

RENDERED: JUNE 23, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002203-ME

K.M., A CHILD
UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM BOYLE FAMILY COURT
HONORABLE BRUCE PETRIE, JUDGE
ACTION NO. 04-J-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS; CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR
JUDGE.¹

POTTER, SENIOR: K.M., a minor, appeals from a Juvenile Status
Disposition of the Boyle Family Court adjudging her beyond
control, in contempt of the terms and conditions of a previously
imposed Juvenile Status Offender Order, and committing her to
the custody of the Cabinet for Health and Family Services
(Cabinet). For the reasons stated below, we affirm.

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

On April 16, 2004, a Juvenile Complaint against K.M. (born January 12, 1991) alleging harassing communications (see KRS² 525.080), was filed in Boyle District Court by Bruce Hall Day Treatment School (Bruce Hall School), the school K.M. was then attending. The Complaint alleged that K.M. had called the Bruce Hall School and left a voice mail message wherein K.M. claimed to be a representative of Bate Middle School. The message made false allegations concerning persons associated with the Bruce Hall School.³

K.M. was arraigned on the Complaint on May 20, 2004, and was appointed a Department of Public Advocacy Attorney. She was released to her mother on various conditions, including the requirements that she follow school and home rules, attend school, and commit no new offenses. K.M.'s mother was advised that she was required to report any violations of these conditions by K.M. A pretrial conference was set for June 17.

On June 10, 2004, K.M.'s mother executed an affidavit stating that K.M. was acting stubborn, was not minding, was being disrespectful, and had been smoking cigarettes. On June 17, 2004, in conjunction with the previously scheduled pretrial conference, a show cause hearing was held on the mother's

² Kentucky Revised Statutes.

³ Bruce Hall School is a Day Treatment/Alternative School into which K.M. was first enrolled in January 2004. Prior to that, K.M. was enrolled in Bate Middle School, but was removed to Bruce Hall School as a result of truancy and fighting with peers.

allegations. K.M. was readvised of the previously imposed conditions; the court further ordered that any further violations would result in an immediate pick-up.

On September 14, 2004, an Affidavit was executed by a Bruce Hall School administrator, Joey Kirk, stating that K.M. had been absent from school without a valid excuse seven times within about a six-week period; had been disruptive in class; had missed Comprehensive Care Center appointments which prevented the monitoring of K.M.'s medication levels; and that K.M.'s mother had missed scheduled meetings. These allegations resulted in a September 23, 2004, show cause hearing. At the show cause hearing, all charges (harassing communications and two counts of contempt) were amended into the single charge of beyond control of school officials. See KRS 630.020(2). Without objection, the matter was transferred to Boyle Family Court. K.M. was released to her mother under the same conditions as previously set forth, with the added imposition of a curfew.

On September 29, 2004, K.M. was arraigned in family court on the amended charge of beyond control, at which time a Juvenile Status Offender Order was entered. Among other things, the order provided that K.M. was not to leave home without her mother's permission; was to obey all rules of home, including any curfew as set by her mother; was to attend all school

sessions on time, have no unexcused absences, and no behavior problems at school; was not to violate the law; and was not to consume, use, or possess any alcoholic beverages, tobacco products, or illegal drugs. The order also stated "[f]ailure to abide by this Order may result in a contempt finding being made against you by the court which could result in a fine and/or your being placed in secure detention or other alternative placement" The order was explained to K.M., she indicated that she had no questions concerning the order, and was released to her mother.

On October 27, 2004, K.M. appeared before the family court and admitted guilt to the beyond control charge. The Status Offender Order was continued in effect pending disposition. A Pre-Disposition Investigation Report was ordered, and disposition was set for December 8, 2004.

At the December 8th hearing, the family court ordered the disposition that K.M. be probated to the family court until the age of 18. The family court indicated that it was ordering probation until 18 because it wanted to retain jurisdiction to change the disposition if need be. The family court also adopted in full the recommendations contained in the Cabinet's

Pre-Disposition Investigation Report,⁴ and continued in force the Status Offender Order. Review was set for March 16, 2005.

In January 2005 Affidavits were filed by a Bruce Hall School administrator Joey Kirk indicating that K.M. had missed three days of school within one week and that Impact Program workers "had not been able to provide in home services because [K.M.'s] mother refused all help." Prior to the scheduled review date, Cabinet social worker Gayle Learned also communicated to the court that, among other things, K.M. was not monitoring her blood glucose levels as required,⁵ and that other prescriptions had been misplaced and not filled in a timely manner. It was also reported during this time that the brother of K.M.'s mother was suffering from cancer and, as a result, K.M.'s mother was spending a good deal of time away from the family residence to look after her brother.

At the March 16th review, the family court ordered that K.M. be probated to the Cabinet under the terms and conditions as previously imposed. The family court cautioned that "once I've probated to the Cabinet you all should know my next step is commitment." In connection with the revised disposition, the Cabinet was directed to open a case on the matter.

