective in curbing his behavior. Therefore, we cannot hold that the court erred in this respect.

To reiterate, we hold that as a juvenile, C.R. did not receive full due process, that his admissions of guilt were improperly entered, and that the underlying order of contempt is invalid. Therefore, the order is vacated, and this matter is remanded to the Webster Family Court.

KELLER, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I fully concur with the majority's excellent opinion. It is, I believe, an unquestionably correct result.

And yet, this correct resolution leaves us all with an important, and as yet unanswered question. It is not a question of any consequence to our jurisprudence. But how it is answered is of great consequence to everyone who cares about C.R. The question is this – how will C.R. understand this decision?

Will C.R. consider this opinion a victory? Will he believe he has "beaten the rap" by a technicality? If so, C.R. will enjoy no benefit at all. The odds will be good that C.R.'s first dealings with the court system will not be his last. C.R.'s victory will prove to be a sham and everyone, particularly C.R., will be a loser.

But C.R. is old enough and wise enough, I believe, to see that this opinion presents him with a fresh start, a clean slate. He has flirted with incarceration and separation for anything he thought of as good in his life; he has stood on the brink of a different and dark future of less possibility, less hope, and less love. He now can turn his back on that abyss. That is the opportunity we present to him by this opinion. But whether to embrace this opportunity or to reject it is his choice, not ours.

BRIEF FOR APPELLANT:

Dawn Fesmier
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky