

FILED
Court of Appeals
Division II
State of Washington
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NO. 53328-6-II

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION TWO

K.M.,

Appellant,

v.

The Honorable JUDITH RAMSMEYER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Both K.M.'s mother and father, as well as her brother are dead. K.M. is a dependent child.

The Department of Children, Youth and Families has repeatedly placed her in various youth shelters. When K.M. has fled the often unsafe conditions, the Department has sought warrants for her arrest. Although she was never provided notice of any requirement that she remain at any specific location and had not been told her failure to do so may result in incarceration, the juvenile court repeatedly issued warrants, found K.M. in contempt, and ordered her jailed.

K.M. filed a writ of habeas corpus challenging her restraint. The trial court erroneously dismissed the petition reasoning that because K.M. was not at the time physically confined the petition was moot. K.M. is entitled to a writ of habeas corpus.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed K.M.'s habeas petition as moot despite her ongoing restraint.

2. The trial court's contempt orders exceed its authority under RCW 13.34.165.

3. The trial court's contempt orders deprived K.M. of due process in violation of the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article IV, § section 6 of the Washington Constitution guarantees the right to challenge unlawful restraint by writ of habeas corpus. A person is restrained so long as they face collateral consequences from the unlawful decisions and certainly so long as they face reincarceration. Because K.M. faces the risk of reincarceration and it is likely the past unlawful contempt findings will factor into future contempt findings she is entitled to seek her release by writ of habeas corpus.

2. RCW 13.44.165 permits a court in a dependency proceeding to find a party in contempt for failing to comply

with the conditions of a court order. Because K.M. is not a party and has not failed to comply with the provision of any court order, RCW 13.34.165 does not provide the juvenile court with authority to hold her in contempt.

3. The Due Process clause of the Fourteenth

Amendment requires that before a person may be found in contempt for violating a court order, the person must first have notice of what the order requires her to do and notice that the failure to comply may result in a finding of contempt. No order entered in this case directs K.M. to do anything. Moreover, no order notifies her that her failure to do something may result in a finding of contempt. In the absence of notice, the contempt findings deprived K.M. of due process.

D. STATEMENT OF THE CASE

One of K.M.'s older brothers died in a car accident when she was 7. CP 144. Not quite five years later, on Christmas Day 2016, her mother died of breast cancer. *Id.* Six months

later her father killed himself. *Id*; Petition for Writ of Habeas Corpus, Attachment A (Declaration of Youth).¹

Following her parents' deaths, K.M. lived briefly with a paternal aunt and her husband. *Id*. Allegations soon arose that her aunt's husband may have sexually abused K.M. Soon thereafter a dependency petition was filed. *Id*.

A shelter care order found K.M. in need of an out-of-home placement but did not specify any placement nor direct her to remain at any placement. CP 192

The court found K.M. dependent. CP 147. The March 23, 2018, dependency order provides:

- 4.4 **Placement:**
- The child is placed in the custody, control and care of DSHS, which shall have the authority to place and maintain the child in:
 - Licensed care:
 - because there is no relative or other suitable person with whom the child has a relationship and who is willing, appropriate and available to care for the child.
- The Department has authority to return the child to the guardian upon agreement of the youth, guardian and Department.
- DSHS/Supervising Agency is authorized to place the child with a relative or suitable adult who is willing, appropriate and available, upon agreement of the youth and reasonable notice to the legal custodian, subject to review by the court.

¹ The Designation of Clerk's Papers included the Petition of Writ of Habeas Corpus. However the index provided by the Superior Court Clerk's office does not include the petitioner. Counsel has contacted the clerk's office on several occasions trying to correct this omission. To date, however, the clerk has not provided an updated index.

CP 147. Nothing in that order directs K.M. to remain at any particular placement.

The disposition order entered a week later, is similarly devoid of any provision specifying a specific placement or provision directing K.M. to remain at any placement. CP 129. The order provides only:

3.1 Placement: see dependency order entered 3/23/2018.

Id. No other order specifies any particular placement. *See* CP 43, 95.

