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NO. COA07-1359

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

IN THE MATTER OF:

D.K.B.

Mecklenburg County
No. 06 J 1113

Appeal by the juvenile from order entered 18 July 2007 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 28 April 2008.

Court of Appeals

Attorney General Roy Cooper, by Assistant Attorney General Jacqueline A. Tope, for the State.

Sofie W. Hosford for the juvenile.

Slip Opinion

STEELMAN, Judge.

The trial court did not abuse its discretion in imposing a level three disposition upon juvenile's second probation violation. Where the appellate entries in this case do not state compelling reasons for juvenile's incarceration pending appeal as required by N.C. Gen. Stat. § 7A-2605, this matter must be remanded for further findings.

At the 5 December 2006 Juvenile session of Mecklenburg County District Court, the juvenile admitted committing the delinquent acts of three counts of breaking and entering a motor vehicle and one count of common law robbery. The trial court entered a level two disposition, which included twelve months of probation. On 2

February 2007, the State filed a motion for review alleging the juvenile had violated the terms and conditions of his probation. The juvenile admitted the allegations contained in the motion for review, and on 20 March 2007, the trial court entered a disposition order imposing a level two disposition of ten days in detention and four days suspended upon the successful completion of other additional terms and conditions of the juvenile's probation.

On 10 May 2007, the State filed another motion for review alleging the juvenile had violated additional terms and conditions of his probation. On 17 July 2007, the juvenile admitted the allegations of the new motion for review. The court entered a level three disposition, including commitment to youth development center for a minimum of six months, and thereafter, an indefinite commitment with no community release. The juvenile appeals.

In his first argument, juvenile contends that the trial court abused its discretion in ordering a level three disposition in this matter and ordering him confined to a youth development center. We disagree.

The juvenile contends it was in his best interest to receive a level two disposition and be placed in a level four therapeutic treatment facility, as suggested by his psychological evaluation. However, "[p]ursuant to the juvenile code, the juvenile court is required to select the most appropriate disposition calculated to *both protect the public and to meet the needs and best interests of the juvenile.*" *In re N.B.*, 167 N.C. App. 305, 310, 605 S.E.2d 488, 492 (2004) (emphasis added and citations and internal quotations

omitted). The North Carolina General Statutes specifically provide:

In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;
- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and
- (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2007).

Our Court has recognized that "choosing between two appropriate dispositional levels is within the trial court's discretion. Absent an abuse of discretion, we will not disturb the trial court's choice." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002); see also *In re N.B.*, 167 N.C. App. at 311, 605 S.E.2d at 492 (holding "a decision vested in the discretion of the juvenile court will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason.").

At the disposition hearing, the trial court received into evidence a report from a psychologist who had evaluated the

juvenile. The report indicated that commitment to a youth development center (a level three disposition) was "not seen as a clinically appropriate treatment recommendation" and recommended placement in a level four treatment facility (a level two disposition). The trial court considered and gave weight to the psychological evaluation. However, the trial court determined that upon juvenile's second violation of the terms and conditions of his probation, it was in the best interests of both the juvenile and the public for the juvenile to be committed to a youth development center.

At the disposition hearing, the trial court asked counsel for the juvenile and the State about the availability of a placement in a level four treatment facility. Neither counsel for the juvenile nor the State indicated such a placement would be available within the next ten days. The trial court determined that while waiting for an available placement in a level four treatment facility, the juvenile would have to be kept "in a juvenile detention facility where he would receive little to no services." The trial court concluded the juvenile would be better served by immediate commitment to a youth development center, where he could begin receiving some services. Before imposing a level three disposition, the trial court further considered the seriousness of the offenses, the juvenile's culpability and failure to avail himself of the services offered during his probation, the need to hold the juvenile accountable for his actions, and the likelihood of the juvenile continuing to endanger the community. We find no

abuse of discretion in the trial court's imposition of a level three disposition. This argument is without merit.

In his second argument, juvenile contends the trial court erred in failing to order the juvenile be released pending appeal. The juvenile argues that no findings of fact support his detention pending appeal and the trial court has not stated any compelling reasons supporting its ruling. We agree.

Unless otherwise ordered, a juvenile should be released from custody pending the disposition of an appeal. N.C. Gen. Stat. § 7B-2605 (2007). The trial court, for the duration of an appeal, "may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." *Id.* Such an order must be based on "compelling reasons which must be stated in writing[.]" *Id.*

In its disposition order, the trial court recommended that, if its order was appealed, the juvenile not be released from his detention at a youth development center pending an appeal. Additionally, at the disposition hearing, the trial court held that it "stands by its reasoning as previously stated and deems that [the juvenile] will need to remain in training school through the perfection of his appeal." However, in the appellate entries filed in this matter, the trial court did not indicate whether the juvenile should be released during the pendency of the appeal. Further, the trial court did not enter a temporary order affecting the custody or placement of the juvenile pending disposition of the appeal as required by N.C. Gen. Stat. § 7B-2605. While we affirm

the disposition order in this case, given the possibility of further appellate proceedings, and the juvenile's indefinite commitment to a youth development center, this issue is not moot. We therefore remand this matter for the entry of a written temporary custody order pursuant to N.C. Gen. Stat. § 7B-2605, including findings as to the compelling reasons for denying release if so ordered.

Juvenile has failed to argue his remaining assignment of error in his brief and it is deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

AFFIRMED IN PART, REMANDED IN PART.

Judges HUNTER and MCCULLOUGH concur.

Report per Rule 30(e).