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SUPREME COURT GRANTED DISCRETIONARY REVIEW MARCH 14, 2007  
(FILE NO. 2007-SC-0025-DGE)

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2006-CA-000330-ME

B.J., A CHILD UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE ELEANORE GARBER, JUDGE  
ACTION NO. 05-J-502330

COMMONWEALTH OF KENTUCKY

APPELLEE

#### OPINION VACATING AND REMANDING

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BEFORE: JOHNSON AND WINE, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

JOHNSON, JUDGE: B.J., a child under 18, has appealed from a juvenile status disposition order of the Jefferson Family Court entered on January 11, 2006, adjudging him as a habitual truant status offender and placing him on probation under the authority of the Department for Community Based Services (the Cabinet).<sup>2</sup>

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<sup>1</sup> Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

<sup>2</sup> A dispositional order is final and appealable under Kentucky Revised Statutes (KRS) 610.130. Commonwealth v. C.J., 156 S.W.3d 296, 297 (Ky. 2005).

Having concluded that the family court erred by adjudicating B.J. as a habitual truant in absentia, we vacate and remand.

On March 15, 2005,<sup>3</sup> the Jefferson County Public Schools (the School) filed a petition against B.J. alleging he was a habitual truant as described in KRS 630.020(3),<sup>4</sup> and within the scope of KRS 610.010(1)(a), (b), (c), and (d). Habitual truancy is classified as a status offense under the juvenile code.<sup>5</sup> The petition stated that as of February 22, 2005, the child had missed 28.5 days of school without a valid excuse during the 2004-2005 school year.<sup>6</sup>

On April 27, 2005, a preliminary inquiry was held before the Court-Designated Worker, which both the child and his mother, C.S., attended. At this preliminary proceeding it was determined that the allegations against the child could not be handled through an informal proceeding because the child had

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<sup>3</sup> B.J. was 14 years old at this time, his date of birth being July 16, 1990.

<sup>4</sup> KRS 630.020(3) provides:

The court shall have exclusive jurisdiction in proceedings concerning any child living, or found within the district, who allegedly:

(3) Has been [a] habitual truant from school.

<sup>5</sup> KRS 610.010(3). See also T.D. v. Commonwealth, 165 S.W.3d 480, 483 (Ky.App. 2005).

<sup>6</sup> A home visit was made on January 6, 2005, with no response. During the time between December 6, 2004, and February 22, 2005, numerous phone calls were made. School conferences were held on October 5, 2004, November 11, 2004, February 8, 2005, and February 14, 2005. A final notice was given on January 21, 2005. All efforts by the school to encourage attendance had been unsuccessful.

been previously adjudicated as either a status offender or a public offender, or had had either of these charges informally adjusted through the formal court process within the last 12 months. Thus, notice was sent to his mother by letter that the child was to appear in family court on May 18, 2005, for arraignment.

At the child's arraignment on May 18, 2005, he pled not guilty. An adjudication hearing was set for September 21, 2005. The child was ordered to timely attend school every day unless medically excused in writing, to enroll and to complete summer activities, to attend the last five days of school, and to start the new school year on August 16, 2005.

On November 2, 2005, the family court held an adjudication hearing. The family court's calendar indicates that the mother and her attorney were present. While the child was not present, his attorney attended. There is no dispute that the mother informed counsel, and the family court through counsel, that the child's absence was due to his refusal to attend the hearing. The child's attorney asked the family court to continue the adjudication hearing based on RCr<sup>7</sup> 8.28, and to enter a bench warrant for the child's arrest.<sup>8</sup>

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<sup>7</sup> Kentucky Rules of Criminal Procedure.

<sup>8</sup> KRS 610.040(4) provides in part that "in any case when it appears to the judge . . . that the welfare of the child requires that he be brought forthwith before the court, a warrant may be issued for the parent, guardian, person having custodial control or supervision of the child, or the child."

Prior to the adjudication, the child's attorney argued to the family court that, while habitual truancy was a status offense, not a misdemeanor, a hearing in the child's absence would violate his liberty interests since he could be removed from his home. The Commonwealth acknowledged that the child's rights would be affected by the proceedings and that the child could be eventually removed from his home, but contended nonetheless that the child had waived his right to appear. The family court ruled that as the child had notice to be in court for the adjudication of this juvenile status offense, the adjudication hearing could proceed in his absence. The mother left before the hearing began and was not present during the adjudication hearing.

