

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1698-22

STATE IN THE INTEREST
OF T.W.

Submitted July 10, 2023 – Decided September 19, 2023

Before Judges Natali and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FJ-07-0181-22.

Joseph E. Krakora, Public Defender, attorney for appellant T.W. (Brian P. Keenan, Assistant Deputy Public Defender, of counsel and on the briefs).

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for respondent State of New Jersey (Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

By leave granted, we consider the propriety of the Law Division's February 3, 2023 order denying T.W.'s request to appear virtually at her trial,

and instead compelling her to appear in-person or be faced with the issuance of a bench warrant and arrest should she not comply. Because we conclude the court abused its discretion in denying T.W.'s request to appear virtually, we reverse and remand for proceedings consistent with this opinion.

I.

We briefly detail the relevant facts and procedural history. On July 22, 2021, the State filed a Juvenile Delinquency Complaint against T.W., charging her with offenses, which if committed by an adult, would constitute third-degree invasion of privacy, pursuant to N.J.S.A. 2C:14-9(b)(1); third-degree invasion of privacy, pursuant to N.J.S.A. 2C:14-9(c); and disorderly-persons harassment, pursuant to N.J.S.A. 2C:33-4(a). Prior to the filing of the complaint, T.W. and her mother moved to Sumter, South Carolina.

On December 21, 2022, the court held a pretrial conference in which T.W. and her mother appeared via telephone, consistent with all previous pretrial proceedings. In accordance with State v. Hudson, 119 N.J. 165, 172 (1990), the court advised T.W. and her mother of the charges, the maximum potential sentence, and that the trial could proceed in T.W.'s absence if she failed to appear. At that time, T.W.'s counsel advised the court that T.W.

intended to seek permission to appear at trial virtually, and, on December 30, 2022, T.W. filed a motion requesting such relief.

In her application, T.W. asserted that appearing in person would be a financial hardship, as her mother does not have the financial ability to travel from South Carolina to New Jersey. T.W.'s mother represented she does not get paid for days she does not work, does not have the funds to travel, nor does she have friends or family in New Jersey with whom the two could stay during the trial. In opposing T.W.'s motion, the State relied on section 2 of the Supreme Court's October 27, 2022, order, titled "The Future of Court Operations – Updates to In-Person and Virtual Court Events," (Order), which provides, in part, that juvenile delinquency matters "will generally proceed in person but may proceed virtually with the consent of all parties."

On January 23, 2023, the court denied T.W.'s motion to appear virtually and entered a conforming order. In its oral decision, the court initially observed there existed "no guidance in the [Rules] or relevant case law regarding a defendant's right to appear virtually when appearing in-person is a hardship." The court considered T.W.'s right to proceed virtually after considering our decision in Pathri v. Kakarlamath, 462 N.J. Super. 208, 212 (App. Div. 2020), but distinguished that case because Pathri considered

alternate means of witness testimony, while T.W.'s application concerned the virtual appearance of a "charged person, which triggers constitutional protections."

Next, the court expressed concerns regarding the impact T.W.'s virtual appearance at an in-person trial would have on her Sixth Amendment right to participate, namely, her ability to confer with counsel and assess witness credibility. The court also noted it was reluctant to proceed with a hybrid trial due to the confidential nature of juvenile proceedings and the sensitive evidence to be presented in this case.

The court also noted the possible difficulties in assessing the juvenile's virtual testimony in the event she elected to testify. Finally, the court rejected T.W.'s argument that ordering an in-person trial would amount to ordering her to waive her appearance for trial because the record did not evidence efforts taken by the Office of the Public Defender (OPD) "to get the juvenile and her parent a bus ticket to New Jersey."

T.W. filed a motion for reconsideration, and in the context of that application the court permitted T.W. to "broaden the record" regarding the financial hardship attendant to her and her mother appearing in person. To that

end, T.W. provided W-2 forms evidencing her mother earns \$10,494.12 annually from one job and \$1,320.00 from a second.

After considering the parties' submissions and oral arguments, the court denied T.W.'s reconsideration application. In doing so, the court concluded permitting T.W.'s virtual appearance would "effectively muzzl[e]" her because "if she is going to appear, it has to be a meaningful appearance." The court rejected defense counsel's argument that the Order "creates a situation where the defendant can participate in the trial virtually." The court recognized the Supreme Court allowed for fully virtual trials involving adults but reasoned "[t]his is a separate issue . . . we're talking about a juvenile trial," and that "[i]f the entire proceeding was virtual, the court and the parties can take . . . actions to make sure that everybody is on a secure line." The court noted that in this case, however, "[i]t doesn't sound like any of those considerations have been tended to."

