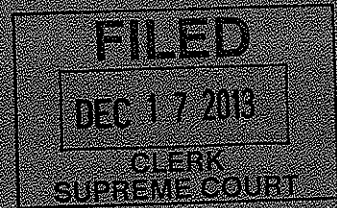


SUPREME COURT OF KENTUCKY
CASE NUMBER: 2013-SC-000210



Q.M., A CHILD UNDER EIGHTEEN

APPELLANT

VS.

Appeal from Christian Circuit Court
Hon. John L. Atkins, Judge
Confidential Case No. 12-XX-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2013, the foregoing "Brief for Appellant" was served by first class mail or messenger mail upon the following:

- Hon. John L. Atkins, Judge, Christian Circuit Court, 100 Justice Way, Hopkinsville, KY 42240;
- Hon. James G. Adams, Jr., District Judge, Christian District Court, 100 Justice Way, Hopkinsville, KY 42240;
- Hon. Lynn Pryor, Commonwealth Attorney, 511 S. Main Street, 2nd Floor, Courthouse Annex, Hopkinsville, KY 42240;
- Hon. J. Michael Foster, Christian County Attorney, P.O. Box 24, Hopkinsville, KY 42240;
- Hon. Duncan Cavanah, Assistant County Attorney, P.O. Box 648, Hopkinsville, KY 42240;
- Hon. Jason Holland, 951 E. C. Ave., Hopkinsville, KY 42240;
- and
- Hon. Jack Conway, Attorney General, Capital Center Complex, 1024 Capital Center Drive, Third Floor, Frankfort, Kentucky 40601.

I also certify that the record was returned to the Kentucky Supreme Court.


RENEE VANDENWALLBAKE

INTRODUCTION

The Appellant's charge of sexual abuse in the third degree was informally adjusted under KRS 610.100 but reinstated approximately five months later without written notice of the grounds for revoking the adjustment and without the presence of conflict-free counsel. In addition, there was no evidence that the Appellant wilfully violated the terms of the adjustment. The District Court subsequently accepted a guilty plea without informing the Child of his constitutional rights or the consequences of pleading guilty to a sexual offense. The Appellant asks this Court to enforce the informal adjustment or, in the alternative, vacate the guilty plea as not knowingly, voluntarily, or intelligently made.

STATEMENT CONCERNING ORAL ARGUMENT

Q.M. believes that oral argument would be beneficial in this case because of the novelty and complexity of the issues. Juveniles are frequently given an informal adjustment by juvenile courts and there is currently no guidance on the protections afforded juveniles when the Commonwealth is seeking to revoke that adjustment and reinstate delinquency charges against the child. It is also common for a child to plead guilty to a juvenile offense, yet courts routinely do not inform the juvenile of the severe and unique consequences that may arise from pleading guilty to a sexual offense. Q.M. believes that oral argument would assist this Court to effectuate proper guidance on issues that juvenile courts routinely face.

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STATEMENT OF THE CASE

A. TRIAL COURT PROCEEDINGS

On April 15, 2011, fifteen year old Q.M. was charged with sexual abuse in the third degree. The petition states:

On 041311 during Mrs. Preston's 6th block class [Q.M.] was pulling his penis out and placing it on another student's shoulder. Witnesses and victim advised [Q.M.] put his penis on his shoulder, tried to stick it in his ear and tried to hit him in the face with it.

(TR, vol.I, p.6). Q.M. had never been charged with a sex offense before. His only prior charge was an assault during a domestic violence incident between Q.M.'s mother and her ex-boyfriend. (TR, vol.I, p.61). Q.M. was arrested and brought before the court on April 19, 2011 and detained. (TR, vol.I, p. 10). At the next court date, Hon. Jason Holland entered his appearance as conflict counsel for Q.M. The Court released Q.M. from detention and placed him on a conditional order of release. (TR, vol.I, pp.14-15).

On May 24, 2011, the Court ordered that Q.M.'s case be "informally adjusted" on the condition "that he moves to Oklahoma to live w/Dad." (TR, vol.I, p.21). No audio record of this proceeding exists. (TR, vol.I, p.118). There was no agreement signed by the child, his mother, or his attorney. There is no indication that Q.M. received a copy of the order. There was no memorialized expiration for the period of adjustment.

