
No. 09-103010-A

IN THE COURT OF APPEALS, STATE OF KANSAS

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IN THE MATTER OF K.F.

CAROL G. GREEN
CLERK OF APPELLATE COURTS

BRIEF OF APPELLANT

**Appeal from the District Court
Of Mitchell County, Kansas
Honorable Kim W. Cudney, District Judge
District Court Case No. 07-JV-04**

FRASIER & JOHNSON, LLC
James M. Johnson #21140
116 North Hersey
P.O. Box 369
Beloit, Kansas 67420
(785) 738-5723
Attorney for Appellant

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**IN THE COURT OF APPEALS
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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an appeal from an order of the District Court of Mitchell County, Kansas granting the State's Motion for Revocation of Conditional Release and imposition of the adult sentence in this case. At said hearing the court also denied the Juvenile's Motion to Modify Sentence. The Respondent Juvenile argues that the court erred when it failed to give credit on the Juvenile's adult sentence for time served in the Beloit Juvenile Correctional Facility and the Mitchell County Jail as required pursuant to K.S.A. §38-2364(b). Respondent Juvenile further argues that the district court erred when it found there was substantial competent evidence presented at the hearing to revoke Juvenile's conditional release and impose the adult sentence. Respondent Juvenile further argues that under the facts of this case the district court abused its discretion in denying the Juvenile's Motion to Modify Sentence when it failed to take into consideration mitigating circumstances that existed in the Juvenile's life at the time the Court's orders were made.

STATEMENT OF THE ISSUES

I. Did the trial court err when it ordered the Respondent Juvenile to serve the full underlying adult prison sentence without the benefit of credit for time served pursuant to K.S.A. §38-2364(b)?

II. Did the trial court err when it found substantial competent evidence to support revocation of the Juvenile's conditional release and the imposition of the adult sentence?

III. Did the trial court err and abuse its judicial discretion when it denied the Juvenile's Motion to Modify Sentence?

STATEMENT OF FACTS

The juvenile offender complaint was filed on February 5, 2007 alleging Count I, Battery against a Juvenile Detention Facility Officer contrary to K.S.A. §21-3413(a)(3); Count II, Battery against a Juvenile Detention Facility Officer contrary to K.S.A. §21-3413(a)(3); Count III, Battery contrary to K.S.A. §21-3412. (Vol. I, p. 4-6)

On February 12, 2007 the State filed a motion for prosecution under extended juvenile jurisdiction. (Vol. I, p. 11-12) On March 29, 2007 the court granted the State's motion for prosecution under extended juvenile jurisdiction and set the matter for trial before the District Court. (Vol. I, p. 13-14) On May 21, 2007 the Respondent entered an admission to an amended complaint alleging one count of Attempted Battery against a Juvenile Correction Facility Officer in violation of K.S.A. §21-3413(a)(3). (Vol. I, p. 21-22)

At the time of the conviction the Respondent was being detained at the Beloit Juvenile Correction Facility on a juvenile case from Wyandotte County, Kansas. This was Wyandotte County Case No. 2005 JV 1159, In the Matter of K.F. (Vol. III, p. 7, l. 16-21)

K.F. was sentenced on July 9, 2007 in Mitchell County District Court for Attempted Battery against a Juvenile Correctional Facility Officer. (Vol. I, p. 34) K.F. was sentenced to 12 months at a juvenile correctional facility, with aftercare for a period of 18 months. (Vol. I p. 35) In addition to the juvenile sentence, an adult sentence of 32 months in a department of corrections facility with 12 months post-release supervision was imposed. (Vol. I, p. 35) K.F. was given 48 days credit for time served. (Vol. I, p. 36) K.F. was conditionally released from the juvenile correctional facility on May 15, 2008. (Vol. I, p. 40)

