COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013–SC–000210

Q.M., A CHILD — APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT,
HONORABLE JOHN ATKINS, JUDGE PRESIDING
ACTION NO. 12–XX–00006

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE
COMMONWEALTH OF KENTUCKY

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Brief for Appellee, Commonwealth of Kentucky, were mailed this 10th day of April, 2014, to the Hon. John Atkins, Judge, Christian Circuit Court, 100 Justice Way, Hopkinsville, Kentucky 42240; Hon. James Adams, Judge, Christian District Court, 100 Justice Way, Hopkinsville, Kentucky 42240; Hon. Lynn Prior, Commonwealth Attorney, 511 South Main Street, Courthouse Annex, Hopkinsville, Kentucky 42240; Hon. Duncan Cavanah, Assistant Christian County Attorney, P.O. Box 648, Hopkinsville, Kentucky 42240; Hon. Michael Foster, Christian County Attorney, P.O. Box 24, Hopkinsville, Kentucky 42240; Hon. Jason Holland, 951 L.C. Avenue, Hopkinsville, Kentucky 42240; and to Renee VandenWallBake, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601. I further certify that the record on review has been returned to the Supreme Court.

JACK CONWAY
ATTORNEY GENERAL

Jeanne Anderson

INTRODUCTION

This is an appeal of a juvenile disposition in which the district court found the child to be a juvenile sex offender and committed him to the Department of Juvenile Justice.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant does not desire oral argument.

STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

Appellee generally agrees with the statement of the case and time line as presented by Appellant but will, however, point the Court to aspects of the underlying case less favorable to the Appellant. First, according to the county attorney prosecuting the case, this was not Appellant's first brush with the law. Appellant had been charged in January 2007 with Terroristic Threatening in the Second Degree, a charge which was diverted by the Court Designated Worker handling that case. (TR 266). Second, as the Circuit Court noted in its denial of the appeal from district court to circuit court, Appellant's behavior was a sexual offense, not some childish prank as Appellant attempted to characterize it below. (TR 262–63). Appellant also states that he was without counsel at some hearings, suggesting his constitutional right to same was somehow violated. A review of the record shows, however, that between the date he pled guilty (January 10th, 2012; TR 30), and the date he was committed to the Department of Juvenile Justice (May 15th, 2012; TR 101), there were at least three instances in which Appellant appeared without an attorney and told the court he was "trying to find" private counsel. (TR 81; 89; 94). The judge, recognizing this as a delay tactic, finally became so exasperated that he wrote "last continuance" on two separate docket sheets. (TR 89; 94). Finally, the judge simply decided to notify DPA conflict counsel to be present at the next hearing date to "stand in for disposition." (TR 94). These instances were not the first in which Appellant tried to stymie progress in his case: there are two Failure to Appear notations in the record, one of which resulted in an Order to Take Juvenile into Custody, though the order was later recalled by the court. (TR 25, 26–27). Other citations to the record will be provided as necessary.

ARGUMENT

The issues presented by Appellant are all unpreserved. He seeks palpable error review only. Review under RCr 10.26 is a "significantly higher standard" than review of preserved error. Smith v. Commonwealth, 410 S.W.3d 160, 167 (Ky. 2013). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding, as was done in [United States Supreme Court opinion] Cotton, to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." The error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006) (*quoting* United States v. Cotton, 535 U.S. 625, 631 (2002)). "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky.2009) (*quoting* Martin, *supra*).

The Commonwealth contends there was no error, much less palpable error: there was nothing shocking or intolerable about the proceedings below. Given the nature of Appellant's offense, nothing in the proceedings below lacked fairness or integrity. Nor has Appellant shown that absent the claimed errors the results below would be different. The Commonwealth asks this Court to uphold the lower court's decision. Arguments on the merit will be presented in the same order as in Appellant's brief.

I. DUE PROCESS NOTICE AND HEARING ARE NOT REQUIRED TO REINSTATE JUVENILE CHARGES

Appellant's first argument hinges on his claim that his due process rights were violated when the trial court reinstated the charges against him without notice and a hearing. To make this argument, he analogizes informal adjustment to diversion under RCr 8.04: both, he claims, are a suspension or an abeyance of the proceedings. He further uses the example of probation revocation as an argument that due process is required. The flaw in this theory is that bringing back charges against a juvenile offender is very different than voiding a diversion agreement or revoking probation.