Almost five months later, Q.M.'s case was re-docketed for a "review." (TR, vol.I, p.23). Without any written motion being filed and noticed to the child and his attorney, the Commonwealth moved the court to revoke the informal adjustment and reinstate the sex offense charge because Q.M. was back in Kentucky. (AR, track 2, 10/4/11, 00:20). Q.M.'s counsel was not present and instead, an attorney who had a direct conflict with the case because she actively represented the complainant stood in as counsel for Q.M.

(AR, track 2, 10/4/11, 0:11-1:16). Q.M.'s mother tried to explain to the court that Q.M. was forced to come back because there was an abuse/neglect case initiated against his father. (AR, track 2, 10/4/11, 2:08). The Judge simply replied, "Well charges have to come back." (Audio Record, track 2, 10/4/11, 2:15). There was no formal hearing, evidence, or testimony presented that established that Q.M. willfully violated the terms of the informal adjustment.

Three months later, on January 10, 2012, the court entered an admission for Q.M. on the sexual abuse charge. (TR, vol.I, p.30). The assault case, which was almost two years old by this point, was dismissed. (TR, vol.I, p.31). Before entering the guilty plea, the court asked four questions: (1) whether Q.M. was admitting to the charge of sexual abuse in the 3rd degree, (2) whether anyone made any threats or promises to him regarding the admission, (3) whether he was under the influence of drugs or alcohol, and (4) whether he was entering the admission "voluntarily and of your own free will." The answers to these questions are barely or outright inaudible. (AR, track 3, 12/15/11, 00:13-01:05). The court did not inform Q.M. of a single possible consequence of pleading guilty, not to mention the severe consequences that were possible under KRS 635.515 since Q.M. was pleading guilty to a misdemeanor sex offense.

At a subsequent hearing, Q.M. appeared without counsel. The record reflects that Q.M. was trying to hire a different attorney but his mother stated that they were not able to locate one that would take the case at that late stage. The court responded that such an effort was futile because he would not allow Q.M. to withdraw his guilty plea. No inquiry was made by the court as to why Q.M. desired to withdraw his guilty plea. (AR, track 5, 4/3/12, 00:04-01:03).

A disposition hearing was held on May 15, 2012. A Juvenile Sex Offender Assessment ("JSOA") was submitted by the Department of Juvenile Justice ("DJJ"), which recommended that Q.M. be committed to DJJ as a juvenile sex offender. (TR, vol.I, pp.59-72). Defense counsel did not ask for a continuance to hire his own expert to conduct an independent assessment. He did not call any witnesses and simply filed a two-page list of errors and discrepancies in the JSOA. (TR, vol.I, p.104-105). Defense counsel did not subpoena the author of the JSOA and did not object when she failed to appear in court for disposition. Despite the fact that Q.M. was in the community for approximately one year without any new offenses while the case was pending, the court accepted DJJ's recommendations, removed Q.M. from the community, and committed him to the Department of Juvenile Justice as a juvenile sex offender. (TR, vol.I, pp.101-102).

B. APPELLATE PROCEEDINGS

A notice of appeal was filed by another attorney on Q.M.'s behalf. (TR, vol.I, p.132). The appeal was perfected in Christian County Circuit Court on August 22, 2012. (TR, vol.II, 158-180). On October 25, 2012, the Circuit Court issued a decision affirming the lower court. (TR, vol.II, p.262). Q.M. filed a timely Motion for Discretionary Review in the Kentucky Court of Appeals, which was denied on March 8, 2013. (TR, vol.II, p.291). Q.M. sought discretionary review to this Court, which was granted.

ARGUMENTS

I.