The court also inquired if T.W.'s counsel had applied "for ancillary services for a bus ticket or something to be procured" for the juvenile and her mother to attend the trial. Counsel responded that he spoke to his "office to provide [those services] and we're not aware of a way [it] can get . . . done." The court accordingly set trial for February 6, 2023, and stated that "[i]f [the

juvenile] doesn't appear [at trial], we can address the issue of whether or not she's voluntarily absenting herself."

T.W. filed a motion for leave to appeal, which we granted on an emergent basis. Before us she argues:

THE MOTION COURT ERRED IN DENYING T.W., WHOSE FAMILY CANNOT AFFORD TO SEND HER TO NEW JERSEY, THE OPPORTUNITY TO APPEAR VIRTUALLY AT HER TRIAL.

- A. A Juvenile's Fundamental Right to be Present at Her Trial is Grounded in the State and Federal Guarantees of Due Process and Confrontation
- B. The October 27, 2022, Supreme Court Order Specifically Allocates the Trial Judge Discretion to Allow T.W. to Appear Virtually at an In-Person Proceeding Without the State's Consent
- C. T.W.'s Family Has No Ability to Pay the Cost to Travel From South Carolina to New Jersey or for Lodging for the Duration of the Trial
- D. Denial of a Virtual Appearance Deprives T.W. of Both Her Right to be Present and Equal Protection Under the Law Because Her Parent Can Afford Neither the Expense of Travel Nor to Forego Wages for the Duration of the Trial and the Days Spent in Transit Between New Jersey and South Carolina
- E. The Court's Decision to Deny T.W.s Request is Based on Perceived Flaws in the Virtual Court System that are Present in Most Cases and the

Irrelevant and Unripe Question of Whether T.W. will Testify

- F. A Virtual Appearance Would Provide T.W. the Greatest Opportunity to Exercise Her Rights to Confrontation and Due Process Consistent with the Rehabilitative Goal underlying Juvenile Justice Code's Preference that Juvenile Matters be Tried in the County of the Juvenile's Domicile

II.

We begin our analysis with the appropriate standard of review. A trial judge has broad discretion in controlling the courtroom and court proceedings. State v. Pinkston, 233 N.J. 495, 511 (2018); State v. Jones, 232 N.J. 308, 311 (2018). "[W]e apply the abuse of discretion standard when examining the trial court's exercise of that control." Jones, 232 N.J. at 311. The same standard applies when reviewing orders for reconsideration. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016), aff'd, 231 N.J. 135 (2017); Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (stating "[r]econsideration is a matter within the sound discretion of the [c]ourt" (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990))).

A trial court abuses its discretion "by relying on an impermissible basis, by relying upon irrelevant or inappropriate factors, by failing to consider all

relevant factors, or by making a clear error in judgment." State v. S.N., 231 N.J. 497, 500 (2018); see also State v. Chavies, 247 N.J. 245, 257 (2021). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)) (alteration in original). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

As noted, before us T.W. argues that the motion court abused its discretion in denying her motion to appear virtually at her in-person trial. In support, she first contends the Order "specifically provides" for the type of relief T.W. seeks, and the court's denial of her request violated her rights of confrontation, due process, and equal protection under the state and federal constitutions.

T.W. also maintains the court's denial of her virtual appearance effectively violated her constitutional right to be present at her trial so that she may confront the witnesses against her, confer with her counsel, participate in her defense, and assist during cross-examination. T.W. also stresses because she does not intend to waive her right to be present at trial but does not have the ability to be present absent the court allowing her to appear virtually, her "failure to appear cannot be deemed [a] voluntary [waiver]."

T.W. next contends the State and the motion court "misread" the Supreme Court's Order. On this point, T.W. asserts that the court failed to consider all provisions of the Order and thereby erred in concluding there was "no guidance in the court [Rules] or relevant case law regarding a defendant's right to appear virtually when appearing in-person is a hardship." Specifically, T.W. argues that the court failed to consider her request under section 7(b) of the Order, which provides:

7. Court events will be scheduled and conducted consistent with the principles of procedural fairness. For all types of matters:

....

b. In individual cases, all judges will continue to have discretion to grant an attorney or party's reasonable request to participate in person in a virtual proceeding

or to participate virtually in a matter being conducted in person.