On May 16, 2018, the Department of Children, Youth and Families alleged, and the trial court found, K.M. failed to comply with the terms of the March 23 order, found K.M. in contempt, and issued an arrest warrant. CP 107-10. The department asserted K.M. had violated the order by leaving her placement at “Spruce Street.” CP 107. Neither the motion nor order identifies any provision in the March 23 order which required K.M. to do anything, let alone remain at “Spruce Street.” While at Spruce Street, another resident repeatedly tried to “touch” K.M.. Petition for Writ of Habeas

Corpus, Attachment A (Declaration of Youth at 1). Despite her complaints, staff was unable to stop the behavior. K.M. was arrested and jailed for one day. CP 105-07.

On June 27, 2018, the Department again alleged, and the trial court again found, K.M. failed to comply with the terms of the March 23 order, found K.M. in contempt, and issued an arrest warrant. CP 80-83. The Department asserted K.M. had violated the order by leaving her placement at Youth Care. CP 107. Neither the motion nor order identifies any provision in the March 23 order which required K.M. to do anything, much less remain at Youth Care. While at Youth Care, two other residents tried to engage in inappropriate contact with K.M. Petition for Writ of Habeas Corpus, Attachment A (Declaration of Youth at 2). K.M. was again arrested and jailed for one day. CP 76-79.

Once more, on September 6, 2018, the Department alleged, and the trial court again found, K.M. failed to comply with the terms of the March 23 order. The court again found K.M. in contempt and issued an arrest warrant. CP 70-73.

The Department again asserted K.M. had violated the order by leaving her placement at Youth Care. CP 70. Once more, neither the motion nor order identifies any provision in the March 23 order which required K.M. to do anything, never mind remain at Youth Care. K.M. was arrested and jailed for a couple of days. CP 63, 66-69.

On December 20, 2018, the Department again alleged and the trial court again found K.M. failed to comply with the terms of the March 23 order. Once more, the court found K.M. in contempt, and issued an arrest warrant. CP 28-31. The Department alleged K.M. refused to be transported to a placement. CP 28. As with the prior motions and orders, neither the motion nor order identify any provision in the March 23 order which directed K.M. to agree to be transported to a placement. K.M. was arrested, jailed, and then released. CP 25-27.

Each time she was brought to court, K.M. was fully shackled just as a criminal, with ankle and belly chains.

Petition for Writ of Habeas Corpus, Attachment A

(Declaration of Youth at 5) Often this shackling occurred in full public view. *Id.* K.M. recalled instances where children pointed at her as she walked shackled into court. *Id.*

Kaitlyn filed a petition for writ of habeas corpus.

Petition for Writ of Habeas Corpus.

K.M.'s whereabouts are currently unknown.

The King County Superior Court, apparently believing the habeas petition created a judicial conflict, promptly disqualified all King County judges from hearing either the dependency or habeas matters. CP 242. The court transferred venue of both the dependency and habeas matters to Pierce County Superior Court. CP 246-47.

The Pierce County court accepted venue of the consolidated cases. CP 248-49. At that same hearing, the State argued the matter was moot because K.M. was not presently imprisoned. RP 22. The trial court agreed and dismissed the habeas petition. *Id.* The court then transferred the dependency matter back to King County. CP 248-49.

E. ARGUMENT

K.M. is entitled to challenge her continued and unlawful restraint by writ of habeas corpus, and this Court should direct the issuance of such a writ.

The Washington Constitution expressly guarantees the right to challenge an unlawful restraint by writ of habeas corpus. Const. Art. IV, § 6. The Legislature also codified the right to petition for a writ of habeas corpus:

Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

RCW 7.36.010.

The writ of habeas corpus provides a unique judicial avenue to challenge restraint on one's liberty. "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987) (quoting *Walker v. Wainwright*, 390 U.S. 335, 336, 88 S. Ct. 962, 19 L. Ed. 2d 1215 (1968)). A writ of habeas corpus provides "a speedy device to test the constitutionality of

detention.” *In re Honore v. Board of Prison Terms & Parole*, 77 Wn.2d 660, 663-64, 466 P.2d 485 (1970).

The writ of habeas corpus is an original proceeding, not simply a review of a lower court's ruling. The writ petition does not seek review, but rather sets forth allegations detailing the unlawfulness of the detention. RCW 7.36.030 (petition must specify where and by whom petitioner has been restrained, the pretense of the restraint and the illegality).

RCW 7.36.130 permits a challenge to a contempt finding by habeas corpus so long as the contempt is coercive rather than punitive. *Ex Parte Lagunilla*, 30 Wn.2d 777, 193 P.2d 875 (1948) (citing *In re Parent*, 112 Wash. 620, 192 P. 947 (1920)).