THE DISTRICT COURT VIOLATED Q.M.'S RIGHT TO DUE PROCESS OF LAW WHEN IT REVOKED HIS INFORMAL ADJUSTMENT WITHOUT NOTICE, FAIR HEARING, OR EFFECTIVE COUNSEL

Preservation: This argument is not preserved but the Appellant seeks review under palpable error. Under RCr 10.26, the Court may grant relief if the error affected the Appellant's substantial rights and if the Court finds that a manifest injustice resulted from the error. Here, the improper revocation of the informal adjustment without notice, an evidentiary hearing or effective counsel affected Q.M.'s due process rights and fundamental fairness of the proceedings. See Murphy v. Commonwealth, 551 S.W.2d 838, 841 (Ky. App. 1977).

Grounds:

On May 24, 2011, the District Court ordered that Q.M.'s case be "informally adjusted" on the condition that Q.M. "moves to Oklahoma" to live with his father. (TR, vol.I, p.21). The adjustment was then revoked approximately five months later without any written notice and without the presence of Q.M.'s attorney. This violated state and federal constitutional protections under due process of law. Therefore, the Appellant respectfully requests that this Court reverse and vacate the adjudication and disposition.

A. Due Process of Law Applies to the Revocation of a Juvenile's Informal Adjustment

Due process of law under the state and federal constitution guarantees fundamental fairness in adversarial criminal proceedings. Ky. Const. § 11; XIV Amend.

U.S. Const. The U.S. Supreme Court recognized the importance of due process in juvenile proceedings, even though they are less formal than an adult criminal case:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure...The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

In Re Gault, 387 U.S. 1, 18-19, 87 S. Ct. 1428, 1438-39, 18 L. Ed. 2d 527 (1967).

Kentucky Courts have consistently required due process protections be applied in juvenile delinquency proceedings. Q.C. v. Commonwealth, 164 S.W.3d 515, 517 (Ky. App. 2005) (due process applies in juvenile delinquency probation revocation proceedings); Commonwealth v. M.G., 75 S.W.3d 714, 721 (Ky. App. 2002) (right of juvenile to be present in courtroom during critical stage of delinquency proceeding under Kentucky Constitution section 11); Commonwealth v. Jeffries, 95 S.W.3d 60, 63 (Ky. 2002) (youthful offenders have the right to present mitigation evidence at sentencing under due process). Kentucky Courts have even extended some of these protections in status offense cases in recognition that the proceedings can result in "severe consequences for the child." T.D. v. Commonwealth, 165 S.W.3d 480, 483 (Ky. App. 2005) (establishing the right to present opening and closing arguments in a status offense case); see also Commonwealth v. B.J., 241 S.W.3d 324, 327 (Ky. 2007) (upholding a child's constitutional right to be present in a status offense proceeding unless there is a valid waiver of that right).

While not all protections afforded adults under due process of law are extended to juveniles and due process does not always apply in pre-adjudication proceedings, the

Kentucky Court of Appeals has suggested that due process applies in revocation of diversion in adult criminal cases. See Hamm v. Commonwealth, 367 S.W.3d 605, 607 (Ky. App. 2012) (applying due process principles in case where diversion was revoked for non-payment of child support). At the very least, the Kentucky Court of Appeals has required proof of a willful violation of the terms of the diversion agreement. Id. at 608.

Even if the constitutional right to due process does not apply to diversion, the Kentucky Rules of Criminal Procedure require the same protections of written notice, hearing, and proof of a “material violation” of the agreement when the court or Commonwealth is seeking termination of the diversion agreement. RCr 8.04. These rules are applicable in juvenile court proceedings upon a motion of the child under KRS 610.080. Even though no motion to apply the criminal rules was made in this case, the codification of the requirements for notice, hearing and proof demonstrate that they are important protections that should be applied to the revocation of a juvenile’s informal adjustment.

