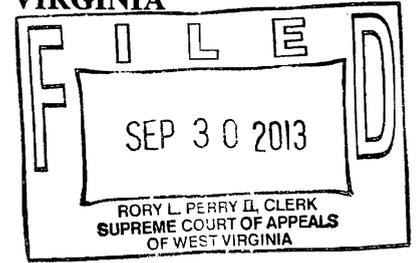


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0890



J.S., a Juvenile,

Petitioner,

v.

STATE OF WEST VIRGINIA

Respondent.

SUMMARY RESPONSE

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SUMMARY RESPONSE

On September 5, 2013, the petitioner, J.S. (hereinafter “petitioner”), by counsel, presented a timely notice of appeal from an order of the Circuit Court of Barbour County (Case Nos. 13-JD-01, 13-JD-11) placing him under the care, custody and control of the Department of Health and Human Resources (“DHHR”) pursuant to § W. Va. Code, 49-1-1, *et. seq.* By Order entered August 8, 2013, this Court ordered respondent to file a brief or summary response to petitioner’s petition. Comes now the State of West Virginia by counsel, Julie A. Warren, Assistant Attorney General, and files the within summary response.

I.

STATEMENT OF THE CASE

On January 23, 2013, the State filed a petition in the Barbour County Circuit Court moving the court to adjudicate petitioner, age 17, a delinquent child within the meaning of W. Va. Code § 49-1-4. (App. at 3.) A full hearing on the petition was conducted on February 11, 2013. (*Id.* at 6.) The petitioner admitted to the charge of burglary, as specified in W. Va. Code § 61-3-11(a). The facts supporting the State’s burglary charge, and which were admitted by the petitioner, is that on December 14, 2012, the petitioner broke into a home in his neighborhood while the wife was present

in the home. (App. at 3 and 6.) During the hearing, the petitioner admitted that he opened the garage door to his neighbors' home, and then used a tool he found in said garage to attempt to "shimmy" open the access door from the garage to the home. (*Id.* at 34, 37.) The wife hid in the bathroom and called her mother, who subsequently arrived at the neighbors' home prompting the petitioner to abandon his criminal enterprise. (*Id.* at 39.)

At the adjudication hearing on the petitioner's burglary charge, the petitioner admitted to having used marijuana and illegal prescription medication in the past, and he admitted that on the day of the burglary he was under the influence of illegal prescription pills that he had taken during the school day and purchased from a fellow student. (*Id.* at 41, 46.) The petitioner's mother testified that the petitioner had been kicked out of his previous high school in Upshur County during his sophomore year for "exposing himself," which prompted the family's move to Barbour County. (*Id.* at 62-63.) The petitioner's mother also admitted that the petitioner's 11.5 unexcused absences were due to the petitioner's skipping school to be with his friends in Buckhannon, WV. (*Id.* at 66.) The court was understandably concerned by the fact that the petitioner's parents had allowed him to go Buckhannon, WV with one of his friends on the Saturday evening prior to the subject hearing, despite the fact that he was facing charges of burglary, and during this trip he admittedly consumed alcohol. (*Id.* at 72.)

The court adjudicated the petitioner a delinquent and continued disposition in accordance with W. Va. Code § 49-5-13, pending the completion of a psychological and substance abuse assessment, as well as a family assessment. (App. at 67-68.) The petitioner was placed in the legal custody of the Department of Health and Human Resources, Division of Juvenile Services pending the disposition of the Petition designated 13-JD-1, and the supervision of the probation department, but he was permitted to be released with his parents on home confinement. (*Id.* at 10, 68-69.)

The court instructed the petitioner and his family at the hearing that he was only permitted to leave his home to go to school, and that he was not permitted to go anywhere else unless he was

accompanied by one or both of his parents. (*Id.* at 68.) The court expressly cautioned that if the petitioner violated any terms of the court's order, then the court would "immediately put him in a secure detention center until we can get the evaluations and have a final disposition hearing." (*Id.* at 69.) The court further warned that there would be "no second chances." (*Id.*) The petitioner confirmed to the court that he understood the terms of his probation. (*Id.*) The court expressed its dilemma surrounding the factual nature of the burglary and the safety of the community, and the victims in particular, and it solicited a guarantee from the petitioner's parents that they would "stand up to him," and not let him go anywhere without their accompanying him. (*Id.* at 75.) On February 27, 2013, the court entered its Order which highlights its ruling set forth during the February 11, 2013 hearing. (*Id.* at 8-10.)

