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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002001-ME

A.A., A CHILD UNDER EIGHTEEN — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE SPAINHOUR, JUDGE
ACTION NO. 14-J-00283

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: A.A., a minor, appeals from a final disposition order entered by the Bullitt Circuit Court on November 12, 2014, adjudicating him to be a habitual truant. Upon review of the record, the briefs and the law, we affirm.

A.A., born in 1999, was enrolled in Bullitt East High School. He lives with his mother who has undergone several surgeries and has experienced bouts of

poor health. A.A. was said to suffer from irritable bowel syndrome (I.B.S.) and asthma.

A status offense complaint was filed by the school alleging A.A. was a habitual truant. Attached to the complaint were school attendance records documenting thirty-two absences—twenty-three of which were unexcused—plus three unexcused tardies—for the 2013-2014 school year.

Defense counsel moved to dismiss the complaint for lack of subject matter jurisdiction, claiming only a superficial home visit had been conducted, and the director of pupil personnel (DPP) had made no determination of truancy before the complaint was filed. Citing KRS[1] 530.060(2) and KRS 159.140(1), the motion argued the DPP must acquaint the school with the student's home conditions; acquaint the student's home with the work and advantages of school; determine the cause of the student's truancy; and try to eliminate the causes for truancy—all *before* the filing of the complaint to establish the court's subject matter jurisdiction —which cannot be waived. *S.B. v. Commonwealth,* 396 S.W.3d 928, 929-30 (Ky. App. 2013) (complaint should not have been filed due to lack of subject matter jurisdiction where "Affidavit and Truancy Evaluation Form" was virtually blank, only documentation was three letters indicating child missed school, no home visit by DPP preceded filing of habitual truancy petition, and, Assistant DPP made home visits but no findings were provided); *N.K. v. Commonwealth,* 324 S.W.3d 438, 440 (Ky. App. 2010) (assessment inadequate and complaint should not have

[1] Kentucky Revised Statutes.

been filed where school noted only "Home visit 3/14/08" and "eight absences were excused and '11-65 Days' were unexcused"); *T.D. v. Commonwealth*, 165 S.W.3d 480, 482 (Ky. App. 2005) (no documented home visit, although parent and DPP had spoken via telephone). In the event a DPP fails to complete his duty, the Court Designated Worker (CDW) is "to review the complaint to determine whether 'an adequate assessment,' in the language of the statute, has been performed." *Id.* When a child fails to participate in the assessment it may be abandoned. *Id.*

A.A.'s case was set for an adjudication hearing on September 17, 2014. Prior to beginning the adjudication portion of the hearing, the trial court addressed two motions filed on A.A.'s behalf by appointed counsel. The first item was the motion to dismiss the complaint and refer the case back to the CDW solely because she had checked a box[2] on the standard form AOC-JW-40e that read:

> Based on the above criteria, the case: ☒is ☐is not appropriate for Informal Processing.
>
> If the case is not appropriate for Informal Processing, it is recommended that this case be referred to court for a formal hearing or an informal adjustment.

Counsel stated he had no case law to support his motion, but thought it appropriate to file in light of the CDW having indicated on the form a court case was unnecessary. The court stated the Commonwealth, through the county attorney, may interrupt a CDW's handling of a matter when it deems a court case is appropriate. Here, the Commonwealth stated it opposed informal processing due

[2] There was no explanation of the CDW's rationale for checking this particular box.

to the sheer number of unexcused absences. Thereafter, the trial court stated in light of the number of school days missed, she was not inclined to let the CDW handle the matter.

At that point, defense counsel mentioned Senate Bill 200—a measure related to juvenile justice—was winding its way through the 2014 General Assembly. He suggested that had the proposal been further along, A.A.'s case might never have reached court. The trial court responded the proposed legislation[3] would not become effective until July 2015 and it was her responsibility to apply the law as it was that day. The motion to dismiss and refer the matter to the CDW was denied.