Pretrial diversion in a criminal case is essentially the same as an informal adjustment in a juvenile proceeding. An informal adjustment, as defined by the Unified Juvenile Code is “an agreement reached among the parties...after a petition has been filed, which is approved by the court, that the best interest of the child would be served without formal adjudication and disposition.” KRS 600.020; see also Commonwealth v. C.J., 156 S.W.3d 296, 298 (Ky. 2005) (“An informal adjustment is ... a conditional agreement to abate the petition against the juvenile defendant. While the conditions are pending, the matter is simply in abeyance.”). Thus, both an informal adjustment in juvenile court and a pretrial diversion agreement in adult court involve the suspension of

prosecution based on an agreement of the parties prior to adjudication.¹ RCr 8.04(1); Commonwealth v. Lopez, 267 S.W.3d 685, 689 (Ky. App. 2008) (“pre-trial diversion essentially delays the final adjudication of a criminal complaint against a defendant.”); Flynt v. Commonwealth, 105 S.W.3d 415, 424 (Ky. 2003) (diversion is an “interruption of prosecution prior to final disposition”).

If the lack of written notice, evidentiary hearing, and effective counsel would not be permissible in an adult diversion revocation, why would it be permissible in a juvenile proceeding? Though an “informal adjustment” is indeed, by its very name, informal, there is no rehabilitative basis on which to justify the complete absence of process and protection when an informal adjustment is being revoked. Constitutional safeguards normally afforded an adult can only be dispensed with if it is to uphold the rehabilitative and protective nature of the juvenile proceedings. See B.J., 241 S.W.3d at 327. Requiring notice, hearing, and counsel when the Commonwealth is seeking to revoke an informal adjustment does not undermine the values or purpose of the juvenile justice system. To the contrary, it upholds the perception of fairness of the system. “We recognize that juvenile proceedings are by nature less formal than adult proceedings; and we are aware of the great number of cases most district judges handle. However, juvenile adjudication proceedings must meet constitutional muster, and this one does not.” J.D. v. Commonwealth, 211 S.W.3d 60, 63 (Ky. App. 2006).

Further, where loss of liberty may result, “criminal protections provided by the constitution apply.” T.D., 165 S.W.3d at 483 (citing In Re Gault, 387 U.S. at 49, 56–57).

¹ Note that the Unified Juvenile Code does state that an informal adjustment can occur “any time during the proceedings,” which arguably may include post-adjudication; however, that is not the circumstances of this case. KRS 610.100(3).

The revocation of diversion in a juvenile case can result in the child immediately being placed in detention pending adjudication. It can also result in the child being transferred to adult court if it is a transferrable offense or, as here, in the child's removal from their home and community for an indeterminate amount of time. These are severe and weighty consequences that should not resurface absent due process of law.

B. Q.M. was not Afforded Written Notice of the Reasons for Revocation, a Fair Hearing, and the Presence of Effective Counsel

The Fifth and Fourteenth Amendments to the U.S. Constitution provide the right to notice of the crimes charged. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Kentucky Courts have consistently held that due process of law requires written notice of a violation of probation. Q.C. v Commonwealth, 164 S.W.3d 515 (Ky. App. 2005); Burge v Commonwealth, 947 S. W. 2d 805 (Ky. 1996). Notice is essential for a defendant to have a fair hearing and contest the allegations against him because it provides him with the opportunity to investigate and secure witnesses and evidence in his defense. For example, this Court has held that the due process of law requirement of notice applies in a sex offender risk assessment hearing so that the defendant could present expert testimony and properly contest the assessment. Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002).

Another key component of due process of law is the presence of counsel. The Sixth Amendment guarantees counsel at every critical stage of his prosecution. Stone v. Commonwealth, 217 S.W.3d 233, 237 (Ky. 2007); see also D.R. v. Commonwealth, 64 S.W.3d 292, 297 (Ky. App. 2001) (interpreting the Juvenile Code to allow for waiver of counsel only after child has had the opportunity to first consult with counsel). This Court

has stated that a proceeding is a “critical stage” if there is a “likelihood that representation by counsel would have benefited Appellant” and where there is “a reasonable likelihood that such prejudice will arise from a complete absence of counsel.” Stone v. Commonwealth, 217 S.W.3d 233, 238 (Ky. 2007) (citing Van v. Jones, 475 F.3d 292 (6th Cir.2007)). Here, a hearing to determine if an informal adjustment will be terminated is a critical proceeding because the presence of counsel is necessary to contest allegations that the defendant violated the terms of the agreement and that the charges should remain held in abeyance.

