

No. 25140     State of West Virginia ex rel. the West Virginia Department of Military Affairs and Public Safety, Division of Juvenile Services, and Phyllis H. Carter, Director, Division of Juvenile Services v. Honorable Irene C. Berger, Judge of the Circuit Court of Kanawha County

Starcher, Justice, dissenting:

The majority opinion states that the “[l]egislature has not expressly stated that it is the Division [of Juvenile Service’s] responsibility to provide for the transportation of detained juveniles . . . [but] it has *made this intention clear*.” Slip op. at 9, \_\_\_ W.Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_ (emphasis added). This seems contradictory.

How would the Legislature “make something clear” without expressly stating it? That seems unlikely, but I suppose it could be done. One method would be by appropriating money for the otherwise unstated purpose. But the record does not disclose any such appropriation -- in fact, the opposite appears to be true: there was no money appropriated to the Division for transporting juveniles. *Id.*, slip op. at \_\_\_, n. 6, \_\_\_ W.Va. at \_\_\_, n. 6, \_\_\_ S.E.2d at \_\_\_, n. 6.

The majority also suggests that a comparison to the express duty to transport prisoners in the Regional Jail System supports finding a “clear” legislative intent to impose such a duty in the juvenile system. This is an entirely backwards argument. The Legislature showed in the regional jail system that it knows exactly how to impose such a duty -- *and it did not do so* in the juvenile system. How does this “clearly” show an intent to impose such a duty?

Additionally, the circuit judge in this case was simply wrong in stating that the historic practice has been for juvenile facilities to provide transportation for juvenile

detainees. Perhaps in Kanawha County this has been so, but as a judge who has sat in 23 of West Virginia's 55 counties, I know that the sheriffs do this job in many, if not most counties.

What the Legislature *has* done is required the Division of Juvenile Services to “develop a comprehensive plan . . . [for a] unified state system of regional predispositional centers for juveniles. . . . The plan shall identify operational problems . . . including . . . transportation problems. . . .” *W.Va. Code*, 49-5a-6a [1997] (in part). The Legislature has required a plan, not imposed a duty. This is more suggestive that current transportation problems be studied, and then a plan for the resolution of transportation problems be developed.

In a diverse state like ours, legal authorities need flexibility to efficiently serve public needs. In some counties, deputy sheriffs are probably by far the preferable entity to transport detained juveniles. Their schedules are more flexible and they can accommodate local needs. In other cases, transportation may be best provided by the Division. This is something the Legislature needs to figure out, with the aid of the Division's plan.

But where there is no direct language in the statute, no money provided to fund the service, and direct language that says “study the transportation problem,” I cannot agree that the Legislature has to date mandated that the Division of Juvenile Services forthwith begin providing for the transportation of juveniles to and from detention centers for our circuit courts. Given time, perhaps the Legislature will see fit to do this.

I often hear “judge-made” law criticized. Usually this criticism is wrongly directed at the common-law evolution that this Court is required to do; or to our similar duty to evolve constitutional law to meet modern times.

But the criticism is correct, if it is directed to law like that in the majority opinion. The majority opinion, in the direct interpretation of a statute, has extracted from some general legislative statements a specific duty that I am entirely confident was never in any shape or fashion intended by the Legislature at the time the statute was enacted.

I think a circuit judge clearly has the power to require the sheriff, who as the majority notes must “attend” the circuit court, to transport detained juveniles. I also think that a judge has the power to require the Division of Juvenile Services to transport detained juveniles if there is no sheriff available -- under the court’s necessary and inherent powers. Until and unless the Legislature speaks on this issue, neither sheriff nor Division is foreclosed from performing this function. And what, pray tell, is wrong with that situation?

It is erroneous for us to set out the legal fiction that the Legislature has spoken on this issue. Accordingly, I respectfully dissent.