The next item addressed was A.A.'s challenge to the trial court's subject matter jurisdiction due to an allegedly insufficient home study being performed before the filing of the complaint. At that point, testimony was heard from A.A.'s mother and Lee Barger, Bullitt East's Assistant Principal.[4]

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[3] KRS 159.050, the basis of defense counsel's motion, was amended by Section 15 of SB 200 to allow local boards of education to:

> (5)(d) Collaborate and cooperate with the Court of Justice, the Department for Community Based Services, the Department of Juvenile Justice, regional community mental health centers, and other service providers to implement and utilize early intervention and prevention programs, such as truancy diversion, truancy boards, mediation, and alternative dispute resolution to reduce referrals to a court-designated worker.

This new option compliments older options of requiring "students to comply with compulsory attendance laws"; requiring "truants and habitual truants to make up unexcused absences"; and imposing "sanctions for noncompliance." This particular change had an effective date of July 1, 2015.

[4] Barger did not testify he is an Assistant DPP.

Mother was the only witness called by the defense. She testified two people had visited her home for a few minutes on May 6, 2014; one man came to her home's door, and the other person remained in the car. When asked why A.A. was not in school that day, she told the man A.A. was sick in bed with a stomach bug—something she stated she had already reported to the school. No one entered her home that day. She told the man, whom she thought was named Foster, she was in a hurry because she was going to look at a vehicle—hers being out of commission. She testified the man asked whether her home had running water and electricity[5]—to which she responded "yes." She said no other questions were asked.

Mother then testified A.A. rides the school bus, but when she is ill, she cannot pick him up if he gets sick at school due to asthma and food allergies. She stated she did not discuss these issues with the school and no attempt was made to schedule another home visit. She said A.A. misses school due to illness, not hearing his alarm clock, or her inability to awaken him.

In response to questions from her son's attorney, Mother testified she had insurance at the time of the school visit, and acknowledged transporting A.A. for medical care had been an issue. She stated she had undergone two spine surgeries that left her unable to drive for a period of time. She also said the school had paperwork from A.A.'s doctors documenting his health for every school year.

[5] A.A. had self-reported his home: is the size of a trailer; has all working and essential utilities; is in livable condition; and, has adequate food. A.A. further indicated he had no issues with peer relationships and no need for clothing or shoes.

On cross-examination, Mother admitted she did not invite the school representative into her home that day because she was in a hurry. She then explained the school had documentation regarding A.A.'s asthma for which he has an Epipen and inhaler at school. She acknowledged she had not given the school information about A.A. suffering from I.B.S. She also admitted A.A. sometimes stays home to help her—but *not* at her request. On redirect, she testified A.A. had been diagnosed with I.B.S. near the end of the 2013-2014 school year. At no point during her testimony did she indicate a desire or need for anything or any services.

Barger was the sole witness called by the Commonwealth. He described his meeting with Mother on May 6, 2014. He said he and Troy Wood, another Bullitt East Assistant Principal, initially went to the wrong house where they left a card stating they had made a visit. Upon leaving the neighbor's home, they realized their mistake and went to the correct home. Barger got out of the car and Mother was "extremely agitated," saying she was "in a hurry" and could not sit down to talk. Barger said he spoke to Mother only five to ten minutes during which she said her son had everything he needed—electricity, running water, clothes—and needed nothing from the school. In leaving the home, Barger returned to the neighbor's home to retrieve the card he had mistakenly left at the wrong door, but Mother met him in the driveway. Feeling uncomfortable, Barger left.

Barger testified he had numerous prior contacts with Mother—perhaps eight or nine by telephone—regarding A.A. and his older brother who had

also missed several days of school before aging out and getting a job. According to Barger, in explaining why A.A. misses school, Mother has said her son "stays home to take care of her." Barger testified he intervened when A.A. began missing school and had discussed numerous times with both mother and son—in his office—the benefits of attending school.