A second Petition was later filed against the petitioner on February 27, 2013, whereby the petitioner was alleged to have committed a battery against a fellow student while at school, and as a consequence the petitioner was removed from his home and placed in a detention facility. (*Id.* at 15-16.) This second Petition asserts that on February 21, 2013, 10 days after his prior adjudication hearing on the burglary charge, the petitioner locked a fellow student in a closet at school, and then punched the student in the groin. (*Id.* at 20-21.) The Juvenile Petition that was submitted to the prosecuting attorney in relation to the battery charge stated that the victim of the battery, a minor and a fellow student at the petitioner's school, alleged that a year prior to incident in question, the petitioner poured diesel fuel on the victim resulting in the victim requiring medical attention at the hospital for chemical burns. (*Id.* at 23.) The petitioner was removed from his family's home and eventually placed at Donald R. Kuhn Diagnostic and Detention Center in Parkersburg, WV, where, pursuant to W. Va. Code § 49-5-13(a), he was subject to a psychological and substance abuse evaluation upon arrival at the facility. (*Id.* at 15-16.)

On June 7, 2013, the court convened another adjudicatory hearing on the charges contained in the second Petition. The victim, who was described as a special education student, testified that

the petitioner lured him into the tool room located in one of their classrooms and then locked him in the tool room using rope, and that he remained locked in the tool room for nearly 20 minutes until he was able to use a blade to cut the rope. (*Id.* at 85, 88.) The victim claimed that after he was able to free himself from the tool room, the petitioner then hit him in the knee with a shovel and then punched him in the groin. (*Id.* at 85-86.) The victim reported the incident to his parents and he gave a statement to the Sheriff's Deputy, in which he complained that on previous occasions the petitioner had poured brake cleaner on him, and poured "kitty litter" over his head, coat and pants pockets. (*Id.* at 87.) The petitioner admitted that he locked the victim in a closet as a "prank," and claimed he punched him in the groin after the victim grabbed his hand and pulled his thumb back. (*Id.* at 103-105.)

The court was provided with a copy of the Kuhn Diagnostic and Detention Center's evaluation report of the petitioner, and the report suggested the petitioner be placed at the Rubenstein Center, in part due to the petitioner's ongoing bullying practice while in detention at the

Kuhn Center. (*Id.* at 116.)¹ However, the Rubenstein Center would not accept the petitioner's placement into the facility. (*Id.*) The petitioner's probation officer testified that the petitioner had "talked to the workers down at Donald R. Kuhn and that [petitioner] has a lot of issues. A lot. He likes to pick on people." (*Id.* at 124.)

The court, having observed the petitioner, the victim upon whom the petitioner perpetrated the battery, and reviewing the report, expressed that "this case is about as troubling as most any that I have ever had. It is a classic case of bullying, but yet we have other offenses, trying to break into a woman's house with her in it." (*Id.* at 125.) The court was further aggrieved by the petitioner's ongoing bullying behavior while in detention. (*Id.* at 126.) The court reasoned that the petitioner's parents "love him dearly," but that his parents have enabled his feeling of entitlement to the point the petitioner "believes that he should be able to step on the downtrodden, to hurt people weaker than

¹ The respondent believes the Kuhn Center's evaluation report holds important information concerning the nature of the petitioner's psychological well-being, his substance abuse issues, and his behavior and potential threat to the public in general. However, the petitioner has expressly and intentionally omitted the report from the Appendix. The respondent has been in contact with the prosecuting attorney, Leckta Poling, who has moved the court to unseal the report, so that the same might be included with the Appendix and reviewed by this Court.

him.” (*Id.* at 125.) The court denied the petitioner’s request to be placed at the Elkins Mountain School. (*Id.* at 117, 127.) Based on well-established and well-founded concerns, the court held that “a level three facility is not appropriate and there’s no way the court or the Department can ensure the safety of the other children in that facility. The court cannot even ensure the safety of other children when he is in a detention facility.” (*Id.* at 127.) The court ultimately ordered that petitioner be placed at a level 4 facility operated by the Division of Juvenile Services until the age of 21 years. (*Id.* at 135.)