K.M.’s continuing restraint is unlawful and she is entitled to a writ of habeas corpus.

1. K.M. is under restraint and her petition is not moot.

Washington courts have long recognized that “restraint” for purposes of relief by writ of habeas corpus is far broader than physical confinement. *Monohan v. Burdman*,

84 Wn.2d 922, 925, 530 P.2d 334 (1975). In *Monohan* an inmate challenging the rescission of his parole date was released while his habeas petition was pending in the courts. The State contended the petition was moot because the inmate was no longer physically incarcerated. The Court rejected such a narrow definition of “restraint” finding it was “not unlikely” that because a parole officer or future sentencing judge might adversely rely on it, the erroneous parole rescission was sufficient restraint. *Id.* Thus the Court determined the collateral consequences of an unconstitutional action are sufficient to establish a person is under restraint. *Id.*; see also *In re Mines*, 146 Wn.2d 279, 284, 45 P.3d 535 (2002) (because revocation of parole could be considered in future proceedings petitioner still restrained despite release to parole during pendency of petition); *Born v. Thompson*, 154 Wn.2d 749, 763-64, 117 P.3d 1098 (2005) (risk that competency determination may factor into subsequent competency or commitment determinations constituted restraint such that habeas petition was not moot).

It is “not unlikely” that in the future a social worker or judge might look to the past findings of contempt to justify future arrest warrants or contempt sanctions of K.M. Thus, K.M. is restrained and her petition is not moot. *Monohan*, 84 Wn.2d at 925.

Moreover, so long as K.M. faces “the possibility of reincarceration” her habeas petition is not moot. *T.B. v. CPC Fairfax Hospital*, 129 Wn.2d 439, 447, 918 P.2d 497 (1996) (citing *In re LaBelle*, 107 Wn.2d 196, 200, 728 P.2d. 138 (1986)). In *T.B.* a child filed a habeas corpus petition challenging the legality of her involuntary confinement in a hospital by her parents and hospital staff. *Id.* at 441. While the petition was pending the child escaped from the hospital. *Id.* at 447. The court concluded the matter was not moot because of the risk of reconfinement. *Id.* The court then granted a writ of habeas corpus. *Id.* at 454. K.M. continues to face the risk of reincarceration, as demonstrated by the pattern of arrest and jailing here.

K.M. is under restraint. The trial court erred in dismissing her petition as moot.

2. Even if it were moot, K.M.'s petition for writ of habeas corpus presents an issue of continuing and substantial public interest.

Even if a case is technically moot, this court may nonetheless reach the claim where it concerns an issue of continuing and substantial public interest. *In re the Personal Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009). To determine whether it is such an issue the court must consider (1) whether the issue is public or private; (2) the desirability of an authoritative determination for the future guidance of public officers; and (3) the likelihood of future recurrence of the question. *State v. Hunley*, 175 Wn.2d 901, 906, 287 P.3d 584 (2012).

The Legislature has determined that for the most part, confinement for status offenses will end in July 2020. Laws 2019, ch. 312 §2. The legislature reached this conclusion recognizing Washington jailed children for state offenses at a rate far beyond any other state in the country. *Id.* at §1(1).

The legislature found such incarceration is disproportionately applied based on the race, gender and class of the child. *Id.* at §2(2). Finally, the legislature concluded such incarceration is counterproductive. *Id.* at §2(1). The Legislature has made clear the jailing of children is an issue of substantial public interest.

It is also a continuing issue, as K.M faces the likelihood of arrest and confinement based upon the same unlawful contempt findings at issue here until July 2020. In light of the repeated statutory and constitutional violations illustrated in K.M.'s case, the department's rote citation to and the court's reliance on vague orders that order the child to do nothing, other children face the same danger. It is clear that the Department and courts require guidance so long as the practice of jailing abused, neglected and dependent children continues. That is especially so as the current practice is what has led to disproportionate jailing of children based upon their race, gender, and socioeconomic class.

Even if the Court were to find K.M. is no longer restrained, because they present substantial and public issues, the Court should address K.M.'s claims.

