STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1604

In the Matter of the Welfare of: D. B. A.

Filed May 5, 2009
Affirmed
Poritsky, Judge[*]

Hennepin County District Court
File No. 27-JV-08-3777

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Freyer, Assistant County Attorney, C-2000 Government Center, 80 South Eighth Street, Minneapolis, MN 55487 (for respondent)

Leonardo Castro, Hennepin County Public Defender, Kellie M. Charles, Assistant Public Defender, 701 Fourth Avenue South, Suite 1400, Minneapolis, MN 55415 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Poritsky, Judge.

U N P U B L I S H E D O P I N I O N

PORITSKY, Judge

Appellant challenges the juvenile court's decision to certify the case for adult prosecution, arguing that the juvenile court (1) erroneously found that retaining jurisdiction over appellant's case would not serve public safety; (2) improperly

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

considered evidence of uncharged conduct; and (3) erred in denying his motion to dismiss for lack of probable cause. We affirm.

FACTS

On April 6, 2008, police observed 15-year-old appellant D.B.A. run a stop sign. When they signaled him to pull over, however, D.B.A. accelerated to approximately 80 miles per hour and led the police on a high-speed chase down Lake Street in Minneapolis. In the course of the chase, police observed D.B.A. drive through multiple red lights without slowing down. They also observed him nearly lose control of the vehicle at least twice.

At some point, the police briefly lost sight of D.B.A.'s car, which had gotten "many blocks ahead of them." After deciding to terminate their pursuit, the police noticed a cloud of dust and smoke billowing from a major intersection in the vicinity. When they arrived on the scene, the police found D.B.A.'s car, which had struck another vehicle crossing the intersection. Witnesses told the police that D.B.A. had fled on foot into a nearby store, where D.B.A. was apprehended shortly thereafter.

After waiving his *Miranda* rights, D.B.A. acknowledged that he both saw and heard the police cars pursuing him but that he did not stop because he had just gotten out of jail for stealing a car and did not want to go back. D.B.A. also told police that he did not know how fast he was going during the chase and that he attempted to stop when he saw the other vehicle cross in front of him but was unable to do so.

The car D.B.A. struck contained three people. The driver, a 26-year-old mother, was pronounced dead at the scene. Her six-year-old son suffered a lacerated spleen, a

fractured pelvis, a broken left femur, and a possible brain injury. A 13-year-old neighbor suffered minor injuries. As a result, D.B.A. was charged with one count each of causing death and causing great bodily harm while fleeing a peace officer, Minn. Stat. § 609.487, subd. 4(a), (b) (2006). He was also charged with four counts of felony criminal vehicular homicide, two counts alleging "grossly negligent" operation, Minn. Stat. § 609.21, subds. 1(1), 1a(a), 1a(b) (2006), two counts alleging "[leaving] the scene of [an] accident," *id.*, subds. 1(7), 1a(a), 1(b) (2006); and two counts of gross-misdemeanor criminal vehicular operation, based on the lesser injuries to the 13-year-old neighbor, one count alleging gross negligence, *id.* subds. 1(1), 1a(d) (2006), and one count alleging leaving the scene of an accident, *id*., subds. 1(7), 1a(d).

The state sought to have D.B.A. tried as an adult. Shortly before the scheduled certification hearing, D.B.A. moved to dismiss the proceedings for lack of probable cause, and alternatively, to have a contested probable-cause hearing. The juvenile court denied D.B.A.'s motions because the evidence contained in the "paper record" and the inferences that could reasonably be drawn from it were sufficient to find probable cause. In doing so, the juvenile court noted that the grounds D.B.A. raised in support of finding no probable cause—whether D.B.A.'s driving amounted to "gross negligence" and whether D.B.A. was still "fleeing" when he hit the other car—were essentially factual disputes for the jury to resolve.

At the adult-certification hearing, the juvenile court heard from a number of witnesses, including three experts who had evaluated D.B.A. Two of the experts, the investigating probation officer and a licensed psychologist, were called by the state, and

one, a licensed psychologist with a Ph.D. in clinical psychology, was called by D.B.A. The juvenile court found that there was clear and convincing evidence that retaining the case in the juvenile system would not serve the public safety and certified the case for adult prosecution. This appeal followed.

D E C I S I O N

D.B.A. challenges the juvenile court's decision to certify the case for adult prosecution. A juvenile court has broad discretion in deciding whether to certify a case for adult prosecution. *In re Welfare of D.T.H.*, 572 N.W.2d 742, 744 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). We will not reverse its decision absent an abuse of that discretion. *Id.*

I.

D.B.A. argues that the state failed to prove that retaining juvenile jurisdiction would not serve public safety. Because D.B.A. was 15 years old at the time of the alleged offenses, there is no presumption that he is to be certified. *See* Minn. Stat. § 260B.125, subd. (3) (2008) (listing requirements for presumption for adult certification). For offenses not subject to presumptive certification, a juvenile court may certify the case for adult prosecution only if it finds by clear and convincing evidence that "retaining the proceeding in juvenile court does not serve public safety." Minn. R. Juv. Delinq. P. 18.06, subd. 2. On appeal, we will not disturb the juvenile court's findings on this issue unless they are clearly erroneous. *In re Welfare of E.Y.W.*, 496 N.W.2d 847, 850 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993).

When evaluating the public-safety concerns regarding adult certification, the juvenile court must consider six factors:

> (A) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Minnesota Sentencing Guidelines, the use of a firearm, and the impact on any victim;
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> (B) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Minnesota Sentencing Guidelines;
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> (C) the child's prior record of delinquency;
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> (D) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
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> (E) the adequacy of the punishment or programming available in the juvenile justice system; and
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> (F) the dispositional options available for the child.

Minn. R. Juv. Delinq. P. 18.06, subd. 3; *see also* Minn. Stat. § 260B.125, subd. 2 (2006) (listing equivalent factors). In doing so, the juvenile court must give greater weight to the seriousness of the offense and the child's prior record of delinquency than to any of the other factors. Minn. R. Juv. Delinq. P. 18.06, subd. 3. Taken together, these factors "are intended to assess whether a juvenile presents a risk to public safety and thus aim to predict whether a juvenile is likely to offend in the future." *In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000). Here, the juvenile court found that five of the six factors weighed in favor of certification and that only one, the availability of extended juvenile jurisdiction as a dispositional option, weighed against it. D.B.A. argues that the findings favoring certification are clearly erroneous. We address each factor in turn.

A. The seriousness of the alleged offense

This factor is one of the two factors to which the juvenile court must give greater weight. The juvenile court found that this factor weighed in favor of certification. D.B.A. argues that the seriousness of the offense should have been weighed as a "neutral" factor. Essentially, he argues that the juvenile court erred by focusing on the consequences of his offense—causing death—rather than the circumstances of the offense itself. D.B.A. attempts to characterize his offense as an unfortunate traffic accident, in which the death of the mother was not the product of any mens rea on his part. But as the juvenile court noted, and we agree, the required mens rea in this case is that the offender deliberately fled from the police. Here, D.B.A. "admitted to fleeing police, thereby admitting to the requisite mens rea."

Moreover, as the district court found, the accident had a serious impact upon the victims. The mother lost her life, and her husband stated that the death of his wife, in addition to the financial impact upon the family, "makes him feel like . . . his family has been 'cut in half, destroyed.'" The decedent's six-year-old child suffered a pelvic fracture, a broken femur, and head injuries. At the time of the hearing, the extent of the son's head injuries had not been determined; he was confined to a wheelchair and needed to be accompanied by a personal care attendant. He was constantly asking where his mother is, but he did not understand the explanations. The juvenile court correctly characterized the impact on the victims as "severe."

Finally, the psychologist called by the state concluded that this factor favors certification, and the psychologist called by D.B.A. concluded that this factor could form

a reasonable argument in support of certification. Thus, the juvenile court's finding that "[t]his was a very serious offense" is not clearly erroneous.

B. The culpability of the child

The juvenile court found D.B.A. to be "fully culpable for his offenses." The court noted: "There were no physical or mental health concerns that impaired D.B.A's ability to make reasoned choices," and the court pointed out that the offense was very similar to prior offenses that D.B.A. had committed. The court concluded: "There are no factors mitigating [D.B.A.'s] responsibility."

In support of his argument that this factor weighs against certification, D.B.A. cites various authorities that stand for the general proposition that juveniles' lack of maturity and undeveloped thought processes make them less culpable than adults. He appears to be arguing that a 15-year-old can never be culpable within the meaning of the certification statute. But the statute, which requires the juvenile court to consider culpability, does provide for certification of a 15-year-old in certain circumstances. Minn. Stat. § 260B.125, subds. 1, 4; *see* Minn. R. Juv. Del. P. 18.06, subd. 3(A).

