NO. COA08-649

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

IN THE MATTER OF:
T.P.

Mecklenburg County
No. 07 J 583

Appeal by Juvenile from orders entered 7 November 2007 and 7 January 2008 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Ann W. Matthews, for the State.

Mary McCullers Reece for Juvenile-Appellant.

ARROWOOD, Judge.

On 23 June 2007, T.P. was charged in a juvenile petition with assault with a deadly weapon. The petition alleged that on 2 May 2007, T.P. held a small pocket knife to the chest of a classmate and then cut her beneath her left eye. At trial on 6 November 2007 the victim, M.M., testified that T.P. sat behind her in their fourth period high school math class and that the two frequently talked and "played around" during class. On 2 May 2007, she and T.P. were "randomly" talking in class when T.P. called her name. She turned around to face T.P. and he held a pocket knife to her chest. M.M. then turned back around, and T.P. called her name a second time. When M.M. turned around a second time, T.P. cut her

under her eye with either the pocket knife or his fingernail. M.M. went to the bathroom and later told a friend about the incident, but did not tell the teacher, her parents, or anyone else. At first, M.M. testified that T.P. did not say anything specific while holding the knife to her chest, but on cross-examination she testified that T.P. asked her to have sex with him.

At some point in time, M.M.'s friend told an assistant principal, who then spoke to M.M. on or about 7 May 2007. M.M. also talked to Officer Matt Dunker, the school resource officer, the same day. Officer Dunker testified that he noticed a scar about a half-inch long under M.M.'s left eye. According to Officer Dunker, M.M. reported that T.P. threatened to rape her as he was holding the knife to her chest.

T.P. testified that he and M.M. were friends and talked during fourth period math. He denied ever holding a knife to M.M. and denied threatening to rape her. T.P. testified that he was out of school sick on 2 May 2007. T.P.'s mother testified that T.P. missed three days of school during early May due to the flu, but she could not remember the specific dates.

After hearing all testimony, the trial court adjudicated T.P. delinquent for having committed the offense of assault with a deadly weapon. The trial court then proceeded to disposition. T.P.'s delinquency history was "low," but the offense, a Class A1 misdemeanor, was classified as "serious." Therefore, the trial court was permitted to sentence T.P. to either a level one or level two disposition. After hearing the court counselor's

recommendation, the trial court imposed a level two disposition: a sentence of twelve months supervised probation, with a suspended sentence of fourteen days in detention. In addition to the regular terms of probation, the trial court ordered T.P. to attend school each and every day and comply with a 7:00 p.m. curfew. Furthermore, the trial court ordered T.P. to comply with all recommended treatment programs, to cooperate with placement in a wilderness program, and to not contact the victim. T.P. gave written notice of appeal from the adjudication and disposition orders on 12 November 2007.

T.P. filed a motion for review on 3 December 2007 seeking to modify and/or vacate the adjudication disposition orders based on counsel's alleged late receipt of T.P.'s attendance records from the 2006-2007 school year. The motion alleged that the attendance records confirm that T.P. was absent from his fourth period math class on 2 May 2007. In the motion, T.P.'s trial counsel claimed that she attempted to obtain T.P.'s attendance records in August 2007, but did not obtain the pertinent records until T.P.'s mother requested and received them on 8 November 2007.

On 3 December 2007, the trial court entered an order setting T.P.'s conditions of disposition pending appeal on 3 December 2007, but continued the hearing as to T.P.'s motion for review.

On 7 January 2008, the trial court held a hearing on the motion for review, and dismissed it for lack of jurisdiction, based on the pending appeal of the adjudication and disposition orders.

T.P. gave written notice of appeal from the dismissal order on 9 January 2008.

I.

T.P.'s first argument on appeal is that the trial court erred in dismissing his motion for review on the ground that it lacked jurisdiction. A fundamental rule of appellate practice is that "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. . . ." N.C. Gen. Stat. § 1-294 (2007). All proceedings in the trial court are thus stayed pending appeal absent a specific exception. *In re B.D.W.*, 175 N.C. App. 760, 764, 625 S.E.2d 558, 562 (2006). T.P. claims that N.C. Gen. Stat. §§ 7B-2600 and -2605 provide exceptions giving the trial court jurisdiction to modify a juvenile order pending appeal.