II.

ARGUMENT

Upon review of the court’s order, and the detailed recitation of facts set forth therein, and the transcript of the adjudicatory and dispositional hearings, there is no question that the sentencing judge correctly weighed all the evidence in view of the least restrictive alternative and found that petitioner, as well as public safety, would be best served in the custody of the DHHR and placed in a Level 4 juvenile detention facility.

a. Standard of Review.

The standard of review for dispositional orders is as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 2, *Walker v. West Virginia Ethics Comm’n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

Accordingly, the standard of review with regard to a circuit court’s sentencing order or disposition under W. Va. Code, 49-5-13 (2002), is whether the circuit court’s ruling constitutes an abuse of discretion. *State v. Kirk N.*, 214 W. Va. 730, 741, 591 S.E.2d 288, 299 (2003), quoting *State ex rel. D.D.H. v. Dostert*, 165 W. Va. 448, 471, 269 S.E.2d 401, 416 (1980), (“discretionary” rulings of circuit courts at the dispositional stage in juvenile cases “should only be reversed where they are not supported by the evidence or are wrong as a matter of law”); In the Interest of *Thomas L.*, 204 W. Va. 501, 504, 513 S.E.2d 908, 911 (1998), (disposition in juvenile case held to be within the circuit court’s “sound discretion”); *State ex rel. Department of Health and Human Resources v. Frazier*, 198 W. Va. 678, 683, 482 S.E.2d 663, 668 (1996), (circuit courts are “vested with discretion to select the appropriate disposition for a particular juvenile”).

State v. Kenneth Y., 217 W. Va. 167, 170, 617 S.E.2d 517, 520 (2005).

b. The Lower Court Did not Abuse its Discretion by Placing J.S. Under the Care, Custody and Control of the DHHR.

The procedural arguments raised by the petitioner are not relevant to the standard of review related to the issues pending before this Court. The issue here is whether the court's decision to place the petitioner under the custody of the DHHR, in a Level 4 juvenile detention facility operated by the Division of Juvenile Services, was an abuse of discretion within the meaning of the applicable authority on this issue in light of the record as a whole. *Kenneth Y, supra*. The court's Orders, as well as the hearing transcripts, indicate that the court correctly weighed all the evidence in view of the least restrictive alternative and found that petitioner, as well as public safety, would be best served by being placed in the custody of the DHHR and placed in a Level 4 juvenile detention facility.

The trial court conducted a full evidentiary hearing on each Petition and arrived at its conclusions based on the petitioner's testimony, the testimony of the petitioner's parents, extensive psychological and substance abuse diagnostics, petitioner's history of behavioral issues, prior delinquency proceedings, reports from school officials and probation officers, as well as the statements and testimony of the petitioner's victims.

After setting forth its findings of fact and conclusions of law, the court ordered:

The juvenile shall be placed with the Division of Juvenile Services in a Level 4 facility until the age of twenty-one (21), or appropriate step-down plan for the safety of the community.

...

The best interests of juvenile and the welfare of the public make the commitment of the juvenile to the Division of Juvenile Services facility appropriate, as no less restrictive alternative than commitment to the Division of Juvenile Services facility will accomplish this juvenile's rehabilitation. (App. at 135.)

