

RENDERED: AUGUST 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001651-ME

E.M., A CHILD UNDER
THE AGE OF EIGHTEEN

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 09-J-01945

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: E.M., a child under the age of eighteen, brings this appeal from June 22, 2011, and August 18, 2011, orders of the Fayette Circuit Court, Family Court Division, adjudicating E.M. to be beyond control of school in violation of Kentucky Revised Statutes (KRS) 630.020(2) and in contempt of court. We affirm.

On November 12, 2010, a juvenile complaint was filed against E.M. alleging that she was beyond control of school in violation of KRS 630.020(2). Violation of this statute by a juvenile is classified as a status offense. KRS 610.010(4). The complaint was filed by Mark Sellers, Director of Martin Luther King Academy (MLKA), where E.M. was a student. Therein, it was specifically alleged that E.M.:

is beyond control in that she refuse[s] to follow directions of school officials, she is defiant, unruly, out of control with her behavior and disrespectful. [E.M.] refuses to work, and obey staff. She often use[s] profanity when speaking, she is aggressive towards other students and has attempted to get other students to fight her. Her behavior has escalated to the point she refuses to obey staff's direction.

A Behavior Detail Report (Report) was attached to the complaint. The Report outlined the specific incidents involving E.M. at MLKA. In the Report, it states that on October 15, 2010, E.M. engaged in disruptive behavior by becoming aggressive toward another female student, repeatedly used profanity and threats, and pushed a teacher in an attempt to fight the student. On October 18, 2010, the Report further revealed that E.M. again used profanity, but this time she directed the profanity toward a teacher. Then, in a separate incident the same day, E.M. refused a teacher's directive to turn over a sharp object and instead threw the object in the trash. The Report also set forth that on October 20, 2010, E.M. engaged in absolute defiance of a teacher and proceeded to verbally defy the teacher. And, on October 22, 2010, E.M. again refused to obey a teacher and used

profanity. The Report also outlined the intervention strategy utilized by MLKA. The Report indicated that each incident led to E.M. being sent to S.A.F.E. – an alternative learning classroom within the school.

Based upon the complaint, E.M. appeared before the family court, and on November 18, 2010, a juvenile status offender order was entered. Relevant to this appeal, the November 18, 2010, order specifically directed E.M. to attend school with “no behavior problems” and “to violate no law.” The case was scheduled for a pretrial conference on December 9, 2010. At the time of the pretrial conference, E.M. had been admitted to a mental health treatment facility, so the matter was continued on the court’s docket. On February 10, 2011, E.M. appeared in family court and reported that she had been released from the mental health facility. At that time, Sellers reported that E.M. was re-enrolled at MLKA. The Commonwealth agreed to place the case under “further investigation” while E.M. attempted to utilize the support services recommended to her.

On April 7, 2011, E.M. was before the family court for a “review.” It was then reported that E.M. had assaulted a teacher and was charged with a public offense for such assault. The family court scheduled a pretrial conference and informed E.M. that the terms of the November 18, 2010, court order remained in effect. E.M. was provided a copy of that order, which terms included that she have “no problems at school” and that she “violate no law.” On May 19, 2011, E.M. requested that the pretrial conference be continued. On June 2, 2011, E.M. again appeared before the court. Sellers reported at that hearing that on May 23, 2011,

E.M. was involved in another behavior incident at school. Sellers also filed an updated Report outlining E.M.'s behavior problems. The court granted another continuance at E.M.'s request and again reminded E.M. that she was subject to the terms of the November 18, 2010, order.

On June 9, 2011, E.M. was before the family court for a pretrial conference on the status offense of beyond control of school. Additionally, E.M. was given notice that she also faced contempt of court for violating the court's November 18, 2010, order by engaging in problematic behavior at school on May 23, 2011. Subsequently, the family court conducted a final adjudication hearing on both the status offense of beyond control of school and upon contempt of court for violating the November 18, 2010, order. By order entered June 22, 2011, the family court adjudicated E.M. to be beyond control of school and to be in contempt of court. This appeal follows.

E.M. initially contends that the family court did not possess subject matter jurisdiction to adjudicate the status offense of beyond control of school. More specifically, E.M. asserts the "requirement [in KRS 600.020(4)] that the school attach documentation listing 'all intervention strategies' to the juvenile complaint is a prerequisite for the [f]amily court to have subject matter jurisdiction over the case." E.M.'s Brief at 6. E.M. argues that the complaint alleging she was beyond control of school did not include such documentation and was in violation of KRS 600.020(4). E.M. maintains that the deficient complaint effectively deprives the family court of subject matter jurisdiction and cites *B.H. v. Commonwealth*, 329

S.W.3d 360 (Ky. App. 2010) as support. For the foregoing reasons, we disagree and believe the complaint complied with the mandates of KRS 600.020(4).