First, notice and hearing are required in a diversion or probation case because, should the agreement be voided or probation terminated, the diverted defendant immediately becomes a felony offender and both he and the probationer will be sent to serve their sentence. Each has a liberty interest at stake and thus a due process right to defend himself against the allegations:

> In Gagnon v. Scarpelli, 411 U.S. 778 (1973), cited by the appellant, the Court held that certain minimum requirements of due process, such as the right to confront and cross-examine adverse witnesses, were necessary in a hearing on the revocation of probation or parole. See Murphy v. Commonwealth, Ky.App., 551 S.W.2d 838 (1977). **Due process is required for parole or probation revocation because one might suffer the loss of his liberty.** Id., 411 U.S. at 781. Presumably, since the amendment of the conditions of probation or conditional discharge in virtually all cases does not involve loss of liberty, the same requirements of due process would not apply.

McMillen v. Commonwealth, 717 S.W.2d 508, 509 (Ky.App. 1986) (emphasis added). A juvenile whose charges are redocketed does not immediately face a loss of liberty or other

dire consequences requiring due process considerations: the child still has a right to have notice of, and be heard at, any dispositional hearings pursuant to KRS 610.080, should the court decide that the informal adjustment was unsuccessful, or that it failed to meet the unique circumstances or needs of the child, or that the more formal process of adjudication and disposition is more appropriate. Appellant did not, in fact, lose his liberty. He was not taken into custody on the day the charges were reinstated, November 4th, 2011. He was committed to the Department of Juvenile Justice some seven months later, on May 15th, 2012. He was neither adjudicated guilty nor was the disposition of his case decided on the day his charges were reinstated.

A better analogy to make is to a scenario in which an adult criminal defendant has had charges which were initially dismissed but subsequently reinstated, and the consideration of what due process rights are afforded at that juncture. There is no liberty interest in being free from possible future indictment. To revoke means to void, reverse, or annul. Obviously, due process is required when something valued–liberty–is to be reversed or annulled. However, to reinstate means to restore to a previous condition or position. No notice or hearing is required for reindictment in the circuit court or recharging a misdemeanant in district court because those actions are not adversarial in nature–they are simply a reinstatement of an action. If notice and a hearing were required, RCr 5.24(2) could not allow for a sealed indictment to issue. Nor could a district court issue a subsequent summons or warrant under RCr 2.04.

Due process is required in adversarial actions to ensure fairness and the ability to defend oneself in an ongoing prosecution. Only after Appellant's charges were reinstated

did the prosecution of those charges begin again, and become an ongoing prosecution. Appellant cites two juvenile cases in which due process was required; however, in both instances the juvenile was involved an adversarial proceeding where evidence and testimony was presented against him or her. In T.D. v. Commonwealth, 165 S.W.3d 480 (Ky.App. 2005), the juvenile was at a truancy hearing where a school official was testifying against him. In Commonwealth v. B.D., 241S.W.3d 327 (Ky. 2007), the juvenile faced adjudication and disposition hearings which also included testimony being given against the child. These hearings were adversarial: without question due process applied. Such is not the case here.

Although bringing back charges against adult offenders usually requires prosecutorial decision making because the trial court loses jurisdiction to reinstate the charges ten days after a dismissal, see, e.g., Commonwealth v. Sowell, 157 S.W.3d 616, 617 (Ky. 2005), these same steps are not required when the district court is acting in its capacity as a juvenile court. KRS 610.010(1) gives district court jurisdiction over "any person who at the time of committing a public offense was under the age of eighteen (18) years," as was Appellant. But this grant of jurisdiction does not simply indicate that the district court is the proper court to hears juvenile public offense cases (at least initially), it also grants the district court *continuing* jurisdiction under subsection fourteen (14): "the [district] court shall have continuing jurisdiction over a child pursuant to subsection (1) of this section, to review dispositional orders . . .". That is what the court below did: it reviewed its earlier disposition.

By granting continuing jurisdiction, the Legislature intended to ensure every

juvenile gets as much help as possible:

> the primary aim when dealing with juveniles is to "promote the best interests of the child through providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen by advancing the principles of personal responsibility, accountability, and reformation, while maintaining public safety, and seeking restitution and reparation." KRS 600.010(2)(e).