It is clear on the face of the record that the court was well within its discretion to issue the challenged ruling. The court's findings of fact and conclusions of law were not only supported by

the record and set forth in the Order, but satisfied this Court's holdings in *State v. Damian R.*, 214 W. Va. 610, 591 S.E.2d 168 (2003) which stated in pertinent part:

[S]uch a petition [for out-of-home placement] may only be granted upon a showing by clear and convincing evidence that such a custody or placement order is actually necessary; that the effective provision of services cannot occur absent such an order; and that all reasonable efforts have been made to provide appropriate services without an out-of-home placement or custody transfer; and orders granting such placement and/or transfer must be based on specific findings and conclusions by the court with respect to the grounds for and necessity of the order.

Id. at Syl. Pt. 2

The *Damian* Court reversed the lower court's order placing the juvenile in restrictive custody because it lacked an adequate factual basis developed on the record. In this case, unlike *Damian R.*, the trial court did not remove petitioner from his home for a mere status offense. In fact, the court adjudicated the petitioner a delinquent and still allowed the petitioner to reside at home. The court extended this grace to the petitioner even though it had reservations following the petitioner's admissions to breaking into a home while the female resident was at home and hid in her bathroom. During the adjudication hearing the petitioner expressly stated that he understood that if he violated the terms of the court's instructions that the police would come to wherever he was and take him to a detention facility. (App. at 69.) Regardless, a mere 10 days after being released to his parents, the petitioner committed a violent battery on a special education student during school hours, in violation of the terms of his probation.

W. Va. Code § 49-5-13(b)(4) provides:

4) Upon a finding that a parent or custodian is not willing or able to take custody of the juvenile, that a juvenile is not willing to reside in the custody of his or her parent or custodian or that a parent or custodian cannot provide the necessary supervision and care of the juvenile, the court may place the juvenile in temporary foster care or temporarily commit the juvenile to the department or a child welfare agency. The court order shall state that continuation in the home is contrary to the best interest of the juvenile and why; and whether or not the department made a reasonable effort to prevent the placement or that the emergency situation made such efforts unreasonable or impossible.

The court's decision to remove the petitioner from his home pursuant to W. Va. Code § 49-5-13(b)(4), given the fact that petitioner committed a crime of battery against a fellow student just 10 days after he was instructed by the court as to the terms of his remaining with his parents, left the

court with no logical choice but to remove the petitioner from his home and place him in a juvenile detention facility. The court's Order, as well as the record, makes it clear that the petitioner's parents were unable to control the petitioner's behavior, which placed the petitioner and the general welfare of the public at risk.

W. Va. Code § 49-5-13(b)(5) provides:

Upon a finding that the best interests of the juvenile or the welfare of the public require it, and upon an adjudication of delinquency pursuant to subdivision (1), section four, article one of this chapter, the court may commit the juvenile to the custody of the Director of the Division of Juvenile Services for placement in a juvenile services facility for the treatment, instruction and rehabilitation of juveniles: Provided, That the court maintains discretion to consider alternative sentencing arrangements.....

The court ultimately found it in the best interest of the petitioner and the welfare of the public to place the petitioner in a Level 4 juvenile detention facility. This decision was based on the petitioner's violation of the terms of probation, i.e. battery against a fellow student, but also petitioner's well documented patter of committing acts that were violent or had the potential for violence and carried the risk of bodily harm to others as well as petitioner himself.

Between the potential for danger presented by petitioner's behavior while under parents control, and the petitioner's continued violent behavior while in a Level 3 facility, the circumstances in this case clearly comport with the applicable statutory language emphasized by this Court in *Damian R*: "[t]he removal of a juvenile status offender or delinquent from his parent's custody is authorized 'only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal . . . W. Va. Code, 49-1-1(a)(12)(b) [49-1-1(b)1999]." *Id.* at 616, 591 S.E.2d at 174.

c. The Placement of the Petitioner in a Level 4 Juvenile Detention Facility was a Proper use of the Court's Discretion.

Given the record as a whole, including but not limited to, the fact that petitioner has a history for bullying, and in fact, admitted to locking a special education student in a closet, hitting him in the knee with a shovel, and then punching him in the groin, and given the fact that this behavior continued even after he was removed from his home and detained at the Kuhn Center, the court

correctly exercised its discretion in ordering the petitioner to be placed in a more secure facility wherein he would be subject to more supervision and be less likely to cause injury to himself and those around him.

