RENDERED: MAY 17, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001551-DG

L.H. APPELLANT

v.

ON DISCRETIONARY REVIEW FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NOS. 16-J-00049-004, 16-XX-00002,
16-XX-00003, 16-XX-00004, AND 16-XX-00005

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND JONES, JUDGES; AND HENRY, SPECIAL JUDGE.[1]

ACREE, JUDGE: We granted discretionary review in this case to address Appellant L.H.'s appeal of the Hopkins Circuit Court's September 15, 2016 order

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[1] Special Judge Henry concurred with this opinion prior to the expiration of his appointment on April 24, 2019. Release of the opinion was delayed by administrative handling.

affirming the Hopkins Juvenile Court's April 18, 2016 disposition order committing L.H. to the Department of Juvenile Justice (DJJ). We affirm.

FACTS AND PROCEDURE

Twelve-year-old L.H. was charged with four crimes between October 2015 and March 2016. He ultimately pleaded guilty to all four charges.

In October 2015, the Commonwealth filed a petition[2] charging L.H. with third-degree burglary, a Class D felony if committed by an adult. KRS[3] 511.040(2). The charge stemmed from L.H. breaking into and stealing items from a business in Webster County, Kentucky, in October 2015. He pleaded guilty to the charge on February 23, 2016, in Webster District Court, and an adjudication order was entered reflecting his plea. The Webster District Court referred the matter to Hopkins County for disposition.

In November 2015, the Commonwealth filed a second petition charging L.H. with the unauthorized use of a motor vehicle, a misdemeanor. KRS 514.100(2). The charge stemmed from L.H. stealing his uncle's vehicle and attempting to leave in the vehicle undetected. L.H. pleaded guilty on March 28, 2016, and the juvenile court entered an adjudication order reflecting his plea.

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[2] "'Petition' means a verified statement, setting forth allegations in regard to the child, which initiates formal court involvement in the child's case[.]" Kentucky Revised Statutes 600.020(47) (2015).

[3] Kentucky Revised Statutes.

In January 2016, the Commonwealth filed a third petition charging L.H. with second-degree disorderly conduct, a misdemeanor. KRS 525.060(2). The charge stemmed from L.H.'s disruptive behavior at South Hopkins Middle School, where he was kicking and throwing chairs, refusing to follow directives, and challenging the authority of teachers and law enforcement. Before adjudication of that petition, in March 2016, the Commonwealth filed a fourth petition charging L.H. with three additional offenses in an unrelated case: second-degree wanton endangerment; no operator's license; and reckless driving. These charges stemmed from L.H. driving his dirt bike at a high rate of speed through an elementary school parking lot when parents were dropping off children for school.

The juvenile court held an adjudication hearing on April 11, 2016, to resolve petitions three and four. L.H. pleaded guilty to second-degree disorderly conduct (petition three), and second-degree disorderly conduct, as amended from second-degree wanton endangerment, and operating a motor vehicle without a license (petition four).[4] The juvenile court entered two adjudication orders, the first adjudicating his guilty plea to petition three, and the second adjudicating his guilty pleas to petition four.

L.H. appeared before the juvenile court on April 28, 2016, for disposition of all four adjudications. In discussing the option of commitment to the

[4] The reckless driving charge was dismissed/merged.

DJJ, the juvenile court candidly acknowledged that L.H. was repeatedly getting into trouble, including L.H.'s daily behavior indiscretions at school and an incident the day before the hearing when L.H. drank his mother's vodka with four other boys at 4:00 a.m. The Commonwealth argued commitment was in L.H.'s best interest because it would be dangerous for him to remain in the community. The DJJ did not object but questioned whether L.H. met the prerequisites for commitment. The juvenile court entered an order committing L.H. to the DJJ. L.H. filed a motion to reconsider, which the juvenile court denied.

