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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000310-DG

R.B., A CHILD UNDER EIGHTEEN APPELLANT

v.

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-XX-00014

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: R.B., a child under eighteen, brings this appeal from a January 17, 2012, Opinion and Order of the Fayette Circuit Court affirming an order of the Fayette District Court to commit R.B. to the custody of the Department of Juvenile Justice (DJJ) as a public offender. We affirm.

On November 8, 2010, the victim, a fifteen-year-old girl, alleged that R.B. forced her to have sex with him by threatening her with a handgun. On that same day, R.B. was arrested and eventually led police to a .25 caliber handgun he had hidden. R.B. admitted to having sex with the victim but maintained that such sex was consensual. As a result of the incident, appellant was charged with first-degree rape.

The Commonwealth initially indicated that it would proceed against R.B. as a youthful offender under Kentucky Revised Statutes (KRS) 640.010 and sought to have the matter transferred from district court to circuit court under KRS 635.020(2). Prior to transfer, the Commonwealth and R.B. reached a plea bargain. Pursuant thereto, the Commonwealth amended the first-degree felony rape charge to two misdemeanor charges – possession of a handgun by a minor and sexual misconduct – and agreed not to seek transfer of R.B. as a youthful offender. In exchange, R.B. agreed to plead guilty to the two misdemeanor charges. There was apparently no agreement as to R.B.'s ultimate disposition but rather disposition was left to the district court.

At the dispositional hearing, the parties stipulated that R.B.'s I.Q. tested below 70. R.B. argued that his low I.Q. rendered him ineligible for commitment to DJJ as a public offender. Instead, R.B. urged the district court to impose the less-restrictive alternative of probation, volunteer work, and mental-health counseling.

By dispositional order entered March 3, 2011, the district court determined that R.B. was a public offender and found that there was no less restrictive alternative to committing R.B. to the DJJ. R.B. undertook a direct appeal (No. 11-XX-00014) to the Fayette Circuit Court. By Opinion and Order entered January 17, 2012, the circuit court affirmed the March 3, 2011, dispositional order of the district court. R.B. subsequently filed a motion for discretionary review in the Court of Appeals on February 15, 2012. Kentucky Rules of Civil Procedure (CR) 76.20. By order entered May 11, 2012, the Court of Appeals granted discretionary review, and our review follows.

R.B. contends that the district court erred by committing him as a public offender to the DJJ. R.B. cites this Court to the stipulated fact that he is considered "mentally retarded" because of an I.Q. below 70 pursuant to KRS 635.505(4).[1] As a mentally retarded juvenile, R.B. points out that he is ineligible to be classified as a juvenile sexual offender by legislative directive in KRS 635.505(2) and (4).[2] R.B. argues that his low I.Q. should, likewise, render him

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[1] Kentucky Revised Statutes (KRS) 635.505 was amended effective July 13, 2012. In its amended form, KRS 635.505 no longer uses the term "mentally retarded;" however, the pre-amended version is controlling in this case.

[2] KRS 635.505 states, in relevant part:

> (2) A "juvenile sexual offender" as used in this chapter means an individual who was at the time of the commission of the offense under the age of eighteen (18) years who is not actively psychotic or mentally retarded . . . .
>
> . . . .
>
> (4) "Mentally retarded" as used in this section means a juvenile with a full scale intelligent quotient of seventy (70) or below.

ineligible to be considered a public offender and committed to the DJJ. In particular, R.B. maintains:

> Trial counsel said that "[i]f his IQ is too low for commitment for one program, it should be too low for another program[.]" It is important to note that before a child may be released from DJJ placement, he or she must successfully complete an "Individual Treatment Plan[.]" Such plans have fourteen (14) different areas of consideration, and their content is to include: "problem statements, short-term goals, long-term goals, and delineate areas of responsibility of the youth and staff." To expect a child whose IQ, at best, must be below 70, to be able to complete such a complex program in the same time frame as his age-similar peers, or even to be able to complete it before "aging out" upon reaching age eighteen (18), is to place an unfair burden on such child.
>
> Such shackling of a child within an inescapable cage whose very bars are the limits of his own feeble mind is undoubtedly the sort of cruel and unusual punishment prohibited by the Eighth Amendment of the U.S. Constitution and Section Seventeen of the Kentucky Constitution.