During the June 7th hearing, the petitioner contended that he should be placed at the Elkins Mountain School where he would have “the proper counseling and groups and education...and get my high school diploma.” (App. at 121.) The court took the petitioner’s allocation under advisement, but due to the record of violent behavior, especially towards fellow students and juvenile detainees in less secure facilities, the court proffered the following explanation as to why it could not agree to his placement at the Elkins Mountain School at this time:

If at some point in time it appears that you have complied and completed the programs I will consider releasing you to a level three. But at this point that’s not appropriate... I cannot allow you to continue to pick on the [minor battery victim]’s of the world. And that’s been happening.

(*Id.* at 127-28.)

The record indicates that while the petitioner was detained at the Kuhn Diagnostic and Detention Center, a Level 3 facility, there was a formal complaint against the petitioner for continued bullying of other children in the facility.

In *State ex rel. R.S. v. Trent*, this Court held:

Before ordering the incarceration of a child adjudged delinquent, the juvenile court is required to set forth upon the record the facts which lead to the conclusion that no less restrictive alternative is appropriate. The record must affirmatively show that the child’s behavioral problem is not the result of social conditions beyond the child’s control, but rather of an intentional failure on the part of the child to conform his actions to the law, or that the child will be dangerous if any other disposition is used, or that the child will not cooperate with any rehabilitative program absent physical restraint.

State ex rel. R.S. v. Trent, 169 W. Va. 493, 289 S.E.2d 166, 168 (1982).

Here, there is nothing in the record to indicate that the petitioner’s conduct is the result of issues related to his social conditions outside of his control, in fact his parents testified at both hearings, and the court noted that the parents appear to love their son, but that they are unable to control his behavior, which included alcohol and drug abuse, burglary, bullying and battery against a special education student at his school while on probation.

During the adjudication hearing on the first Petition related to the burglary charge, the court made it abundantly clear that it was extending leniency to the petitioner by allowing him to stay at home with his parents while on probation, but that his behavior must conform to the terms set forth by the court. The petitioner affirmatively stated that he understood the terms and the consequences for violating those terms. Instead of conforming to the terms of his probation, however, the petitioner intentionally perpetrated a violent crime of battery against a fellow student just 10 days after being placed on probation. Moreover, the petitioner continued to demonstrate his pattern of violence by bullying other juveniles at the Kuhn Diagnostic and Detention Center, where he was placed after he violated probation by committing said battery. Given this pattern of violence by the petitioner that was presented to the court, it is clear that the court properly exercised its discretion by placing the petitioner in an increased security facility.

Therefore, based upon the entire record it is clear that there is sufficient evidence to conclude factually and legally that the record evidence supports the trial court's decision in this matter.

III.

CONCLUSION AND RELIEF SOUGHT

Therefore, counsel for the Respondent requests that the underlying order of the Circuit Court of Barbour County be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent

by Counsel

**PATRICK MORRISEY
ATTORNEY GENERAL**



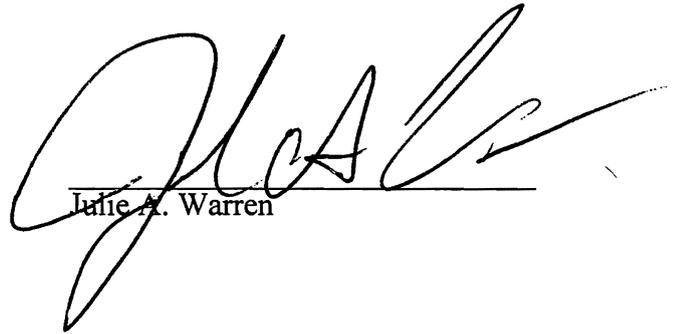
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CERTIFICATE OF SERVICE

I, JULIE A. WARREN, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the "*Summary Response*" upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this ____ day of September 2013.

To: Phillip S. Isner, Esquire
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Julie A. Warren