

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000385-ME

B. H., A JUVENILE

APPELLANT

v. APPEAL FROM BULLITT JUVENILE COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 12-J-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND MOORE, JUDGES.

MOORE, JUDGE: B. H., a minor, appeals the Bullitt Juvenile Court's order placing her in the temporary custody of the Cabinet for Health and Family Services ("Cabinet"). After a careful review of the record, we affirm because the Standard School Attendance Order was a valid court order and the court did not err in placing B. H. in the temporary custody of the Cabinet.

I. FACTUAL AND PROCEDURAL BACKGROUND

B. H.'s mother filed a status/public offender petition against B. H. alleging that she was beyond control of her parent. The mother contended, in pertinent part, as follows:

[T]he . . . juvenile is consistently punching holes in the walls breaking anything in reach; cussing parents and siblings and throwing things. The affiant states that the police have been called on [B. H.] several times. The affiant states that the homelife is not healthy due to [B. H.'s] behavior. . . . The affiant states that [B. H.] does not help with anything around the house. The affiant states that her youngest daughter is on medication for migraines due to the stress from the above juvenile. The affiant states that the above juvenile [does not] think she needs to be held accountable for her actions. . . . The affiant states that she will not get up to go to school and it is a fight every morning. The affiant states that she bought her an alarm clock and she demolished it [three] days later during one of her rages.

Included in the record is an unsuccessful diversion agreement dated approximately three weeks prior to the date the beyond control petition was filed in this case. The unsuccessful diversion agreement, which was signed by a court designated worker, states that “[m]om advised me that after meeting with me on 1/11/12 [B. H.] has not been going to school and as part of her diversion she is to go to school every day.” It also states that “[m]om has had to contact law enforcement to assist her in getting [B. H.] to school.”

At B. H.'s arraignment, she entered a "not true" plea. She was ordered to follow the "house rules" (submitted by her mother)¹ and the Standard School Attendance Order (SSAO) entered by the court. B. H.'s mother was ordered to take B. H. to the Department of Public Advocacy's office before court. The Cabinet was ordered to open a case for the purpose of "service linkage." The SSAO, directed at B. H., provided as follows:

Effective 2/29/12, until further order of this Court or until the jurisdiction of this Court ceases, whichever comes first, you are hereby placed under the Standard School Attendance Order (SSAO) of the Bullitt District Court. Under this Order, you are subject to DETENTION for 1-30 days for any of the following infractions: Unexcused Absences or Tardies as determined by school officials; Bus, ISAP or Office Referrals; Suspensions; or Tobacco/Alcohol/Drug Violations.

If a violation of this order occurs, you will receive written notice to appear for a Contempt Hearing. At that hearing you are entitled to be represented by an attorney. If you or your parent(s)/guardian(s) cannot afford an attorney, you may apply to have the Public Defender appointed to represent you. If you wish to be represented by the Public Defender, you must fill out a written application with the District Court Clerk IMMEDIATELY upon receiving any Contempt Hearing notice. Your failure to appear with an attorney or to make timely application for appointment of the Public Defender, without good cause shown, shall not be grounds for a continuance.

Served upon the above juvenile in open court in the presence of his/her parent/guardian.

The SSAO was signed by B. H.'s mother and the court.

¹ The "house rules" for B. H. were as follows: Curfew at 8:00 p.m. on school nights and 10:00 p.m. on weekends; if B. H. does not attend school, she will be grounded from the computer, telephone, and any access to the outside world for that day; and when she is outside the home, B. H. must check in with her mother at least once per hour.

The Commonwealth filed a motion for contempt on the basis that B.H. failed to comply with the SSAO. In support thereof, the mother filed an affidavit stating B. H. had missed at least three days of school since the SSAO was entered, and B. H. had texted her multiple times one day stating very negative things, which was against the house rules. A hearing on the motion was scheduled, and the court ordered B. H. to be placed in the Cabinet's custody pending the hearing.

The court's order following the contempt hearing revealed that no one was present for the hearing; B. H. had a one-week pass with her mother; a show cause order was going to be issued for the mother; and the Cabinet was going to call the mother to tell her B. H. had to be returned to the Home of the Innocents that day. The show cause order was issued to the mother.

