IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20100329

South Central Judicial District, County of Burleigh, Court No. 08-10-R-98

In the Interest of L.T., a child

Jacob Rodenbiker,
Petitioner and Appellee,

v.

L.T., Child; and H.T., Mother,
Respondents,

and

B.T., Father,
Respondent and Appellant.

Appeal on the Findings of Fact and Order of June 17, 2010, and Order Adopting Referee's Findings and Order of September 9, 2010, affirming.

South Central Judicial District, County of Burleigh
The Honorable John W. Grinsteiner and the Honorable Bruce A. Romanick

REPLY BRIEF OF APPELLANT B.T., FATHER

Bradley Peterson #04902
and Meredith Vukelic #06544
Legal Services of North Dakota
1025 N. Third Street
P.O. Box 2419
Bismarck, ND 58502-2419
701-258-4270
Attorneys for Appellant B.T., Father

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ARGUMENT

Pursuant to Rule 28(d) of N.D.R.App.P., B.T. seeks to clarify three points:

I. Davenport v. State is not controlling.

In response to B.T.'s argument that L.T.'s mandatory registration as a sex offender was more than a collateral consequence of conviction, the State argues Davenport v. State is controlling and that there is no requirement a child or his parent be advised of a collateral consequence in a non-criminal juvenile matter. Brief of Petitioner-Appellee at ¶¶ 3, 4. Davenport is not controlling authority and is distinguishable. The same Burleigh County State's Attorney's Office that represents the State's interests in this appeal also represented the State's interests in Davenport. The Burleigh County State's Attorney's Office stated in their Davenport brief:

> In the present case the trial court determined the Defendant knew about the registration requirement before sentence was imposed. (Appx. p. 9). The trial court found the Defendant's attorney did go over the PSI with the Defendant and the State referenced the registration requirement before the sentence was accepted (Appx. P.9). In this case, the registration requirement was read to the defendant (Sentencing Hearing Trans. p. 9 & 10) and was placed in the judgment. (Appx. P. 8)

Brief of Plaintiff-Appellee, Davenport v. State, 2000 ND 218, 620 N.W.2d 164 (No. 20000148). This Court accepted this portion of Burleigh County's Davenport argument in full:

> The trial court sentenced Davenport on January 5, 1998. During the sentencing hearing, the prosecutor mentioned the registration requirement as a condition of probation. The court asked Davenport if he had any additions or corrections to the presentence investigation report, which included a notation that Davenport was required to register as a sex offender as a condition of probation. The court reviewed the conditions of probation with Davenport, specifically mentioning the registration requirement. The criminal judgment states Davenport is required to register as a sex offender.

Davenport, 2008 ND 218, at ¶ 4.

Unlike Davenport. L.T.. H.T., and B.T. were never given a meaningful hearing to address the issue of sex offender registration because upon L.T.'s admission. registration automatically attached with no opportunity to oppose it. N.D.C.C. § 12.1-32-15. In Davenport, the defendant was given notice that he faced registration, this opportunity was not provided to any of the Respondents at L.T.'s adjudication hearing. The Referee never made an inquiry regarding registration. nor did he review the conditions of registration with L.T.. H.T.. or B.T. prior to accepting L.T.'s admission. (Tr. at 4, March 16, 2010). The Referee never mentioned mandatory registration upon admission. (Tr. at 4-6, March 16, 2010). The Finding and Interim Order of March 16, 2010, never stated the mandatory requirement of registering as a sex offender. (R. 19). Because of the vast differences in these cases. finding Davenport controlling in this action would not be judicially sound.

II. A Padilla v. Kentucky analysis is appropriate.

The State goes to great lengths to explain the nuances of Padilla by arguing it is limited to the issue of the bad advice given by an attorney on the issue of deportation. Brief of Petitioner-Appellee at ¶¶ 5-8. But what gets lost in the State's translation is that Padilla rests on the premise that the threat of deportation was an *integral part of the conviction*. Padilla v. Kentucky, 559 U.S. ___, 130 SCt 1473, 1478-82 (2010) (emphasis added). Mandatory registration as a sexual offender is an integral part of a conviction. Mandatory registration does not allow a juvenile to argue against it: there is absolutely nothing the juvenile or his family can protest or challenge. N.D.C.C. § 12.1-32-15. Mandatory registration removes all discretion a judicial referee may have on the issue.

N.D.C.C. §12.1-32-15. Because of the drastic measures mandatory sexual offender registration imposes on a citizen, it is not surprising a state appeals court chose to apply a Padilla analysis to determine that the mandatory requirement of sexual offender registration required notice be given. See, Taylor v. State, 304 Ga.App. 878, 882-83, 698 S.E.2d 384 (2010).

