

20180122

IN THE SUPREME COURT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

AUG 24 2018

IN THE INTEREST OF M. M., A CHILD STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Petitioner and Appellee,)	
)	
-vs-)	
)	
M. M., child,)	Supreme Ct. No. 20180122
)	
Respondent and Appellant,)	
)	
J.G., Mother,)	
R.M., Father,)	
)	
Respondents.)	
)	District Ct. No. 08-2018-JV-00020
)	

BRIEF OF PETITIONER-APPELLEE

APPEAL FROM AN ORDER ENTERED ON NOVEMBER 27, 2017

Southwest Judicial District
The Honorable William A. Herauf, Presiding

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ISSUE PRESENTED FOR REVIEW

[¶1] Whether the district court erred in denying the Respondent Child's Motion to Dismiss.

STATEMENT OF THE CASE

[¶2] On October 13, 2017, the State of North Dakota filed a proposed Summons and Petition against the Respondent Child, M. M. (YOB 1999). App. 1. The Petition alleged M. M. committed the delinquent acts of Simple Assault and Contact by Bodily Fluids. App. 8. The and Summons and Petition were approved by the district court and formally entered on October 16 and October 17, 2017, respectively. App. 1. The Petition was entered into the district court record as “Juvenile Petition (Not in Custody).” App. 1.

[¶3] The Summons set an initial appearance for November 7, 2017, at 9:00 AM. App. 6. The district court also issued a Notice of Assignment of Judge; Initial Hearing, Pretrial Conference, and Trial on October 13, 2017. App. 5. Again, the Initial Appearance was set for November 7, 2017, at 9:00 AM, the Pretrial Conference was set for November 14, 2017 at 9:30 AM, and the Trial was set for November 27, 2017 at 9:00 AM. App. 5.

[¶4] M. M. applied for counsel on November 1, 2017. App. 1. Counsel for M. M. was appointed on November 2, 2017. App. 2.

[¶5] The Initial Hearing proceeded as scheduled on November 7, 2017. App. 1-2. The Pretrial Conference proceeded as scheduled on November 14, 2017. App. 2.

[¶6] M. M. filed a Motion to Dismiss on November 21, 2017. App. 2, 11-16. The State of North Dakota filed a Brief in Opposition on November 22, 2017. App. 2, 17-18. The district court denied the Motion to Dismiss in an order dated November 24, 2017 and entered on November 27, 2017. App. 2, 19.

[¶7] M. M. admitted the allegations at a dispositional hearing held January 16, 2018. App. 2. The district court transferred the case to Burleigh County for disposition. App. 23.

[¶8] A dispositional hearing was held in Burleigh County on February 27, 2018 and then again on March 13, 2018. App. 2. M. M. was placed in the custody of the Division of Juvenile Services and ordered to pay restitution. App. 25. Custody was set to run concurrent with a previous Division of Juvenile Services custody order issued in 08-2017-JV-54. App. 25.

[¶9] M. M. filed a Notice of Appeal on March 29, 2018. App. 2.

STATEMENT OF THE FACTS

[¶10] The relevant facts for this appeal are largely procedure based.

[¶11] On October 13, 2017, the State of North Dakota filed a proposed Summons and Petition against the Respondent Child, M. M. (YOB 1999). App. 1. The Petition alleged M. M. committed the delinquent acts of Simple Assault and Contact by Bodily Fluids. App. 8. The and Summons and Petition were approved by the district court and formally entered on October 16 and October 17, 2017, respectively. App. 1. The Petition was entered into the district court record as “Juvenile Petition (Not in Custody).” App. 1.

[¶12] The district court issued a Notice of Assignment of Judge; Initial Hearing, Pretrial Conference, and Trial on October 13, 2017. App. 5. The Initial Appearance was set for November 7, 2017, at 9:00 AM. App. 5. The Summons issued on October 16, 2017 contained the same Initial Appearance date. App. 6. The Notice of Assignment; Initial Hearing, Pretrial Conference, and Trial also set the date for the Pretrial Conference as November 14, 2017 at 9:30 AM, and the Trial was set for November 27, 2017 at 9:00 AM. App. 5.

[¶13] That same document contained the following relevant language: “Prior to the pretrial, the following matters must be completed. [sic] a. All pretrial motions shall be served and filed with the Court in such time that they may be heard not later than the date for the pretrial.” App. 5.

[¶14] The Initial Appearance proceeded as scheduled on November 7, 2017, with no noted objections to the date as set from M. M.

[¶15] The Pretrial Conference also proceeded as scheduled on November 14, 2017. App.

