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SJC-12986

COMMONWEALTH vs. ULANI U., a juvenile, & another.<sup>1</sup>

Plymouth. January 6, 2021. - April 12, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Contempt. Practice, Criminal, Contempt proceeding. Juvenile Court. Rules of Criminal Procedure.

Complaint for contempt filed in the Plymouth County Division of the Juvenile Court Department on September 22, 2017.

The case was heard by Kathryn A. White, J.

The Supreme Judicial Court granted an application for direct appellate review.

Joseph N. Schneiderman for the juvenile.

Katherine E. Burdick, for Juvenile Law Center, amicus curiae, submitted a brief.

Melissa Allen Celli, for youth advocacy division of the Committee for Public Counsel Services & others, amici curiae, submitted a brief.

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<sup>1</sup> Trial Court, interested party.

CYPHER, J. This case concerns the application of the rules of criminal procedure regarding criminal contempt, Mass. R. Crim. P. 43 and 44, and their use in the Juvenile Court. See Mass. R. Crim. P. 43, as appearing in 466 Mass. 1501 (2013); Mass. R. Crim. P. 44, 378 Mass. 920 (1979). The sixteen year old juvenile was before the Juvenile Court judge for a hearing on alleged violations of conditions of her release. After the judge set bail, the juvenile called the judge, among other things, a "dumb, white bitch." The judge found the juvenile in criminal contempt for her statement. At a subsequent sentencing hearing on the charge of contempt, taking place after a separate complaint had issued alleging common-law criminal contempt with the judge who presided over the hearing named as the complainant, the judge sentenced the juvenile to ninety days -- the maximum sentence under rule 43.

The juvenile timely appealed, and we subsequently granted her application for direct appellate review. The juvenile argues that (1) under G. L. c. 119, § 53,<sup>2</sup> it was error for the judge to hold her in summary criminal contempt, and (2) the judge violated requirements of summary criminal contempt

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<sup>2</sup> General Laws c. 119, § 53, provides, in relevant part: "[T]he care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."

proceedings, see rule 43, and therefore the judge should have proceeded against her in a nonsummary contempt proceeding pursuant to rule 44, the procedures of which the judge also violated. We conclude that the judge abused her discretion by not taking the juvenile's status as a child into account when she imposed the ninety-day criminal contempt sentence and that the judge did not comply with the requirements of rule 43 or rule 44.<sup>3</sup> We therefore vacate the judgment of contempt.<sup>4</sup>

Background. 1. Hearing on alleged violations of conditions of release. In 2017, a delinquency complaint issued against the juvenile from the Juvenile Court, alleging attempted escape from a Department of Youth Services (DYS) facility and malicious destruction of property greater than \$250. The juvenile was

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<sup>3</sup> Because we vacate the judgment of contempt on the grounds of abuse of discretion and failure to follow the procedures set forth in Mass. R. Crim. P. 43 and 44, we need not address the juvenile's additional arguments that the sentence constituted cruel or unusual punishment, that she did not validly stipulate to the finding of summary contempt, and that if no single error justifies relief, the cumulative effect of all of the errors created a substantial risk of a miscarriage of justice.

<sup>4</sup> We acknowledge the amicus briefs submitted by the youth advocacy division of the Committee for Public Counsel Services; the children and family law division of the Committee for Public Counsel Services; Massachusetts Association of Criminal Defense Lawyers; National Association of Social Workers; Charles Hamilton Houston Institute for Race and Justice; Center for Law Brain and Behavior of Massachusetts General Hospital; Roxbury Youthworks, Inc.; More Than Words; Citizens for Juvenile Justice; Mental Health Legal Advisors Committee; and Jessica L. Griffin; and by the Juvenile Law Center.

released on recognizance with pretrial conditions of release. However, in August 2017, she allegedly violated the conditions of her release by running away from a Department of Children and Families (DCF) group home.

At the hearing on these alleged violations, the Commonwealth alleged that the juvenile was a flight risk because she ran away from her group home and because she cut off her global positioning system (GPS) monitor imposed from a different case. The Commonwealth requested bail of one dollar and that the juvenile be released only to DCF. The Commonwealth acknowledged that "DCF is reluctant or does not bail out their juveniles"; therefore, the request for bail of one dollar in effect meant a request for a detention order. See R.L. Ireland, *Juvenile Law* § 1.22 (2d ed. 2006) (discussing certain issues present with bail for juveniles). See also A Juvenile v. Commonwealth, 480 Mass. 1012, 1013 n.2 (2018). The juvenile argued against bail, and she also addressed the court herself, requesting to avoid DYS commitment and to be granted "[one] more chance to go back to the program" where she had been living. The judge imposed bail of one dollar and restricted the juvenile's release to DCF.<sup>5</sup> Children often do not have funds

