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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0797

In the Matter of the Welfare of: R. S. B.

Filed May 6, 2008
Affirmed in part, reversed in part, and remanded
Poritsky, Judge*

Hennepin County District Court
File No. 27-JV-06-2781

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Poritsky, Judge.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

PORITSKY, Judge

Appellant R.S.B. was adjudicated delinquent on one count of possession of a dangerous weapon on school property and one count of underage possession of a pistol, both felonies. *See* Minn. Stat. §§ 609.66, subd. 1d(a), 624.713, subds. 1(a), (2) (2006). The court's dispositional order included the following conditions, among others: R.S.B. was placed on probation, he was ordered to complete a six-week out-of-home placement, and he was required to complete a gun-offender program. On appeal, R.S.B. contends: (1) the out-of-home placement is not supported by either the record or the court's findings; (2) the out-of-home placement was error because it was "dictated" by executive-branch policy; and (3) the court erred in adjudicating R.S.B. delinquent and imposing dispositional orders on both offenses charged in the petition. We conclude: (1) the court's out-of-home placement is supported by the record, but the court's written findings are insufficient; (2) the record is insufficient to address R.S.B.'s argument that the disposition was dictated by the executive branch; and (3) the court properly adjudicated R.S.B. delinquent and imposed a dispositional order on both offenses. Therefore, we affirm in part, reverse in part, and remand.

FACTS

On February 14, 2006, Minneapolis police responded to a call from a school reporting that a gun had been found in a student's backpack. Police found a loaded semi-automatic .22 caliber handgun in a backpack that contained books and papers belonging to R.S.B. The handgun had accidentally discharged in the school lunchroom during the

lunch period. Two students told police that R.S.B. showed them the gun, and another student stated that the gun discharged when R.S.B. threw his backpack down in the lunchroom.

The district court, following an adjudicatory hearing, found that R.S.B. admitted ownership of the backpack, that a student's testimony that R.S.B. had shown her the pistol was credible, and that defense evidence that another student had reached for the backpack in the lunchroom lacked probative value.

The pre-disposition report indicated that R.S.B. had no prior out-of-home placements but had failed the Operation De Novo diversion program in 2005. In the course of preparing the pre-disposition report, the probation officer talked to R.S.B.'s mother about the family, telling her that "the Disposition for Gun Offenses, are legislated, to ensure equal treatment for anyone committing Gun offenses." The report recommended that R.S.B. be required to attend and complete the gun-offender program and to complete a six-week out-of-home placement (the "Beta program."). The report also recommended that the court stay an additional out-of-home placement.

At the disposition hearing, the prosecutor supported the probation officer's recommendation of the six-week Beta program, followed by completion of the gun-offender program. Defense counsel explained R.S.B.'s two prior failures to appear in court and argued that none of the criteria for out-of-home placement had been met. Defense counsel stated that R.S.B. had never been offered community-based services on the current charges.

Defense counsel contended that the gun program had preceded the Beta program in the past, with placement in Beta only if the juvenile failed the gun program, and argued that requiring completion of Beta before the gun program was "illegal." Counsel requested that the Beta placement be stayed and the court "order [R.S.B.] to the gun program and see how he does."

The prosecutor argued that the offense itself, involving the discharge of a gun in an elementary school, required a "higher level of intervention" than community-based treatment. The district court heard from R.S.B.'s mother, who stated that R.S.B. was doing "exceptionally well in the home and at school." After additional discussion of the seriousness of the offense and R.S.B.'s prior failures to appear, the district court ordered R.S.B. to complete the Beta program and then the gun-offender program.

DECISION

1. Findings and record supporting the disposition

R.S.B. argues that the district court's dispositional findings are inadequate, and that there is insufficient evidence in the record to support the out-of-home placement. The district court has broad discretion to order a disposition authorized by statute, and its decision will not be disturbed absent an abuse of discretion. *In re Welfare of J.B.A.*, 581 N.W.2d 37, 38 (Minn. App. 1998), *review denied* (Minn. Aug. 31, 1998). The disposition must be necessary for the child's rehabilitation. *In re Welfare of N.T.K.*, 619 N.W.2d 209, 211 (Minn. App. 2000). And when the disposition includes out-of-home placement, it must be supported by evidence that the placement is the least drastic step necessary to restore law-abiding conduct. *Id.*

A. Adequacy of findings

The rule requires that the district court make findings on "why public safety and the best interests of the child are served by the disposition," what alternative dispositions have been considered, and, if out-of-home placement is ordered, the reasons why public safety and the child's best interests are not served by parental custody, and the suitability of the out-of-home placement. Minn. R. Juv. Delinq. P. 15.05, subd. 2(A). The statute requires written findings of fact and findings on the best interests of the child and the alternative dispositions considered. Minn. Stat. § 260B.198, subd. 1(m) (2006).

The state concedes the inadequacy of the district court's findings, which do not address the "best interests" standard, any alternative dispositions considered, the need for out-of-home placement, or the suitability of the placement. But the state argues that because R.S.B. has completed the out-of-home placement, remanding for proper findings would serve no purpose. R.S.B., however, argues that the issue of inadequate findings is capable of repetition, and that he is still subject to the other conditions of probation imposed in the dispositional order.