A defendant has not been afforded the fundamental right to an attorney where there is the physical presence of an attorney, but the attorney is hampered by a direct and active conflict in the case. Beard v. Commonwealth, 302 S.W.3d 643, 646 (Ky. 2010); Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). “[T]he ‘Assistance of Counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.” Beard, 302 S.W.3d at 646 (citing Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942)); see also Oden v. U.S., 224 F.3d 561, 568 (6th Cir. 2000) (discussing how substitution of counsel violates the 6th Amendment and no demonstration of prejudice is necessary when there is a conflict with the replacement counsel). See also Allen v. Commonwealth, 410 S.W.3d 125, 139 (Ky. 2013) (“generally, standby counsel does not satisfy a defendant’s Sixth Amendment right to counsel”); Mitchell v. Commonwealth, 323 S.W.3d 755, 759 (Ky. App. 2010) (stating that when there is an actual conflict of interest, prejudice is

presumed in the Strickland analysis); Pillersdorf v. Department of Public Advocacy, 890 S.W.2d 616 (Ky. 1994) (Circuit Court lacked authority to appoint substitute counsel without clear determination of good cause).

In this case, the fundamental protections under the 5th, 6th, and 14th Amendments to the U.S. Constitution and under Sections 2 and 11 the Kentucky Constitution were not provided to Q.M. There was no written motion or notice by the Commonwealth requesting that the juvenile court terminate the informal adjustment and the reasons for the termination. The court hearing was scheduled as a "review" rather than a revocation proceeding. (TR, vol.I, p.23). Once at the review hearing, the Commonwealth stated that it was seeking for the charges to be reinstated based on the fact that Q.M. was back in Kentucky. (AR, track 2, 10/4/11, 00:20). Q.M. also did not have counsel as required under the Sixth Amendment at the critical stage that would determine whether he would face a sexual abuse charge. His attorney Hon. Mr. Holland was not present at the hearing. The attorney who was present informed the court that she currently represented the complainant in the case. (AR, track 2, 10/4/11, 00:43). Certainly it would be a conflict for an attorney who represents the complainant to advocate that the charges continue to be informally adjusted. Thus, no arguments were made on Q.M.'s behalf. Only Q.M.'s mother tried to explain what had occurred, but to no avail. Q.M. did not have a fair hearing at which he was able to contest the revocation of the informal adjustment. Q.M. was thus deprived of his state and federal rights to notice, fair hearing, and counsel. The Appellant therefore requests that this Court vacate the adjudication and disposition in this case and uphold the informal adjustment of the charge of sexual abuse in the third degree.

II.

THE REVOCATION OF THE INFORMAL ADJUSTMENT WAS IMPROPER BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT THE TERMS OF THE ADJUSTMENT WERE WILLFULLY VIOLATED

Preservation: This argument was not preserved; however, the Appellant seeks review under palpable error. RCr 10.26. The error resulted in a manifest injustice in this case because as a result, a serious sexual offense charge was reinstated against Q.M. without evidence that he had wilfully violated the terms of the informal adjustment. This ultimately resulted in his removal from the community and the harshest sanction available under the Unified Juvenile Code. Thus the error seriously affected “the fairness, integrity, or public reputation” of the juvenile justice system and is “jurisprudentially intolerable,” warranting relief under palpable error. Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006); Wiley v. Commonwealth, 348 S.W.3d 570, 574 (Ky. 2010).

Grounds:

Even if this Court finds that the requirements of notice and counsel were provided in this case, the revocation was in error because the Commonwealth did not provide sufficient evidence that the terms of the informal adjustment were wilfully violated as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and section Eleven of the Kentucky Constitution. Therefore, the Appellant respectfully requests that this Court enforce the informal adjustment and vacate the adjudication and disposition for the charge of sexual abuse in the third degree.