⁴ Among other things, the recommendations provided that K.M. be subject to random drug screens.

⁵ K.M. has been diagnosed as diabetic.

On May 13, 2004, K.M.'s mother filed an Affidavit wherein she stated "[m]y daughter [K.M.] had a drug test at Bruce Hall Day Treatment yesterday and failed it. She told me about it late last night. She said they found marijuana and some type of pain killer." On May 17, 2005, Bruce Hall School administrator Joey Kirk filed a report with the court which, among other things, reflected that K.M. had refused to submit to a drug screen; had admitted to taking a Lortab; that she continues to have problem behaviors; that she had had five disciplinary reports; that she was failing three out of seven classes; and that "[s]he does not seem to be taking court orders seriously."

On May 20, 2005, the family court entered an Order to Take Juvenile into Custody upon the charge of "Contempt of Court - Failure to Abide w/ orders[.]" K.M. was taken into custody by the Cabinet at approximately 2:15 p.m. that day.

On May 23, 2005, a hearing was held on the detention and the underlying violations of the terms and conditions of K.M.'s probation to the Cabinet. Though K.M. was not present and K.M.'s counsel indicated she was not prepared to proceed, counsel did not seek a continuance. The family court then heard testimony from K.M.'s mother and the case social worker, Gayle Learned. At the conclusion of the hearing the family court held that detention would be appropriate due to probable cause that

K.M. had violated the terms and conditions of the Status Offender Order and, accordingly, was in contempt. However, the family court ordered that temporary custody be given to the Cabinet as a less restrictive alternative.

A hearing on the new contempt charge was convened on June 1, 2005, but because K.M. had been placed into a 28-day treatment program at Lincoln Trail, and medical advisors had stated that it was not in K.M.'s best interest to have her treatment interrupted, the matter was continued. A second continuance was required on June 15, 2005.

On July 6, 2005, a hearing was held on the new contempt charge and the associated allegations that had led to the charge. At the contempt hearing, on-going social worker Gayle Learned testified that K.M. had refused to submit to a drug screen. Learned also testified that K.M. had admitted to her that she had taken a Lortab and had smoked marijuana.

Joey Kirk of Bruce Hall School testified concerning K.M.'s behavior at school. Among other things, Kirk testified that K.M. had been suspended because of a pattern of behavior contrary to program standards, including refusal to work, disruption of class, and showing disrespect to the school staff. He also testified that K.M. had refused a drug screen.

K.M.'s mother also testified. She testified that K.M. had told her that she had failed a drug screen and that she was

very concerned about K.M.'s drug use. She further testified that prior to being removed to the Cabinet's custody, K.M. was frequently argumentative and refused to obey. She also testified that she was pleased with the progress K.M. had made since being placed in Lincoln Trail.

At the conclusion of the hearing, the family court found that there was proof beyond a reasonable doubt that K.M. had taken a Lortab; disobeyed school rules by being disruptive and disrespectful; had disobeyed house rules, and was accordingly in contempt of the previously imposed terms and conditions as set forth in the Status Offender Order. The family court set the matter for disposition on August 17, 2005, and ordered that K.M. remain in the temporary custody of the Cabinet until then. Following completion of the Lincoln Trail program, K.M. was placed in the Florence Crittenden Home.

Prior to the disposition hearing, a Pre-Disposition Investigation Report was filed by the Cabinet. The report recommended, among other things, that K.M. be committed to the Cabinet and to continue her residency at the Florence Crittenden Home for completion of its therapeutic program. At the subsequent August 17th disposition hearing, the family court adjudged K.M. beyond control in violation of KRS 630.020(2), accepted the recommendations of the Cabinet as contained in the

Pre-Disposition Investigation Report, and ordered that K.M. be committed to the custody of the Cabinet. This appeal followed.

First, K.M. contends that there was insufficient evidence to support a finding of contempt.

We begin with a general statement of our standard of review. Under Kentucky Rules of Civil Procedure (CR) 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). An appellate court, however, reviews legal issues de novo, see, e.g., Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001); Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003), including, of course, (as in jury trials) whether or not there were facts from which guilt beyond reasonable doubt could be found. In re Winship, 397 U.S. 358, 362-63, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Davis v. United States, 160 U.S. 469, 16

S.Ct. 353, 40 L.Ed. 499 (1895); U.S. v. Atwell, 570 F.2d 650, 652 (6th.Cir. 1978)

Based upon the evidence and testimony presented at the July 6, 2005, adjudication hearing, there is substantial evidence in the record to support the family court's conclusion that K.M. violated the terms and conditions imposed by the September 29, 2004, Juvenile Status Offender Order and the further restrictions imposed in the Cabinet's December 2004, Pre-Disposition Investigation Report.