Jackson v. Commonwealth, 363 S.W.3d 11, 17 (Ky. 2012). The district court had every right to review the success, or lack thereof, regarding the manner in which the charges were initially disposed of. It retains that right until a juvenile is no longer eligible to be subject to its statutory authority.

And, of course, Appellant did in fact get notice to be again before the juvenile court. He and his mother were present when the charges were reinstated. He also was afforded an opportunity to be heard at any of his follow-up hearings to contest any evidence presented against him. Unlike the examples of diversion and probation, there was no need to have notice and a hearing regarding the judge's decision to grant the Commonwealth's motion to reinstate the charges. And although he claims the attorney present at the time the charges were reinstated had a conflict because she represented the victim[1], the only thing the judge asked her to do was notify DPA conflict counsel to be present at the following hearing date. (AR 10/4/11; tape counter 15–18).

Lastly, Appellant had no right to rely on the informal disposition because, unlike the dispositional order he appeals from here, it is not a final order. It remains under the

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[1] It is not clear from the record why this DPA lawyer was representing the victim. The most logical reason is that the victim had his own case before the juvenile court, not because DPA was representing the victim in Appellant's case.

control of the district court. And it remains that way for good reason–to supervise the juvenile offender. "If a trial court wishes to supervise a juvenile for a period of time prior to entering a final order, the Juvenile Act provides several alternatives by which to do so, including informal adjustment ...." Commonwealth v. C.J., 156 S.W.3d 296, 298 (Ky.2005) (*quoting* Commonwealth v. S.M., 769 A.2d 542, 544 (Pa. 2001)).

Reversal is warranted under the palpable error standard only "if a manifest injustice has resulted from the error," and it requires a showing of the "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). See also RCr 10.26; Ladriere v. Commonwealth, 329 S.W.3d 278, 281 (Ky. 2010). Clearly Appellant was afforded due process of law and no manifest injustice resulted even this Court finds error below. The Commonwealth maintains there was no error below, much less palpable error warranting reversal. The decision below should be upheld.

II. THERE WAS SUFFICIENT EVIDENCE TO REVOKE THE AGREEMENT

Appellant next argues there was insufficient evidence that he willfully violated the terms of the informal adjustment by not remaining at his father's Oklahoma residence. He claims to have done everything the agreement required him to do because it did not specify that he was to stay in Oklahoma once he got there. Obviously, that he stay there was what was intended by the agreement: he was to "live" with his father, not merely

visit for a week or two. He also argues that it was "impossible" for him to abide by the agreement because of abuse in his father's home.

The only indication that he mentions in regard to the impossibility of abiding by the agreement is his mother's statement to the judge that there was abuse. (Brief at 13). However, Appellant does not note in his brief that in fact the mother had, during the interview with the Department of Juvenile Justice, admitted to the case worker that Q.M. called her and wanted to come back to Kentucky. The reasons for this, the mother reported, was that the father used drugs and chose his step-children over his own biological son. She also noted that the father loved and supported Q.M. (TR Vol. 1, 40). This report was addressed directly to the judge. (TR Vol. 1, 37). There was no mention of abuse at the interview. Perhaps understandably, the mother was attempting to keep her son from being committed to DJJ. It is not impossible to live with a father who loves and supports you, even if you feel as though he prefers his step-children. Appellant's situation was not one where "the thing cannot be done," but rather one of "I cannot do it" because it is too hard on me. See, e.g., Raisor v. Jackson, 225 S.W.2d 657, 659 (Ky. 1949)

Furthermore, Appellant's mother was well aware of what was required under the informal adjustment. Surely if there had been a real reason that it would have been impossible for her son to complete the conditions therein, she would have tried to get back into court to see if there was some other way the case could continue to be informally adjusted. Yet she did not contact the court or Appellant's attorney. Instead, she waited until her son's presence became known to the Commonwealth and Appellant was

summoned back to court–nearly four and one-half months after the informal adjustment. The judge was well aware of the mother's disrespect for the court and her willingness to maneuver around the system if given the chance: Appellant had been released from custody under his mother's care on what is called a "strict conditional order of release." On April 28, 2011, the court entered a show cause order for the mother to have her explain why she had violated the conditions of release set by the court on the very same day those conditions had been set. (TR 18; 99-100). The judge had no reason to believe the mother's story, and every reason to believe the informal adjustment had been willfully violated. He did not abuse his discretion.

