0+7

IN THE SUPREME COURT OF FLORIDA

FILED

AUG 15 1983

SID J. WHITE

CLERK, SUPREME COURT

By _____ Chief Deputy Clerk

CASE NO. 63,974

A.O., a juvenile,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

BRUCE A. ROSENTHAL
Assistant Public Defender

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

OTHER AUTHORITIES

FLORIDA STATUTES (1981)

INTRODUCTION

The Petitioner, A.O., was the juvenile respondent in the trial court and the appellant in the Third District Court of Appeal. The Respondent, the State, was the petitioner in the trial court and the appellee in the District Court. The parties will be referred to as they stood before the trial court. The symbol "R" will refer to the record on appeal before the District Court.

STATEMENT OF THE CASE AND FACTS

On March 18, 1982, the then fifteen-year-old juvenile entered a plea of nolo contendere to a petition for delinquency charging contempt of court for failing to attend school, in violation of a prior dependency order (R. 1, 12, 20-29). The plea specifically reserved the right to appeal the question of whether the act admitted, failure to attend school as required by court order, could support an adjudication of delinquency (R. 22, 23, 27, 28). The trial court accepted the nolo contendere plea, adjudicated the child delinquent, and committed him to the custody of the Department of Health and Rehabilitative Services for an indeterminate period (R. 3, 11, 12).

On direct appeal, the Third District Court of Appeal, by a two-to-one majority, rejected the juvenile's argument that Chapter 39, Florida Statutes did not permit delinquent treatment for dependent behavior, and affirmed the adjudication of delinquency and indeterminate commitment. A.O. v. State, 433 So.2d 22 (Fla. 3d DCA 1983). The District Court certified its decision as one passing upon a question of great public importance, that is:

> (W)hether a juvenile may be adjudicated delinquent based upon a finding of contempt for a violation of a previous order adjudicating him a dependent.

Id. at 23.

Notice invoking the discretionary review jurisdiction of this court was timely filed on July 12, 1983.

ARGUMENT

THE FLORIDA JUVENILE JUSTICE ACT, CHAPTER 39, FLORIDA STATUTES, DOES NOT PERMIT AN ADJUDICATION OF DELINQUENCY FOR DEPENDENT BEHAVIOR.

The Florida Juvenile Justice Act, Chapter 39, Florida Statues (1981), makes a clear differentiation between dependent and delinquent treatment, and does not permit delinquent treatment for dependent behavior. The distinction is demonstrated in the case of J.M.J. v. State, 389 So.2d 1208 (Fla. 1st DCA 1980).

In J.M.J., the juvenile was initially adjudicated dependent and an order was entered prohibiting runaway and truant behavior. A delinquency proceeding was then commenced for an act of contempt -- disobeying the dependency order -- resulting in an order withholding adjudication of delinquency and imposing probationary terms prohibiting truant and runaway behavior. The juvenile was ultimately adjudicated delinquent and committed for violation of the probation order. On appeal, in addition to arguing deficiencies in the pleading by which the proceeding was commenced, the juvenile argued that the delinquency adjudication was a frustration of the legislative intent of chapter 39, which designated truant and runaway behavior as act of dependency. The First District fully agreed with the juvenile's contentions, holding that (a) the petition was insufficient, and (b) in any event, the legislative intent was to treat the acts involved as acts of dependency. The court noted both the Juvenile Justice Act's important purpose of serving the best interests of the dependent child, and the requirement that the Act must be

liberally construed. Id. at 1210.

The court further noted the following distinctions between the delinquency (Part II) and dependency (Part III) provisions of the chapter:

> Notably, delinquent children are those who have usually committed crimes. See § 39.01(8) and (34). In contrast, dependent children include those neglected and those formerly known as ungovernable. Compare § 39.01(9), Fla.Stat. (Supp. 1978) with 39.01(9), Fla.Stat. (1977). Further, distinguishing between delinquent and dependent acts has important consequences for a child. It is impermissible to detain a runaway child in a cell with a child charged with having committed a crime. See § 39.402(4). Also, the court may commit a delinquent to the custody of the department until the age of 19, not 18. Compare § 39.11(1)(c) with § 39.41(1)(c). Undoubtedly, the delinquent child incurs a stigma very much like that attached to the word "criminal." See State In Interest of M.S., 73 N.J. 238, 374 A.2d 445, 448 (N.J. 1977). It is apparent that the legislature, in deliberate wisdom, chose to classify persistent runaways and habitual truants only as dependent children, providing the court with a flexible range of placement options to meet the child's need for supervision. §39.41. Thus, we hold the delinquency adjudication under chapter 39 is invalid under the facts presented in this case.

