NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

FIRST CIRCUIT

NO. 2015 CJ 0902 c/w 2015 CJ 0903

STATE OF LOUISIANA IN THE INTEREST OF T. R.

Judgment Rendered: NOV 0 6 2015

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Appealed from
The City Court of Morgan City
In and for the Parish of St. Mary
State of Louisiana
Case No. 16780 and 16781

The Honorable Kim P. Stansbury, Judge Presiding

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McClendon, J. concurs
McDonald, J. Concurs

THERIOT, J.

The defendant/appellant, T.R.,[1] seeks reversal of the judgment of the juvenile court of the City Court of Morgan City, in which he and his family were adjudicated a family in need of services (FINS). For the following reasons, we affirm the judgment in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

T.R., born August 13, 1997, was arrested for cyberbullying, in violation of La. R.S. 14:40.7, on June 23, 2014. It was alleged in two separate complaints that on June 18, 2014, T.R. posted graphic photographs of female genitalia on Instagram and subtitled the photographs to suggest that they were images of two juvenile females whom he knew. The juvenile females and their parents suspected that T.R. could have been responsible for posting the photographs. The true identities of the females in the photographs could never be verified since no faces were shown.

On June 19, 2014, Officer Billy May of the Berwick Police Department and Detective Travis Triggs of the Morgan City Police Department contacted S.E., the mother of T.R., and informed her that her son was a person of interest in the complaints they were investigating.[2] They asked her if they could look at T.R.'s phone to search for any photographs that matched those posted on Instagram. S.E. signed a consent form allowing the officers to look for the photographs on T.R.'s phone. S.E. also provided the officers with the password to unlock the phone. S.E. then asked T.R. if there were photographs of naked females on his phone, and

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[1] The defendant was a juvenile at the time of the adjudication and shall remain anonymous throughout this opinion.

[2] One victim lived in the city limits of Morgan City, Louisiana, while the other lived in the city limits of Berwick, Louisiana. Both officers had been working their cases separately until Det. Triggs contacted Ofc. May to tell him that they were possibly looking for the same suspect.

T.R. admitted there were. The officers were able to find photographs on the phone that matched the two Instagram photographs in question. T.R.'s phone was seized by the officers, and S.E. was asked to bring T.R. to the Berwick Police Department for questioning.

Before questioning, S.E. and T.R. were advised of his *Miranda* rights,[3] and they were given an opportunity to discuss those rights in private. Both S.E. and T.R. signed an advice of rights form, indicating they were advised of their rights, discussed them together, waived their right to have an attorney present, and consented to giving a statement and answering questions. T.R. admitted to the officers that he obtained the photographs in question from Google, then added the names of the victims to the photographs before posting them on Instagram. Subsequently, the officers applied for and received warrants for T.R.'s arrest.

The city prosecutor charged T.R. with cyberbullying on June 24, 2014.[4] On August 29, 2014, as a condition of his release to his parents' custody, the city court ordered that T.R. not attend Morgan City High School or Berwick High School, since the alleged victims attended those schools. On September 24, 2014, the State amended the petition against T.R. from a delinquency proceeding to a FINS proceeding, and the city court so ordered. Counsel for T.R. also filed a motion to return T.R.'s cell phone and a motion to suppress evidence. The motions were denied after hearings on November 12, 2014.

T.R. and his family were adjudicated as a FINS on January 12, 2015. After a dispositional hearing on March 3, 2015, a judgment was rendered on March 11, 2015, placing T.R. on supervised probation until his eighteenth

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[3] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] Another charge of cyberbullying had been originally filed in the Sixteenth Judicial District Court, but that charge had been transferred to the City Court of Morgan City.

birthday, with various conditions, including attending a formal education program, having no contact with the victims or their families, not attending Morgan City High School or Berwick High School, abiding by a "dusk to dawn" curfew, and attending medical and psychiatric evaluations as recommended. T.R. timely appealed the city court's disposition of this matter.