Like in Taylor, there was no notice given by the State or the Referee to Respondents about the mandatory effects of an admission. In its brief, the State proposes that, "Padilla remains a case that affects only the *representation attorneys provide their clients*, and that issue is not at hand." Brief of Petitioner-Appellee at ¶ 6 (emphasis added). What the State does not mention is that, when it joined in the Brief of Amicus Curiae, it joined with the Amicus Curiae's sentiment that, "B.T.'s involvement is for the purpose of protecting the child's own due process rights to a fair hearing." Brief of Amicus Curiae at 10 (citation omitted). It seems to B.T. that L.T. not being put on notice that admission would result in mandatory registration as a sexual offender would in fact be an instance where L.T. was deprived of his right to a fair hearing. B.T. is not a law school graduate. In order for B.T. to protect his child's due process right to a fair hearing by discussing issues with L.T. at home or in the courtroom, B.T. would need to have been advised by his own attorney of instances when due process rights were being violated. This aspect of needing advisement by an attorney requires B.T. have such an opportunity to be represented. Not having this opportunity resulted in a lack of appropriate assistance of counsel. Appropriate assistance of counsel, or as the State put it, "representation attorneys provide their clients," is what Padilla discusses. See generally, Padilla, 559 US ___, 130 SCt 1473 (2010). B.T. argues that the option to have

appropriate assistance of counsel, in order to provide notice of mandatory registration and in turn protect Respondents' due process rights to a fair hearing, should be afforded an indigent parent just as the option is afforded a wealthy parent.

The United States Supreme Court recognized that children are different than adults in terms of maturity, responsibility, and culpability. See Graham v. Florida, 560 U.S. ___ (No. 08-7412) (2010) (slip op. at 16-17); Roper v. Simmons, 543 U.S. 551, 569-70 (2005); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988); Application of Gault, 387 U.S. 1, 14 (1967). Because of the differences between children and adults, this Court has recognized that a juvenile may need additional legal protection. Interest of R.P., 2008 ND 39, ¶ 13, 745 N.W.2d 642, 645. L.T. needing additional legal protection is yet another reason B.T. should have been allowed to fully participate – to protect his juvenile child's due process rights to a fair hearing. The additional protection of being put on notice of mandatory registration, an integral part of L.T.'s admission, would have been achieved had B.T. been provided the opportunity to be represented by a court-appointed attorney.

III. An indigent parent must be given the same access to the Juvenile Court as a parent with wealth is entitled.

For the sole reason that B.T. and H.T. are indigent, they were automatically denied the assistance of a court-appointed attorney. N.D.C.C. § 27-20-26(1) expressly prohibits a court-appointed attorney from representing B.T.'s interests at the time L.T. entered his admission and automatically became a registered sex offender. However, N.D.C.C. § 27-20-26(1) does not prohibit a parent with wealth from the opportunity to receive the assistance of counsel when their child is in an identical situation. In its brief,

the State does not address the negative impact N.D.C.C. § 27-20-26(1) had on this case: instead the State neatly hands the entire issue off by simply affirming the brief of the Amicus Curiae. Brief of Petitioner-Appellee at ¶ 2.

The Amicus Curiae has a lengthy explanation as to why an indigent parent, who had a statutory right to a court-appointed attorney from 1969 until 2007, should be stripped of this basic right. Brief of Amicus Curiae at 8-20. However, the Amicus ignores a very large, prejudicial, and unfair aspect of § 27-20-26(1) – a parent with wealth *can have* their paid-for attorney represent their interests in order to provide additional protection for their juvenile child. Absolutely nothing in N.D.C.C. § 27-20-26(1) prohibits a parent with the necessary financial means from retaining an attorney to represent their legal interests at the adjudication stage of their juvenile child's delinquency case. See N.D.C.C. § 27-20-26(1). Nothing in the Amicus explains this drastic discrepancy or how it can be constitutional to place indigent parents on such a different playing field than parents with wealth.

The Amicus brief says, "B.T.'s involvement is for the purpose of protecting the child's own due process rights to a fair hearing." Brief of Amicus Curiae at 10 (citation omitted). This leads B.T. to ask, "How?" How can an indigent parent participate in order to protect his child's due process rights to a fair hearing when the indigent parent himself is not afforded any opportunity to be advised by legal counsel of the severe consequences of admission? The Amicus also says, "There is no constitutionally recognized right for parents to actively participate in their own right in the adjudicative stage of delinquency proceedings" and, "[U]nless the Legislature has authorized otherwise, a parent does not have the right to appear with counsel for the adjudicative

stage of a delinquency proceeding when the juvenile is represented by counsel." Brief of Amicus Curiae at 9-10; 12 (citations omitted). This leads B.T. to question, if there is "no constitutionally recognized right for parents to actively participate in their own right" at this stage of the proceeding, then how does one justify the fact that parents with wealth *are given the right* to actively participate? The Amicus brief does not provide adequate answers to these questions. Nor does it explain the fact that an unrepresented parent faces the possibility of being held in contempt at the adjudication proceeding, even though the parent does not have an attorney. See N.D.C.C. § 27-20-55 and N.D.R.Juv.P. 10(a)(3).