Id. at 1210.

In a footnote, the J.M.J. court noted that not presented in the case before it was the question of the inherent power of a court to punish a juvenile for contempt. Id. at 1210, n.4. The First District noted that the trial court had "intended to employ chapter 39 mechanisms to deal with J.M.J.'s behavior (,)" and, of course, that chapter 39 did not permit such treatment. Id.

In R.M.P. v. Jones, 419 So.2d 618 (Fla. 1982), a certified

question related to that noted by the J.M.J. court as not before it was presented to this court, to-wit:

> Whether a juvenile court may impose conditions upon a dependent child, find the violation of those conditions constitutes contempt of court, and place the child in secure detention in the custody of the Department of Health and Rehabilitative Services for a limited time?

R.M.P., 419 So.2d at 619. (Emphasis supplied).

This court answered each aspect of the certified question in the affirmative, thereby, as far as punishment is concerned, only approving limited secure detention under the exercise of the inherent contempt power.

In R.M.P., the juvenile was adjudicated dependent, and then picked up as a runaway. The trial court reviewed and reaffirmed the dependency order and ordered that the juvenile be placed in contemporary custody of her mother, with eight conditions including that she not run away again and not associate with a particular juvenile. Id. at 619. Significantly, the dependency order in that case stated that breach of the conditions would lead to contempt proceedings. Id. at 619. The juvenile was found guilty of (indirect) criminal contempt for, within two weeks of the order, again associating with the particular juvenile and for running away. Id. at 619. The trial court sentenced the juvenile to serve twenty days in secure detention for each of the two counts.

On review in this court, R.M.P. contended that: (1) The dependency disposition statute did not authorize imposition of conditions of behavior; and (2) the court's power to punish a

dependent for contempt had to be exercised within the constraints of Chapter 39. As to the first contention, this court ruled that both the dependency and delinquency parts of the chapter authorized imposition of reasonable conditions and that the two conditions in question were reasonable. As to the second contention of R.M.P., this court, in distinguishing J.M.J., upon which the juvenile R.M.P. relied, was careful to note that the trial court in that case intended to employ "chapter 39 mechanisms" to deal with J.M.J.'s behavior. In so passing upon J.M.J., this court was careful to leave the square J.M.J. holding -- that chapter 39 did not permit delinquent treatment for acts of dependency -- unaffected. It distinguished R.M.P. as one involving the inherent contempt power of the court, a power not predicated upon Chapter 39. It further held only that the inherent contempt power permitted placement of a juvenile for a limited time -- in that case twenty days for each act of contempt -- in secure detention in the custody of the Department of Health and Rehabilitative Services.

The juvenile herein submits that J.M.J. and R.M.P. are controlling, and require reversal of the decision below.

In this case, the juvenile had previously been adjudicated dependent and, as pertinent here, ordered to attend school. The state filed a petition for delinquency for contempt on the basis that the juvenile failed to attend school. Notwithstanding the fact that under Section 39.01(9), persistence or habitualness of dependent behavior does not render it more serious, i.e., delinquent behavior,[1] the majority of the panel in essence

summarily affirmed as if it were an ordinary delinquency adjudication. No reasoning is set forth in the body of the majority's decision. In a footnote, the court reasoned that the legislature designed Section 39.01 to avoid the "cumbersome procedure" of further dependent judicial treatment and intended, as the majority put it, to "allow remedial action to be taken before it is too late to be of assistance to the juvenile and society." Id., 433 So.2d at 22, n.1. The court further stated it was persuaded to "follow what (it) perceive(d) to be the legislative solution." Id.