KRS 600.020 is contained in the Unified Juvenile Code (UJC), and KRS 600.020(4) specifically defines “Beyond the Control of School” as:

any child who has been found by the court to have repeatedly violated the lawful regulations for the government of the school as provided in [KRS 158.150](#), and as documented in writing by the school as a part of the school's petition or as an attachment to the school's petition. The petition or attachment shall describe the student's behavior and all intervention strategies attempted by the school[.]

KRS 600.020(4).

In this case, we do not need to reach the issue of whether failure to document a student’s behavior and the school’s interventional strategies results in a statutorily deficient complaint. Here, the record reveals that written documentation was attached to the complaint outlining E.M.’s problem behavior and the intervention strategies employed by MLKA. As hereinbefore pointed out, a Report was attached to the Complaint, and this Report described each of the incidents involving E.M. and MLKA’s intervention strategy. Upon review of the record, we are of the opinion that the complaint satisfied the requirements of KRS 600.020(4) by the inclusion of the Report. Thus, the family court was not deprived of subject matter jurisdiction.

Next, E.M. maintains that she was denied the right to a fair trial and the right to confront witnesses because “all of the evidence introduced during the

adjudication hearing . . . was impermissible hearsay evidence or was not properly introduced at trial.” E.M.’s Brief at 13. Thus, E.M. argues that the evidence was insufficient to support the family court’s adjudication that she was beyond control of school or in contempt of court for violating the court’s November 18, 2010, order. Under KRS 600.020(4) and KRS 610.010(2)(a), a child is beyond control of school when she “repeatedly violate[s] the lawful regulations for the government of the school as provided in KRS 158.150.” KRS 158.150 provides, in relevant part:

(1) All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools:

(a) Willful disobedience or defiance of the authority of the teachers or administrators, use of profanity or vulgarity, assault or battery or abuse of other students, the threat of force or violence, the use or possession of alcohol or drugs, stealing or destruction or defacing of school property or personal property of students, the carrying or use of weapons or dangerous instruments, or other incorrigible bad conduct on school property, as well as off school property at school-sponsored activities, constitutes cause for suspension or expulsion from school; and

(b) Assault or battery or abuse of school personnel; stealing or willfully or wantonly defacing, destroying, or damaging the personal property of school personnel on school property, off school property, or at school-sponsored activities constitutes cause for suspension or expulsion from school.

In this case, the record reveals that Sellers, the Director of MLKA, Joseph DeSpain, Behavior Curriculum Specialist for MKLA, and Jennifer Hatton, a social worker with the Cabinet, testified on behalf of the Commonwealth. Sellers testified that he was familiar with E.M. Sellers stated that E.M. returned to MLKA in October of 2010 after starting the 2010-2011 school year at another facility. Upon her return, E.M. immediately began to exhibit problem behavior. Sellers testified that the problem behavior detailed in the Report led to filing the beyond control of school petition. DeSpain, also testified that he was familiar with E.M. DeSpain described the events that were identified in the Report attached to the petition and the extent of his involvement in each incident. DeSpain explained that although he was not present during some of the incidents, he conducted an investigation into each incident and prepared the Report including MLKA's intervention strategy.

Based upon the above, we think the evidence was more than sufficient to support the family court finding that E.M. was beyond control of school. Moreover, E.M. had the opportunity to cross-examine Sellers, DeSpain, and Hatton at the final hearing, and E.M. failed to object to any evidence as inadmissible hearsay. Upon the whole, we are of the opinion that E.M. was not deprived of her constitutional right to cross-examine witnesses or to a fair trial.

E.M. next contends that the circuit court erred by improperly admitting evidence of E.M.'s prior juvenile status offense. E.M. argues that this evidence constituted "prior bad acts" and was inadmissible per Kentucky Rule of

Evidence (KRE) 404(b). E.M. specifically asserts that the Commonwealth's first witness, Sellers, discussed E.M.'s prior beyond control of school petition in violation of KRE 404(b).

Upon direct examination, Sellers was questioned as to when the present beyond control of school complaint was filed. Sellers was attempting to recall the time frame and responded: "There was one before and I think [E.M.] had left the county and then came back." Sellers did not testify regarding the allegations supporting the earlier complaint or the court's disposition of the complaint.

In this case, the Commonwealth did not intentionally illicit testimony from Sellers regarding a previous status offense complaint. Sellers was merely attempting to answer the question regarding when the beyond control complaint was filed. Even if Sellers' testimony was improper as evidence of "prior bad acts," we do not believe such testimony prejudiced E.M. The family court judge was familiar with E.M. as he had presided over E.M.'s prior status offense proceedings. The judge's familiarity with the child, the child's particular circumstances, and the child's history conforms with the intent of the legislature when it placed status offenses under the jurisdiction of the family court with its goal of "one-family one-judge." Upon the whole, we conclude that any error by the family court in failing to exclude Sellers' remark to be harmless error at best. Kentucky Rules of Civil Procedure 61.01.

For the foregoing reasons, the disposition order of the Fayette Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Renee VandenWallBake
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Elizabeth G. Messer
Special Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

Elizabeth G. Messer
Special Assistant Attorney General
Frankfort, Kentucky