In any case, D.B.A. offers no specific reason why *he* is less culpable beyond pointing to his own expert's opinion that his offense was the product of the "raw impulsivity and compromised decision-making" of a 15-year-old. The expert stated that in committing the offenses, D.B.A. lacked planning, intention, or willful misconduct. The juvenile court carefully considered the expert's opinion and rejected it. We agree. Although D.B.A. may not have meant to crash into the decedent's car, he did mean to flee from the police. *Cf. State v. Johnson*, 374 N.W.2d 285, 288-89 (Minn. App. 1985)

(noting that fleeing an officer is a specific-intent crime), *review denied* (Minn. Nov. 18, 1985). And crashing into the decedent's car was the direct result of D.B.A.'s deliberate choice to lead the police on a high-speed chase. Thus, the juvenile court did not err in concluding that this factor weighed in favor of certification.

C. The child's prior record of delinquency

This factor, like the seriousness of the offense, is one of the two factors to which the juvenile court must give greater weight. The juvenile court found that this factor weighed in favor of certification.

D.B.A. argues that this weighs against certification because his prior delinquency record is limited to three felonies—two auto-thefts and one theft from a person—and one petty misdemeanor disorderly conduct. To support his argument, D.B.A. relies on *Welfare of H.S.H.*, in which we reversed a certification in part because the juvenile court failed to explain how the appellant showed "deeply ingrained, escalating criminal behavior that presents a threat to public safety." 609 N.W.2d at 263. But "[w]e do not require a lengthy history of contact with the juvenile justice system" to satisfy this factor. *In re Welfare of D.T.N.*, 508 N.W.2d 790, 795 (Minn. App. 1993), *review denied* (Minn. Jan. 14, 1994). In any case, *H.S.H.* is not persuasive; there the juvenile court failed to connect the appellant's prior history to any threat posed to public safety, 609 N.W.2d at 263, while here, the juvenile court found that D.B.A.'s prior offenses involved similar underlying facts that demonstrated D.B.A.'s "inability to control himself." This case is a repetition of one of D.B.A.'s prior auto thefts in which he stole a car, fled from police, and crashed into a pole, only there the results were far less tragic. For that offense,

D.B.A. was placed at Thistledew, a short-term placement, lasting typically 90 to 120 days, with both correctional and treatment components. Nine days after he was released from that placement, apparently neither rehabilitated nor deterred, D.B.A. committed the present offenses. That sequence of events demonstrates a "deeply ingrained, escalating criminal behavior that presents a threat to public safety." *H.S.H.*, 609 N.W.2d at 263. Thus, the juvenile court's finding on this factor is not clearly erroneous.

D. The child's programming history

The juvenile court found that this factor weighs in favor of certification. D.B.A., challenging this finding, claims that he did quite well at previous programs in the juvenile system. He specifically argues that he "did extremely well when in structured programming, like Camp Thistledew." But the current offenses occurred only nine days after he was released from Thistledew. In spite of the fact that he did "extremely well" in the program, the program was completely ineffective in changing his behavior.

D.B.A. has also been in several community-based programs, including sentence-to-serve, Project Support, electronic home monitoring, Life Long Mentoring, Katahdin, and Keystone IDT. He admits that he "did not do well with community-based programming."

We note that D.B.A.'s expert testified that this factor "equally favor[ed] certification and EJJ designation," and we conclude that the juvenile court's finding is not clearly erroneous.

E. Adequacy of punishment or programming available in the juvenile justice system.

The juvenile court, after reviewing dispositions available for fleeing a peace officer resulting in death—the most serious charge—in adult court and in juvenile court, including EJJ, found that this factor weighed in favor of certification. D.B.A., disputing this finding, argues that there are three programs that would have accepted him. The juvenile court took note of D.B.A.'s prior "intervention history and the fact that other juvenile programming is substantially similar to that which [he] has already completed" and concluded that D.B.A. would not receive adequate punishment or programming in EJJ or with a juvenile disposition. The juvenile court's conclusion is reasonable, given that D.B.A.'s previous experience with juvenile-system punishment and programming was inadequate to deter him from committing a similar offense only nine days after being released.

F. Dispositional options available for the child.

The juvenile court found that the final factor—dispositional options available for D.B.A.—weighed against certification. Neither D.B.A. nor the state challenges this finding. And as the juvenile court's findings that the other five factors all weighed in favor of certification, findings that are not clearly erroneous, a favorable finding on this factor is insufficient to warrant reversal.

II.

D.B.A. argues that the juvenile court erred by admitting and considering evidence of past conduct that did not result in an adjudication of delinquency. This argument is not supported by the record.

D.B.A. correctly observes that the supreme court recently held that a juvenile court may not consider "uncharged behavior reflected in school and institutional records" when determining the prior-record-of-delinquency factor. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 710 (Minn. 2008).[1] D.B.A.'s argument fails, however, because here the juvenile court explicitly stated that it "considered only [D.B.A.]'s prior adjudications of delinquency and not uncharged behavior reflected in school or institutional records" in accordance with *N.J.S.* Thus, any error in admitting such evidence was harmless because it was specifically excluded from the decision-making process. *Cf. In re Conservatorship of Smith*, 655 N.W.2d 814, 820 (Minn. App. 2003) (stating that erroneous admission of evidence does not require reversal if it did not prejudice the party appealing the ruling).