In the circumstances of a plea agreement, the agreement is enforceable where the defendant has substantially complied with the terms. “Here the appellant did everything

he had agreed to do. Justice and fair play, as well as the due process clause of the Constitution, require the state to do likewise.” Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989) (quoting Shanklin v. Commonwealth, 730 S.W.2d 535 (Ky.App. 1987)). In this case, Q.M. did everything that he was required to do and thus this Court should enforce the informal adjustment. The District Court’s order per the terms of the informal adjustment was merely that Q.M. “moves to Oklahoma to live w/Dad.” (TR, vol.I, p.21). This is exactly what Q.M. did. This was even acknowledged by the Commonwealth during the review/revocation hearing, “My understanding is that he was there briefly but has now returned.” (AR, track 2, 10/4/11, 00:30). The agreement did not specify that Q.M. stay in Oklahoma for a certain period of time.² Thus, Q.M. satisfied his part of the agreement and the informal adjustment should be enforced.

Further, even if remaining in Oklahoma was an implicit term of the agreement, the brief testimony by Q.M.’s mother demonstrated that Q.M.’s return to Kentucky was not of his own accord. It is fundamentally unfair for an agreement to be terminated if it is impossible for the defendant to comply with the terms. In the circumstances of court orders, this Court has held that a defendant cannot be punished for failing to do an impossible act. Clay v. Winn, 434 S.W.2d 650, 652 (Ky. 1968). In the case Commonwealth v. Marshall, this Court held that when determining if a defendant’s probation or conditional discharge must be revoked for failure to pay child support, due process requires that the court consider whether the defendant was unable to pay through no fault of his own. 345 S.W.3d 822, 824 (Ky. 2011) (citing Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). The Court expressed concern about

² Note that the Court only speaks through its record. If there were other terms of the agreement they are void because they were not memorialized in writing.

revoking in circumstances where a defendant has made a good faith effort to comply with the terms of the agreement. Marshall, 345 S.W.3d at 831. The Kentucky Court of Appeals recently applied Marshall to a pretrial diversion agreement to pay child support in the case Hamm v. Commonwealth, 367 S.W.3d at 608. So too should juvenile courts consider whether the breach of the terms of an informal adjustment was willful or whether the defendant has made good faith efforts to comply with the terms prior to revoking the adjustment and reinstating the delinquency case.

Here, there was no evidence that Q.M. willfully violated the terms of the informal adjustment. Q.M. is a minor child and thus has no control over where he lives. By law he must be in the care of a legal custodian or otherwise be charged as a runaway. When the state steps in and revokes a custodian's rights, Q.M. must live elsewhere; he must comply. Q.M.'s mother indicated that Q.M. could not remain in Oklahoma due to a DCBS³ investigation and that remaining in Oklahoma would "place [Q.M.] in harm's way." (AR, track 2, 10/4/11, 2:20). Oklahoma's child welfare system may have sent Q.M. back home or it could have even been court ordered. It appears that Q.M. was compelled to return to Kentucky by forces beyond his control. Thus, there was insufficient evidence that Q.M. violated the terms of the informal adjustment or did so wilfully and thus he respectfully requests that this Court uphold the informal adjustment and dismiss the adjudication and disposition in this case.

³ Department for Community Based Services, a branch of the Cabinet for Health and Family Services, which is responsible for investigating allegations of child abuse and neglect.

III.

THERE IS INSUFFICIENT EVIDENCE THAT Q.M.'S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY MADE BECAUSE THE COURT DID NOT ADVISE HIM OF HIS RIGHTS OR THE SEVERE CONSEQUENCES OF PLEADING GUILTY

Preservation: This argument was not preserved at the trial level; however, the Appellant seeks review under palpable error. RCr 10.26. A guilty plea involves a waiver of essential constitutional rights, including the Fifth Amendment right to remain silent and the Sixth Amendment right to a trial. In juvenile cases it is especially important that the child is informed of the rights that he is waiving and the consequences of the waiver because he has limited experience in the world and lessened ability to foresee negative results. Thus, the failure to advise Q.M. of his rights and a single consequence of entering a guilty plea resulted in a manifest injustice in this case because there is insufficient evidence that the waiver of his fundamental rights was knowing, voluntary, and intelligent.

Grounds:

A guilty plea is "a grave and solemn act" that circumvents a defendant's fundamental and constitutionally protected right to a trial and for the Commonwealth to prove his guilty beyond a reasonable doubt. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747 (1970). Thus a defendant's waiver of these essential rights must only be accepted after a defendant has been fully advised on his rights during a trial as well as the consequences for entering a guilty plea, which entails what sentence he may receive.