After she was placed on conditional release on May 15, 2008, K.F. was faced with multiple life-changing, unfortunate events. K.F.'s boyfriend was murdered. (Vol. III, p. 26, l. 6) K.F. witnessed this murder and was then threatened and followed by those whom she was to testify against. (Vol. III, p. 30, l. 9-23) K.F. had a miscarriage when she was 5 ½ months pregnant. (Vol. III, p. 21, l. 13-15) As a result of these events, K.F. suffered depression and was unable to attain the mental health treatment she needed. (Vol. III, p. 28, l. 4-25) K.F. was also involved in a car accident in which her right leg and right arm were both broken. (Vol. III, p. 27, l. 18-25) As she was dealing with these events and circumstances, K.F. enrolled in a community college and gained employment in the Kansas City area. (Vol. III, p. 25, l. 13-25, p. 26, l. 24-25) K.F.'s Wyandotte

County conditional release was revoked due to failure to report to her probation officer and failure to make payments toward the restitution owed. (Vol. I, 40-41)

At the time of her conditional release on May 15, 2008, K.F. was being supervised by court services in Wyandotte County for one case, Wyandotte County Case No. 2005 JV 1159. (Vol. I, p. 41) However, it appears that K.F. was not being supervised at all on her three Mitchell County cases: Mitchell County Case No. 2006 JV 24; Mitchell County Case No. 2006 JV 31; and Mitchell County Case No 2007 JV 04, the case at point in this appeal. (Vol. I, p. 41), (Vol. III, p. 6, l. 23-25), (Vol. III, p. 7, l. 1-21) The Twelfth Judicial District JJA Case Manager had no idea this case even existed and testified that no one was supervising K.F. for her Mitchell County cases. (Vol. III, p. 7, l. 9-21) In addition, the Twelfth Judicial District JJA Case Manager had not asked for courtesy supervision from Wyandotte County court services on this case. (Vol. III, p. 9, l. 7-13)

On January 25, 2009, K.F. was arrested in Wyandotte County for violation of her Conditional Release under Wyandotte County Case No. 2005 JV 1159. (Vol. III, p. 39, l. 3) K.F. had her conditional release revoked in that case on January 29, 2009 for failing to report and failing to make restitution payments. (Vol. I, p. 37-42) K.F. was returned to the Beloit Juvenile Correctional Facility at that time for a direct commitment of three months with aftercare of six months. (Vol. I, p. 37)

Although Mitchell County was charged with supervision for the three Mitchell County cases, there was no “hands on” supervision of K.F. (Vol. III, p.

9, l. 7-11) It was only after K.F. returned to the Beloit Juvenile Correctional Facility for direct commitment under the Wyandotte County case that Mitchell County moved to revoke K.F.'s conditional release. (Vol. I, p. 37) On April 23, 2009, the Mitchell County Attorney filed a Motion for Revocation of Conditional Release under Mitchell County Case No. 2007 JV 04. (Vol. I, p. 37) This motion was filed the day before K.F. was to be released from the Beloit Juvenile Correctional Facility and was based on her failure to report and pay restitution under her Wyandotte County case. (Vol. I, p. 37-42) K.F., who at the time had reach 18, was arrested on April 23, 2009 and sent to the Mitchell County Jail, pending a hearing scheduled for May 27, 2009. (Vol. I, p. 43-46)

The Respondent Juvenile filed a Motion to Modify Sentence on May 15, 2009, with a hearing scheduled for May 27, 2009 (Vol. I, p. 48) At the hearing on May 27, 2009, both the State's Motion for Revocation of Conditional Release and the Respondent's Motion to Modify Sentence were argued. (Vol. III, p. 3, l. 6-10) The court addressed both issues and granted the Motion for Revocation of Conditional Release while denying the Motion to Modify Sentence. (Vol. I, p. 62-63) The district court imposed the underlying adult sentence of 32 months with the Department of Corrections and 12 months Post-release Supervision. (Vol. I, p. 62-63) The district court only gave the Respondent Juvenile credit for time served in the Mitchell County Jail from April 23, 2009 to May 27, 2009. (Vol. I, p. 62)