Another hearing was held, and the court noted that the Commonwealth had moved to remand. The court also wrote that the show cause hearing that had been scheduled was deleted because the mother had provided an appropriate reason for not attending the contempt hearing.

In July 2012, the Cabinet filed a report with the court stating a social worker had "received a settlement offer in the amount of \$200 from Kmart regarding [B. H.'s] theft of items from their store. At present time, it is unknown if those fees have been paid by [B. H.'s] mother." The report further noted another social worker was informed that B. H. had been "AWOL" during a home pass and later picked up by police. The social worker met with B. H. at the Home of the

Innocents and discussed “her previous behaviors, the importance of making positive choices and the rewards associated with them.” Since that time, the reports about B. H.’s behavior had been positive, and they had allowed her to earn weekend passes home. The Cabinet recommended in the report that the family continue to cooperate with the Cabinet and follow all court orders.

A review was conducted, and the Commonwealth moved to adopt the Cabinet’s recommendations from its report. The court did so, and also ordered that the child be returned to the custody of her mother. B. H. was also ordered to have no contact with two specific girls.

The Cabinet filed another report with the court stating that B. H. had been returned to her mother’s custody and a social worker met with the child and her mother and completed a case plan concerning the behavioral and educational expectations of B. H. while she was at home. The mother reported B. H.’s return home was going well and they were working together as a family. The Cabinet recommended the family continue to cooperate with the court and follow all previous orders. The court remanded the case.

In October 2012, the Commonwealth moved the court to find B. H. in contempt for her failure to comply with the SSAO. The Commonwealth alleged that B. H. had accumulated seven unexcused absences since she was placed on the SSAO on February 29, 2012.

Before its motion was ruled upon, the Commonwealth filed another motion for contempt against B. H. based upon her mother’s affidavit alleging that

B. H. initially did well when she was back in the mother's custody, but B. H.'s behavior had taken a turn for the worse. The mother attested that B. H. refused to go to school; she was very disrespectful of her mother when the mother tried to speak with her or asked her to do anything; and B. H. had photographs of herself on her Twitter account showing her passed out on a toilet while under the influence. The mother also testified in her affidavit that B. H. texted her saying she hates her mother and her mother is worthless, which B. H.'s mother alleged was "against the no negative contact order." The mother attested that B. H. repeatedly violated the house rules, refusing to return home on a school night and refusing to do household chores.

Another Cabinet report was filed with the court. It stated a social worker had received a telephone call from the mother informing the social worker that B. H. had refused to go to school; B. H. was returning to her "old, wild ways"; and B. H. had told her mother that she did not want to be good anymore. The mother told the social worker that B. H. was trying to quit school. The social worker spoke with B. H. and informed her of the consequences for not attending school and for exhibiting negative behaviors. B. H. told the social worker that she understood, but B. H. made no commitment to change her behavior. The Cabinet recommended in its report that B. H. attend school daily and on time; she complete a mental health assessment; she submit to random drug screens; the family continue to cooperate with the Cabinet; and the family to follow all court orders.

A contempt hearing was held. According to the written record, the Commonwealth recommended thirty days to serve. The court's notes from the hearing reflect that B. H. admitted having seven unexcused absences, being disrespectful to her mother and siblings, refusing to go to school, violating curfew, and having a picture of herself appearing to be passed out on a toilet. B. H. was found in contempt for violating the SSAO and house rules. She was ordered to serve two weeks on house arrest with no contact with friends other than at school, no Facebook or internet access, and no telephone or cellular telephone. The court also ordered that the child was to be accompanied by her mother if she were to leave the house other than to go to school.

Subsequently, the court noted B. H. had another half-day unexcused absence. The mother reported things were going well at home. The court ordered one week of restricted living was to be conditionally discharged on the basis that B. H. follows the rules.

In the Cabinet's next report to the court, it noted the social worker met with the mother to discuss B. H.'s progress. The mother reported the child had only two additional unexcused absences from school and her behavior had improved. The mother told the social worker that B. H. was much more pleasant to be around. The Cabinet recommended B. H. attend school daily and on time; B. H. follow all house rules; the family continue to cooperate with the Cabinet; and the family follow all court orders.

Following a review hearing, the court noted the child allegedly had six and one-half unexcused absences and was failing. The court also noted the Commonwealth would file a motion to hold B. H. in contempt.