L.H. then appealed to the Hopkins Circuit Court. He argued: the juvenile court was not authorized to order him to DJJ commitment because he did not have three prior adjudications, as required by KRS 635.060(4)(a)(1); the juvenile court did not attempt less restrictive alternatives prior to committing L.H., as required by KRS 600.010(2)(c); and L.H.'s guilty pleas were not made knowingly or intelligently pursuant to *Boykin v. Alabama*, 395 U.S. 238, 239, 89 S. Ct. 1709, 1710, 23 L. Ed. 2d 274 (1969) and *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001), because the juvenile court did not inform L.H. that his pleas could result in his commitment. The circuit court affirmed the juvenile court's disposition decision. Upon L.H.'s request, this Court granted discretionary review. We will discuss additional facts in the course of our analysis.

ANALYSIS

L.H. presents two arguments on appeal. First, that the juvenile court was not permitted to commit him to the DJJ because he did not meet the statutory standard for commitment set forth in KRS 635.060(4)(a)(1). And, second, that his guilty plea was not knowingly and intelligently made. We disagree.

A. KRS 635.060(4)(a)(1)

L.H.'s primary argument on appeal is that commitment was not authorized by KRS 635.060(4)(a)(1) because he had insufficient prior adjudications. Resolution of this claim is a matter of statutory interpretation. Questions involving statutory interpretation are reviewed *de novo*. *Brewer v. Commonwealth*, 478 S.W.3d 363, 368 (Ky. 2015).

When interpreting a statute, our main goal "is to 'effectuate the intent of the legislature.'" *Id.* at 371 (quoting *Commonwealth v. Plowman,* 86 S.W.3d 47, 49 (Ky. 2002)). "That intent is perhaps no better expressed than through the actual text of the statute, so we look first to the words chosen by the legislature—if they are clear, they are decisive." *Id.* (footnote omitted). "And '[w]here the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as written.'" *Bell v. Bell*, 423 S.W.3d 219, 223 (Ky. 2014) (citation omitted).

KRS 635.060, the statute at issue in this case, states, in pertinent part, that the juvenile "court, at the dispositional hearing, may . . . [o]rder the child to be committed" to the custody of the DJJ if the child has been "adjudicated for an offense that would be a misdemeanor or Class D felony if committed by an adult and the child has at least three (3) prior adjudications . . . which do not arise from the same course of conduct[.]" KRS 635.060(4)(a)(1). It is undisputed that, at the time of disposition, L.H. had four adjudications, each of which arose from a different course of conduct. Three of those adjudications were for misdemeanors, and one adjudication, third-degree burglary, was for a Class D felony, if committed by an adult. Nonetheless, L.H. argues the statute did not authorize commitment because he did not have "at least three prior adjudications[.]" He presents three arguments to support his position.

First, L.H. asserts he did not have any qualifying prior adjudications because "adjudication" refers to and encompasses a complete and final juvenile case: that is, an adjudication *and* disposition. He contends his four cases were not fully adjudicated until all four were finally disposed at the disposition on April 18, 2016. Accordingly, commitment was not authorized, L.H. argues, because he had no prior dispositions and thus his guilty pleas were not "adjudications" under KRS 635.060(4)(a)(1). We disagree.

The juvenile code carefully, and consistently, differentiates between adjudications and dispositions. KRS 610.080 states that a juvenile case "shall consist of two (2) distinct hearings, an adjudication and a disposition, which shall be held on separate days unless the child" agrees otherwise. "The adjudication shall determine the truth or falsity of the allegations in the petition and shall be made on the basis of an admission or confession of the child to the court or by the taking of evidence." KRS 610.080(1). In contrast, "[t]he disposition shall determine the action to be taken by the court on behalf of, and in the best interest of, the child under the provisions of KRS Chapter 630 or 635." KRS 610.110(1). Adjudication and disposition are two distinct terms with two distinct definitions offering two distinct functions within the juvenile system.

The legislature specifically chose to use the word "adjudication" in KRS 635.060(4)(a)(1). It has particular meaning in the juvenile code. Had the legislature intended for commitment to be available only if the child had three prior juvenile *cases*, it could have used that language. But it did not. Instead, the statute's plain language only requires three prior *adjudications*. It does not require there to be three prior adjudications <u>and</u> dispositions.

