

# Children's Law Center of Indiana



## Delinquency

8/15/11

In **T.W. v. State**, 953 N.E.2d 1120 (Ind. Ct. App. 2011), the Court affirmed the trial court's order requiring the juvenile to register as a sex offender for ten years. The juvenile, born in December 1991, was adjudicated a delinquent child on June 11, 2009, for engaging in what would be Class C felony child molesting if committed by an adult. The juvenile had molested two girls who were under the age of ten. The juvenile was made a ward of the Department of Correction and underwent counseling both while in confinement and after his release. The juvenile was discharged from the custody of DOC on September 14, 2010. On September 22, 2010, the State filed a petition to require the juvenile to register as a sex offender and a motion to have him professionally evaluated to determine his risk of reoffending. On September 24, 2010, the trial court appointed two psychologists, Anthony Flores and Kathi Lange, to evaluate the juvenile. There is no indication that the juvenile's attorney was served with the petition to require the juvenile to register, the motion for evaluation, or the order appointing the psychologists. At the hearing on February 25, 2011, the juvenile objected to the testimony of both psychologists on the basis that his counsel had not received notice of their appointment to evaluate the juvenile and on the additional basis that communications between the psychologists and the juvenile were protected by the psychologist-patient privilege. The trial court overruled these objections. Flores and Lange both testified that, despite the juvenile's treatment and counseling, there was a high risk of the juvenile committing sex offenses in the future. On February 28, 2011, the trial court entered an order finding clear and convincing evidence that the juvenile was at high risk of reoffending and ordered him to register as a sex offender for ten years. The juvenile appealed.

**The Court opined that the trial court had subject matter jurisdiction to find that the juvenile is required to register as a sex offender.** *Id.* at 1125. The juvenile's claim of lack of subject matter jurisdiction is rooted in his contention that ordering a juvenile delinquent to register as a sex offender is inconsistent with the overall purpose of the Juvenile Code, namely to "ensure that children with the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation..." (IC 31-10-2-1(5)). Citing **K.J.P. v. State**, 724 N.E.2d 612, 615 (Ind. Ct. App. 2000), the Court noted its holding that requiring a juvenile to register as a sex offender "does not constitute an additional penalty." *T.W.* at 1122. The juvenile contended that **K.J.P.** necessarily was overruled by the Indiana Supreme Court's decision in **Wallace v. State**, 905 N.E.2d 371 (Ind. 2009). The **Wallace** Court held that requiring

an adult offender to register as a sex offender constitutes additional punishment in violation of the Indiana Constitution's ban on ex post facto laws, where the offender was charged, convicted, and served a sentence for a crime before the Indiana Sex Offender Registration Act took effect. Wallace at 384. T.W. at 1122. The Court noted that in C.E.K. II v. State, 928 N.E.2d 258 (Ind. Ct. App. 2010), *trans. denied*, the Court had rejected the claim that Wallace overruled K.J.P. T.W. at 1122. The Court saw no reason to reconsider the result reached in C.E.K. T.W. at 1122. The Court opined that the Juvenile Code does not absolutely prohibit a juvenile court from imposing what might be called "punishment" upon a juvenile. Id. at 1122-23. Observing that another of the stated purposes of the Juvenile Code is to "promote public safety and individual accountability by the imposition of appropriate sanctions..." (IC 31-10-2-1(11)), the Court said that the sex offender registry is directly related to the protection of the public. Id. at 1123. The Court opined that, to the extent that requiring a juvenile delinquent to register as a sex offender may be "punitive," the policy and purpose of the Juvenile Code do not bar the imposition of such a requirement. Id.

The Court said that the juvenile failed to explain how the general purposes and policy of the Juvenile Code would divest a juvenile court of subject matter jurisdiction to issue a sex offender registration order. Id. The Court noted that the subject matter jurisdiction of Indiana's circuit courts is entirely a creature of the legislature, and Montgomery Circuit Court had subject matter jurisdiction over the juvenile's proceedings. IC 33-23-7-1. Id. The Court concluded that, in the absence of any constitutional constraints, it was entirely within the General Assembly's prerogative to grant Indiana courts the subject matter jurisdiction to enter orders requiring certain juveniles to register as sex offenders. Id.

**The Court found that the trial court did not abuse its discretion in overruling the juvenile's objections to the testimony of the psychologists who had evaluated him.** Id. at 1125. The Court first addressed the juvenile's argument that the testimony of psychologists Flores and Lange should have been excluded because his attorney failed to receive advance notice of the juvenile's examinations by the psychologists. The Court responded that, assuming without deciding that the juvenile's attorney should have received notice of the examinations, such error could be compared to a discovery violation in failing to disclose evidence. Id. at 1123. The Court said that a continuance is usually the proper remedy for such a violation, unless the violation is flagrant and deliberate, or so misleading or in such bad faith as to impair the right to a free trial. Id. at 1123-24. The Court opined that, here, there is nothing to indicate deliberate malfeasance or bad faith by the State in failing to provide the juvenile's attorney with advance notice of his examinations by Flores and Lange. Id. at 1124. The Court could not say the trial court abused its discretion in refusing to sustain the juvenile's objections to Flores's and Lange's testimony on this basis. Id.

The juvenile's second argument was that permitting Flores and Lange to testify over his objections violated IC 25-33-1-17, which provides that a licensed psychologist may not disclose any information acquired from persons the psychologist has dealt with in a professional capacity except for six circumstances. The Court concluded that IC 25-33-1-17(6), "Circumstances under which privileged communication is abrogated under the laws of Indiana" applied to this case. Id. The Court noted that IC 11-8-8-4.5(e), which tasks the trial court with deciding whether a juvenile qualifies as a "sex offender" for purposes of the sex offender registry, provides that "the court *shall* consider expert testimony concerning whether a child is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult" (emphasis in opinion). Id. The Court found that it would be impossible for a trial court to carry out this statutory mandate if it could not, because of the statutory psychologist-patient privilege, receive testimony from psychologists or other mental health experts who have examined the juvenile. Id. The Court also observed that IC 31-37-8-4.5(b) provides, with respect to a mental health evaluation ordered by a juvenile court, "a statement communicated to an evaluator in the evaluator's official capacity may not be admitted as evidence against the child on the issue of whether the child committed a delinquent act or a crime." Id. The Court held that the clear import of this statute is that such statements are otherwise admissible for purposes that the statute does not expressly exclude, which would include sex offender registry proceedings and whether there is a likelihood that the juvenile will reoffend. Id. at 1124-25. The Court also found its holding in this case consistent with previous opinions where statutory privileges were found to be abrogated in the context of termination of parental rights proceedings; namely, Ross v. Delaware County Dep't of Pub. Welfare, 661 N.E.2d 1269 (Ind. Ct. App. 1996), *trans. denied* (psychologist-patient privilege abrogated) and Shaw v. Shelby County Dep't of Pub. Welfare, 612 N.E.2d 557 (Ind. 1993) (physician-patient privilege abrogated). T.W. at 1125. The Court concluded that sex offender registry proceedings under IC 11-8-8 necessarily present a situation in which the privilege "is abrogated under the laws of Indiana" by implication, at least with respect to the question of whether a juvenile is likely to reoffend. Id.