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AUGUST 17, 2005 (2003-SC-0465-D)

Commonwealth Of Kentucky
Court of Appeals

NO. 2001-CA-002507-DG

C.G., A CHILD

APPELLANT

ON DISCRETIONARY REVIEW
FROM KENTON CIRCUIT COURT
v. HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 01-XX-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: This case comes before the court on discretionary review of an opinion of the Kenton Circuit Court affirming a disposition order in a juvenile case in the Kenton District Court. We will refer to the juvenile as C.G. so that his identity will not be disclosed. Having reviewed the record and considered the oral and written arguments of counsel, we vacate and remand.

On January 31, 2001, C.G., who was fifteen years old at the time, was placed on probation for a six-month period subject to the supervision of the Department of Juvenile Justice after having admitted that he committed the offense of unauthorized use of a motor vehicle in violation of KRS¹ 514.100. He was later found to be in contempt of court and was ordered to serve one day in juvenile detention after admitting he had violated his curfew on several occasions. The disposition order was entered by the Kenton District Court on April 24, 2001.

On May 1, 2001, a juvenile petition was filed alleging that C.G. was in contempt of court for violating prior court orders by failing to attend school on three separate days. C.G. was taken into custody on a pick-up order and was placed in detention on May 14, 2001. He appeared before the district court on May 15, 2001, the same day the juvenile petition was filed with the district court clerk.

When C.G. appeared before the court, his attorney stated that "he is going to go ahead and admit that he's missed these three days of school."² The district court judge then ordered C.G. to serve sixty days in detention but authorized an alternate placement in the Central Kentucky Youth Academy.

¹ Kentucky Revised Statutes.

² C.G.'s father was also present.

C.G. appealed to the Kenton Circuit Court. On October 26, 2001, the Kenton Circuit Court entered an order affirming the adjudication and disposition in C.G.'s case. This court then accepted discretionary review of the case upon C.G.'s petition.

The dispute in this case involves the nature of proceeding before the Kenton District Court wherein C.G. was adjudged to be in contempt of court and was sentenced to sixty days in juvenile detention with alternative placement authorized. The entire hearing before the district court judge consisted of the following:

Male: Jeff Middendorf for the Commonwealth.

Female: Kim McClellan for [C.G.]

Judge: [C.], state your name and date of birth.

C.J.G.: [C.J.G.] 6/28/85.

Judge: Sir, state your name for the record.

Dad: [J.G.].

Judge: And you're [C.'s] father?

Dad: Yes Ma'am.

Judge: We're here for detention hearing on contempt?

CW: That's correct, Judge.

McClellan: Your Honor, actually, he's going to go ahead and admit that he's missed these three days of school. So, I

don't know, you and I talked about
. . . Ms. Calme and I talked about
. . .

Judge: (inaudible) sixty days in detention
with alternative to detention
authorized, and I ask that he be
placed in CKYA for those sixty days.

Female: Do I put that on . . .? _____.

CW: Yes. Would it help to put on there
where the placement would be or
just, just alternative placement?

Judge: KYA?

CW: Yeah, I don't even think you really
have to do that Judge, just
authorized alternative placement.

Judge: Well, if I follow anything, I am
going to with recommendations, sixty
days in detention, authorizing an
alternative, alternative placement,
that will be CKYA.

CW: Thank you, Judge.

C.G. raises four issues for our consideration, and we will
address each of them.³

Before addressing C.G.'s arguments, we must address
the Commonwealth's assertion in its brief that three of the four
arguments raised in this court were not raised by C.G. in his
appeal to the Kenton Circuit Court. Citing Stucker v. Bibble,
Ky., 442 S.W.2d 578, 580 (1969), the Commonwealth maintains that

³ None of the alleged errors were preserved for appellate review, but C.G.
urges us to review the issues as palpable error and to reverse the district
court order pursuant to Kentucky rules of Criminal Procedure (RCr) 10.26.

C.G. may not raise those three arguments to this court since he did not raise them in his appeal to the circuit court. Having reviewed the circuit court order affirming the district court's adjudication and disposition of the case, we note that, rather than addressing individual arguments, the circuit court merely found that C.G.'s rights were properly protected by his attorney. Further, our review of the record clearly indicates that C.G. raised each of the four issues now before us at the circuit court level. The Commonwealth's assertion that C.G. did not raise these arguments to the circuit court is simply incorrect.

C.G.'s first argument is that his federal and state constitutional due process rights were violated because the petition was filed the same date he was "found guilty" and because no proof in support of the petition was submitted. He asserts that the notice given to him of the contempt of court charge was "both inadequate and untimely." He also argues that the proceeding was improperly instituted against him in the form of a petition rather than a show cause motion through the county attorney's office.

As C.G.'s due process rights relate to these allegations, we reject his argument. First, C.G. cites no authority to support his argument that it was improper to file the petition on the same day he appeared before the court on the

charge. The petition against C.G. was completed two weeks prior to the hearing, and it was filed on the day of the hearing. It is also apparent from the hearing that C.G. and his attorney had been given notice of the contempt of court charge. We further note that C.G.'s attorney made no request for any continuation of the hearing so that a defense could be prepared or witnesses could be subpoenaed to testify. In short, C.G., through his attorney, was obviously aware that he was before the court on a charge of contempt of court for skipping school in violation of prior court orders.