On cross-examination, Barger said he was aware of A.A.'s asthma, but had not seen any documentation of an I.B.S. diagnosis. During Barger's brief home visit, Mother told him A.A. was home sick that day, but mentioned no specific medical condition. Barger testified the family did not have a working vehicle that day, and stated he believed Mother had gone in search of a vehicle.

Barger testified he had performed all of the school's home visits—between twenty-five and fifty—during the prior school year—and had received administrative training. He stated he no longer deals with attendance and has not spoken with A.A. since the beginning of the 2014-2015 school year. When questioned by the court, Barger stated Mother was "so agitated" that morning it was clear she did not want to have a conversation with him.

During summation, defense counsel argued the school was aware A.A. suffered from asthma, and there was no reason to disbelieve he had been diagnosed with I.B.S. He then asked the court to determine it lacked subject matter jurisdiction and either dismiss the complaint or refer it back to the CDW for monitoring. Importantly, defense counsel did not orally argue only the DPP or an Assistant DPP may conduct the home study to satisfy the statutes and give the trial

court subject matter jurisdiction. Additionally, this precise argument was not made in the written motion to dismiss for lack of subject matter jurisdiction.

The Commonwealth painted a different picture than that offered by the defense, noting Mother had told Barger her son needed nothing and she needed to leave to look at a vehicle. The school expected follow-up documentation, but none was ever provided.

After hearing argument, the court stated it agreed with the Commonwealth and found the home visit was "not superficial" as A.A. had alleged. The court further found: Mother had told Barger A.A. was home sick with a stomach virus, not I.B.S. or a chronic health condition; Mother was unwilling to speak with Barger; and, Mother indicated all of her son's needs were being met. According to the court, nothing Mother said during the home visit shifted responsibility to the school to find a way to help the family or inquire further. Stating the court and the Department of Public Advocacy (DPA) disagreed on how many times a school must try to have a home visit, the court said it did not "understand what DPA would consider to be an adequate home visit." Finding Barger's home visit was not superficial, A.A.'s motion to dismiss was denied.

Having resolved the two preliminary motions, the court convened the adjudication hearing. Jennifer Williams of the Bullitt County Board of Education testified A.A. had a total of twenty-seven and one-half unexcused absences for the 2013-2014 school year for which no medical excuses had been provided. On cross-examination, Williams testified A.A. also had nine excused absences during

the school year and school policy allows a maximum of six parent notes, meaning all other excuses must come from a doctor. When questioned by the court, Williams testified A.A. had a total of thirty-two absences, but she did not know the content of any of the notes for an excused absence. Barger clarified one notation about a "substitute bus" meant a substitute bus driver had failed to pick up A.A. one morning, but that error was quickly corrected.

The Commonwealth briefly recalled Barger. He testified he did not recall discussing asthma or I.B.S. with Mother. He also confirmed he had tried to contact Mother several times by phone and she had been to his office.

Defense counsel recalled Mother. She testified since the school accepts only a maximum of six parent notes, she did not send more than six. She then explained A.A. has had asthma for fourteen years and had been diagnosed with I.B.S. in the last six months. She said he takes medication twice daily. Mother testified she now has a working vehicle and is physically able to transport A.A.; previously, she had to rely on others for transportation, particularly her older son. She stated A.A. did not intentionally miss school.

Before ruling, the trial court stated it had gone through the court record finding in one school year: twenty-three unexcused absences; one note from Mother; seven doctor's excuses; forty-one automated phone calls; and four letters. The court found it odd that if asthma were the reason for A.A. missing so much school Mother never mentioned it. When Barger asked Mother why A.A. was not in school during the home visit, Mother responded he was home sick with

the flu, not I.B.S. or asthma, and no doctor's note was ever submitted. Additionally, the school had no medical records verifying A.A.'s asthma. If a non-functioning car were the issue, the court stated A.A. could ride the bus and the school could transport him in the event of a medical emergency during school. As a result, the trial court found A.A. to be truant, stating it could not characterize his repeated absences from school as being beyond the family's control. It is from this order, adjudicating A.A. to be truant, that he now appeals.