2. M. M. did not make any motions or raise any objections during that hearing. See Transcript of Pretrial Conference.

[¶16] M. M. filed a Motion to Dismiss on November 21, 2017. App. 2, 11-16. The alleged ground for dismissal was that the Initial Appearance was not held within the timeframe set forth by statute and the North Dakota Rules of Juvenile Procedure. App. 14-15. M. M. specifically alleged that because he was in detention when the Petition was filed, the Initial Appearance on the Petition needed to be held within (fourteen) 14 days from when the Petition was filed. App. 14-15. That would have had to take place on or before October 30, 2017. App. 14.

[¶17] The State opposed the motion, arguing both that the Motion was untimely under the North Dakota Rules of Civil Procedure and that M. M. was not detained in the case so the fourteen (14) day timeframe did not apply. App. 17-18.

[¶18] The district court denied the Motion to Dismiss in an Order entered on November 27, 2017. App. 2, 19.

[¶19] M. M. appeals that Order.

ARGUMENT

[¶20] I. THE DISTRICT COURT DID NOT ERR IN DENYING THE RESPONDENT CHILD'S MOTION TO DISMISS.

A. Standard of Review

[¶21] Whether the district court erred in denying M. M.'s Motion to Dismiss is a question of law because the court's action was based on an interpretation of the requirements of section 27-20-24, N.D.C.C. and Rule 2 of the North Dakota Rules of Civil Procedure. "Statutory interpretation is fully reviewable on appeal as a question of law." City of Bismarck v. McCormick, 2012 ND 53, ¶ 10, 813 N.W.2d 599.

B. The district court did not err in denying the Respondent Child's Motion to Dismiss because it was untimely filed.

[¶22] M. M.'s Motion to Dismiss was correctly denied because it was filed outside of the deadlines imposed by rule and court order.

[¶23] The State of North Dakota argued M. M.'s Motion to Dismiss should be denied because it was not timely. App. 17. That argument was supported by the North Dakota Rules of Civil Procedure. App. 17.

[¶24] The State concedes the North Dakota Rules of Civil Procedure do not apply in juvenile proceedings. However, the State's argument is supported by the North Dakota Rules of Juvenile Procedure as well.

[¶25] Rule 14, N.D.R.Juv.P., governs the filing of motions in juvenile court. Paragraph (c) provides, "Motion Deadline. The court may set a deadline for the parties to make motions and may also schedule a motion hearing." N.D.R.Juv.P. 14(c).

[¶26] In this case, the district court set a deadline for filing motions in its Notice of Assignment of Judge; Initial Hearing, Pretrial Conference, and Trial. App. 5. The

relevant language of that document said, “All pretrial motions shall be served and filed with the Court in such time that they may be heard not later than the date for the pretrial.” App. 5. The Pretrial Conference was set for November 14, 2017. App. 5. M. M. filed his Motion to Dismiss on November 21, 2017, which is well after the deadline. App. 2, 11-16. Therefore, the filing of the motion was untimely and the motion was rightly denied by the district court.

[¶27] The motion was also untimely because it was not raised at the appropriate time. There is nothing within the record indicating M. M. objected to the Initial Appearance date prior to November 21, 2017. In fact, the record shows the opposite. The State indicated in its motion that M. M. neither made a motion nor raised an objection to the hearing dates as the court set them. The Transcript from the Pretrial Conference is devoid of any motions or objections from M. M. Counsel for M. M. was appointed on November 2, 2017. App. 2. He should have been aware of the issue prior to the Initial Appearance. This Court has generally held objections to errors must be made in a timely fashion. See, e.g., Krueger v. Grand Forks County, 2014 ND 170, ¶ 41, 852 N.W.2d 354 (holding defendant waived argument by failing to raise an objection to prejudicial statements made during closing arguments soon after the statements were made). Therefore, M. M. waived his argument by not timely raising it, and the district court did not err in granting the motion.

[¶28] M. M. argues his argument was timely because he had to wait until after the alleged violation occurred in order to raise it. However, when M. M. received the Assignment of Judge; Initial Hearing, Pretrial Conference, and Trial, he was put on notice of the times and dates for the hearings. App. 5. That document was generated on October

13, 2017 and counsel for M. M. was appointed on November 2, 2017. App. 1-2, 5. M. M. could have and should have raised his objection as soon as he was aware of the issue. He did not. Therefore, his motion was untimely.

C. The district court did not err in denying the Respondent Child's Motion to Dismiss because the Motion was based on a misapplication of Rule 2 of the North Dakota Rules of Juvenile Procedure.

[¶29] M. M.'s Motion to Dismiss was correctly denied because it was based on a misapplication of Rule 2 of the North Dakota Rules of Juvenile Procedure.