The Commonwealth filed this motion. In support thereof, the Commonwealth attached the mother's affidavit stating B. H. was doing well until about December 20, 2012, when she began missing school again, going where she wanted and returning home when she wanted. B. H. was caught sneaking out of the house on one occasion. She was believed to have been under the influence of alcohol two or three times over the holiday break, and she was failing all of her classes. The Commonwealth also submitted an affidavit from Jennifer Williams, who was the Supervisor of Social Services with the Bullitt County Board of Education. Ms. Williams attested that since the last court date of November 14, 2012, B. H. had accumulated seven check-ins/outs, five unexcused absences, and failed six out of eight classes.

A contempt hearing was held, during which B. H. stipulated to being in contempt. The court ordered her to perform twenty-five hours of community service. The court's written notation in the record also states "30 days, serve 2 days from 6 p.m. Friday, 1/18/13 to 6 p.m. Sunday[,] 1/20/13."

A "Juvenile Detention Order for Status Offense" was entered, directing the detention of B. H. pursuant to

KRS^[2] 630.080, after a detention hearing wherein probable cause [was] established that a status offense

² Kentucky Revised Statute.

[was] committed and that the child committed the offense AND, in addition, probable cause [was] established that: the child [was] subject to a valid court order and the Court [found] that the child violated the valid Court order pursuant to the conditions of KRS 630.080(3)(a), (b), and (c).

In the Juvenile Detention Order for Status Offense, the court also found that “[c]ontinuation in the home [was] contrary to the welfare of the child [and r]easonable efforts were made to prevent the child’s removal from the home.” B. H. was ordered to be detained from January 18, 2013 at 6:00 p.m. until January 20, 2013 at 6:00 p.m. at “LVYDC”³ and thereafter released to her parent.

A review hearing was conducted almost a month later, on February 13, 2013. The court’s notes from the hearing reveal the Cabinet reported that B. H. refused to go to school and was not cooperating with her mother. B. H.’s school report was also bad, with ten and one-half unexcused absences since the date the Juvenile Detention Order for Status Offense was entered. The court noted the Commonwealth was to file a motion “to revoke 28 days as ordered on 1/16/2013 [and] possibly to place child in Cabinet care.”

The Commonwealth filed its motion for contempt with an affidavit from Jennifer Williams stating B. H. had accumulated ten and one-half unexcused absences since her last court date in January 2013. The affidavit further alleged B. H. was failing four out of her six classes.

³ There is no explanation provided to us for the meaning of this acronym, but we assume it is a detention facility.

The court thereafter entered a temporary custody order. The order stated that Jennifer Williams, B. H.'s mother, and a social worker who had worked with B. H. each testified either by affidavit or sworn testimony that the following was true: "There are no other services available on an in-home basis. Child refuses to cooperate even to the point of refusing to go to school for [a] planned meeting to deal with child's stated issues. Her conduct remains unchanged." The court found there were no allegations of dependency, neglect, abuse or mental illness which would require the provisions of either KRS 620 or KRS 645 to be followed. Based upon the affidavits or sworn testimony, the court found that B. H. was a danger to herself or to the community, and that "continuation in the home [was] not in the child's best interest." (Internal quotation marks removed). The court determined that reasonable efforts were made to prevent B. H.'s removal from her home and it ordered B. H. to be placed in the temporary custody of the Cabinet.

B. H. now appeals, contending that: (a) the trial court improperly held her in contempt because the SSAO was not a valid court order; (b) the trial court's placement of her on a charge of contempt was improper, as the penalty exceeded the consequences warned of in the original order; and (c) the trial court improperly placed B. H. in the temporary custody of the Cabinet.

II. ANALYSIS

A. VALIDITY OF SSAO

B. H. first alleges that the trial court improperly held her in contempt because the SSAO was not a valid court order. She acknowledges that this issue was not properly preserved, but she asks us to review it for palpable error pursuant to RCr⁴ 10.26. “A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” RCr 10.26.