For this case, Mitchell County Case No. 2007 JV 04, K.F. has served the following sentence:

- May 21, 2007 to July 9, 2007 in the Beloit Juvenile Correctional Facility
48 days served (1 month, 18 days) (Vol. I, p. 36)
- July 10, 2007 to May 14, 2008 in the Beloit Juvenile Correctional Facility
310 days served (10 months, 5 days) (Vol. III, p. 19, l. 12)
- May 15, 2008 to January 25, 2009 on Conditional Release
257 days (8 months, 12 days) (Vol. III, p. 38, l. 25), (Vol. III, p. 39, l. 3)
- April 23, 2009 to May 27, 2009 in the Mitchell County Jail
34 days served (1 month, 4 days) (Vol. I, p. 62)

Between her time served at the Beloit Juvenile Correctional Facility and the Mitchell County Jail, K.F. served 392 days (12 months, 27 days), through May 27, 2009 for this Mitchell County Case No. 07 JV 04. From May 27, 2009 to the present, the Respondent Juvenile has either been incarcerated in the Mitchell County Jail or the Topeka Women’s Correctional Facility, pursuant to the court’s order on May 27, 2009. (Vol. I, p. 63)

ARGUMENT AND AUTHORITY

I. Did the trial court err when it ordered the Respondent Juvenile to serve the full underlying adult prison sentence without the benefit of credit for time served pursuant to K.S.A. §38-2364(b)?

Standard of Review

Interpretation of a statute is a question of law, and an appellate court's review is unlimited. An appellate court is not bound by the district court's interpretation of a statute. When a statute is plain and unambiguous, the court's

duty is to respect the intention of the legislature as expressed. *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003).

Argument

Between May 21, 2007, the date the Complaint in Mitchell County Case No. 07 JV 04 was filed, and May 27, 2009, the date the court imposed her underlying adult sentence, the Respondent Juvenile served 392 days in the Beloit Juvenile Correctional Facility and the Mitchell County Jail. The trial court erred when it failed to give the Respondent Juvenile credit for this time served.

K.S.A. §38-2364(b) states in relevant part:

“Upon such finding (that the conditions of the juvenile sentence have been violated), the juvenile’s extended jurisdiction status is terminated, and juvenile court jurisdiction is terminated. **The juvenile offender shall be credited for time served in a juvenile correctional or detention facility on the juvenile sentence as service for any authorized adult sanction.**” (emphasis added)

Upon imposition of the adult sentence at the May 27, 2009 hearing, the trial court only gave the Respondent Juvenile credit for 34 days served. (Vol. I, p. 62) The trial court erred, and pursuant to K.S.A. §38-2364(b), should have given the Respondent Juvenile credit for 392 days served.

In analyzing K.S.A. §38-16,133 (now K.S.A. §38-2364), the Kansas Court of Appeals has stated, “It is perfectly obvious from reading the statutes that a juvenile offender is only entitled to jail time credit for time he or she has spent incarcerated. The determinative factor is whether the individual claiming the credit had been sent to that facility pursuant to court order. Incarceration used in §38-16,133 means placement in a facility where the juvenile offender, if he or she escaped, would be subject to a charge of escape from custody in violation of

K.S.A. §21-3809 or §21-3810. The critical factor to both statutes was whether the individual was placed in a facility pursuant to court order.” *In the Matter of T.G.*, 35 Kan. App. 2d 216, 221, 133 P.3d 1279 (2005) (citing *In the Interest of W.M.*, 81 P.3d 461 (2003)).

Here, K.F. was incarcerated in the Beloit Juvenile Correctional Facility and the Mitchell County Jail. K.F. was court ordered to serve her time either at the Juvenile Correctional Facility or the Mitchell County Jail, and if she would have escaped, she would have been criminally charged for escaping custody. K.F. clearly was incarcerated as defined by this court in *In the Matter of T.G.* and pursuant to K.S.A. §38-2364(b), should have been given credit for time served.