The testimony and evidence presented at the hearing established that K.M. had admitted to using drugs; that K.M. had had unexcused absences from school; that K.M. had at times failed to comply with school rules; and that K.M. had at times failed to comply with her mother's house rules, all in violation of the terms and conditions imposed by the Status Offender Order. The family court's finding that K.M. was in contempt of the Status Offender Order was not clearly erroneous, and we are accordingly bound by that determination.

Next, K.M. contends that the family court erred by relying upon social worker Gayle Learned's testimony at the July 6th hearing that K.M. had admitted to her that she had smoked marijuana and taken a Lortab because K.M. had not been warned that she had a right not to incriminate herself. K.M. admits that this issue is not preserved, and we accordingly review this

alleged error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

We construe this argument as a contention that, in effect, the social worker should not have been permitted to testify to K.M.'s incriminating statements in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny. However, Miranda principles are not implicated here. Miranda is applicable only in the event of a custodial interrogation. See Welch v. Commonwealth, 149 S.W.3d 407, 410 (Ky. 2004). There is no allegation that K.M. was either in custody or under interrogation by the social worker when she made the statements admitting to drug use. To the contrary, the social worker's testimony, which is uncontradicted, was to the effect that the incriminating statements were unsolicited and wholly voluntary. Accordingly, this argument is without merit.

Next, K.M. contends that the family court erred when it committed K.M. to the Cabinet because this was not the least restrictive alternative.

KRS 600.010(2)(c) provides "[t]he court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary[.]" KRS 600.020(35) defines "least restrictive alternative" as follows:

"Least restrictive alternative" means, except for purposes of KRS Chapter 645,⁶ that the program developed on the child's behalf is no more harsh, hazardous, or intrusive than necessary; or involves no restrictions on physical movements nor requirements for residential care except as reasonably necessary for the protection of the child from physical injury; or protection of the community, and is conducted at the suitable available facility closest to the child's place of residence[.]

While it does not appear that the family court made a specific written finding concerning this, it did make a finding to the effect that reasonable efforts were made to prevent the K.M.'s removal from the home. Moreover, we note that the finding was implicit in the family court's determination. Further, K.M. did not request findings on the matter. See CR 52.04.

In addition, the family court's determination that commitment to the Cabinet was the proper disposition was not clearly erroneous. The initial court action in this docket imposed the minimum restriction available - K.M. was placed in the care of her mother with terms and conditions that she simply behave herself. As K.M. violated her terms and conditions, and continued to violate them, the family court reasonably escalated the disposition up the restrictive alternative scale. In

⁶ KRS Chapter 645 is concerned with the Mental Health Act of The Unified Juvenile Code.

further support of our conclusion that the family court was not clearly erroneous in his determination that commitment to the Cabinet was in the best interest of K.M., we note the following evidence contained in the record.

On July 5, 2005, just prior to the July 6th hearing, Lincoln Trail Behavioral Health Systems completed a report on K.M. The report states, in part, as follows:

K.A. was admitted to Lincoln Trail Hospital . . . for treatment of oppositional defiant disorder, bi-polar disorder current episode depressed, severe, cannabis dependence, and polysubstance use disorder continuous. . . . Patient reports problematic daily use of marijuana resulting in lifestyle disruption. Although she admits to frequent use of other drugs, her drug of choice is marijuana.

. . . .

It is the treatment team's recommendation that, following the completion of the 28-day CD program, [K.M.] continue her treatment in a highly structured setting with the ability to address her chemical dependency as well as psychiatric issues. A structured setting is recommended in order to provide [K.M.] with tools needed to prevent relapse and decompensation.

Further, the record discloses that K.M.'s home is located in a disadvantaged neighborhood where drug use is common among her peers. The record discloses concern that K.M.'s association with these peers may impede her recovery from her drug dependency. In addition, at the time of the family court's decision, K.M.'s mother was frequently away from home because of

her brother's cancer, hindering parental supervision during this time period.

In light of all these factors, and having carefully reviewed the record, we cannot conclude that the family court was clearly erroneous in its decision to order K.M.'s commitment to the Cabinet for further treatment at the Florence Crittenden Home.

Next, K.M. contends that commitment to the Cabinet is not a permitted disposition for a finding of contempt. We do not, however, construe the family court's decision as based merely upon its finding of contempt. We, rather, construe the disposition as having been made in light of the entire record and all of the circumstances involved, much of which has been recounted herein. We accordingly believe this argument is based upon a false premise and without merit.

Finally, K.M. contends that this matter should have been converted into a neglect petition. K.M. concedes that this issue is not preserved, and we accordingly review the issue pursuant to RCr 10.26. By all indications, the family court and the Cabinet are directing their efforts in this matter toward reunifying K.M. with her family and the present disposition is merely an intermediate step toward this objective. As such, we believe the result would have been the same if the matter had

been adjudicated as a neglect petition. As such, we discern no manifest injustice.

For the foregoing reasons the judgment of the Boyle Family Court is affirmed.

ALL CONCUR.

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