Only one witness testified at the hearing, Robert Morehead, Assistant Director of Pupil Personnel for the School, who testified that according to the child's school records, he had 83 days of unexcused absences in the 2004-2005 school year, and 45 days of unexcused absences in the 2005-2006 school year. The family court found the child to be a habitual truant and issued a bench warrant for his arrest. Further, the family court ordered that, pending the disposition hearing, the child was to timely attend school every day, unless medically excused in writing, and that the mother was to schedule an appointment to enroll the child in school as soon as possible. A

disposition hearing was scheduled for December 28, 2005.

Subsequently, the hearing date was changed by letter to January 11, 2006. At some point after the adjudication hearing, a neuropsychological evaluation of the child by Edelson & Associates dated May 17, 2004, was filed of record.

A disposition hearing was held on January 11, 2006. The family court's calendar indicates that the child was not present, but his attorney and his mother and her attorney were present. Again, over the opposition of the child's attorney, the family court ordered the hearing to proceed, despite the child's absence. The family court found that the child was aware of the disposition hearing, and ordered as follows: (1) that the Cabinet's dispositional report dated January 11, 2005, be made part of the record; (2) that the child be "probated" to the Cabinet; (3) that the child be enrolled in school immediately; (4) that the child attend counseling and continue until released; (5) that the child be referred to family intervention; (6) that the child's family cooperate with the Cabinet; and (7) that the mother maintain contact with the Cabinet and school personnel.<sup>9</sup> This appeal followed.

It is undisputed that all counsel and the family court understood at the adjudication hearing and the disposition

<sup>9</sup> The case was set for review on February 8, 2006. On January 18, 2006, the Cabinet sent a letter to C.S. stating that B.J. had still not enrolled in school and was in violation of the family court's orders. On February 8, 2006, the family court noted at the hearing that the case was on appeal.

hearing that the child had notice of the hearings, but, according to his mother, refused to appear before the family court. The child argues that the family court's adjudication and disposition of his habitual truancy status offense in his absence denied him due process of law. The child contends that he had a constitutional right to be present at both hearings and that there was not a valid waiver of his right to be present at either hearing. The Cabinet argues that the child's blatant disregard for the juvenile court process resulted in his waiving his right to be present during his adjudication and disposition hearings.

This Court in T.D., a habitual truancy case, held that due process and the right to effective assistance of counsel require that a juvenile be permitted to make a summation of the child's position and stated as follows:

Proceedings in juvenile courts are not criminal in nature. Moreover, a juvenile who has been a habitual truant from school is considered a status offender under Chapter 630, and such behavior shall not be considered criminal or delinquent pursuant to KRS 600.020(58). A "Status offense action" is any action brought in the interest of a child who is accused of committing acts, which if committed by an adult, would not be a crime [citations omitted].

Despite the non-criminal nature of juvenile proceedings, however, the United States Supreme Court has held that:

A proceeding where the issue is whether the child will be found to be

"delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

The Gault case reflects that where the fault of the child is at issue and penalties, including loss of liberty, may attach, criminal protections provided by the constitution apply [citations omitted].

A proceeding against a child for the status offense of habitual truancy under Chapter 630 relates to the fault of the child and can result in severe consequences to that child. The consequences are probation and detention for failure to meet the attendance terms. . . . [citations omitted].<sup>10</sup>

The due process rights recognized by this Court in T.D. are consistent with the specific rights provided in RCr 8.28 as follows:

- (1) The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence. The defendant's voluntary absence after the trial has been commenced in his or her presence shall not prevent proceeding with the trial up to and including the verdict. . . .

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<sup>10</sup> T.D., 165 S.W.3d at 483.

- (4) In prosecutions for misdemeanors or violations the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. However, no plea of guilty to a violation of KRS 189A or KRS 218A may be entered in the defendant's absence, unless the defendant first executes a written waiver of his or her right to be present.

In view of the juvenile's due process rights set forth in T.D. and the failure of RCr 8.28 to exclude juvenile status offenders from the requirement that they be present at every critical stage of the trial, we conclude that it was substantial error for the family court to proceed with the adjudication and disposition hearings in the child's absence. Accordingly, the adjudication order and the disposition order of the Jefferson Family Court are vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.



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