ANALYSIS

A.A.'s first claim is the trial court lacked subject matter jurisdiction because KRS 159.140(1)(c)(d) and (f) and KRS 630.060 were not satisfied. We disagree.

> The statutory language reads in relevant part:
>
> (1) The director of pupil personnel, or an assistant appointed under KRS 159.080, shall:
> . . . .
> > (c) Acquaint the school with the home conditions of a habitual truant as described in KRS 159.150(3), and the home with the work and advantages of the school;
> >
> > (d) Ascertain the causes of irregular attendance and truancy, through documented contact with the custodian of the student, and seek the elimination of these causes;
> > . . . .
> > (f) Attempt to visit the homes of students who are reported to be in need of books, clothing, or parental care;
> > . . . .

KRS 159.140(1). Additionally, KRS 630.060(2) reads:

> [n]o complaint shall be received by the court designated worker alleging habitual truancy unless an adequate assessment of the child has been performed pursuant to KRS 159.140(1)(c), (d), and (f), unless it can be shown that the assessment could not be performed due to the child's failure to participate.

Unlike the schools in *S.B., T.D.* and *N.K.,* Bullitt East took significant steps to document A.A.'s many absences from school.

The school's awareness of the family began when A.A.'s older brother was a student and also missed substantial amounts of school. In a single school year, A.A. amassed twenty-three unexcused absences—documented by date; day of the week; whether he was absent, exempt or tardy; amount of time he was absent on a given day; whether the absence was excused or unexcused; and whether the absence was supported by a doctor or parent note. The extent of this record far exceeds the scant information compiled by the schools in *S.B., T.D.* and *N.K.* While the legislature intended to make the DPP's duties "mandatory" and "rigorous" before a complaint is filed in court, *N.K.,* 324 S.W.3d at 441, it did not intend to make the task impossible. Repeated contact with the family did not reduce the amount of school A.A. missed.

Here, a home visit occurred on May 6, 2014. It was brief in time, but only because A.A.'s mother was highly agitated and in a hurry to leave to see about a car. Before the home visit concluded, Mother said her son had everything he needed and asked for no help of any kind. A.A. now claims the school made no

real effort to learn the condition of his home, but Barger's attempt to confirm the home's condition was met with agitation by Mother. According to Barger, Mother was clearly not in the mood to talk with him during the home visit.

Mother testified A.A. misses school due to illness, not hearing the alarm clock, or her inability to awaken him. Testimony from Barger indicated A.A. desired to stay home from school to help Mother due to her own health issues and she allowed him to stay at home. According to the Student Intervention Document created by Barger the same day of the home visit, intervention by the school failed because "mother allows student to stay home" and the cause of irregular attendance and truancy was "Student choice. Parent allows student to stay home." In light of the record developed in this case—documenting a pattern of missed school despite ongoing contact between student, parent and school—the trial court had subject matter jurisdiction to hear the complaint and the final disposition order need not be vacated.

While A.A.'s brief emphasizes Barger was unqualified to perform the home visit because he was neither the DPP or an Assistant DPP, the record does not indicate this specific claim was ever argued to the trial court—neither in the written motion to dismiss nor during the hearing on the motion. As a court of review, when a trial court has not ruled on a specific claim, there is nothing for us to review. *Keeton v. Lexington Truck Sales, Inc.,* 275 S.W.3d 723, 726 (Ky. App. 2008). This particular claim not having been raised below, and not having been mentioned in the trial court's final disposition order, there is nothing for us to

review and we need say nothing more about whether an Assistant Principal who is not specifically designated as an Assistant DPP may conduct the home study required by KRS 159.140(1) and KRS 630.060(2).