In an attempt to explain the difference in treatment of a wealthy parent compared to an indigent parent, the Amicus relies upon Interest of P.F. when he quotes, "The equal protection clauses of the state and federal constitutions do not prohibit legislative classifications or require identical treatment of different groups of people." Brief of Amicus Curiae at 13; P.F., 2008 ND 37, ¶ 15, 744 N.W.2d 724. The Amicus chose not to include the next sentence of the P.F. decision which states, "Rather, the equal protection clause prohibits the government from treating individuals differently *who are alike in all relevant aspects*." P.F., 2008 ND at ¶ 15 (emphasis added). By including this additional line from P.F., the effect of a denial of a court-appointed attorney becomes more clear. The relevant aspects referred to in P.F. of this case, and the reason for B.T.'s argument against the constitutionality of N.D.C.C. § 27-20-26(1), are: 1) B.T. is a *parent* of a juvenile, 2) that juvenile was *involved in a delinquency proceeding*, and 3) B.T. continues to have a *legal responsibility to parent his child* during and after the adjudication stage of the proceeding in which the juvenile was mandated to register as a

sexual offender even while living at his parents' house. These relevant aspects are exactly the same aspects that a parent with adequate wealth to retain an attorney would have at their own juvenile child's delinquency proceeding. Therefore, based on this Court's own interpretation of the equal protection clause in P.F., B.T. should receive the identical treatment a person of wealth receives in a North Dakota juvenile court.

The Amicus, in footnote 2, cited to an assortment of state statutes from across the country to support the argument that an indigent parent is not entitled to an attorney in an adjudication proceeding. Brief of Amicus Curiae at 13 (citations omitted). After examining each statute separately, B.T. found that none of these states' statutes flat out prohibit indigent parents from the opportunity to be represented while at the same time allowing parents with adequate wealth to be represented.[1] Only North Dakota has this dubious distinction. See N.D.C.C. § 27-20-26(1).

By ignoring the effect wealth, or lack of wealth, has on the parents of a juvenile – parents who are legally required to house, care for, and be responsible for their child – the State advocates for a caste system in our juvenile courts based solely upon wealth. A juvenile court system based on a system of wealth does not guarantee equal justice to the citizens of North Dakota as required by the U.S. Constitution and the North Dakota Constitution. U.S. Const. am. 14; N.D. Const. art. 1, §§ 21, 22. The Amicus acknowledges, "Statutes must be construed to avoid constitutional conflicts and, if a

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[1] California's Code, which the Amicus cites to in support of denying counsel to an indigent parent, says, "When it appears to the court that the minor *or his parent or guardian desires counsel* but is unable to afford and cannot for that reason employ counsel, the court *may* appoint counsel." Cal. Welf. & Inst. Code § 634 (emphasis added).

statute may be construed two ways, one that renders it of doubtful constitutionality and one that does not, a construction must be adopted that avoids the constitutional conflict." Brief of Amicus Curiae at 5 (citing Ash v. Traynor, 1998 ND 112, ¶ 7, 579 N.W.2d 180)). A constitutional conflict was not avoided when N.D.C.C. § 27-20-26(1) was amended at the request of the North Dakota Supreme Court's Juvenile Policy Board. Equal protection does not exist for parents who are participating in their children's juvenile delinquency proceedings; parents with adequate wealth are afforded an opportunity that indigent parents are not afforded. N.D.C.C. § 27-20-26(1) is unconstitutional beyond a reasonable doubt.

Conclusion and Prayer for Relief

WHEREFORE, for the reasons stated herein, B.T. respectfully asks the Court to find N.D.C.C. § 27-20-26(1) unconstitutional, and find the Referee erred when he failed to notify B.T., an unrepresented parent, of the sexual offender registration requirement and remand for further consideration.

Respectfully submitted this 26th day of January, 2011.

Bradley Peterson #04902
Meredith Vukelic #06544
Legal Services of North Dakota
1025 N. Third St.
P.O. Box 2419
Bismarck, ND 58502-2419
701-258-4270
Attorneys for Appellant B.T., Father

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v.	)	
L.T., Child; H.T., Mother, Respondents; and B.T., Father, Respondent and Appellant.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

1) I am an employee of Legal Services of North Dakota.
2) I had possession of copies of the following documents for this case:

1. **Reply Brief of the Appellant;**
2. **Affidavit of Service by Mail.**

3) A copy of each of these documents were placed in an envelope and addressed to each of the following people at that person's last known address:

Jacob Rodenbiker
Assistant States Attorney
514 E Thayer Ave.
Bismarck, ND 58501

Justin Roness
Attorney at Law
P O Box 4252
Bismarck, ND 58502-4252

Susan Schmidt
Attorney at Law
400 East Broadway Ave Suite 27
Bismarck, ND 58501

Ken R. Sorenson
Assistant Attorney General
600 East Boulevard Ave., Dept.125
Bismarck, ND 58505-0040

4) These envelopes were deposited, postage prepaid, by me in the U.S. Mail at the U.S. Post Office in Bismarck on January 27, 2011

Audrey Wingerter

Signed and sworn to before me on January 27, 2011.

STACEY M FETZER
Notary Public
State of North Dakota
My Commission Expires April 23, 2014

Notary Public
State of North Dakota
County of Burleigh