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<sup>5</sup> The judge stated on the record, "So, what I will do is impose the requested bail of \$1.00 DYS -- DCF, I'm sorry, only." See R.L. Ireland, *Juvenile Law* § 1.22 (2d ed. 2006) ("In making bail determinations in delinquency cases, Juvenile Court judges

with which to post bail, and as DCF acknowledged, it does not post bail on behalf of children in its custody. The juvenile replied:

"This is my first case. Like, I don't understand why I can't get sent back to my program. This is my first case. . . . My first case, girl. You don't even know me like that. You don't know me, girl. Give me the fucking papers. Fuck you. . . . Bitch, fuck you. . . . And DCF ain't paying my bill, you dumb, white bitch. . . . You dumb bitch."

After a recess, the judge found that calling her "a dumb, white bitch" was contemptuous conduct. She appointed trial counsel to represent the juvenile in the contempt matter, the juvenile apologized, and counsel did not present any evidence. The judge found the juvenile in criminal contempt, and she continued the matter for sentencing. A separate complaint issued alleging common-law criminal contempt with the presiding judge named as the complainant.

2. Hearing on contempt sentencing. At the sentencing hearing, the judge ordered the juvenile committed to DYS for ninety days, which is the maximum possible sentence for summary criminal contempt. See Mass. R. Crim. P. 43 (a) (4). Trial counsel had requested that the juvenile be committed to time served of one week, noting that her other attorney was "doing a

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frequently impose restrictions regarding who may post the amount set, e.g., . . . [DCF] . . . as in the formulation '\$1.00 cash bail, [DCF] only'). However, the docket entry states, "Temporary mittimus to DYS \$1.00 cash bail release to DCF only."

pysch eval for her in another court" and that "maybe there was a reason why she acted the way she did."

3. Hearing on motion to rewrite court order and to address court. The juvenile thereafter moved to rewrite the court order and to address the court. She wrote a letter of apology to the judge and apologized in court. The judge told the juvenile, in part, "[S]aying you're sorry . . . doesn't mean that the sentence I've imposed goes away. You have to understand that when you speak like that it has consequences. And sometimes those consequences are negative consequences."

In response to a concern raised by the Commonwealth that a delinquency commitment would require DYS to have custody of the juvenile until she was eighteen, the judge ordered a revised mittimus to commit the juvenile to DYS for ninety days as a stipulation without bail.

4. Hearing on motion to vacate and motion to stay execution of sentence. The juvenile subsequently sought relief from the contempt judgment and sentence, asserting that (1) the judge did not comply with the requirements of summary or nonsummary contempt proceedings; (2) the ninety-day sentence did not account for, and was not proportionate to, her juvenile status; and (3) the ninety-day sentence constituted cruel or unusual punishment. At the hearing on the juvenile's motion to vacate and her motion to stay execution of sentence, the judge

resentenced the juvenile to time served and released her to her social worker.

5. Hearing on motion to correct record. The juvenile next moved to correct the record, arguing that the docket inaccurately reflected a stipulation to contempt. She contended that she did not stipulate to being found in contempt and that there was not a colloquy of the rights she was waiving, nor was there a written stipulation to the contempt. The judge denied the motion after a hearing. The juvenile appealed, and the case is now before us on direct appellate review.

Discussion. The juvenile argues that even though the judge resentenced her to time served and she has turned eighteen, the case presents a live controversy "because [she] has a continuing stake in avoiding any collateral consequences from an invalid adjudication of criminal contempt." We agree. See Commonwealth v. Preston P., 483 Mass. 759, 769 (2020) (presence of record can influence officer's decision whether to charge juvenile with crime, and "juvenile adjudications can be predicate offenses for sentencing enhancements"); Commonwealth v. Oswaldo O., 94 Mass. App. Ct. 550, 552-553 (2018), and cases cited (defendant agreeing to continuance without finding does not make his appeal moot because adjudication of delinquency could adversely affect his outstanding request to change his immigration status); Commonwealth v. Bain, 93 Mass. App. Ct. 724, 725 n.2 (2018)

(probation violation is not moot after probation period is completed because defendant faces collateral consequences and violation may be considered in future proceedings for bail, sentencing, or parole).