L.H. had at least three prior adjudications prior to the disposition hearing on April 28, 2016: third-degree burglary, adjudicated February 23, 2016; unauthorized use of a motor vehicle, adjudicated March 28, 2016; and disorderly

conduct, adjudicated April 11, 2016. Each adjudication had its own number designation and each offense occurred on a different date. They are separate and distinct adjudications. The fact that disposition had not yet occurred on those adjudications is irrelevant. The statute does not require it. Instead, the statute's plain language only requires that the child have three prior adjudications. In this case, because L.H. had three prior adjudications, the juvenile court had the authority to commit L.H. to the DJJ for the fourth adjudication – second-degree disorderly conduct, as amended from wanton endangerment, also entered on April 11, 2016.

L.H. next contends he did not have any qualifying prior adjudications because all four cases were handled together at one disposition. In other words, L.H. argues that the guilty pleas/prior adjudications merged at disposition into one adjudication and one disposition. Again, we disagree.

Nothing in the juvenile code states that one disposition hearing results in the merger of all prior adjudications. The district court's decision to conserve judicial resources by holding one disposition hearing to dispose of all four adjudications in no way impacts the nature and character of those prior adjudications. They are, and remain, four separate and distinct adjudications. The absurdity of L.H.'s argument becomes clear upon the realization that had the juvenile court held four separate disposition hearings on four consecutive days,

L.H. clearly would have had three prior adjudications (and dispositions) prior to the fourth disposition hearing, thereby authorizing commitment under KRS 635.060(4)(a)(1). We do not think the legislature intended for the juvenile code to be interpreted in this manner.

Again, each adjudication had its own number designation and arose from a separate course of conduct. The juvenile court entered separate adjudication and disposition orders for each matter. It was correct to count the resolution of each petition individually as one adjudication, even though all four petitions resulted in one disposition. We reject L.H.'s argument that, because disposition occurred on the same day for all four adjudications, the adjudications merged into one adjudication/case for purposes of KRS 635.060(4)(a)(1).

Third, L.H. asserts KRS 635.060(4)(a)(1) should be interpreted such that, for it to apply, the child must have had three prior adjudications at the time the fourth offense was <u>committed</u>, not at disposition of the fourth offense. To find otherwise, L.H. argues, shifts the focus from what the child has done to what has happened in court and the timing of court procedures. L.H. contends that when his last offense occurred on March 17, 2016, he only had one prior adjudication for purposes of KRS 635.060(4)(a)(1) – his guilty plea to third-degree burglary on February 23, 2016. Therefore, he was ineligible for commitment to the DJJ. We again disagree.

The statute does not definitively state at what point in time the juvenile court is to determine whether the child has three prior qualifying adjudications – at the time the offense was committed or the time the case is up for disposition. We think logic dictates the latter. KRS 635.060 specifically authorizes the juvenile court "at the dispositional hearing" to commit the child to the DJJ if "the child has at least three (3) prior adjudications" and the other qualifications in the statute are met. It is most sensible for the juvenile court to determine if the child has the requisite number of qualifying adjudications at the disposition hearing.

A review of the indicia of legislative intent underlying KRS 635.060 supports our interpretation. *Saxton v. Commonwealth*, 315 S.W.3d 293, 300 (Ky. 2010) ("Discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction."). In 2012, the Kentucky legislature created the Task Force on the Unified Juvenile Code to, *inter alia*, develop recommendations for reform to the juvenile justice system. One such recommendation was to establish criteria, such as a certain criminal history or risk level, prior to commitment of misdemeanor and lower-level D felony offenders to the DJJ. In 2014, the General Assembly ostensibly accepted the Task Force's recommendations and completely re-wrote KRS 635.060 with the passage of Senate Bill (SB) 200. Prior to SB 200, the juvenile court could commit a juvenile

to the DJJ for any type or level of offense. Now, as repeatedly explained, the child must have been adjudicated for a misdemeanor or Class D felony (if committed by an adult) and have three prior adjudications which did not arise from the same course of conduct.

By requiring that each adjudication not arise from the same course of conduct the legislature sought to ensure that only offenders with a certain criminal history or risk level were committed to the DJJ. This requirement safeguards against a child being committed for few or low-level offenses. It also reserves commitment for children who repeatedly engage in criminal behavior. In this case, L.H. repeatedly engaged in disruptive, volatile behavior resulting in the Commonwealth filing multiple petitions against him, which in turned resulted in multiple misdemeanor or Class D felony adjudications. He has demonstrated an unwillingness to live within the parameters of the law. L.H. had the requisite criminal history prior to disposition, satisfying the purpose underlying KRS 635.060(4)(a)(1).