ASSIGNMENTS OF ERROR

T.R. raises nine assignments of error:

1. The city court erred in filing a delinquency petition under La. R.S. 14:40.7.

2. The city court erred in putting T.R. under house arrest before any disposition.

3. The city court erred in expelling T.R. from Morgan City High School for an alleged offense occurring while school was out of session and done in the town of Stephenville in St. Martin Parish.

4. The city court erred in not dismissing the original petition and ancillary court orders putting T.R. under house arrest and subsequently ordering him not to attend school at Morgan City or Berwick High Schools.

5. The city court erred in not granting the motion to suppress evidence and motion to return the cell phone, which is still in the court's possession, and motion to remove to district court and/or recuse judge.

6. The city court erred in talking to witnesses prior to trial of the charges or a disposition while T.R. did not have private counsel, thereby prejudicing itself in this case.

7. The city court erred in changing the placement of T.R. without authority under the Louisiana Children's Code and Individuals with Disabilities Act, which preempts state law.

8. The city court erred in that it prejudiced the case by finding it to be a sexual offense and that the photographs in question were pornography at the August 20, 2014 hearing.

9. The city court erred by forcing the parents of T.R. to agree to a change in placement under threats of contempt and incarceration of both T.R. and themselves if they did not agree to one of the four options the city court gave them.

DISCUSSION

T.R. has reached the age of majority since the disposition of the FINS proceeding was rendered; however, at the time the FINS petition was filed, T.R. was seventeen years old. Louisiana Children's Code article 728(2) defines a "child" as "a person under eighteen years of age who, prior to juvenile proceedings, has not been judicially emancipated or emancipated by marriage." Therefore, under Title VII of the Children's Code, which governs Families in Need of Services, the city court could exercise jurisdiction over T.R. See La. Ch.C. art 729. A judgment of disposition shall remain in force only until a child reaches his eighteenth birthday. La. Ch.C. art. 784. As such, this Court will be unable to remedy most of T.R.'s complaints on appeal for the reasons that follow.

As to the first assignment of error, the delinquency petition was amended to a FINS petition. The amendment cured any defect that may have existed in the delinquency petition. This assignment of error is without merit.

As to the second, third and fourth assignments of error, the time T.R. has spent in house arrest has ended, and he will not spend any additional time in house arrest pursuant to the action taken by the city court. Furthermore, if the city court erred in expelling T.R. from Morgan City High School, as an adult, T.R. is now capable of seeking any educational avenue he may choose. There is no justiciable controversy pertaining to these three assignments of error for this Court to decide.

As to the fifth assignment of error, should we find that the city court erred in denying T.R.'s motion to suppress, the basis for his delinquency petition and subsequent FINS petition would be excluded. Even though T.R.'s juvenile record is sealed, he would have grounds to have the FINS

charge and adjudication removed from his juvenile record should the evidence on his cell phone be suppressed.

In T.R.'s brief, he states that the officers were not given lawful consent to seize and search his phone, because neither he nor his mother were informed that he was the principal suspect in the cyberbullying case. The evidence submitted into the record indicates otherwise. Det. Triggs testified at the suppression hearing that he "informed S.E. of the complaints and advised her that her son was a person of interest." He then asked S.E. if he could view T.R.'s phone "to try to clear him as a suspect to move on."

S.E. subsequently signed a consent to search form on behalf of T.R. The form was specifically tailored for a search of data on a cell phone, and the form indicates that the phone "will be searched for data and information which may include ... photos [and] videos."[5] It was further explained that the officers were looking for photographs on T.R.'s phone that matched the photographs that were posted on Instagram. S.E. asked T.R. if he had photographs of naked women saved on his phone. Clearly, S.E. was aware of the nature of the photographs the detectives were looking for when she handed the phone over to them. Neither T.R. nor S.E. testified at the suppression hearing to controvert the evidence or testimony introduced by the State.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution prohibit unreasonable searches and seizures. A search made without a warrant issued upon probable cause is unreasonable unless the search can be justified by one of the narrowly drawn exceptions to the warrant requirement. *State v. Cambre,* 2004-1317 (La. App. 5 Cir. 4/26/05), 902 So.2d 473, 482, writ denied, 2005-1325 (La.

