No. 23-275 – *W. Va. Dept. of Human Svcs. v. David B., et al*

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OF WEST VIRGINIA

WOOTON, Justice, dissenting:

This Court historically and routinely affirms abuse and neglect adjudications and subsequent terminations of parental or custodial rights based, in whole or in part, on children being exposed to registered sex offenders. Exposing children to sex offenders is so egregious a failure of parental supervision and protection that our abuse and neglect statutory scheme unequivocally provides that reunification of the family is not necessarily required. *See* W. Va. Code §§ 49-4-602(d)(2)(F) (2015) and -604(c)(7)(D) (2020). Nonetheless, the majority has determined that despite being fully aware that the child victims in this case were living with a registered sex offender—and having received two formal referrals in that regard—there existed no "clearly established" legal obligation for petitioner DHS to intervene to ensure the children's safety. Respondents more than adequately identified clearly established law that gave DHS "fair warning" that a failure to act was potentially violative of that law. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As a result, I believe that DHS does not enjoy qualified immunity and I would permit a jury to consider the reasonableness of its conduct. Therefore, I respectfully dissent.

To strip a public official/employee, or vicariously liable State agency, of qualified immunity for negligence, a plaintiff need only allege that the actionable conduct "violate[d] clearly established laws of which a reasonable official would have known." Syllabus, in part, *State v. Chase Sec.*, 188 W. Va. 356, 424 S.E.2d 591 (1992); *see also*

Hutchison v. City of Huntington, 198 W. Va. 139, 148-49, 479 S.E.2d 649, 658-59 (1996) ("[W]hether qualified immunity bars recovery in a civil action turns on the objective legal reasonableness of the action assessed, in light of the legal rules that were clearly established at the time it was taken."). In the context of DHS's child protective services, there is little question that many of its duties are necessarily governed by individual, discretionary judgments. However, it is equally certain that there are aspects of its duties which are "'so well prescribed, certain, and imperative that nothing is left to the public official's discretion[,]'" making them virtually ministerial and unprotected by immunity. *W. Va. Dep't of Health & Hum. Res. v. Payne*, 231 W. Va. 563, 574, 746 S.E.2d 554, 565 (2013) (quoting *Chase Sec.,* 188 W. Va. at 364, 424 S.E.2d at 599). Providing ongoing protective services and/or filing an abuse and neglect petition where children are residing with a registered sex offender is precisely such a duty.

Instead of scouring our abuse and neglect statutory scheme to ascertain the nature of DHS's obligations when children are exposed to sex offenders, the majority scarcely mentions the statutory scheme at all. Nowhere does the majority acknowledge the express statutory directive requiring court evaluation and approval of custodial situations where children are exposed to registered sex offenders—just as the DHS's policy contemplates. West Virginia Code §§ 49-4-602(d)(2)(F) and -604(c)(7)(D) [1] each

[1] West Virginia Code § 49-4-604(c)(7)(D) provides:

(continued . . .)

provide—as pertains to temporary and dispositional custody, respectively—that a parent, guardian, or custodian who "has been required by state or federal law to register with a sex offender registry" is such an obvious risk to children's safety that it obviates the need for DHS to make reasonable efforts to reunify the family unless a court makes specialized findings. Efforts to reunify with a parent or guardian who is a registered sex offender are presumptively not required unless a circuit court evaluates "the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family." *Id.*

If children being in the custody of a registered sex offender requires the circuit court to evaluate special considerations before it is permitted, it goes without saying that it is necessary to bring that family before the court such that it may conduct that analysis. Further, if a parent or guardian being a registered sex offender creates a general

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> (7) For purposes of the court's consideration of the disposition custody of a child pursuant to this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:
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> . . . .
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> (D) A parent has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family.

West Virginia Code § 49-4-602(d)(2)(F) regarding temporary custody reads nearly identically.

presumption that the family need not be reunified—the overarching goal of our abuse and neglect scheme—it is beyond question that the children's exposure to a sex offender in their own household requires, at a minimum, DHS intervention to provide ongoing protective measures for the children. To suggest that DHS intervention in this scenario is not reasonably implied by these statutes is wholly disingenuous, as evidenced by DHS's own policy, discussed *infra*. That there is no specific statutory authority directing it to file a petition in this circumstance is of no consequence; there is likewise no directive to file a petition when a child is physically or sexually abused, yet no one would reasonably argue DHS has no duty to do so.