We therefore examine N.C. Gen. Stat. §§ 7B-2600 and -2605 to determine whether they provide a basis for the trial court to retain jurisdiction pending appeal. N.C. Gen. Stat. § 7B-2600 provides the following:

> (a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.
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> (b) In a case of delinquency, the court may reduce the nature or the duration of the disposition on the basis that it was imposed in an illegal manner or is unduly severe with

> reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses.

N.C. Gen. Stat. § 7B-2600(a),(b) (2007). The statute thus gives the trial court authority to modify or vacate a disposition order, but it is silent as to whether the trial court may do so pending appeal. Therefore, we find that N.C. Gen. Stat. § 7B-2600 does not provide an exception to the general rule. Because T.P. sought to vacate the disposition order *after* he gave notice of appeal, N.C. Gen. Stat. § 7B-2600 is inapplicable to the instant case.

North Carolina General Statute § 7B-2605 provides that "[f]or compelling reasons which must be stated in writing, the court may enter a temporary order affecting the *custody or placement* of the juvenile" pending appeal of a juvenile order. N.C. Gen. Stat. § 7B-2605 (2007) (emphasis added). It thus allows the trial court to enter a temporary order pending appeal, but limits such authority to entry of an order that affects the *custody or placement* of the juvenile. N.C. Gen. Stat. § 7B-2605; *B.D.W.*, 175 N.C. App. at 764, 625 S.E.2d at 562. Section 7B-2605 does not allow the trial court to vacate an adjudication or a disposition order. Here, T.P. sought to vacate the orders on the basis of newly acquired exculpatory evidence. This purpose is not authorized by the statute.

It does not appear that any other statute affords the trial court authority to modify the orders on the grounds sought in T.P.'s motion for review. *See B.D.W.*, 175 N.C. App. at 764-65, 625 S.E.2d at 562 (finding that the trial court lacked jurisdiction to

enter an order allowing an amendment to a juvenile petition after the juvenile had perfected his appeal). Therefore, T.P.'s notice of appeal stayed the proceedings in the trial court. We accordingly find no error in the trial court's dismissal of T.P.'s motion for lack of jurisdiction. However, this determination does not serve as a bar to the Juvenile filing another Motion for Review on the same grounds set forth in the original motion once this matter is returned to the trial court.

II.

T.P. also contends that the trial court abused its discretion by ordering a level two disposition. Under the statutory framework, the trial court is required to select the "most appropriate disposition" which is "designed to protect the public and to meet the needs and best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-2501(c) (2007). Here, T.P. had a low delinquency history, but was adjudicated delinquent for having committed a Class A1 misdemeanor, which is classified as "serious." Therefore, under the framework of N.C. Gen. Stat. § 7B-2508 (2007), the trial court had the authority to impose either a level one or level two disposition.

We have previously held that "choosing between two appropriate dispositional levels is within the trial court's discretion." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002). Additionally, it is within the discretion of the trial court to determine which dispositional alternatives to impose. *In re Ferrell*, 162 N.C. App. 175, 176, 589 S.E.2d 894, 895 (2004). "It

is well settled that 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." *In re N.B.*, 167 N.C. App. 305, 311, 605 S.E.2d 488, 492 (2004) (citation omitted).

Here, there is no evidence that the trial court abused its discretion. Although T.P. suggests that the facts surrounding the assault offense warrant a lesser disposition, we note that the trial court is required to take factors other than culpability into consideration. Indeed, the trial court is required to consider the juvenile's needs and risk assessment when entering the appropriate disposition. *See* N.C. Gen. Stat. § 2501(c)(5). Here, the court counselor recommended a level two disposition based on T.P.'s educational problems and diversion history. Although T.P. had no previous delinquency history, T.P. had previously entered two pretrial diversion plans for past offenses. It appears that the trial court took the counselor's recommendation into consideration, which is proper under the statutory framework. After reviewing T.P.'s needs and risk assessment, we cannot say that this decision was "unsupported by reason." Therefore, we hold the trial court did not abuse its discretion in entering the disposition.

Affirmed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).