

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001066-DG

C.I., A CHILD

APPELLANT

ON DISCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 01-XX-000037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: DYCHE, JOHNSON AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This matter is on discretionary review from an order, entered by the Jefferson Circuit Court, affirming the Jefferson District Court's order committing appellant C.I. to the Department of Juvenile Justice (DJJ) as a juvenile sexual offender. For the reasons stated hereafter, we affirm.

On November 29, 2000, fourteen-year-old C.I. pled guilty to the second degree sexual abuse of a younger child. DJJ referred C.I. to David Breeding, an "Approved Sex Offender

Evaluation and Treatment Provider," for a mental health assessment. On March 15, 2001, after reviewing Breeding's report and recommendations, the district court committed C.I. to the custody of DJJ for residential placement as a sexual offender. DJJ then, for the first time on the record, raised the issue of whether C.I. is mentally retarded and therefore ineligible for commitment as a juvenile sexual offender rather than as a public offender. See KRS 635.505(2). The court declined to set aside its order of commitment, noting that DJJ could file a motion for reconsideration if, after further assessment, it determined that C.I. was not appropriately committed.

DJJ subsequently filed a motion to alter, amend or vacate the court's order of commitment, asserting:

1. Under Kentucky Law, a mentally retarded child cannot be adjudicated a "juvenile sexual offender." KRS 635.505(2).
2. The child scored a 66 on the Kaufman Brief Intelligence Test, placing him in the "lower extreme range" for verbal ability.
3. The child therefore cannot legally be committed to the Department of Juvenile Justice as a "juvenile sexual offender."

The court denied the motion, and the circuit court affirmed the order of commitment. This court granted discretionary review.

C.I. contends on appeal that the trial court abused its discretion by failing to conduct an evidentiary hearing to

determine whether he is mentally retarded and therefore exempt from commitment to DJJ as a juvenile sexual offender. Our review of the entire record indicates that this issue was not raised below, however, until after the district court verbally committed C.I. as a juvenile sexual offender. Even then, the issue was raised by DJJ rather than by C.I., and the argument was based on the Kaufman Brief Intelligence Test (KBIT) which was administered some seventeen months earlier by Kegel & Associates and then summarized in Kegel's report. Although the record on appeal has been supplemented with a copy of the Kegel report, and although a copy of that report allegedly is included in other portions of C.I.'s previous juvenile court records, the report was never specifically presented to the trial court or introduced into evidence during the district court proceedings. Regardless of whether the issue on appeal was properly preserved, however, we conclude that C.I. is not entitled to relief herein.

DJJ is statutorily obligated to operate a program to treat juvenile sexual offenders, who are defined as juveniles who are "not actively psychotic or mentally retarded" and who have pled or have been found guilty of certain offenses, including felony or misdemeanor offenses under KRS Chapter 510. See KRS 635.500(1) and 635.505(2). The term "mentally retarded" was not defined in Chapter 635 at the time of these proceedings,

but KRS 635.505(4) was subsequently enacted to define the term as pertaining to "a juvenile with a full scale intelligent quotient of seventy (70) or below."

Here, the record shows that C.I. initially was charged with the Class A felony offense of first degree sodomy. KRS 510.070. KRS 635.510(1) mandates that a juvenile who is at least thirteen years of age, and who is adjudicated guilty of a felony charge under KRS Chapter 510, "shall be declared a juvenile sexual offender." However, since appellant pled guilty to a misdemeanor sexual offense, under KRS 635.510(2)(b) the court was permitted but not obligated to find that he was a juvenile sexual offender.

C.I. contends that he is mentally retarded and therefore is ineligible for commitment as a juvenile sexual offender. He relies upon the seventeen-month-old KBIT results which show that he tested as having a verbal ability score of 66, a matrices score of 74, and a composite score of 67. According to C.I., these scores demonstrate that he has an I.Q. of less than 70 and therefore is mentally retarded as defined in KRS 635.505(4) and KRS 532.130(2). Although as noted above the term "mentally retarded" was not defined in KRS Chapter 635 at the time of his disposition, C.I. points out that KRS 635.505 was subsequently amended to define a mentally retarded juvenile as one with a "full scale" I.Q. of 70 or less. C.I. also refers

to KRS 532.130(2), which for purposes of death penalty eligibility defines a "seriously mentally retarded individual" as a person "with significant subaverage intellectual functioning," which in turn is described as an I.Q. of 70 or less, "existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental behavior."

Even if one relies upon such definitions, however, the trial court was not compelled to conclude that C.I. was mentally retarded based on the seventeen-month-old KBIT results. Although those results certainly raised issues regarding C.I.'s intellectual capacity, the KBIT was merely a brief screening device rather than either a "full scale" I.Q. test as described in KRS 635.505(4), or a device which could satisfy the multifaceted requirements of KRS 532.130(2). Moreover, as noted by the trial court, the KBIT and the Kegel report never specifically addressed the issue of whether C.I. is mentally retarded. Breeding's subsequent assessment, by contrast, was performed pursuant to DJJ's referral after C.I. pled guilty to second degree sexual abuse, and it rejected any claim of mental retardation. More specifically, that assessment indicated that C.I. "showed no signs of mental illness, incapacity or retardation that would impede treatment amenability," that C.I. reported that he was in a learning disability program in school

“‘because of my attitude – my counselor said my test scores are high enough for regular classes,’” that C.I.’s “presentation contained no signs of mental impairment or retardation,” that his “intellect appeared to be within the normal range,” that psychological testing was “[n]ot indicated for the purpose of making treatment recommendations as called for in KRS 635.510(2),” and that “[n]o mental impairment or limitation was seen which would preclude sex offender treatment amenability in” C.I. Finally, neither C.I. nor DJJ requested an evidentiary hearing for the presentation of additional evidence on the subject, and nothing in the record indicates that there was any attempt to follow up on the court’s suggestion that DJJ could return to court if additional testing showed that C.I. is mentally retarded.

Given the evidence adduced below, as well as C.I.’s apparent failure to specifically request an evidentiary hearing on the subject, we cannot say that the trial court erred by failing to conduct an evidentiary hearing to address the issue of C.I.’s intellectual functioning for purposes of determining his eligibility for commitment to DJJ as a juvenile sexual offender.

The court’s order is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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