[¶30] Section 27-20-24, N.D.C.C., governs the conduct of hearings in juvenile proceedings. It provides, in relevant part, "If the hearing has not been held within the time limit, or any extension thereof, required by subsection 1 of section 27-20-22, the petition must be dismissed." Section 27-20-22, N.D.C.C., has been superseded by Rules 2, 5, and 10 of the North Dakota Rules of Juvenile Procedure. Of particular relevance to this appeal is Rule 2, which governs hearing times in juvenile proceedings. N.D.R.Juv.P. 2. The Rule provides a timeframe within which a Detention Hearing must be held. N.D.R.Juv.P. 2(a)(1). The Rule also provides a timeframe within which a hearing on a Petition must be held. N.D.R.Juv.P. 2(a)(3). Specifically, the Rule says:

(3) Petition Hearing. After the petition has been filed, the court must set a hearing . . .

(A) Unless a continuance is granted under Rule 2(c), the hearing on the petition must not be held later than 30 days after the filing of the petition.

(B) If the child is in detention, the time for the initial hearing on the petition must not be later than 14 days after the child has been taken into custody.

(C) If a child is in shelter care, the petition must be filed within 30 days after the child has been taken into shelter care. The hearing on the petition must be held and findings made within 60 days of the initial removal.

N.D.R.Juv.P. 2(a)(3).

[¶31] In this case, M. M. was not in detention. The record is devoid of any mention of a detention hearing or order placing M. M. into detention. The Register of Actions does not indicate a detention hearing was held or that an order for detention was entered. This is notable because Rule 2 clearly provides for a process by which a child can be held in detention pending the disposition of a case. N.D.R. Juv.P. 2(a)(1). The district court did not go through that process for this case, so it could not have been holding M. M. in detention on the basis of the pending case. While M. M. was residing at the Youth Correctional Center in Mandan, ND, he was not placed there under an order from the case at bar. M. M. mentioned a release date of February 25, 2018 in his argument. Appellant's Brief, ¶ 7. That date was not set by any order from the district court in the case at bar. In fact, it would have been outside the district court's authority to hold M. M. in detention that long without an additional hearing. See N.D.R. Juv.P. 2(a)(1)(C). Again, no such hearing exists within the record of this case. App. 1-2. It is clear M. M.'s custodian, the Division of Juvenile Services, placed him there under their authority as custodian. App. 18.

[¶32] Therefore, because M. M. was not ordered into detention for the case at bar, the fourteen (14) day timeframe located at Rule 2(a)(3)(B), N.D.R. Juv.P., does not apply. Rather, the thirty (30) day time frame at Rule 2(a)(3)(A), N.D.R. Juv.P., applies. Under that provision, the Initial Appearance needed to be held on or before November 12, 2017. It was held five (5) days before that on November 7, 2017.

[¶33] In regards to the hearing on the petition itself, it does not matter who asked for the continuance in the case below – although in this case it was M. M. who asked for the continuance. A continuance of the hearing on the petition was granted by the district court. App. 19. That is the exception to the timeframe set by Rule 2. N.D.R.Juv.P. 2(1)(3)(A). Therefore, the Motion to Dismiss was correctly denied by the district court.

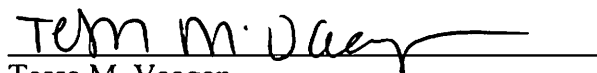
[¶34] M. M.’s motion was based on a misapplication of Rule 2 of the North Dakota Rules of Juvenile Procedure and the district court was correct in denying that motion.

CONCLUSION

[¶35] For these reasons, the State respectfully requests that this Court affirm the district court’s Order denying M. M.’s Motion to Dismiss.

RESPECTFULLY SUBMITTED:

Dated this 24th day of August, 2018.


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State of North Dakota,)	Supreme Ct. No. 20180122
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Petitioner-Appellee,)	District Ct. Nos. 17-2017-JV-00005
)	& 08-2018-JV-00020
STATE OF NORTH DAKOTA)	
) ss	
COUNTY OF BURLEIGH)	

I, Mandy Pitcher, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 24 day of August, 2018, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Petitioner-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Kevin McCabe
North Dakota Public Defender's Office
135 Sims St., Ste. 221
Dickinson, ND 58601
(701) 227-7460
dickinsonpublicdefender@nd.gov

which address is the last known address of the addressee.

Mandy M Pitcher
Mandy Pitcher

Subscribed and sworn to before me this 24 day of August, 2018.

ELVEDINA PAPALICHEV
Notary Public
State of North Dakota
My Commission Expires March 21, 2022

Elvedina Papalichev
Elvedina Papalichev, Notary Public
Burleigh County, North Dakota