

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002192-ME

A.B., A CHILD UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 07-J-01030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: TAYLOR, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: The issue in this appeal is whether A.B.'s stipulation to the status offense of habitual truancy without the advice of counsel and without any dialogue required for an admission pursuant to *Boykin v.*

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), was valid. We hold that it was not and, therefore, vacate and remand.

Facts and Procedural History

On January 24, 2007, a juvenile petition was filed in the Fayette Family Court against A.B. for habitual truancy. On April 23, 2007, A.B., who was 13 years old at the time, appeared before the court regarding the petition. She was accompanied to court by her mother, who did not speak English and required an interpreter.

At the hearing, A.B. declined counsel and stipulated to habitual truancy without consulting with an attorney. The judge proceeded to verbally enter an order requiring A.B. to: go to school everyday with no unexcused absences or tardies; obey the rules of her home including a 9:00 p.m. curfew; not consume, use, or possess alcohol, tobacco, or illegal drugs; and submit to a drug test that day. The written order added an additional requirement that A.B. submit to random drug testing.

The following exchange between the court and A.B. occurred regarding her admission or stipulation to habitual truancy:

Judge: I will appoint legal aid. I will appoint legal aid.
She's qualified for legal aid.

Mother (via translator): What is that?

Judge: It's an attorney to represent her in this process.
Your next court appearance is in a little while [A.B.]
when you're ready I will call you back and ask how you

respond to this charge. I'll ask if you admit it or if you deny it.

A.B.: So I can't say right now that I agree?

Judge: Yeah, well you can if you would like. But I'll also give you the opportunity to talk to your lawyer and look at your school records if you'd like. Do you want that opportunity?

A.B.: I don't think it is necessary.

Judge: And you know that by stipulation to the truancy I have jurisdiction to enter court orders over you and your family?

A.B.: Yes.

Judge: And you would like to do that?

A.B.: Yes.

Judge: I will take the stipulation to habitual truancy.

No disposition hearing was set nor was the Cabinet for Health and Family Services ordered to provide a predisposition investigation report. Rather, over the next two and one-half years, A.B. and her mother made numerous court appearances for reviews of the case. A.B. had the assistance of counsel for some of the appearances, but she was never informed she was entitled to counsel. In addressing the truancy, the following events occurred: the court regularly reviewed A.B.'s school attendance; A.B. was given 24 hours of detention on May 21, 2007; A.B. was given five days of detention on November 10, 2008; a second juvenile complaint and Juvenile Status Offender Order were entered in January

2009; and A.B. was placed under Cabinet for Health and Family Services supervision in February 2009.

In September 2009, the Family Court decided it had exhausted its resources and asked the Cabinet to prepare a disposition report. At the disposition hearing in October 2009, the judge committed A.B. to the Cabinet. A.B.'s attorney submitted a Motion to Reconsider and a Supplemental Motion to Reconsider, but the court denied both motions.

On appeal, A.B. argues that her admission or stipulation of guilt was invalid and that she did not knowingly waive her right to counsel. The Commonwealth concedes both that the stipulation of guilt was invalid and that A.B. did not effectively waive her right to counsel.

Standard of Review

The United States Supreme Court stated in *Boykin v. Alabama*,:

In *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: **“Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”**

We think that the **same standard must be applied to determining whether a guilty plea is voluntarily made.** For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. **Ignorance**, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of

course governed by federal standards. *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934. (Emphasis added.)

395 U.S. at 242-43, 89 S.Ct. at 1712

Analysis

We conclude that A.B. did not knowingly, intelligently, and voluntarily enter into a stipulation of guilt or waive her right to assistance of counsel.

I - Stipulation of Guilt

A.B.'s stipulation of guilt was invalid. In *D.R. v. Commonwealth*, 64 S.W.3d 292 (Ky. App. 2001), and *J.D. v. Commonwealth*, 211 S.W.3d 60 (Ky. App. 2006), this Court decided that in order for a juvenile stipulation or plea of guilty to be valid, it must meet the requirements of *Boykin v. Alabama*. Consequently, to be valid, the record must reflect the defendant's plea was made knowingly, intelligently, and voluntarily. The Supreme Court stated in *Boykin* that "[w]e cannot presume a waiver of these important federal rights from a silent record." *Id.*, 395 U.S. at 243, 89 S.Ct. at 1712. Therefore, the validity of a guilty plea is determined by considering the totality of the circumstances surrounding the plea, including the accused's demeanor, background, and experience, and whether the record reveals that the plea was voluntarily made. *D.R.*, 64 S.W.3d at 294; *J.D.*, 211 S.W.3d at 62.

The record does not reflect that A.B. was advised of or had knowledge of the constitutional rights she was waiving by entering her stipulation of guilt.

She did not receive any assistance from counsel and was not informed of the consequences of her stipulation. At the time of the stipulation, A.B. was 13 years old and had never made a court appearance. Further, the court did not explain to A.B. or her mother their respective rights or the potential benefits of representation by counsel. Consequently, considering the totality of the circumstances, A.B. did not enter into the stipulation of truancy knowingly or intelligently. The requirements of *Boykin* were not met.

II – Waiver of Counsel

A.B.’s waiver of counsel was also invalid. In *D.R. v. Commonwealth*, this Court held that under KRS 610.060(1)(a) and (e), “a child may waive the right to counsel *only if* that child has first been appointed, and consulted with, counsel concerning the waiver.” *D.R.*, 64 S.W.3d at 296-97. Furthermore, KRS 610.060(2)(b) requires that before a court allows a child to proceed without counsel, it must conduct a hearing concerning the waiver of counsel and must make specific findings of fact that the waiver of counsel was made knowingly, intelligently, and voluntarily. Here, A.B.’s waiver of counsel was invalid because she was not appointed counsel and did not have an opportunity to consult with counsel before she waived her constitutional right to counsel. Further, the court did not conduct a hearing or make specific findings of fact.

Conclusion

As acknowledged by the Commonwealth in its brief, A.B.’s stipulation of truancy and her waiver of counsel were invalid. Therefore, A.B.’s

admission or stipulation to the status offense of habitual truancy and the disposition of commitment are vacated, and this matter is remanded to the Fayette Family Court for further proceedings.

ALL CONCUR.

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