B. H. argues that in order for the trial court to have found her in contempt, the SSAO had to be a “valid court order,” and she alleges that it was not. B. H. may be held in contempt of court if she violated “valid court orders previously issued by the court.” KRS 610.010(11). A “valid court order” is defined as:

[A] court order issued by a judge to a child alleged or found to be a status offender:

- (a) Who was brought before the court and made subject to the order;
- (b) Whose future conduct was regulated by the order;
- (c) Who was given written and verbal warning of the consequences of the violation of the order at the time the order was issued and whose attorney or parent or legal guardian was also provided with a written notice of the consequences of violation of the order, which notification is reflected in the record of the court proceedings; and
- (d) Who received, before the issuance of the order, the full due process rights guaranteed by the Constitution of the United States.

⁴ Kentucky Rule of Criminal Procedure.

KRS 600.020(64). B. H. specifically claims KRS 600.020(64)(d) was not met and, therefore, the SSAO was not a valid court order. She further contends the SSAO was based solely on allegations against her, and not upon factual findings by the trial court.

B. H. is incorrect because the SSAO in the present case was a valid court order. The SSAO was entered after B. H. was initially brought into court for her arraignment on the beyond control of parent charge⁵ and entered a plea of “not true.” B. H. was made subject to the SSAO. The SSAO regulated her future conduct in that it provided she would be subject to between one and thirty days of detention for any of the following infractions: “Unexcused Absences or Tardies as determined by school officials; Bus, ISAP or Office Referrals; Suspensions; or Tobacco/Alcohol/Drug Violations.” It also provided that if a violation of the SSAO occurred, B. H. would receive written notice to appear for a contempt hearing, in which she would be entitled to be represented by an attorney. The SSAO further informed B. H. that her “failure to appear with an attorney or to make timely application for appointment of the Public Defender, without good cause shown, [would] not be grounds for a continuance.” The SSAO stated that it was “[s]erved upon the above juvenile in open court in the presence of his/her parent/guardian.” It was signed by B. H.’s mother and the court.

⁵ In their appellate briefs, the parties at times refer to B. H.’s charge of “beyond control of parent” as “Trailer 001,” to distinguish it from other proceedings in the trial court concerning a charge of “habitual truancy” that was later brought against B. H., which they refer to as “Trailer 002.” However, the habitual truancy, or “Trailer 002” charge and proceedings, are not before us at this time and they are not part of the record before us. Therefore, we will not consider the habitual truancy charge and proceedings.

Further, during her arraignment hearing, B. H. was represented by counsel and the court informed B. H. that if she violated the SSAO order, she could receive detention, and she would have to appear for a contempt hearing. The court explained to B. H. that if it found her in contempt, she would be punished accordingly, *e.g.*, by ordering her to perform community service, write an essay, or be detained in a juvenile detention facility, depending upon the severity of her violation. A copy of the written SSAO, which informed B. H. that if she violated the order she could receive one to thirty days of detention, was given to B. H. during the hearing.

Consequently, despite B. H.'s argument to the contrary, she received the "full due process rights" owed to her at that stage of the proceedings, *i.e.*, at her arraignment. B. H. cites our opinion in *M. A. M. v. Commonwealth*, 402 S.W.3d 546 (Ky. App. 2013), for the proposition that when a status offender order is based solely on allegations, the order is not a valid court order because the child has not received his full due process rights before the order is entered. However, B. H.'s case is distinguishable from *M. A. M.* Also, B. H. misunderstands our decision in *M. A. M.*, and we take this opportunity to clarify it.⁶

In *M. A. M.*, the juvenile was ordered and treated as though he was a status offender without first being found to be a status offender. This resulted in various procedural problems that were specific to that case.

⁶ As discussed, the facts in *M. A. M.* made it improper for the court to rely solely on allegations as a basis for the JSOO in that case. Although this case is distinguishable from *M.A.M.*, we nonetheless pause to take this opportunity to clarify that where we used the phrase "based solely on allegations" in *M. A. M.*, that phrase is limited to the unique facts of that case. We are obviously bound to apply the law as written by the legislature.

However, in B. H.'s case, she was brought into court on a beyond control of parent petition. At her arraignment, during which a plea of "not true" was entered, the SSAO was entered merely in an attempt to ensure that she attend school and stay out of trouble while at school and on the school bus. It was not entered as though B. H. had already been found to be beyond control of her parent. Therefore, because B. H. received the full due process rights to which she was entitled at that stage of the proceedings, the SSAO was a valid court order, and the trial court did not err in finding her in contempt for violating it.