II. Did the trial court err when it found substantial competent evidence to support revocation of the Juvenile’s conditional release and the imposition of the adult sentence?

Standard of Review

In reviewing K.S.A. §38-2364, the standard of review is to ascertain whether substantial competent evidence was presented at the revocation hearing to support revocation. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. Stated another way, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *State v. J.H., Jr.*, 40 Kan. App. 2d 643, 644-645, 197 P.3d 467 (2007).

Argument

The court did not have substantial competent evidence to support its finding that the Juvenile violated the terms of her conditional release and that the conditional release should be revoked. The only evidence presented was that the Juvenile had her Wyandotte County conditional release revoked and that she had completed her direct commitment by the time the Mitchell County Attorney filed his Motion for Revocation of Conditional Release. It is impossible for K.F. to have violated the terms of her conditional release in this case for failure to maintain contact with her supervising officer if she did not have a supervising officer in this case. The Twelfth Judicial District JJA Case Manager testified that K.F. was not being supervised in Mitchell County and “didn’t even know she existed.” (Vol. III, p. 7, l. 9-21)

After she was placed on conditional release on May 15, 2008, K.F. was faced with multiple life-changing, unfortunate events. K.F.’s boyfriend was murdered. (Vol. III, p. 26, l. 6) K.F. witnessed this murder and was then threatened and followed by those whom she was to testify against. (Vol. III, p. 30, l. 9-23) K.F. had a miscarriage when she was 5 ½ months pregnant. (Vol. III, p. 21, l. 13-15) As a result of these events, K.F. suffered depression and was unable to attain the mental health treatment she needed. (Vol. III, p. 28, l. 4-25) K.F. was also involved in a car accident in which her right leg and right arm were both broken. (Vol. III, p. 27, l. 18-25) As she was dealing with the events and circumstances, K.F. enrolled in a community college and gained employment in the Kansas City area. (Vol. III, p. 25, l. 13-25, p. 26, l. 24-25) K.F.’s Wyandotte

County conditional release was revoked due to failure to report to her probation officer and failure to make payments toward the restitution owed. (Vol. I, 40-41)

Kansas Law gives the district court many alternatives when it is faced with a juvenile who is facing revocation of a conditional release. K.S.A. §22-3716(b) states in relevant part:

“...Except as otherwise provided, if the violation is established, the court may continue or revoke the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction and may require the defendant to serve the sentence imposed, **or any lesser sentence...**” (emphasis added)

Given the facts here and this statute, the district court should have imposed an alternative to the underlying adult sentence. Under the statute, there are many alternatives that would have been in the best interests of K.F., considering what she had experienced during the eight months that she was on conditional release and considering she was not being supervised under the conditional release in this Mitchell County case.

III. Did the trial court err and abuse its judicial discretion when it denied the Juvenile’s Motion to Modify Sentence?

Standard of Review

The standard of review of an abuse of discretion was enunciated in *State v. Wagner*, 248 Kan. 240, 242, 807 P.2d 139 (1991): “Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the

propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.”

Argument

K.S.A. §38-2367(a) states in relevant part:

“...at any time after the entry of an order of custody or placement of a juvenile offender, the court upon the court’s own motion or the motion of the commissioner or parent or any party, may modify the sentence imposed.”

In addition K.S.A. §38-2367(b) states in relevant part:

“after the hearing, if the court finds that the sentence previously imposed is not in the best interest of juvenile, the court may rescind and set aside the sentence, and enter any sentence pursuant to §38-2361 and amendments thereto.”

The court in this case clearly had statutory authority under the Revised Kansas Juvenile Justice Code to modify the Respondent’s sentence when a motion was filed by the Respondent to do so. Evidence presented at the hearing on the Respondent’s motion to modify sentence showed compelling reasons why the sentence should be modified.