A.A.'s final allegation is that the trial court lacked subject matter jurisdiction because KRS 610.030 and KRS 630.050 were not satisfied. Stated more succinctly, he complains the Commonwealth interfered with the CDW's handling of the case even though KRS 610.030(4) specifically reads:

> [a]t any stage in the proceedings described in this section, the court or the county attorney may review any decision of the court-designated worker. The court upon its own motion or upon written request of the county attorney may refer any complaint for a formal hearing.

Citing *B.H. v. Commonwealth,* 329 S.W.3d 360 (Ky. App. 2010), a case in which a panel of this Court discerned no evidence of compliance with KRS 630.050, A.A. maintains—as stated in his reply brief—"every status offender must be referred to [social] services prior to the filing of the petition and that if the case is eligible for diversion, it must be handled informally unless the court or child opts for formal processing." We disagree.

The first motion the trial court heard prior to the adjudication hearing was the defense request to refer the matter back to the CDW. According to defense counsel, the motion was based solely on the CDW checking the box for informal processing on AOC-JW-40e. The county attorney opposed returning the matter to the CDW due to the extreme number of absences. Thereafter, the trial court stated it understood the Commonwealth could interrupt the CDW's handling

of a case when it believed a court case was the appropriate avenue. After a full discussion on the record, the trial court stated its reluctance to allow the CDW to handle the case and proceeded with the adjudication hearing.

KRS 630.050 reads:

> Before commencing any judicial proceedings on any complaint alleging the commission of a status offense, the party or parties seeking such court action shall meet for a conference with a court-designated worker for the express purpose of determining *whether or not*:
>
> (1) To refer the matter to the court by assisting in the filing of a petition under KRS 610.020;
>
> (2) To refer the child and his family to a public or private social service agency. The court-designated worker shall make reasonable efforts to refer the child and his family to an agency before referring the matter to court; or
>
> (3) To enter into a diversionary agreement.

[Emphasis added]. Contrary to A.A.'s position, the statute identifies a referral for social services and diversion as two of three *options* for a CDW to consider, not foregone conclusions that must occur to vest a court with subject matter jurisdiction. Our interpretation results from the statute's use of the phrase "whether or not." We interpret a statute by reading the words chosen by the legislature, not by "surmising what may have been intended but was not expressed." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (citations omitted). Our interpretation is sensible because each case must be considered on its own merits—what is appropriate for one child is not necessarily

appropriate for all children. In this case, since no social services were needed according to both A.A. and Mother, to what social services agency could the family have been referred? Absence of a social service agency referral and a diversionary agreement cannot equal a lack of subject matter jurisdiction.

Here, the CDW completed form AOC-JW-40e on June 16, 2014, after conducting a preliminary inquiry with A.A. and his mother. The CDW marked the case as being "appropriate for Informal Processing" but otherwise marked no criteria. The preliminary inquiry happened before the complaint was filed on July 1, 2014. On July 29, 2014, defense counsel moved the court to refer the matter back to the CDW based on her notation the case was appropriate for informal resolution and A.A.'s belief he would be a diversion candidate.

Based on a literal reading of KRS 630.050, the statute was satisfied. The CDW conducted the mandatory inquiry and determined no referral to a public or private social agency was necessary, nor was entry of a diversion agreement. While the CDW must determine "whether or not" a court referral is appropriate, that decision may be overridden by the county attorney in writing. The county attorney did not submit a written request in this case, but in open court the Commonwealth explained its position that the extreme number of absences constituted reasonable grounds for the matter to be handled in court rather than informally by the CDW. After review, the trial court stated it agreed with the Commonwealth and was not inclined to let the CDW handle the matter. As argued by the Commonwealth, the court's ruling was the equivalent of it taking the matter

from the CDW of its own volition as allowed by KRS 610.030(4). Thus, vacating the final disposition order is not mandated.

WHEREFORE, we affirm the Bullitt Circuit Court's final disposition order adjudicating A.A. to be a habitual truant.

TAYLOR, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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