R.B.'s Brief at 6-7 (citations omitted). Essentially, R.B. asserts that committing him to the DJJ as a public offender is contrary to legislative intent behind the Unified Juvenile Code and amounts to cruel and unusual punishment violative of the Eighth Amendment to the United States Constitution. We address each seriatim.

It is uncontroverted that the General Assembly disqualified mentally retarded juveniles from being considered juvenile sexual offenders. KRS 635.505(2) and (4) are clear and unambiguous that a juvenile with an I.Q. below 70 may not be considered a juvenile sexual offender. However, the General

Assembly placed no similar I.Q. limitation on a juvenile being considered a public offender. KRS 600.020(47);[3] KRS 635.020; KRS 635.025; KRS 635.060(3). And, we are unwilling to insert such an I.Q. limitation in the absence of specific statutory language so providing. *See Com. v. Allen*, 980 S.W.2d 278 (Ky. 1998). Hence, we conclude that R.B.'s low I.Q. does not exempt him from being a public offender.

As to R.B.'s next assertion, it is well-established that the Eighth Amendment requires "that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. U.S.*, 217 U.S. 349, 367 (1910)). To determine if the punishment is proportioned to the crime, the court must consider the standards that currently prevail in society. *Atkins*, 536 U.S. 304.

To prevail upon his claim of cruel and unusual punishment, R.B. alleges that his low I.Q. renders him unable to successfully complete an individual treatment plan while committed to the DJJ. However, R.B. fails to provide any specific details or proof upon how his low I.Q. would adversely affect his ability to successfully complete an individual treatment plan once committed to the DJJ. He merely advances general allegations. Additionally, the facts underlying R.B.'s public offense indicate that he possessed a handgun and threatened a fifteen-year-old victim into having non-consensual sex on a playground. Considering the societal standards in relation to R.B.'s punishment, we do not believe that R.B.'s

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[3] KRS 600.020 was amended effective July 12, 2012; however, the pre-amended version is applicable herein.

commitment to the DJJ as a public offender amounted to cruel and unusual punishment in contravention to the Eighth Amendment of the United States Constitution.

R.B. next asserts that commitment to the DJJ as a public offender was not the least restrictive alternative available to the district court; thus, the district court violated KRS 600.010(2)(c). R.B. argues that his commitment to the DJJ was "unnecessary and unduly harsh." R.B.'s Brief at 11. Instead, R.B. believes that the district court should have placed him on probation and allowed him to receive mental health treatment while probated.

An overriding consideration throughout the Unified Juvenile Code is that every 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). In determining the "least restrictive alternative," the Kentucky legislature provided the following definition:

> "Least restrictive alternative" means, except for purposes of KRS Chapter 645, 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[.]

KRS 600.020(35). And, on appellate review, the Court of Appeals will not reverse a decision as to the least restrictive alternative if substantial evidence supports a finding that either:

> (1) [A]ll less restrictive alternatives were attempted, or
> (2) no feasible alternative to commitment existed.

J.S. v. Com., 304 S.W.3d 67, 70 (Ky. App. 2009).

In this case, the district court determined that R.B.'s commitment to the DJJ as a public offender was the least restrictive alternative for R.B., and the evidence of record overwhelmingly supports same. Specifically, evidence was introduced showing that R.B. had a long history of behavior problems at school and home. These behavior problems included physical and verbal aggression and disruptive behavior. To remedy such behavior problems, R.B. was previously placed at Sunrise Foster Care, put on home detention, and ordered to cooperate with in-home mental-health services. In fact, R.B. was on electric monitoring imposed by the family court when the current incident occurred on November 8, 2010.

Considering the whole of the record, there is substantial evidence to support the finding that no feasible alternative to commitment existed for R.B. Accordingly, we conclude that the district court did not erroneously decide that commitment of R.B. to the DJJ as a public offender was the least restrictive alternative.

For the foregoing reasons, the Opinion and Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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