Furthermore K.S.A. §22-3716 (b) states in relevant part:

“except as otherwise provided, if the violation is established the court may continue or revoke the probation, assignment to community correctional services program, suspension of sentence or non prison sanction and may require the defendant to serve the sentence imposed or **any lesser sentence**”

The Kansas Supreme Court in *State v. McGill, III*, 271 Kan. 150, 154, 22 P.3d 597 (2001), found that the District Court had jurisdiction pursuant to K.S.A. §22-3716 (b) to modify defendant’s sentence. In this particular case the trial court had

revoked the defendant's probation and had imposed a sentence lower than the defendant's initial sentence.

Both K.S.A. §22-3716(b) and the Supreme Court's decision in *McGill*, clearly indicate that a Court has the authority to modify an adult sentence in a criminal case when the evidence warrants a finding that it should do so.

The Respondent, in support of her motion, presented substantial competent evidence that she had been incarcerated in the Beloit Juvenile Correctional Facility for almost three and one half years of her life. When she was finally released on conditional release, she had multiple tragedies in her life including a miscarriage and the murder of her boyfriend which put her into a depression. The Court's failure to modify the Respondent's sentence was not in the best interest of the Juvenile Respondent.

CONCLUSION

The trial court erred when it sentenced the Respondent Juvenile to the full underlying adult prison sentence without the benefit of time served pursuant to K.S.A. §38-2364(b). Upon the imposition of the underlying adult sentence, the Respondent Juvenile was entitled to credit for her time served in the Beloit Juvenile Correctional Facility and the Mitchell County Jail. The Juvenile was entitled to 392 days of credit for time served and the trial court only gave her 34 days credit for time served.

The trial court erred when it found substantial competent evidence to support revocation of the Juvenile's conditional release and the imposition of the adult sentence, and the trial court erred when it denied the Juvenile's Motion to

Modify Sentence. The Juvenile has spent 3 ½ years of years of her life incarcerated in jail or in the juvenile correctional facility. The Juvenile was conditionally released on another case from another county and faced multiple unfortunate tragedies in her life. Because of the circumstances, the Court should have used its authority under K.S.A. §38-2367 to modify the Juvenile's sentence, or used its authority under K.S.A. §22-3716 to impose a lesser sentence upon a finding that the Juvenile was not being supervised by the Twelfth Judicial District JJA Case Manager or by Wyandotte County Court services in regard to this case.

FRASIER & JOHNSON, LLC

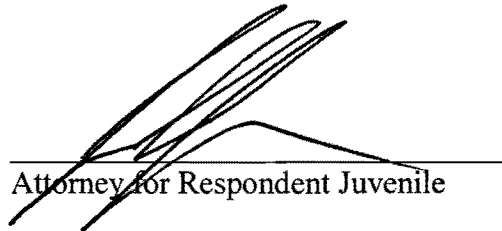
James M. Johnson #21140

116 North Hersey

P.O. Box 369

Beloit, Kansas 67420

(785) 738-5723



Attorney for Respondent Juvenile

CERTIFICATE OF SERVICE

I, James M. Johnson, hereby certify that on this 26th day of October, 2009, I hand delivered sixteen (16) copies of the Brief of Appellant to the following:

Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th, Room 374
Topeka, Kansas 66612

and hand delivered five (5) copies of the Brief of Appellant, to the following:

Steve Six
Kansas Attorney General
120 S.W. 10th, 2nd Floor
Topeka, Kansas 66612-1597

and on the 23rd day of October, 2009, I mailed one (1) copy of the Brief of Appellant to the following:

Mark J. Noah
Mitchell County Attorney
119 South Mill
Beloit, Kansas 67420

Becky L. Hoesli, CSR/RPR
811 Washington, Ste. P
Concordia, KS 66901

FRASIER & JOHNSON, LLC
James M. Johnson #21140
116 North Hersey
P.O. Box 369
Beloit, Kansas 67420
(785) 738-5723



Attorney for Respondent Juvenile