However, rather than examining the import of these statutes that expressly reference registered sex offenders in the abuse and neglect context, the majority's lone reference to our abuse and neglect statutory scheme is to West Virginia Code § 49-4-605 (2018) (previously codified at §49-6-5b) entitled "When department efforts to terminate parental rights are required." The majority concludes that because this particular statute does not require DHS to seek *termination* of rights where a parent, guardian, or custodian is a registered sex offender, DHS had no "clearly established" obligation to intervene in the underlying circumstances.[2] However, as this Court well knows, filing an abuse and

[2] The statutorily prescribed circumstances where termination of rights is required under Section 605 and where reasonable efforts to reunify are not required pursuant to Sections 602 and 604 are virtually identical, with the addition of a parent or guardian being a registered sex offender to the latter. *Compare* W. Va. Code §§ 49-4-605 *with* 49-4-602, -604. DHS's policy therefore reflects a reasonable compilation of *all* statutory (continued . . .)

neglect petition is not tantamount to seeking termination of parental or custodial rights. Indeed, the purpose of abuse and neglect proceedings is not exclusively and invariably to terminate a parental relationship; rather, the overarching purpose is to address the conditions of abuse and/or neglect and reunify families. Therefore, whether or not being a sex offender is on the list of scenarios where DHS is statutorily required to seek termination of rights is of no moment. The salient question for immunity purposes is whether the statutory scheme and our caselaw would have caused a reasonable DHS caseworker to know that failure to intervene—by way of providing ongoing safety services or filing an abuse and neglect petition—where children are residing with a registered sex offender potentially violates "clearly established" law stripping DHS of qualified immunity.

The statutory scheme aside, the majority's analysis denigrates the force of this Court's own precedent on the issue. This Court's caselaw has made abundantly clear that exposure to sex offenders justifies DHS intervention up to and including termination of rights. The majority dismisses this caselaw because some, but not all, of the cases cited by respondents reflecting this clearly established law post-date the events at issue. However, this Court held precisely the same in this regard for at least a decade prior to the underlying events. *See, e.g., In re Charity H.*, 215 W. Va. 208, 213, 599 S.E.2d 631, 636 (2004) (affirming denial of improvement period based on adjudication where parent "consistently failed to take protective safety measures by exposing the children to sex

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circumstances requiring its affirmative intervention such as to allow the circuit court to evaluate children's safety and is entirely consistent with our caselaw as discussed herein.

offenders[]"); *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006) (requiring DHS to amend petition to include exposure to sex offenders as allegation of abuse and/or neglect); *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014) (affirming termination of custodial rights and denial of visitation where mother associated with sex offenders); *In re A.D.*, No. 14-0507, 2014 WL 6634543, at *3 (W. Va. Nov. 24, 2014) (memorandum decision) (affirming termination where "Petitioner Mother allowed her boyfriend, a known registered sex offender, to live in her home and care for the children[]"); *In re L.C.*, No. 14-0008, 2014 WL 2462981, at *2 (W. Va. June 2, 2014) (memorandum decision) (finding improvement period violated and termination required where father "permit[ted] his children to associate with a registered sex offender."); *In re M.W.*, No. 15-0196, 2015 WL 7628820, at *2 (W. Va. Nov. 23, 2015) (memorandum decision) (affirming termination of rights based on adjudication for "knowingly allowing a registered sex offender in the home with the children[]"); *In re N.U.*, No. 15-0032, 2015 WL 6181469 (W. Va. Oct. 20, 2015) (memorandum decision) (affirming termination and denial of post-termination visitation based on sex offender status); *In re H.C.*, No. 17-0935, 2018 WL 1040464, at *2-4 (W. Va. Feb. 23, 2018) (memorandum decision) (affirming adjudication and termination of parental rights where "dangerous or inappropriate" people including "individual substantiated by CPS as a sex offender" frequented home). [3]

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[3] And while cases post-dating the DHS's conduct in this case may not themselves establish DHS's "fair warning" of its obligation to act at the time of the underlying events, these cases demonstrate that DHS's present contention—that no reasonable DHS worker would have known DHS intervention was required—is opportunistic, at best.

In fact, as far back as 2006, this Court specifically took DHS and the lower court to task for failing to require investigation and amendment of a petition where evidence developed that a parent was exposing children to sex offenders. In *Randy H.*, the guardian ad litem expressed concern that the mother associated with sex offenders and an ex-husband of the mother "*might* return to live in the respondent's household[.]" 220 W. Va. at 126, 640 S.E.2d at 189 (emphasis added). This Court found that "DHHR failed to act upon the allegations that further harm might come to the children because of respondent Lucinda H.'s alleged association with several sex offenders" and that the circuit court was obliged to require amendment of the petition and investigation into those specific allegations. *Id*. at 127, 640 S.E.2d at 190. *Randy H*. involved mere *exposure* to sex offenders and the *potential* that one may reside with the children in future, in contrast to the children's known, full-time residency with a sex offender in the instant case. Further, we chastised DHS for its failure to "thoroughly pursue the allegations of potential danger[.]" *Id*. at 128, 640 S.E.2d at 191. However, in this case the majority excuses its failure to do so because DHS could not have reasonably been aware of its obligation to do so—all evidence and its own policies to the contrary.

Further, in the year immediately prior to the first referral in the instant case, this Court affirmed an adjudication and termination of custodial rights where the allegations consisted exclusively of the children's exposure to sex offenders by their mother. In *B.H.*, we found that despite substantial compliance with an improvement period, there was well-founded concern that the mother would continue to expose the

children to sex offenders and thereby subject them to "serious risks attendant with such ill-advised associations." 233 W. Va. at 66, 754 S.E.2d at 752. We further expressly rejected the mother's "endeavor[] to excuse this relationship on the basis that her daughters were never around [the sex offender]" and affirmed termination of custodial rights for the mother's failure to "protect her children by avoiding relationships with individuals in whose presence her children were placed *at risk of abuse*." *Id*. (emphasis added).