3. K.M.'s restraint is unlawful.

Each of the show cause orders in this case purport to rely upon RCW 13.34.165. That statute provides in relevant part:

(1) Failure by a party to comply with an order entered under this chapter is civil contempt of court as provided in RCW 7.21.030(2)(e).

• • • •

(5) Whenever the court finds probable cause to believe, based upon consideration of a motion for contempt and the information set forth in a supporting declaration, that a child has violated a placement order entered under this chapter, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW 13.32A.065.

Id. But none of the contempt findings are permitted by the statute. Moreover, each of the contempt findings deprived K.M. of due process.

a. K.M. is not a party and did not fail to comply with the provisions of any order.

i. Because K.M. is not a party, RCW 13.34.165(1) does not permit a finding of contempt.

RCW 13.34.165(1) limits the reach of the statute to a party's failure to comply with an order. K.M. is not party to, but merely the subject of, the dependency action. *In re the Dependency of E.H.*, 191 Wn.2d 872, 888-89, 427 P.3d 587 (2018). *E.H.* observed that in response to a prior Supreme Court case suggesting statutory language could be read to define "party" as including the child, the statutory scheme was amended in the 1990s to remove any reference to dependent children as "parties." *See Id.* at 886 n.2. (Discussing 1993 amendment of RCW 13.34.100). The child is merely the subject of the proceedings. *Id.* at 888–89. Indeed, the shelter care order in this case identifies K.M. as "the subject of this action." CP 192. Because K.M. is not a party RCW 13.34.165(1) does not permit the juvenile court to find her in contempt

ii. Because K.M. has not violated the conditions of any order neither RCW 13.34.165(1) nor RCW 13.34.165(5) permit a finding of contempt.

Contempt is the “intentional disobedience of a lawful court order.” *King v. Department of Social and Health Services*, 110 Wn.2d 793, 797, 756 P.2d 1303 (1988). At no point has the Department identified any order or “placement order” which K.M. has violated. Each of the show cause motions identified the March 23 dependency order as the order which K.M. purportedly violated. CP 28, 70, 80, 107. But that order does not require K.M. to do anything. The order does not identify any specific placement at which K.M is required to remain. The order does not even contain more general language requiring K.M. remain at whatever placement the Department provides. The order does nothing more than authorize the Department to provide out-of-home placement for K.M.

Unless the court ordered K.M. to comply with the wishes of the department, her failure to do so is simply not contempt under the case law or the statute. No order does

that. Because no order required K.M. to remain at any specific placement, she did not violate the conditions of any order when she left her placement and cannot be in contempt under any provision of RCW 13.34.165.

b. The contempt orders deprive K.M. of due process.

Assuming the sanctions imposed against K.M. are coercive, or civil, in nature

. . . civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding *upon notice and an opportunity to be heard.*

International Union, United Mine Workers of America. v.

Bagwell, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642

(1994). Due process requires a person have notice that the

failure to comply with some provision of a court order may

result in a finding of contempt. *Smith v. Whatcom County*

District Court, 147 Wn.2d 98, 113, 52 P.3d 485 (2002). In

short, a person must know what they are required to do or not

do and that their failure to do so may result in a finding of contempt.

As set forth above, no order required K.M. to do anything. Further, nothing in the March 23, 2018, order, or any subsequent order, afforded K.M. notice that her failure to remain at some unspecified placement could lead to a finding of contempt, her arrest, or incarceration. Each of the contempt findings here deprived K.M. of due process. Too, any future contempt finding will be similarly unconstitutional unless the court first notifies K.M. of what she is required to do and that her failure to do so may result in a finding of contempt and incarceration.

4. K.M. is entitled to a writ of habeas corpus.

A person is entitled to a writ of habeas corpus to gain their immediate freedom from unlawful restraint.

F. CONCLUSION

K.M.'s restraint stemming from the repeated contempt findings is contrary to RCW 13.34.165 and violates due

process. This Court should order the issuance of a writ of habeas corpus to free her from this unlawful restraint.

Respectfully submitted this 30th day of August, 2019.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is written in a cursive style with a large, sweeping initial "G".

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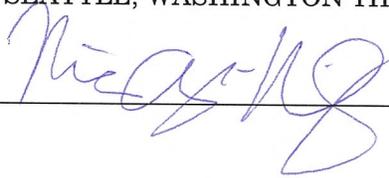
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| |) | NO. 53328-6-II |
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