[5] The exhibits were admitted as evidence at the adjudication hearing on January 12, 2015.

1/9/06), 918 So.2d 1039. One of these exceptions is a search conducted pursuant to consent. *State v. Packard,* 389 So.2d 56, 58, (La. 1980), cert. denied, 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 359 (1981).

In *Cambre*, the consent to search a juvenile's bedroom was ruled voluntary when the juvenile's parents invited the officers into their home, first gave verbal consent to search the bedroom, then signed a consent form. The parents accompanied the officers to the bedroom and had full access to it and all its contents. *Cambre,* 902 So.2d at 482-83. In the instant case, S.E. was advised of the reasons why the officers wanted to search T.R.'s phone. She gave the phone to the officers and signed a consent form that contained language that indicated what the officers would be searching for. She also wrote on the form the phone's password. The evidence shows that S.E. was fully aware of the circumstances surrounding the search of the phone and gave informed consent to the officers. The city court therefore was correct in denying T.R.'s motion to suppress.

T.R.'s remaining issues in his fifth assignment of error concerns the city court's denial of his motion to return the cell phone and the court's denial of his motion to recuse. As stated herein, this case has been closed for some time. We find no reason as to why the cell phone should be retained by law enforcement for the safekeeping of evidence. Thus, we find that the trial court's denial of the motion to return the cell phone is no longer warranted. The appropriate remedy is to remand the case to the city court on this matter only, and the city court can issue an order to the appropriate law enforcement agency to have the cell phone returned to T.R. See *In re Matter Under Investigation*, (unpublished opinion), (La. 7/1/09), 15 So.3d 972, 993.

A motion to recuse must set forth affirmative allegations of fact stating valid grounds for recusal found in La.C.Cr.P. art. 671; if it does not,

the trial judge may overrule the motion without referring the matter to another judge. *State v. Williams,* 601 So.2d 1374, 1375 (La. 1992). T.R.'s motion for recusal does not state any of the grounds for recusal found in La.C.Cr.P. art. 671, but complains of the way in which the city court was handling the FINS case. The city court therefore properly overruled the motion to recuse without referring it to another judge. This assignment of error is without merit.

As to the sixth assignment of error, the city court spoke with a parent of one of the victims,[6] with the permission of T.R.'s parents and his defense counsel, in order to gain an understanding of the relationship between T.R. and the victims. The purpose of the meeting was to allow the city court to fashion conditions by which T.R. could be released from custody while awaiting the adjudication of his delinquency charges. See La.Ch.C. art. 738(A). This assignment of error is without merit.

As to the seventh assignment of error, T.R. is presently an adult, therefore, any placement of T.R. by the city court outside the authority of the Louisiana Children's Code and/or the Individuals with Disabilities Act is moot. There is no justiciable controversy for this Court to address.

As to the eighth assignment of error, T.R. was never adjudicated a sex offender, and neither his initial delinquent charge nor his FINS disposition were classified as a sex offense. Cyberbullying is not defined as a sex offense under La. R.S. 15:536(A), which lists all offenses for which a person would be required to register as a sex offender. The city court did not characterize the photographs as pornography. The city court merely expressed concern at the August 20, 2014 hearing over the sexual nature of

[6] The parent of the other victim was not available for conference at that time. She was subsequently notified by telephone that she would be contacted by the city prosecutor concerning any trials or dispositions in the matter.

the charges. T.R. has not been adjudicated a delinquent, much less a sex offender, and there is no justiciable controversy for this Court to decide.

As to the ninth assignment of error, whether the city court did or did not threaten T.R.'s parents with contempt of court in order to make them agree to a change in placement for T.R. is not properly before this Court, as T.R.'s parents were never found in contempt of court or penalized in any way for contempt. This assignment of error is without merit.

DECREE

The judgment of the City Court of Morgan City is affirmed, except the portion of the judgment denying the motion to return T.R.'s cell phone, which is hereby reversed and remanded to the city court for further proceedings in conformity with this opinion. All costs of this appeal are assessed to T.R.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.