Next, L.H. argues KRS 635.060(4)(a)(1) is ambiguous and this Court should apply the rule of lenity to give him the benefit of that ambiguity. L.H. correctly notes that the "rule of 'lenity' is a rule of statutory construction that applies to the interpretation of penal statutes; if the statute is ambiguous, a criminal is entitled to the more lenient construction." *Funk v. Commonwealth*, 842 S.W.2d

476, 486 (Ky. 1992). "[D]oubts about the meaning of a penal statute should be resolved: 'in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishment totally disproportionate to the gravity of the offenses.'" *Commonwealth v. Lundergan*, 847 S.W.2d 729, 731 (Ky. 1993) (citation omitted).

We do not find KRS 635.060(4)(a)(1) ambiguous. The statute clearly requires three prior qualifying adjudications. The term "adjudication" is plainly defined in the juvenile code. The statute clearly does not require an adjudication *and* disposition, and nothing in the juvenile code supports L.H.'s argument that the multiple adjudications "merge" into one when the juvenile court conducts one disposition hearing to resolve all prior adjudications. A plain reading and straightforward application of the statute reveals the juvenile court had the authority to commit L.H. to the DJJ. The circuit court was correct to affirm the juvenile court's decision. We likewise affirm.

B. Guilty Plea

Finally, L.H. contends the juvenile court did not inform him that commitment could be a consequence at the time he entered his guilty plea and, therefore, his plea was not knowingly or intelligently made under *Boykin*, *supra*.

He admits this argument is unpreserved, and requests palpable error review under RCr[5] 10.26:

> Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule's requirement of manifest injustice requires showing . . . [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.

Young v. Commonwealth, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted).

This Court explained in detail the application of *Boykin* to juvenile proceedings in *J.D. v. Commonwealth*, 211 S.W.3d 60 (Ky. App. 2006):

> *Boykin* is the seminal case in the arena of the validity of a guilty plea. In *Boykin,* the U.S. Supreme Court stated that "[s]everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. . . . We cannot presume a waiver of these [ ] important federal rights from a silent record." [*Boykin*] 395 U.S. at 243, 89 S.Ct. 1709. The Supreme Court ultimately held that the trial court committed error when it "accept[ed] petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242, 89 S.Ct. 1709. In *D.R.* [*v. Commonwealth,* 64 S.W.3d 292 (Ky. App. 2001)], this Court stated that "it [is] beyond controversy that *Boykin* [ ] applies to juvenile adjudications." 64 S.W.3d at 294, FN2. The *D.R.* court went on to state that:

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[5] Kentucky Rules of Criminal Procedure.

> The validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea. . . . These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.

Id. at 294.

The Sixth Circuit Court of Appeals has also weighed in on this issue in a federal case arising out of the Western District of Kentucky, for which the juvenile had counsel. In *Laswell v. Frey,* 45 F.3d 1011, 1015 (6th Cir. 1995), the court stated:

> Upon review, this Court notes that an adjudication demands a determination of the truth or falsity of the allegations, and that a determination of the truth requires more than the simple verbal admission at the detention hearing at issue in the instant case. The Court is persuaded that, because no inquiry was made of the veracity of the charges or admission, because no inquiry was made to determine if "the plea" was voluntarily made, and because no inquiry was made as to the nature of the charges, that the proceedings cannot later be transformed from a determination of probable cause for detention into an acceptance of a valid guilty plea.

J.D., 211 S.W.3d at 62-63.

In applying these principles in *J.D.*, the Court expressed concern that while the district court explained the juvenile's *Boykin* rights to him during an earlier hearing as to one charge, it did not specifically review these rights in the context of his decision to admit guilt to that charge. It further faulted the district court for failing to inform J.D. of his *Boykin* rights at any point as to two other charges.

Furthermore, in *D.R.*, *supra*, this Court noted:

> Since pleading guilty involves the waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. 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.