The majority of criminal and juvenile cases are resolved by a guilty plea rather than an adjudication. To protect a defendant's constitutional rights and ensure that

defendants are not entering guilty pleas due to pressure, coercion, or ignorance, the U.S. Supreme Court added some responsibility to inform the defendant of his rights to the court. The U.S. Supreme Court stated in Boykin v. Alabama, "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969).

Under Boykin, the court is not required to utter specific words but rather, the analysis of whether a guilty plea was validly entered is whether under the totality of the circumstances the plea was knowing, voluntary, and intelligently made "with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970).

The Kentucky Court of Appeals applied the Boykin protection to juveniles in the case D.R. v. Commonwealth. 64 S.W.3d 292, 294 (Ky. 2001). D.R. was charged with the status offense of beyond control of parent. Prior to accepting the child's guilty plea the court only informed him of his right to remain silent and his right to have an attorney present. Id. at 294-295. The Kentucky Court of Appeals reversed under Boykin, stating:

From the above, it is clear that appellant was not informed of the consequences of an admission of guilt. Specifically, he was not informed of constitutional rights waived by admitting guilt or of the range of possible punishments. **In short, appellant was not informed of a single consequence of his decision to enter an admission of guilt.** Appellant was a fifteen-year-old child who had no previous experience with the court system. Upon the totality of circumstances, we are convinced that appellant's admission of guilt was not made knowingly and intelligently.

Id. at 295 -296 (emphasis added). Two years later, the Kentucky Court of Appeals strengthened Boykin as it applies to juveniles in Kentucky by finding that a waiver of constitutional rights by the child's attorney, rather than the child him/herself, was insufficient. In J.D. v. Commonwealth, the child had been advised of all his constitutional rights at arraignment and was represented by counsel at the time the guilty plea was entered. 211 S.W.3d 60, 63 (Ky.App. 2006). However, no rights were explained to the child at the time of the guilty plea. Further, the court held that under KRS 610.080, only the child could waive his constitutional rights. Id.

As in D.R. and J.D., here, the lower court failed to inform Q.M. of his rights so that he could make an informed decision. Further, the court did not warn Q.M. that he was pleading to an offense that subjected him to discretionary commitment to the Department of Juvenile Justice as a Juvenile Sex Offender ("JSO"). While the court is not required to inform a defendant of all possible consequences of a guilty plea, the consequences of pleading guilty to a sex offense are sharply different than a public offense. Unlike a public offender committed to DJJ, a JSO must complete sex offender treatment and can be committed beyond the age of eighteen for such purposes. DJJ can also request leave of the court to keep a JSO in commitment four years, up to the age of twenty-one. KRS 635.515. Thus, a juvenile adjudicated guilty of manslaughter could be released earlier from commitment than a child labeled a juvenile sex offender. While this Court has held that counsel and the court are not required to inform a defendant of the consequences of sex offender labeling on parole eligibility, the Court distinguished it from advising a defendant that he had to complete sex offender treatment:

[A]t the colloquy the court can attempt to ensure that the defendant has been advised of those matters necessary to render his plea adequately informed and constitutionally valid. The trial court did so here, by assuring that Cox had been expressly cautioned that the sex offenses to which he was pleading guilty carried significant collateral consequences including the sex offender treatment requirement.

Commonwealth v. Pridham, 394 S.W.3d 867, 884 (Ky. 2012) (cert. denied, 13-5570, 2013 WL 3948417 (U.S. Oct. 7, 2013)).

Further, in Padilla v. Kentucky, the U.S. Supreme Court held that the failure to inform a defendant of the severe civil consequence of deportation prior to entering a guilty plea violates constitutional protections. 559 U.S. 356, 365, 130 S. Ct. 1473, 1481, 176 L. Ed. 2d 284 (2010). As with immigration law, the terms of the Kentucky Unified Juvenile Code “are succinct, clear, and explicit in defining the” consequences of pleading guilty to a juvenile sex offense. Id. at 368. Certainly, the failure to inform a child of the severe consequences of being labeled a sex offender is just as offensive to the constitution as the failure to inform a defendant of the immigration consequences of a guilty plea.