Moreover, the SSAO was a pre-trial order, and because B. H. has not been adjudicated on her beyond control of parent charge, the pre-trial order remains in effect. The trial court properly found her in contempt for violating the pre-trial order because B. H. was warned of the consequences for violating the SSAO, yet evidence was introduced to show, and the court found, that she nevertheless violated it. Therefore, this claim is without merit.

B. PLACEMENT OF CHILD

B. H. next contends that the trial court's placement of her in the temporary custody of the Cabinet based upon a charge of contempt was improper, as the penalty exceeded the consequences warned of in the original order.

However, her argument is misplaced.

If it appears to the court, by affidavit or by sworn testimony, that the child is a danger to himself or the community, or is in such condition or surroundings that his welfare is being harmed or threatened with harm to such a degree that his best interest requires that his

custody be immediately changed by the court from the original custodian to another, the judge may sign an order giving temporary custody of the child to a suitable custodian consenting to temporary custody. . . . The temporary custody order shall be effective until the case is heard on its merits or until modified by the court. As a result of such order, the child shall be placed in custody and care in a home or other suitable facility.

KRS 610.050.

In its temporary custody order in this case, the court found that a social worker, B. H.'s mother, and Jennifer Williams "testified by affidavit or sworn testimony that the following facts are true: There are no other services available on an in-home basis. Child refuses to co-operate even to the point of refusing to go to school for planned meeting to deal with child's stated issues. Her conduct remains unchanged." The court concluded that B. H. was "a danger to . . . herself or to the community, and that 'continuation in the home [was] not in the child's best interest.'"⁷ It further noted that it found reasonable efforts had been made to prevent B. H.'s removal from her home. The court granted temporary custody of the child to the Cabinet.

We note that, pursuant to KRS 610.050, a child does not have to be found in contempt for violating a valid court order before being placed in the Cabinet's temporary custody. Rather, the court merely has to find, based upon affidavit or sworn testimony, that "the child is a danger to himself or the

⁷ We pause to note that during the hearing upon which this order was based, B. H.'s mother attested that B. H. used to be a good student, but that her attendance and grades worsened after B. H.'s friend committed suicide. The mother testified that on the days B. H. does not attend school, the mother comes home from work in the mid-to-late afternoon to find B. H. still in bed. The court noted that this hearing was the first time it had heard that B. H.'s friend had committed suicide.

community, or is in such condition or surroundings that his welfare is being harmed or threatened with harm to such a degree that his best interest requires that his custody be immediately changed by the court.” KRS 610.050. There need not be a finding of contempt in order to place the child in the Cabinet’s temporary custody under KRS 610.050.

In fact, that is precisely what transpired in this case. During the hearing, the court noted that pursuant to KRS 610.050, it could place B. H. in Cabinet care without sanctioning her for contempt. The court stated that that was what it was going to do – it was going to reserve the sanction for contempt, yet place B. H. in the temporary custody of the Cabinet in accord with KRS 610.050. Thus, B. H.’s argument that the trial court improperly placed her in the Cabinet’s custody based upon her contempt is misplaced because the court did not place her in the Cabinet’s custody based upon contempt. Further, the court in the present case made the required findings pursuant to KRS 610.050 before placing B. H. in the temporary custody of the Cabinet.

B. H. asserts that the court could not place her in the Cabinet’s temporary custody because it had already heard the contempt allegation on its merits; this argument, however, is also misplaced. Pursuant to KRS 610.050, a “temporary custody order shall be effective until the case is heard on its merits or until modified by the court.” Because B. H.’s beyond control of parent charge has yet to be adjudicated, B. H.’s case has not been heard on its merits. Consequently, this claim lacks merit.

C. TEMPORARY CUSTODY

Finally, B. H. argues that the trial court improperly placed her in the temporary custody of the Cabinet. However, as we noted above, the court made the requisite findings pursuant to KRS 610.050 before placing B. H. in the Cabinet's temporary custody. Therefore, this claim lacks merit.

Accordingly, the order of the Bullitt Juvenile Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Wampler
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Monica Meredith Robinson
Bullitt County Attorney
Shepherdsville, Kentucky

Shelly Alvey
Special Assistant Attorney General &
Assistant Bullitt County Attorney
Shepherdsville, Kentucky