But D.B.A. further argues that the juvenile court's mere exposure to such evidence nevertheless requires reversal because such evidence "no doubt . . . played a role in influencing the court" when evaluating his prior juvenile history. D.B.A. makes no showing, other than his own belief, that the juvenile court was so influenced. Moreover,

[1] D.B.A.'s adult certification was under advisement by the juvenile court when *N.J.S.* was released. The supreme court's ruling relates only to the prior-record factor. The court expressly noted that it was not error for the juvenile court to consider records other than delinquency adjudications in ruling on the factors of programming history; adequacy of available punishment or programming; and dispositional alternatives. 753 N.W.2d at 711.

the record reflects that the juvenile court's evaluation on this issue focused on a prior adjudication for auto theft. The juvenile court noted the "remarkabl[e] similar[ity]" between the present case and the prior case, which had also involved D.B.A.'s "fleeing from the police and resulted in [D.B.A.] losing control of the vehicle and crashing into a pole." And because this is sufficient to sustain the juvenile court's finding on this factor, we must presume that the juvenile court disregarded any evidence of D.B.A.'s unadjudicated misbehavior when considering this factor. *See Reeves v. Sawyers*, 88 Minn. 218, 222, 92 N.W. 962, 963 (1903) (presuming that district court disregards evidence that was improperly received when findings are supported by other, evidence properly admitted).

III.

Finally, D.B.A. argues that the juvenile court erred by denying his motion to dismiss for lack of probable cause and, alternatively, to hold a contested probable-cause hearing. A juvenile court may certify a child to be tried as an adult only if it finds that there is probable cause to believe the child committed the offenses alleged by delinquency petition. Minn. Stat. § 260B.125, subd. 2(5). For purposes of a precertification probable-cause determination, the facts supporting probable cause may be contained in the charging document and any attached police reports, Minn. R. Juv. Delinq. P. 6.05, subd. 1, which the juvenile court must presume are true, *In re Welfare of D.W.*, 731 N.W.2d 828, 834 (Minn. App. 2007). The juvenile court has broad discretion in determining whether probable cause exists, and we will not disturb its findings unless they are clearly erroneous. *Welfare of E.Y.W.*, 496 N.W.2d at 850.

D.B.A. first argues that the facts before the juvenile court demonstrate that he was no longer "fleeing" from the police or driving in a negligent manner when he struck the decedent's car. In support of this, he relies on the following facts: (1) the pursuing officers briefly lost sight of D.B.A.'s vehicle; and (2) the accident-reconstruction report estimated D.B.A.'s speed to be 48 miles per hour at the moment his car came in contact with the decedent's car, causing, in the words of the report, a "deep intrusion into the driver's compartment." D.B.A. told the arresting officers that he attempted to stop when he saw the decedent's car cross in front of him but was unable to. Apparently he slammed on his vehicle's brakes to avoid an imminent collision, which would thwart his successful flight, allowing the inference that he was going considerably faster than 48 miles per hour when he first saw the decedent's car cross in front of him.

D.B.A. also argues that the juvenile court erred in denying his motion to dismiss without holding a contested hearing. We disagree. The juvenile court was entitled to rely on the contents of the "paper record," which contained these underlying facts. This is because the primary function of a contested probable-cause hearing is to "screen[] out cases which, for one reason or another, ought not to be prosecuted" when the record as a whole contains an insufficient factual basis to support the offenses charged. *State v. Florence*, 306 Minn. 442, 447 n.4, 453-54, 239 N.W.2d 892, 896-97 n.4, 900 (1976). Here, the juvenile court correctly reasoned that deciding which of these competing inferences to believe was a question of fact for the jury to resolve at trial, not at a probable-cause hearing. *See* Minn. R. Juv. Delinq. P. 6.05, subd. 1 (providing that the underlying facts may be contained in the charging document and any attached police

reports); *Welfare of D.W.*, 731 N.W.2d at 834 (stating that a motion to dismiss for lack of probable cause should be denied if the facts in the record, including those alleged in the delinquency petition, would preclude a directed verdict of acquittal (citing *Florence*, 306 Minn. at 459, 239 N.W.2d at 903).

Thus, we conclude the juvenile court did not err in (1) denying D.B.A.'s probable-cause motion and (2) certifying the case for adult prosecution.

Affirmed.

Judge Bertrand Poritsky