Lastly, the Commonwealth is entitled to have its part of the bargain fulfilled.

> In general, "[p]lea agreements are contracts, and we interpret them according to ordinary contract principles." United States v. Ramunno. "[A] defendant who breaches a plea agreement forfeits any right to its enforcement." United States v. Wells. "Further, if a defendant materially breaches his plea agreement, the prosecution is released from its obligations under that agreement and may bring a new indictment on previously dismissed charges." Hentz v. Hargett. These cases are also supported by Jones v. Commonwealth, Ky., 995 S.W.2d 363, 366 (1999), which similarly held that following a defendant's breach of a plea agreement, the Commonwealth was relieved of its obligation to recommend favorable sentencing.

O'Neil v. Commonwealth, 114 S.W.3d 860, 863 -864 (Ky.App. 2003) (partial citations omitted). The Commonwealth detrimentally relied on Appellant's agreement to the condition that he go to live with his father: it gave in exchange an agreement to allow informal adjustment for what was a very serious offense. It was well within its rights to ask the district court to reinstate the higher charges. There was no error, much less

palpable error.

III. APPELLANT'S PLEA WAS KNOWINGLY AND INTELLIGENTLY MADE

Finally, Appellant argues that his plea was not made knowingly and voluntarily. "Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it. The trial court is in the best position to determine the totality of the circumstances surrounding a guilty plea." Rigdon v. Commonwealth, 144 S.W.3d 283, 287-288 (Ky.App. 2004).

Appellant paints a picture of himself as timid, inexperienced, and inaudible during his plea. Unfortunately, because not all district courts have video recording, this Court can not view the person of Appellant during his admission. However, although Appellant claims some of his answers were inaudible, when the volume on a tape player is turned up[2], his answers can be heard, and they do not exhibit any timidity. (AR 1/10/12; tape counter 1 *et seq*). He was twice asked whether his plea was knowing and voluntary, and he answered affirmatively each time. (Id.) Furthermore, he understood that the Assault in the Second Degree charge against him would be dismissed. (Id.). And again, this was not his first brush with the juvenile justice system. As the circuit court's order affirming notes, "[t]he totality of the circumstances surrounding the plea support the conclusion that the plea was voluntary and intelligently made." (TR 263). Here, the trial court not only heard Appellant, he saw him as well. Under the totality of the circumstances, the plea was

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[2] At least the tape player undersigned counsel used made it possible to hear Appellant's responses.

valid.

Appellant next argues that, because the consequences of being a juvenile sex offender are so serious, the lower court was required to explain those consequences to him before allowing him to enter his plea. In support of this claim, Appellant cites to Commonwealth v. Pridham, 394 S.W.3d 867 (Ky. 2012) and Padilla v. Kentucky, 559 U.S. 356 (2010). Both cases are, however, inapposite. Neither case is about what information *a court* should give to a defendant pleading guilty but rather about what obligations defense counsel has toward his client when the client is contemplating entering a plea. Both cases examine the Sixth Amendment right to effective assistance of counsel. In fact, the Pridham case specifically notes that while a court can to some extent *help out* by warning of consequences, it does not have a duty to do so:

> The trial court cannot practice defense counsel's case for him, of course, and so the protection can never be complete, but at 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. Under Cox's expansive reading of Padilla, however, the Sixth Amendment right to pre-plea information would so swamp what has been required as a matter of due process and what a court could attempt to inquire about during its proceedings as to render the plea colloquy largely an empty gesture, a courtroom exercise to establish a record regarding the defendant's awareness of his basic due process rights.

Pridham at 884–885. Appellant herein is not making an ineffective assistance of counsel claim, and there is no way to know what transpired between Appellant and his attorney prior to Appellant's admission of guilt. Instead, Appellant is asking that a trial court go

beyond what is now required in a plea colloquy, and to do so in every juvenile case before it when the child makes an admission. There was no error. There was no palpable error.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court uphold the district court's decision below.

Respectfully submitted,
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