An appeal is moot if the appellate court cannot provide effectual relief, although the court may nevertheless address the issue if it is one capable of repetition yet evading review. *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn. 2000). This court has generally addressed the inadequacy of dispositional findings even after the disposition is served because it is a frequent problem that could otherwise escape review. *See In re Welfare of C.A.W.*, 579 N.W.2d 494, 496 (Minn. App. 1998) (noting that parties would otherwise be "unjustly discouraged from seeking appellate relief" and "erroneous trial court processes"

would otherwise be encouraged). R.S.B. has made a showing that the issue of inadequate findings is capable of repetition. *Cf. Welfare of N.T.K.,* 619 N.W.2d 209, 211-12 (Minn. App. 2000) (noting this court's "many published decisions that hold inadequate juvenile disposition findings constitute reversible error.") Therefore, we remand the dispositional order for new findings complying with the rule and the statute.

B. Merits of the disposition

In deciding on a disposition, the rule requires that the court consider a non-exclusive list of factors. Minn. R. Juv. Delinq. P. 15.05, subd. 2(B). The factors bearing on considerations of public safety regarding a disposition are: (1) the seriousness of the offense, including any aggravating factors under the guidelines; (2) the culpability of the juvenile, including any planning and any mitigating factors; (3) the juvenile's prior record of delinquency; and (4) the juvenile's programming history. *Id.*, subd. 2(b)(1)(a). The rule also requires consideration of proportionality, the best interests of the child, which are presumed to favor parental custody, the suitability of any sanctions, and "the criteria used for determining delinquency dispositions in the local judicial district." *Id.*, subd. 2(B)(1)(b) - 2(B)(5).

Here, the district court's dispositional order recites the arguments of the attorneys, including the reasons for the prosecutor's recommendation of the out-of-home Beta program. The order particularly notes that R.S.B. failed to follow up on his referral to Operation De Novo in an earlier case and that the prosecutor took into consideration R.S.B.'s "lack of a delinquency history, the facts of the case, and the charges in determining [her] recommendation."

Thus, it appears that the court relied heavily on the seriousness of bringing a loaded weapon to school, a factor the court commented on at the disposition hearing, along with R.S.B.'s failures to appear, particularly his failure to follow up on the Operation De Novo referral. These factors are again referenced in the court's order denying the motion for reconsideration.

R.S.B. argues that the disposition was disproportionate to the seriousness of his conduct and did not meet the "necessity" standard or the "best interests" standard. We disagree. The record establishes that R.S.B. brought a loaded gun to school, where it discharged. It was only by chance that no one was injured. The record also indicates that, although R.S.B. had no prior delinquency adjudications or juvenile programming history, he had been charged with disorderly conduct and failed to appear for an appointment to set up the Operation De Novo diversion program.

2. Gun-offender policy

R.S.B. argues that he was unjustifiably ordered to complete the Beta out-of-home placement because the corrections department has "dictated" to the juvenile court a policy that all juvenile "gun offenders" must be placed in that program. He implicitly claims that the judges of that court have surrendered their authority on this issue and have abjectly followed the dictates of the corrections department. Having made that claim, R.S.B. concedes that the record here is not sufficient for this court to decide his challenge to such a policy, specifically whether such a policy exists and whether the judges have surrendered their authority in the face of it. We have examined the record, and we agree that the record is insufficient. Therefore, we do not address the issue.

3. Multiple adjudications

R.S.B. argues that the district court erred in adjudicating him delinquent on both of the charges. He points to a court document that is separate from the district court's order. The state, referring to the judges' orders, argues that R.S.B. received only a single adjudication of delinquency. But even if R.S.B. were correct that there were multiple adjudications, his claim that they would violate Minn. Stat. § 609.04 (2006) is without merit.

Relying on the facts of his offense, he argues that the offense of underage possession of a pistol was necessarily proven by proof that he possessed a dangerous weapon on school grounds. But "to determine whether one crime necessarily is proved by proof of another, the court looks at the statutory definitions of the crimes, not the facts of a particular case." *State v. Carr*, 692 N.W.2d 98, 102 (Minn. App. 2005) (citing *State v. Gisege,* 561 N.W.2d 152, 156 (Minn. 1997). The offense of possessing a dangerous weapon on school grounds, while more commonly committed by juveniles, would be committed by an adult who enters the school grounds carrying a shotgun; such an act does not implicate any of the elements of underage possession of a pistol. Minn. Stat. § 609.66, subd. 1d(a) (2006). And the offense of underage possession of a pistol would be committed by a child who possesses a pistol on a public street; such an act would not amount to possession of a pistol on school grounds. Minn. Stat. § 624.713, subd. 1(a)(2) (2006). We conclude that the underage possession charged in count II was not a lesser-included offense of the possession-on-school-grounds offense charged in count I. Thus,

even if there were multiple adjudications of delinquency in this case, they would not violate Minn. Stat. § 609.04, and we affirm the adjudication of delinquency.

R.S.B.'s claim that the district court improperly imposed multiple dispositions in violation of Minn. Stat. § 609.035 is also without merit. The disposition order notes that R.S.B. was found guilty of two offenses. The order, however, imposes only a single disposition. There is no factual basis for R.S.B.'s claim that the district court imposed multiple dispositions.

Affirmed in part, reversed in part, and remanded.