1. Individualized assessment of juvenile. The juvenile contends that it was error for the judge to hold her in summary criminal contempt without considering her juvenile status because under G. L. c. 119, § 53, the judge had a mandate to treat the juvenile as a child requiring "aid, encouragement and guidance." In this regard, she argues that her being an African-American girl exposes her to the risk of implicit bias, adolescent brain development makes juveniles unusually prone to emotional outbursts, and incarceration should be a last resort to avoid retraumatizing a juvenile in a form of custodial limbo.

General Laws c. 119, § 53, provides that children brought before the court "be treated, not as criminals, but as children in need of aid, encouragement and guidance." We therefore "recognize that the juvenile justice system 'is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward "the correction and redemption to society of delinquent children."' See Commonwealth v. Humberto H., 466 Mass. 562, 575-576 (2013), quoting Commonwealth v. Magnus M., 461 Mass. 459, 461 (2012),

and Metcalf v. Commonwealth, 338 Mass. 648, 651 (1959). See generally, R.L. Ireland, Juvenile Law, supra at § 1.3.

A Juvenile Court judge may impose sanctions for criminal contempt and may utilize summary contempt proceedings pursuant to rule 43 or 44. See R.L. Ireland, Juvenile Law, supra at § 1.89. However, "[a]s the Supreme Court recognized in [Miller v. Alabama, 567 U.S. 460, 471 (2012)], 'children are constitutionally different from adults for purposes of sentencing,' irrespective of the specific crimes that they have committed." Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 670 (2013), S.C., 471 Mass. 12 (2015) (Diatchenko I). Children "are less deserving of the most severe punishments." Id., quoting Graham v. Florida, 560 U.S. 48, 68 (2010). In Diatchenko I, supra at 669, the court looked to "current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior" (footnote omitted).

Judges have inherent power to impose sanctions for contempt, and a statutory mandate impairing a judge's authority under the rules of criminal procedure "should not be found by implication." See Doe v. Commonwealth, 396 Mass. 421, 422 (1985) ("statutory mandate denying a court the power to try a person for criminal contempt of its orders should not be found by implication"); Sussman v. Commonwealth, 374 Mass. 692, 695

(1978) ("Trial judges have the inherent power to deal with contumacious conduct in the court room in order to preserve the dignity, order, and decorum of the proceedings"). Although we do not conclude that § 53 itself restricts a judge's power to find a child before him or her in contempt or to impose a sanction for that contempt, a judge should take a child's characteristics into account when imposing a criminal contempt sentence.

The juvenile and amici cite to numerous articles and studies in support of their argument that a judge should take a child's status as a child and his or her past trauma into account when deciding whether to impose a punishment on a child. We need not recite them here because, as discussed supra, our cases recognize the distinction between adults and children with regard to sentencing. See, e.g., Commonwealth v. Perez, 480 Mass. 562, 568-573 (2018); Diatchenko I, 466 Mass. at 669-671.

The juvenile here was a dually involved child, being involved with both DYS and DCF. She was present in court at the time she made her contemptuous statement because she had run away from her group home and had cut off her GPS monitor. She expressed to the judge that she wanted "[one] more chance to go back to the program." When told that she would not get another chance and would instead have her relative freedom taken away by being in custody with the one dollar bail imposed, the juvenile

made what she describes on appeal as "disrespectful comments to the judge." Although her comments required a response from the judge, see Commonwealth v. Brunnell, 65 Mass. App. Ct. 423, 425, 428-429 (2006), given the circumstances of the case, the juvenile's characteristics, and the juvenile's apology to the judge, we conclude that the ninety-day sentence was outside reasonable alternatives. Compare Commonwealth v. Wilson, 81 Mass. App. Ct. 464, 467-472, 476 (2012) (defense attorney received ninety-day sentence for contempt after "angry outburst [that] covered over five pages of the transcript" and continued despite judge trying seven times to have attorney stop). The judge therefore abused her discretion, and we vacate the judgment of contempt.<sup>6</sup>

2. Criminal contempt rules. The juvenile argues that because the judge violated multiple requirements of summary criminal contempt proceedings, the Juvenile Court should have

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<sup>6</sup> Because we determine that the judge abused her discretion by not taking the juvenile's status as a child into account, and there is nothing in the record to indicate that the judge was motivated by bias, we need not reach the juvenile's argument regarding implicit bias. We do, however, reemphasize our remarks from our June 2020 letter to the members of the State bar and judiciary: "As judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal." Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020).

proceeded against her in a nonsummary contempt proceeding pursuant to rule 44, rather than a summary proceeding pursuant to rule 43. She further asserts that the judge did not follow the procedures set forth in rule 44 for a nonsummary contempt proceeding. We agree and therefore vacate the judgment of contempt on this ground as well.

