

RENDERED: October 8, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000044-MR

J.E., A CHILD

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE KEVIN L. GARVEY, JUDGE  
ACTION NO. 95-J-504106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

SCHRODER, JUDGE: J.E., a minor child, appeals as a matter of right from an adjudication of the Jefferson Family Court finding her beyond control of parent and committing her to the custody of the Cabinet for Families and Children (CFC). We reverse and remand.

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

J.E. is the seventeen-year-old daughter of R.E. and D.E. R.E., her natural father and sole custodian, brought a complaint in October, 2002, alleging that J.E. was beyond control pursuant to Kentucky Revised Statute (KRS) 630.030(2). Counsel was appointed and the offense was informally adjusted. Several months later the offense was reinstated and J.E. pleaded guilty to beyond control. At that time J.E. was temporarily placed with a family friend. At the dispositional hearing the family court reunited her with R.E. and instructed her to attend school daily, to follow house rules, to continue counseling, and to cooperate with child protective services (CPS). The record indicates that J.E. and counsel were present at every stage of these proceedings.

A few months after the adjudication, R.E. filed a motion with the family court indicating that J.E. was not meeting the conditions of the disposition. At a hearing on the motion, the family court entered a "re-disposition" on the court's calendar and committed J.E. to the Cabinet for Families and Children (CFC). Although the court's calendar indicates on the "appearance" line that J.E.'s counsel was present, the video proceeding establishes that neither J.E. nor her counsel was present before the court for the disposition that day. The CPS worker explained J.E.'s absence by stating on the video record that J.E. was in a shelter house.

J.E. brings two issues before this court in seeking that the family court's order committing her to CFC be vacated and remanded. We reverse and remand on both issues.

Addressing first the right to counsel issue, it is undisputed that J.E.'s counsel was not present in court on the date she was committed to CFC. Pursuant to Application of Gault, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451, 18 L. Ed. 2d 527 (1967), the Due Process Clause of the Fourteenth Amendment to the United States Constitution gives a juvenile the right to be represented by counsel in delinquency proceedings which may result in commitment to an institution in which the juvenile's freedom is curtailed. Additionally, KRS 610.010(1)(a), 630.120(3), and 610.110(2), the statutes outlining the status offender dispositional hearing process, mandate that an indigent juvenile be appointed counsel and that counsel have the opportunity to examine and controvert information presented at the dispositional hearing.

While conceding that the lack of counsel's presence is "troublesome," the Commonwealth argues without citation to any controlling or persuasive authority that the failure of counsel to be present at disposition is harmless due to the failure of J.E. to demonstrate prejudice. As stated in Quarels v. Commonwealth, Ky., \_\_\_\_ S.W.3d \_\_\_\_ (slip opinion p. 5; finality endorsed 9/16/04):

"The fact that an error involves a constitutional right does not preclude harmless error analysis." The United States Supreme Court has applied a harmless error analysis to a wide variety of constitutional errors . . . [A] "trial error," . . . may be "quantitatively assessed in the context of other evidence presented," . . . and thus susceptible to a harmless error analysis. In contrast, a "structural error" affects the entire framework of the trial and therefore defies harmless error analysis. Examples of such structural errors include: . . . the deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct 792, 9 L.Ed.2d 799 (1963). (Citations omitted).

There is no allegation or evidence of record establishing that J.E. waived her right to have counsel present at the disposition hearing. D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292, 296-297 (2001). The lack of counsel's presence at this critical stage of the proceedings without a waiver, therefore, mandates that we reverse and remand.

It is additionally important to address the absence of J.E. at the dispositional hearing. As indicated above with regard to the necessity of counsel at the disposition hearing, KRS 630.120(3) likewise gives to the juvenile the opportunity to examine and controvert information presented. The Commonwealth again fails to direct us to any authority supporting the court's authority for committing J.E. to CFC in her absence, especially in light of the fact that CPS knew where she was located. The Commonwealth concedes that a remand on this issue is the proper

remedy. Upon remand, J.E. and her counsel must be given the opportunity to be present at the disposition hearing.

Additionally, J.E. argues that the family court acted improperly in unilaterally committing J.E. to CFC upon a "re-disposition" of the adjudication. We must agree with J.E. Statutory procedures for bringing an alleged violation of the terms of J.E.'s disposition before the court all require constitutional protections. For example, KRS 630.120(1)(b) provides that a status offense disposition ". . . is a valid court order and any child violating that order may be subject to the provisions of KRS 630.080(3) [requiring a finding of a valid court order and probable cause on the violation thereof before the juvenile can be placed in secure detention]." Additionally, pursuant to KRS 600.060, violation of a valid court order is subject to the contempt power of the court. KRS 610.100(2) and 630.120(3), the instructive statutes on how to conduct dispositions, speak to minimal due process protections. There is no provision for a unilateral modification of the court's disposition order.

The Commonwealth directs us to KRS 610.010(13) which provides:

The court shall have continuing jurisdiction over a child pursuant to subsection (1) of this section, to review dispositional orders . . . until the child is placed for adoption, returned home to his or her

parents with all the court imposed conditions terminated, or reaches the age of eighteen (18) years.

The Commonwealth also relies on the family court's comments at the original disposition hearing wherein he instructed CPS to contact J.E.'s father weekly to assess compliance and told J.E. that noncompliance could result in placement with the family friend or commitment to CFC. The court's statutory jurisdiction to "review" dispositions and the court's notice to J.E. at the disposition does not allow unilateral ability to change a disposition nor does it overcome J.E.'s minimum due process rights to rebut evidence against her of violation of a court order. This modification of a court order is additionally egregious in light of the absence of J.E. and counsel.

The Commonwealth lastly argues that the case is moot. This argument is based upon information that was not part of the record before the family court below. Pursuant to CR 76.12(4)(c), therefore, this Court will not consider this assertion except to note that the unavailability of one potential placement does not render this case moot.

For the foregoing reasons, the order of the Jefferson Family Court is reversed and remanded for proceedings consistent with the Unified Juvenile Code. Upon remand, J.E. and her counsel shall be afforded the opportunity to be present at all critical phases of the proceedings.

ALL CONCUR.

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