C.G.'s contention that he was "found guilty" and that no proof was submitted regarding the charge is likewise without merit. C.G. was not "found guilty" but rather the written record by the judge on the court calendar reflects his admission to the offense. Assuming C.G. admitted the offense, the Commonwealth was not required to submit proof to support the charge.

C.G.'s complaint that the action against him proceeded by way of petition and pick-up order rather than show cause motion is also without merit. Although the county attorney's office apparently could have proceeded by way of a show cause order rather than proceed in the manner in which it did, a pick-up order and detention were authorized by statute. See KRS

610.265(1). Also, C.G. was given a hearing within forty-eight hours of his detention as required by the statute. Id.

C.G.'s second main argument is that the district court "committed reversible error by entering a contempt admission against [C.G.] despite the fact that [C.G.] did not speak on the record except to state his name and date of birth and without conducting a plea colloquy in accordance with Boykin v. Alabama." We believe this argument has merit. C.G. appeared before the judge with his attorney and stated his name and date of birth. Other than giving that information, C.G. made no other statement on the record. Thereafter, his attorney stated that "he's going to go ahead and admit that he's missed these three days of school." Following that statement the judge sentenced C.G. to sixty days in detention with alternative to detention authorized. The hearing then ended quickly.

Juvenile proceedings that involve allegations that a juvenile has committed a crime are handled differently from adult proceedings. The district court in a juvenile proceeding determines the truth or falsity of the allegations based on an admission or confession of the child or by the taking of evidence. KRS 610.080(1). Unlike an adult, a juvenile does not actually enter a guilty plea. In fact, adjudication by a juvenile session of the district court that a child committed a criminal offense is not deemed to be a conviction. KRS 635.040.

Nevertheless, it is an elementary principle that juveniles are entitled to the same rights as adults prior to admitting or denying the allegations against them. These rights include the right to remain silent, the right to an attorney, the right to subpoena witnesses, the right to a hearing, and other rights.

Before a guilty plea, or an admission by a juvenile in a juvenile proceeding, may be accepted by the court, it must be determined that the plea was voluntarily and intelligently made by a competent person. See Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). In fact, RCr 8.08 states that the court "shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." Pleading guilty involves the waiver of the aforementioned constitutional rights, and a waiver of these rights may not be presumed from a silent record. Centers, supra. "The court must question the accused to determine if he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record." Id., citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

The record does not reveal that any of these constitutional protections were afforded to C.G. prior to his being sentenced to sixty days in detention. First, C.G. did not himself admit the truth of the allegation (contempt of court)

against him. KRS 610.080(1) requires that an adjudication "shall be made on the basis of an admission or confession of the child to the court or by the taking of evidence." Second, his attorney also did not admit the truth of the allegation. His attorney only indicated that C.G. was "going to go ahead and admit that he's missed these three days of school." The problem with this is that C.G. never admitted that he missed the three days of school. Furthermore, even if C.G. missed the three days of school, that fact alone would not amount to contempt of court. Obviously, school absences may be caused by legitimate reasons such as illness. At any rate, even if the statement of C.G.'s attorney amounted to an admission on behalf of C.G., C.G. himself never admitted that he was in contempt of court.

Furthermore, the court failed to engage in any colloquy with C.G. so as to determine that he understood what he was admitting, its consequences, and the possible punishment that he could receive. As this court stated in D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292 (2001), the principles of the Boykin case apply to juvenile adjudications. Id. at 294 n. 2. While the Commonwealth maintained at the oral argument of this case that the admission and disposition was pursuant to a plea agreement, there is no such agreement in the record supporting that contention. In short, if there was a plea

agreement, then it should have been stated on the record.⁴ The court should then have engaged in a Boykin colloquy with C.G. to determine the voluntariness and intelligence of his admission. C.G., not his attorney, should have made an admission or denial of the truth of the allegations.⁵ We conclude that the manner in which these proceedings occurred amounted to palpable error entitling C.G. to relief under RCr 10.26.

In short, we vacate and remand this matter to the Kenton District Court for further proceedings consistent with this opinion. In addition to affording C.G. the rights to which he is entitled as set forth above, the court should also make clear that less restrictive alternatives were considered but rejected. See KRS 600.010(2)(c).

Finally, we come to C.G.'s argument that the district court erred in ordering sixty days of detention because KRS 635.060(4) limits detention sentences to forty-five days for fifteen-year-old offenders. That statute does, in fact, limit the period of time for detention of fifteen-year-old juveniles who have committed public offenses to a term not exceeding forty-five days. However, as the Commonwealth notes, KRS

⁴ "It is elementary that a court of record speaks only through its records." Allen v. Walter, Ky., 534 S.W.2d 453, 455 (1976).

⁵ The fact that C.G. was before the court on a charge of contempt rather than a charge that he committed a criminal offense is not important. As this Court stated in Campbell v. Schroering, Ky. App., 763 S.W.2d 145 (1988), "some sort of due process is required" before a person may be incarcerated for criminal contempt. Id. at 147.

600.060 states that "[n]otwithstanding any other provision of KRS Chapter 600 to 645, the inherent contempt power of the court shall not be diminished." As a specific statute is controlling over a general statute where both could arguably apply to a given situation, KRS 600.060 clearly applies in this case. See Commonwealth v. Phon, Ky., 17 S.W.3d 106, 107 (2000). We conclude the district court had the authority to order C.G. placed in juvenile detention for sixty days for contempt of court.

The order of the Kenton Circuit Court affirming the adjudication and disposition of C.G.'s case in the Kenton District Court is vacated and remanded.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
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