(emphasis added)

T.W. also argues the court's denial of her motion to appear virtually amounts to a denial not only of her fundamental right to participate in her trial but also "denies her equal protection under the law," as she does not have the financial ability to appear in-person. T.W. explains the motion judge's concerns with T.W. appearing virtually are based on the incorrect presumption that the alternative to T.W.'s virtual appearance is her in-person appearance, when the actual alternative is that T.W. will be tried in absentia. Additionally, T.W. stresses the issue of her potential virtual testimony is not presently before this court as T.W. moved only to participate as a party virtually, not to testify virtually. Rather, T.W. asserts that should she choose to testify virtually, that issue "will not be affected by a decision to allow her a virtual appearance as a party."

Finally, T.W. maintains a virtual appearance supports the rehabilitative goal of the Juvenile Justice Code and accompanying court Rule 5:19-1(a)(1), which provides "venue shall be laid in the county of the juvenile's domicile unless the court finds good cause for venue to be retained in the county where the incident allegedly occurred." T.W. argues that the "public policy reasons

for laying venue in the child's county of domicile similarly support allowing T.W. to appear virtually from her home in South Carolina."

In requesting we affirm, the State first argues the Order prohibits virtual or hybrid juvenile delinquency trials without the consent of all parties. The State relies on section 2(c) of the order, which provides that juvenile delinquency trials "will generally proceed in person but may proceed virtually with the consent of all parties." Notably, the State does not address section 7(b) of the order, the provision central to T.W.'s argument.

The State next contends that T.W. does not have the right to demand a virtual or hybrid trial, and that such a trial would raise a host of issues prejudicial to the State. First, it generally argues virtual criminal trials "create multiple problems that do not exist in a live court room." On this point, the State adopts the court's concerns regarding the ability to assess the credibility of T.W., should she choose to testify, T.W.'s Sixth Amendment rights to confer with counsel and participate in her defense, her ability to assess witnesses in the courtroom, and possible technological difficulties.

Finally, the State argues that the Office of the Public Defender "can do what is necessary to ensure the presence of its client in this matter." In this regard, the State contends that the Public Defender Act, specifically N.J.S.A.

2A:15A-5 and N.J.S.A. 2A:15A-11, obligates the OPD to provide T.W. and her mother with the travel costs of attending her trial, and analogizes T.W.'s travel costs to the costs associated with securing alibi witnesses. The State also argues that the court may order the OPD to pay for T.W.'s travel expenses, as those costs represent a "service" or "facility" under the Public Defender Act, similar to paying for transcripts or an expert witness' fee.

III.

The Order established an "updated framework for court operations to allow more in-person proceedings" and superseded the Supreme Court's November 18, 2021, order, also addressing court operations in the wake of the Covid-19 pandemic. The Order remains in effect today.

In denying T.W.'s motion to appear virtually, the motion court relied on section 2(c) of the Order, which provides, as noted, that juvenile delinquency matters will be among those that "will generally proceed in person but may proceed virtually with the consent of all parties." In this case, the State did not consent to a virtual trial. The court, however, did not address whether the State's refusal to grant consent was reasonable, or its ability to grant T.W.'s request under section 7(b) of the Order.

The Order "establishes a more sustainable approach to court operations in order to optimize access, participation, and the timely administration of justice." The Order also states that by "continuing to leverage virtual technologies, the court today can effectively balance in-person and virtual proceedings in a way that maximizes access and fairness and supports meaningful participation and timely justice." As such, the Order presupposes that, in cases where a reasonable request for virtual appearance is made, and to consent to such an accommodation is in the interest of justice and fundamental fairness, consent by the opposing party will not be unreasonably withheld.

In this case, the State's primary reason for withholding consent to T.W.'s virtual appearance was ostensibly to protect T.W.'s Sixth Amendment rights and ensure the security and decorum of the trial proceeding. We discern no violation or impingement of T.W.'s constitutional rights, and T.W. has not asserted a contrary position, through a virtual appearance so long as all technological and procedural considerations, addressed below, are observed. We are confident in the court's ability to safeguard T.W.'s constitutional rights and ensure the confidentiality of the trial proceeding using available technologies and established court procedures for virtual proceedings. As such, we conclude the State's refusal to consent was unreasonable. Under the

circumstances, the court was empowered to grant T.W.'s request under section 2(c). Finally, we are satisfied that section 7(b) permits T.W. to participate virtually under the unique circumstances presented.