"Although the power to punish contumacious conduct is inherent in the courts . . . , rule 43 narrowly limits the availability of summary contempt." Vizcaino v. Commonwealth, 462 Mass. 266, 270 (2012). "Summary contempt refers to criminal contempt punished by the judge summarily -- that is, without due process protections such as formal notice, a hearing, and 'all that goes with a conventional court trial.'" Id. at 270-271, quoting Sacher v. United States, 343 U.S. 1, 9 (1952). "Because due process protections are lost . . . , '[s]ummary punishment always, and rightly, is regarded with disfavor.'" Vizcaino, supra at 271, quoting Commonwealth v. Corsetti, 387 Mass. 1, 7 (1982). Therefore, "rule 43 is narrowly written, and narrowly construed." Vizcaino, supra, citing Corsetti, supra.

Under Mass. R. Crim. P. 43 (a), four prerequisites must be met to warrant summary punishment for contempt:

"(1) summary punishment is necessary to maintain order in the courtroom; (2) the contemptuous conduct occurred in the presence of, and was witnessed by, the presiding judge; (3) the presiding judge enters a preliminary finding at the time of the contemptuous conduct that a criminal contempt

occurred; and (4) the punishment for each contempt does not exceed three months imprisonment and a fine of \$2,000."

Rule 43 (b) provides the procedure for summary contempt, stating, in part, that "[i]f, after the hearing, the presiding judge determines that summary contempt is appropriate, the judge shall make a finding on the record of summary contempt, setting forth the facts upon which that finding is based. The court shall further announce a judgment of summary contempt in open court, enter that judgment on the court's docket, and notify the contemnor of the right to appeal." Mass. R. Crim. P.

43 (b) (3) (iii). Rule 43 does not require written findings, but that is the better practice. See Reporters' Notes to Rule 43, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure (LexisNexis 2021).

When a judge does not comply with the requirements for criminal contempt under rule 43, a summary contempt prosecution becomes a nonsummary contempt prosecution by operation of law under rule 44. See Vizcaino, 462 Mass. at 273, 274-275; Reporters' Notes to Rule 44, supra. See also Mass. R. Crim. P. 44 (a) ("All criminal contempts not adjudicated pursuant to Rule 43 shall be prosecuted by means of complaint, unless the prosecutor elects to proceed by indictment").

The judge here did not comply with the requirements of rule 43. The judge issued a separate complaint for contempt, there

was no judgment of contempt on the complaint for the underlying matter for which the juvenile was appearing in court when the contemptuous conduct occurred, and the judge did not provide the juvenile with notice of her right to appeal. See Mass. R. Crim. P. 43 (b) (3) (iii). Because the judge did not comply with the mandatory requirements of rule 43, she must have transitioned to proceeding under rule 44. See Vizcaino, 462 Mass. at 273, 274-275; Reporters' Notes to Rule 44, supra.

However, even were we to treat the matter as having proceeded under rule 44, it also did not comply with the requirements of that rule. Under Mass. R. Crim. P. 44 (c), the "contempt charges should be heard by a judge other than the trial judge 'whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality.'" Furtado v. Furtado, 380 Mass. 137, 152 (1980), quoting Mass. R. Crim. P. 44 (c). See Commonwealth v. Carr, 38 Mass. App. Ct. 179, 182 (1995). The hearing on the sentencing for the contempt did not comply with rule 44 because the judge who presided over the hearing on the alleged violations of conditions of the juvenile's release and had the contempt complaint issue, with herself listed as the complainant, was the same judge who adjudicated the complaint. See Mass. R. Crim. P. 44 (c). The procedures under rules 43 and 44 were not followed; therefore, we vacate the judgment of contempt.

3. Cruel or unusual punishment. The juvenile also argues that her ninety-day sentence constituted cruel or unusual punishment in violation of art. 26 of the Massachusetts Declaration of Rights because it did not account for juvenile specific characteristics. Because we vacate the juvenile's sentence on the above stated grounds, we do not reach the constitutional issue. However, we note that juvenile law and the juvenile courts inherently contemplate a juvenile's status, see, e.g., G. L. c. 119, § 53, and that just because there has been a violation of a protection afforded to a juvenile, that violation does not necessarily rise to the level of cruel or unusual. Compare Commonwealth v. Okoro, 471 Mass. 51, 62 (2015) (mandatory life sentence with possibility of parole after fifteen years for juvenile convicted of murder in second degree not unconstitutional), with Diatchenko I, 466 Mass. at 667 (life sentence without possibility of parole for juvenile constituted cruel or unusual punishment).

Judgment of contempt vacated.