It is respectfully submitted that the decision below

---

1 To the contrary, persistence and habitualness are embodied in the very definition of dependent behavior. §39.01(9) provides:

> "Child who is found to be dependent" means a child who, pursuant to this chapter, is found by the court:
>
> (a) To have been abandoned, abused, or neglected by his parents or other custodians.
>
> (b) To have been surrendered to the department or a licensed child-placing agency for purpose of adoption.
>
> (c) To have persistently run away from his parents or legal guardian.
>
> (d) To be habitually truant from school while being subject to compulsory school attendance.
>
> (e) To have persistently disobeyed the reasonable and lawful demands of his parents or other legal custodians and to be beyond their control.

seriously mistakes the manifest intent of Chapter 39. Unlike the intent with regard to the delinquency portion of Chapter 39 (Part II) which recognizes "retributive punishment"[2] as an available although less-preferable method of dealing with delinquents[3] in striking the balance between society's and the child's conceivably competing interests, the dependency provisions (Part III) appropriately equate the child's best interests as synonymous with society's interest. Punishment is not ever recognized as appropriate in the case of a dependent child.

Specifically, Section 39.09(3)(d) recognizes the following criteria as pertinent to the court's determination of delinquency adjudication and disposition:

> 1. The seriousness of the offense to the community.
>
> 2. Whether the protection of the community requires adjudication and commitment to the department.
>
> 3. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner.

---

2 Section 39.001(2)(a), which is cast in terms of an "offense" (obviously referring to delinquent behavior), provides that one of the chapter's purposes is: "To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases."

3 Section 39.01(8) defines a delinquent child "a child who, pursuant to the provisions of this chapter, is found by a court to have committed a felony, a misdemeanor, contempt of court, or a violation of a local penal ordinance and whose case has not been prosecuted as an adult case."

4. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.

5. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.

6. The child record and previous criminal history of the child, including without limitations:

a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies, and courts;

b. Prior periods of probation or community control;

c. Prior adjudication of delinquency; and

d. Prior commitments to institutions.

7. Prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is committed to a community services program or facility.

In marked distinction, the dependency disposition statute, Section 39.408(2), mandates a pre-disposition study encompassing all of the factors specified in the (dissolution of marriage) provision of Section 61.13(3). The latter section, which is concerned solely with the best interests of the child, enumerates the following factors:

(a) The love, affection, and other emotional ties existing between the parents and the child.

(b) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the educating of the child.

> (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home.
>
> (f) The moral fitness of the parents.
>
> (g) The mental and physical health of the parents.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
>
> (j) Any other factor considered by the court to be relevant to a particular child custody dispute.

The harsh result of the majority's decision to affirm is certainly not in A.O.'s best interests. As cogently put by the dissent below,

> ... (A) concededly dependent child should (not) face a criminal sanction for what could best be characterized as a status offense. See J.M.J., 389 So.2d 1210.
>
> A.O., fifteen years old at the time of this adjudication, now faces a potential four years of incarceration in institutions populated by young offenders who have committed real crimes; all this for the "crime" of not going to school. Such a result was not intended by the legislature. See J.M.J., 389 So.2d at 1210.

A.O. v. State, 433 So.2d at 23 (Jorgenson, J., dissenting).

It would seem self-evident that the problems which cause a

child to become a dependent can not be expected to be ameliorated merely by a trial court's order directing, in effect, that the child not be a dependent. It follows, therefore, that a child continuing to engage in dependent behavior should rarely if ever be met with the response of a court invoking its contempt power. In any event, if such exceptional circumstances arise that a court is justified in vindicating its authority with respect to a dependent, the court certainly should not treat and stigmatize the dependent child as a delinquent, J.M.J., supra, nor, under its inherent contempt power, should it punish for more than a specific limited time. R.M.P. v. Jones, supra. Accordingly, the decision of the lower court, which departs both from the express legislative intent of Chapter 39 and from this court's decision in R.M.P. v. Jones, should be reversed.

CONCLUSION

Based on the foregoing arguments and authorities cited, the juvenile Petitioner respectfully requests this Court to reverse the judgment of the lower court, direct that the adjudication and indeterminate commitment for delinquency be vacated, and direct that he be discharged.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: 
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, 33128, this 12th day of August, 1983.

BRUCE A. ROSENTHAL
Assistant Public Defender