Clearly, these cases affirming adjudications and terminations based on exposure to sex offenders—brought by the very agency that now claims it did not "clearly" know it was required to do so—involve facts not only commensurate with the underlying case, but arguably even less egregious. The underlying facts demonstrate not just that the children were "exposed" to sex offenders but resided with one on a full-time basis. The United States Supreme Court has explained, with regard to the level of specificity required when caselaw serves to establish a law or right as "clearly established," that

> earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, [but] they are not necessary to such a finding. The same is true of cases with "materially similar" facts. . . . [T]he salient question . . . is whether the state of the law . . . gave respondents fair warning that their alleged treatment . . . was unconstitutional.

Hope, 536 U.S. at 741.

Perhaps even more germane to the majority's resolution, the *Hope* Court more closely examined the types of evidence which demonstrate that a law is "clearly

established," including non-Legislative support. In *Hope*, the Court found that its own cases, along with "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report" gave defendants "fair warning" that certain inmate disciplinary measures were unconstitutional. *Id*. at 741-42. More importantly, the Court expressly found non-"law" instructive as to whether that right was clearly established. The Court discussed at length the referenced DOJ report that concluded that the practices at issue were unconstitutional. Unlike the majority herein, instead of fixating on the report and whether the report was "law," the Court found it relevant to its assessment of whether a reasonable official would know that his conduct was improper—even where there was no evidence the defendant in the case had even received the report:

> Although there is nothing in the record indicating that the DOJ's views were communicated to respondents, this exchange lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment.

Id. at 745. The Court recognized that the caselaw which formed the underpinning of the DOJ report was clearly established and that the report merely evidenced as much. This precedent makes plain that demonstrating that a defendant had "fair warning" that his or her conduct was violative of rights or laws is a holistic endeavor and is not determined solely by scrutinizing the form in which the clearly established law is presented.

However, perhaps the most frustrating aspect of this case is the irreconcilability between DHS's dubious position that there was no "clearly established" law requiring it to intervene and the fact that its policy—based on statutory and decisional law—specifically required it to do so. The law that DHS now bemoans as not "clearly established" was apparently so unmistakably clear that DHS felt compelled to formally adopt it into its internal written policies which govern its workers' actions. DHS representatives admitted that the policy is premised upon our abuse and neglect statutory scheme, as cited therein.

Rather than trying to square DHS's incongruous positions, the majority resolves the case by declaring that internal policies are neither statutes nor "law." Of course, mere internal policy is not "law," but a law is no less clearly established simply because it is restated in an internal policy. In fact, quite the opposite is implied thereby, as recognized by the United States Supreme Court in *Hope*. Further, DHS's policy is not an "interpretation" of statutes or decisional law; rather, it is a summary reiteration of it, as admitted by DHS representatives. To that end, despite acknowledging that identification of a "predicate body of law" suffices to establish a clearly established law that penetrates the shield of immunity, the majority refuses to look past DHS's policy to analyze the predicate body of statutory and caselaw upon which it is based.

The foregoing notwithstanding, I do not disagree generally with the idea that internal policies crafted through use of the judgment and discretion imbued in an agency

may not themselves *necessarily* constitute "clearly established" laws. Each offering of "clearly established" law must be evaluated on its own merits in light of our guiding immunity principles. Internal policies are frequently the product of discretionary "best practices" and guidelines, subject to change or use of individual application and judgment or are otherwise insufficient to place a reasonable official on notice that his or her conduct violates clearly established law. The entire concept of qualified immunity would be destroyed by exposing the State to litigation for every insignificant or inadvertent variance from ever-changing internal protocol that does not place the State and its officials and employees on notice that their conduct violates the law. However, this is simply not such a case. DHS's alleged failures in this case are deeply rooted in both the statutory scheme and our caselaw; to say that it is not "clearly established" that exposure of children to registered sex offenders requires DHS's affirmative intervention defies common sense.

Finally, I note that the majority goes to great pains in its presentation of the facts to characterize DHS's conduct in this matter as timely, reasonable, justifiable and at worst—the product of its workers' seasoned judgment for which they enjoy immunity. However, these are matters for a jury to assess and have no bearing whatsoever on whether respondents have sufficiently identified a potential violation of "clearly established" law to overcome qualified immunity. This Court is required to construe respondents' case in the light most favorable to them. Under that view, respondents have alleged a failure of DHS's very charge, in the face of circumstances that clearly established law suggests that any reasonable child services worker would have known to initiate protective intervention.

That is not to say, however, that respondents would have inevitably succeeded on their claim were it permitted to proceed. Rather, respondents' case is sufficiently plead such as to remove the shield of qualified immunity and allow a jury to determine whether the facts and circumstances suggest that DHS should be held to account for these alleged failures.

Accordingly, I respectfully dissent.