Both the United States Constitution and the New Jersey Constitution provide a criminal defendant has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. As such, "[t]he right of a person accused of a crime to be present at his or her trial is among the most fundamental of constitutional rights." State v. Grenci, 197 N.J. 604, 614 (2009). Additionally, our court rules state that "the defendant shall be present at every stage of the trial" unless the defendant provided a "knowing" and "voluntary" waiver. R. 3:16(b). Such rights apply to both adult criminal defendants and juveniles. State in Interest of N.C., 453 N.J. Super 449, 455-456 (App. Div. 2018) (citing N.J.S.A. 2A:4A-40; State ex rel. P.M.P., 200 N.J. 166, 173-74 (2009); State v. Franklin, 175 N.J. 456, 465 (2003)).

In addition to T.W.'s right to be present, T.W.'s mother is a necessary party to T.W.'s delinquency proceeding. Indeed, Rule 5:20-4 states "[t]he parents, guardians or other person having custody, control and supervision over the juvenile shall be necessary parties to every proceeding in all juvenile

delinquency actions." Accordingly, both T.W. and her mother have a right to be present at T.W.'s trial.

In our view, T.W.'s request to appear virtually for trial was eminently reasonable and appropriate. First, as noted T.W. has a constitutional right to participate in her defense, and her mother is a necessary party to T.W.'s proceedings. Second, T.W. demonstrated she and her mother do not have the financial ability to travel from South Carolina to New Jersey for trial. As a juvenile, T.W.'s ability to travel is dependent entirely on her mother's ability to provide for those attendant expenses, and as T.W.'s mother represented to the court she does not have the financial ability to travel from South Carolina to New Jersey, denying T.W.'s request to participate virtually constituted an involuntary waiver of her rights. Allowing T.W. to appear virtually constitutes a reasonable accommodation, is expressly permitted under the section 7(b) of the Order, and under section 2(c) in a situation where a party unreasonably withholds consent. It also protects T.W.'s constitutional rights to be present at and participate in her trial.

As noted, the court and the State expressed various concerns with the security and procedure of a hybrid or virtual trial and the impact on T.W.'s constitutional rights. We simply do not find merit in these claims as the Order

authorizing hybrid and virtual proceedings remains in place. In doing so, the Order presumes the ability of courts and parties to leverage available technology, resources, and procedures to conduct virtual and hybrid proceedings with every formality of in-person proceedings.

In support of this argument, the State relies on D.M.R. v. M.K.G., 467 N.J. Super. 308, 320-322 (App. Div. 2021), in which we concluded the defendant's due process rights had been violated when the court held a remote trial that consisted of several "irregularities." That case, however, is easily distinguishable. In D.M.R., the plaintiff's mother was present in the room with him throughout the trial and spoke during his testimony, the parties improperly addressed one another directly, and the court questioned the plaintiff's mother in a manner that resembled advocacy. Ibid.

Here, we are confident the parties and the court can, and will, take measures to avoid such irregularities by utilizing the technologies and procedures used during a fully remote trial, adjusting for the fact this proceeding may be hybrid. See State v. Vega-Larregui, 246 N.J. 94, 134-135 (2021) (holding a virtual grand jury proceeding did not violate the fundamental fairness doctrine or defendant's constitutional rights, as the court took precautions to preserve the sanctity of these proceedings). The court, for

example, is empowered to ensure that T.W. and her mother appear from a secure location using the video platform used during fully remote trials, that T.W. be able to confer with counsel through that platform, that T.W.'s counsel have access to a secure room should he need to speak at length with T.W., and that all evidence presented virtually is presented in accordance with procedures established for fully remote trials. In sum, we are confident that the court has the resources and ability to conduct a secure hybrid trial that does not violate T.W.'s Sixth Amendment rights.

With respect to the State's concerns surrounding T.W.'s possible testimony, and the prejudicial impact that choice may have on the State, we assume that should T.W. choose to testify, she will do so virtually, as we accept defense counsel's representation to the court that T.W. is unable to travel to New Jersey. Any argument which presumes T.W. may demand to testify in-person after being allowed to otherwise participate virtually is therefore speculative and we decline to consider it at this time.

Finally, in light of our decision that the Order fully enables the court to permit T.W. to appear virtually, we need not address the State's argument that the Public Defender Act authorizes the court to compel the OPD to reimburse T.W. and her mother's travel expenses as a necessary service or facility.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION