No. 25195 -- State of West Virginia v. Craig D.

Starcher, Justice, dissenting:

I dissent because I disagree with the majority opinion's conclusion that "the circuit court conducted a sufficiently detailed dispositional hearing in an effort to determine the most suitable dispositional alternative" to incarceration. The prosecutor in this case recommended Craig D. be returned to the custody of his parents with "extraparental" supervision provided by the probation department. The dispositional hearing to determine Craig D.'s sentence did not contain any of the required findings or analysis of why this recommended sentence was rejected, nor any findings to suggest why incarceration with the Department of Corrections was the best alternative. Therefore, in my opinion, Craig D.'s incarceration constituted an abuse of the circuit court's discretion.

We have held that a trial court must make a detailed record in a juvenile proceeding where incarceration is viewed as a sentencing alternative. As the majority opinion states, we held in Syllabus Point 1 of *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980) (emphasis added) that "it is the *obligation* of a trial court to make a record," and that the trial court "*must* set forth reasons" for concluding that incarceration is the best alternative.

Accordingly, a trial court has an obligation, and therefore must, at a minimum, set forth its consideration of the eight factors listed in Syllabus Point 1 of *State ex rel. D.D.H. v. Dostert*. (*See* the Syllabus of the majority's opinion.)

When an adult criminal defendant is sentenced, this Court has not hesitated to impose procedures to ensure that the trial court sentences the adult defendant fairly, openly and publicly based upon accurate information. If a trial court "runs roughshod" over these sentencing procedures, it commits reversible error.

For example, in *State v. Holcomb*, 178 W.Va. 455, 360 S.E.2d 232 (1987) we stated that under Rule 32 of the *West Virginia Rules of Criminal Procedure*, an adult defendant has a right to "allocution," or in other words, the right to comment on matters relating to sentencing. The failure of a trial court to merely address the adult defendant at sentencing, or to "ask him if he wishes to make a statement" constitutes reversible error.

Similarly, in *State v. Craft*, 200 W.Va. 496, 490 S.E.2d 315 (1997), we held that when an adult defendant claims there is a factual inaccuracy in a presentence investigation report, Rule 32 of the *West Virginia Rules of Criminal Procedure* requires the sentencing court to make *written* findings about the allegedly inaccurate fact or make a *written* determination that such findings are unnecessary because the disputed fact will not be relied upon in sentencing.

I am at a loss to understand why, in this and other juvenile cases, courts fail to protect the rights of juvenile defendants with the same care given to adult defendants. When an adult defendant is sentenced, Rule 32 of the *Rules of Criminal Procedure* requires that a record be created so that the defendant and the public understands the basis for the sentence imposed.

A juvenile disposition should be given the same, if not more, care as an adult defendant's sentencing. Our mandate in *State ex rel. D.D.H. v. Dostert* was not crafted with the sole intent of creating a record for this Court to look at on appeal. Instead, by the court stating on the record its analysis of the eight factors set out in *State ex rel. D.D.H. v Dostert*, pursuant to *W.Va. Code*, 49-5-13 [1997], the court will demonstrate to the juvenile and to the public[1] that it has considered all of the possible options, and adopted the least restrictive alternative to accomplish the required rehabilitation of the child. Furthermore, the court should, by enunciating its reasoning, demonstrate that the adopted disposition is required by the best interests of the child and the welfare of the public.

In sum, as in an adult sentencing under Rule 32 of the *West Virginia Rules of Criminal Procedure*, in a juvenile disposition a trial court should carefully prepare a detailed record using the factors contained in *State ex rel. D.D.H. v. Dostert*. This way, all who are involved will be explicitly and specifically apprised of the trial court's basis for imposing the particular disposition. In my opinion, the failure to do so is reversible error.

In this case, the circuit court failed to set out any consideration of the eight factors in *State ex rel. D.D.H. v. Dostert*. While a court has substantial discretion in

[1]I recognize that juvenile proceedings are supposed to be confidential. However, as is clear from the letters in the record signed by local citizens in support of Craig D., the public is often aware and takes an interest in how the courts deal with troubled juveniles.

determining a suitable disposition (or sentence), the circuit court failed to state any proper basis for its disposition in this case. Accordingly, I believe the circuit court abused its discretion and committed reversible error.

In the December 11, 1997 dispositional hearing, the circuit court allowed Craig D. to make a brief statement, where Craig D. apologized to the victim, Mr. Hayhurst, and said that he was sorry for scaring him. Craig D. also admitted that he had "made a pretty big mistake" by committing the robbery. (This is an understatement, considering this juvenile had no prior contact with the juvenile justice system.)

The circuit court did not question Craig D. concerning the circumstances of his criminal act or his motive. Nor did the court ask Craig D. about any of the information in the social summary. The court did not question Craig D.'s parents concerning his home situation, yet seems to have based its disposition on their alleged inability or refusal to discipline him. If the court had made more extensive inquiries and a record of its findings as contemplated by *State ex rel. D.D.H. v. Dostert*, the court might have discovered that incarceration was not the best alternative for Craig D.

For example, the court based its disposition, in part, on the fact that Craig D.'s parents were not keeping their son from seeing the "wrong" people, and that Craig D. had *only* seen his infant daughter on three occasions in the 3 months since her birth.

A review of the social summary indicates that Craig D.'s daughter was born on September 28, 1997, 5 days after Craig D. was arrested and incarcerated. Craig D. remained incarcerated until October 17, 1997, and the probation officer's social summary

discussing the three visits was completed on November 13, 1997. Craig D., therefore, had visited with his daughter three times, not over a 3-month period, but over at most a 4-week period.[2]

On appeal, Craig D. asserts that reason he never visited his daughter is because she was in the custody of his girlfriend's mother -- and his parents would not let him visit because they thought the girlfriend's mother was a bad influence. The social summary suggests that the girlfriend's mother may have given Craig D. a *real* gun (not a toy gun as claimed by Craig D.) to use in the robbery, and told Craig D. to use it to find money to support her pregnant daughter.

It therefore appears that Craig D.'s parents *were* keeping him from seeing the "wrong" people -- *i.e.*, his girlfriend and her mother -- and Craig D. never saw his daughter because he was either incarcerated or kept from visiting his child by his parents. Hence, two of the reasons underlying Craig D.'s disposition could have been explained had the circuit court conducted a proper hearing under *State ex rel. D.D.H. v. Dostert*.

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[2]The "three visits" conclusion was based entirely upon an interview with Craig D.'s parents that is paraphrased in the social summary. Craig D.'s parents said:

> Since his return home, he has done very well, the first week was kind of rough, but he is attending school, keeping his curfew and helping us out more. He has seen the baby about three times.

There is nothing in the social summary to indicate when this interview took place; accordingly, the interview could have been conducted a significant time before the social summary was completed on November 13, 1997.

There are two parts to the circuit court's "record" of Craig D.'s brief disposition hearing.

The first part of the "record" of Craig D.'s disposition consists of four pages of transcript where the circuit court quizzed Craig D. about his grades and classwork -- Craig D. had an overall high school grade point average of 1.7, but in the semester before and after his arrest had maintained a 3.1 grade point average. While the majority opinion notes that Craig D. was tardy and insubordinate, and holds that this finding supported Craig D.'s incarceration, I find nothing in the record to suggest that the circuit court ever asked Craig D. to explain the "excessive tardiness and insubordination."

The second part of the circuit court's disposition "record" begins with the court saying, "I gave you an opportunity to talk. Now you're going to listen to me." The circuit court then spends four pages of transcript telling Craig D. that he has accepted "no responsibility for anything," and that

> . . . with that kind of background, the Court feels that it has no alternative but to place you in the -- with the Department of Corrections . . . and see if they can give you some rehabilitation and direction, because you certainly need it. And if you don't learn something there, then you will have to suffer whatever consequences that are there as an adult.

At no place in the record does the circuit court explain why it felt it had no alternative to incarceration. Similarly, there is no explanation for why the circuit court rejected the prosecutor's recommendation that Craig D. be placed under the supervision of the probation office.

On this meager record, I believe that the circuit court's disposition of Craig D. was an abuse of discretion. The circuit court's disposition should have been reversed, and the circuit court compelled to make a proper record balancing the factors stated in *State ex rel. D.D.H. v. Dostert*.

I therefore respectfully dissent.