The constitutional necessity to advise a defendant of the serious consequences to pleading guilty to a sexual offense is especially apparent in a juvenile case because juveniles are less likely to understand the consequences of their plea and thus there is an increased risk that their plea is not knowing, voluntary, and intelligent. “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 2699, 101 L. Ed. 2d 702 (1988).

In this case, Q.M. was only fifteen years old. Like the child in D.R., Q.M. had no prior adjudications. As in J.D., the lower court did not inform Q.M. of the rights he was relinquishing when he entered his plea. The court simply asked if Q.M. was under the influence or if he was cajoled or threatened. (AR, track 4, 1/10/12, 00:13-1:05). While this might address Q.M.'s voluntariness, without informing Q.M. of what his rights are the record is silent on whether the waiver was knowingly and intelligently made. "[U]nder any test, the bare minimum for compliance with Boykin was not met." J.D. v. Commonwealth, 211 S.W.3d 60, 63 (Ky. App. 2006).

In addition, the court did not inform Q.M. of a single consequence of pleading guilty. The court did not warn Q.M. that he was pleading to a sex offense that required him to complete sex offender treatment and exposed him to a greater length of commitment than for a public offense. While commitment as a JSO was not automatic in Q.M.'s case, it automatically triggered a sex offender evaluation which would determine his fate. If designated a Juvenile Sex Offender, the Kentucky State Police would also be able to collect his DNA for a criminal database. Further, he would be placed on an internal DJJ registry of sex offenders. While not required to publicly register in Kentucky, if Q.M. and his family moved to a state that has adopted Sex Offender Registration and Notification laws ("SORN"), such as Ohio, he may be required to publicly register as a sex offender.⁴ These are severe consequences that are unique to juvenile sex offense cases and are vital for a child to be aware of prior to relinquishing all of his constitutional rights in order for his guilty plea to be knowingly, voluntarily, and intelligently made.

⁴ Ohio's juvenile SORN laws can be found at R.C. 2152.82-2152.85.

Under the totality of the circumstances, the record raises doubt that Q.M.'s admission was knowingly, voluntarily and intelligently made since in later proceedings he attempted to obtain new counsel and possibly withdraw his plea. (AR, track 5, 4/3/12; track 6, 4/17/12). The lower court told Q.M. that it would not allow him to withdraw his plea, even though the court was not aware of the reasons why Q.M. wished to do so. (AR, track 5, 4/3/12, 00:32). Thus, there is insufficient evidence that Q.M.'s plea was knowingly and intelligently entered at the time it was made and he respectfully requests that this Court vacate the adjudication and disposition for sexual abuse in the third degree.

CONCLUSION

For the reasons set forth above, the Appellant respectfully requests that this Court vacate the adjudication of sexual abuse in the third degree and enforce the informal adjustment because the revocation of the informal adjustment violated due process of law. Alternatively, the Appellant moves this Court to reverse and vacate the guilty plea to sexual abuse in the third degree as not knowingly, voluntarily, and intelligently made.

Sincerely,



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APPENDIX

Tab Number	Item Description	Record Location
1.	Christian Circuit Court Opinion Affirming	TR Vol. 2, pgs. 262-264
2.	<i>Q.M., a child v. Comm.</i> , Order denying discretionary review	TR Vol. 2, pg. 291
3.	Docket Sheet 5/24/11 Ordering informal adjustment	TR Vol. 1, pg. 21
4.	Docket Sheet 10/4/11 Ordering charges to be Re-docketed	TR Vol. 1, pg. 23
5.	Docket Sheet 1/10/12 Entering admission to charge Of sexual abuse in 3 rd degree	TR Vol. 1, pg. 30
6.	Dispositional Order of of commitment to Dept. of Juvenile Justice	TR Vol. 1, pgs.102-103
7.	<i>D.R., a Minor Child, v Comm.</i> 64 S.W.3d 292 (2001)	N/A