64 S.W.3d at 294 (quoting *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990)).

In this case, at L.H.'s arraignment on each petition, the juvenile court took considerable care to explain to L.H. his *Boykin* rights. For example, during his arraignment on the second and third petitions, the juvenile court explained to L.H. his right to remain silent and his right to counsel. It then explained:

> You have the right to admit to these charges only after you have revealed all the facts to your attorney and your attorney has advised you of the ramifications. If you do not want to admit, there will be a hearing before me. It

> will be a trial and I will hear the witnesses. If I find you committed that beyond a reasonable doubt, then I could find you guilty and then set it for disposition. So you have the right to admit or go to trial. If we go to trial, you have the right to question those witnesses and cross-examine them as to their testimony. You have the right to force witnesses to testify on your behalf. You would do that through a subpoena. If the Court finds you committed the offense that you are charged with, you would have the right to appeal to a high court. Those are basically your rights, [L.H.].

The juvenile court then handed L.H. the AOC-JV-49 form and stated: "The next thing is, I'm going to hand you a sheet that sets forth those rights I just read to you. I am going to ask you to look at that, read it, and if you understand it, then I am going to ask you to sign it." L.H. paused, reviewed the document, and signed it.

The AOC-JV-49 form lists the juvenile's rights and possible punishments that he might receive upon entering a plea of guilty. Specifically, it provides: "IF YOU ADMIT TO COMMITTING THE OFFENSE OR THE COURT FINDS THAT YOU COMMITTED THE OFFENSE YOU MAY BE ORDERED TO . . . [b]e removed from your parent(s) or guardian's home." The form also states that, "I UNDERSTAND THE ABOVE RIGHTS AND CONSEQUENCES. I HAVE EITHER READ THEM OR HAD THEM EXPLAINED TO ME." L.H. signed the AOC-JV-49 form at each arraignment for each offense.

Later at L.H.'s adjudication for each offense, L.H. signed form AOC-JV-51, Admission or Confession and Waiver of Formal Adjudication Hearing. By signing that form, L.H. was admitting that he "had the charges, proceedings, and the potential consequences of my admission or confession explained to me in terminology that I understand." The AOC-JV-51 form also states:

> I have received and signed a copy of the JV-49, Notice of Juvenile Rights and Consequences. I understand that by entering into this Admission or Confession I waive my right to a formal adjudication hearing where the Commonwealth would be required to prove the contents of the petition, where I would have: the right to confront and cross-examine any witnesses and have witnesses appear in court on my behalf; the right not to incriminate or testify against myself, and the right to appeal.

At each adjudication, the juvenile court held up L.H.'s signed AOC-JV-51 form and read the admitted charges. It then inquired if that was L.H.'s signature, if he was admitting to the facts as stated in the form, if he signed by choice and after discussing it with his attorney, and if he understood the consequences of pleading guilty. L.H. responded, "Yes," to all of the court's inquiries.

Considering all the circumstances, it is clear to this Court that L.H. acknowledged he understood the charges, had conferred with counsel, and was not forced or coerced into entering his plea. The juvenile court inquired as to the veracity of the allegations and as to whether L.H.'s admission was voluntary. While the juvenile court did not again detail the possible consequences, it did

inquire whether L.H. was aware of the consequences. Those consequences were specifically identified in the AOC-JV-51 form signed at or before the adjudication hearing, as well as explained and identified in the AOC-JV-49 form signed previously by L.H. We are not convinced that L.H. was unaware of his *Boykin* rights or the consequences of pleading guilty, including possible commitment to the DJJ.

To avoid a possible *Boykin* violation, we caution juvenile courts to take care to explain, in detail, *at adjudication*, the child's *Boykin* rights and all the consequences of entering a guilty plea. Nonetheless, we cannot say, based on all the facts and circumstances in this case, that L.H.'s plea was not entered voluntarily, intelligently, and knowingly or that any error by the juvenile court amounts to palpable error requiring reversal of L.H.'s guilty pleas.

CONCLUSION

We affirm the Hopkins Circuit Court's September 15, 2016 order affirming the Hopkins Juvenile Court's disposition order committing L.H. to the DJJ.

ALL CONCUR.

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