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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1996**

In the Matter of the Welfare of: W. H. G., Child

**Filed June 16, 2009
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. 62-JV-08-3503

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a district court order certifying the second-degree-murder proceeding against appellant for prosecution in adult court, appellant argues that the district court erred in concluding that public safety was not served by retaining the proceeding in juvenile court. We affirm.

FACTS

On August 23, 2008, appellant W.H.G. attended a party at the home of a person known to be a member of a rival gang. Appellant arrived at the party with a loaded handgun. As appellant was leaving, he saw the victim arriving on a bike. Appellant and the victim previously had been involved in a gang-related fight. Appellant and the victim began arguing, and according to appellant, the victim made a gesture indicating that he was ready to fight. Appellant stated that when he could no longer see his sister or his cousin in the crowd, he panicked and began shooting. He fired six shots, killing the victim. Appellant fled the scene but was identified by witnesses at the party.

Appellant was arrested and appeared in juvenile court on a charge of second-degree murder. The state filed a motion to certify the proceeding for adult prosecution. The juvenile court ordered psychological and probation-certification reports. The psychological report was prepared by Patricia K. Orud, and the probation-certification study was prepared by Toua Lee. Orud opined that two certification factors – the seriousness of the offense and culpability of the child – favored adult certification, while the other four certification factors favored extended juvenile jurisdiction (EJJ). She recommended retaining appellant under EJJ status. Lee opined that two certification factors – prior record of delinquency and programming history – favored EJJ, while the other four factors favored adult certification. He recommended adult certification. Following a certification hearing at which Lee and Orud testified regarding the findings in their reports, the juvenile court certified the proceeding for adult prosecution. The

court determined that five certification factors favored certification and one, programming history, favored EJJ. This appeal followed.

D E C I S I O N

“A district court’s decision to certify a juvenile for adult prosecution is entitled to considerable latitude.” *In re Welfare of H.S.H.*, 609 N.W.2d 259, 261 (Minn. App. 2000) (quotation omitted). We will not reverse a “certification order unless the district court’s findings are clearly erroneous so as to constitute an abuse of discretion.” *Id.* (quotation omitted). “For purposes of the certification hearing, the charges against the child are presumed to be true.” *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

“When a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.” Minn. Stat. § 260B.125, subd. 1 (2008). Because appellant was 15 years old at the time of the offense, it was not presumed that the proceeding would be certified. *Id.*, subd. 3(1) (2008). Therefore, the district court could order certification only if it found that

the prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety. If the court finds that the prosecutor has not demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety, the court shall retain the proceeding in juvenile court.

Id., subd. 2(6)(ii) (2008). The certification statute sets out the following six factors that the district court must consider when determining whether retaining the proceeding in juvenile court serves public safety:

(1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;

(2) 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 Sentencing Guidelines;

(3) the child's prior record of delinquency;

(4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;

(5) the adequacy of the punishment or programming available in the juvenile justice system; and

(6) the dispositional options available for the child.

Id., subd. 4 (2008). The statute also states, "In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision." *Id.* If the district court decides not to order certification, it may designate the proceeding as an EJJ prosecution. *Id.*, subd. 8 (2008).

The district court determined that appellant's programming history supported EJJ, while the other five factors supported certification. Appellant argues that the district court erred because the state failed to meet its burden of proving by clear and convincing evidence that public safety is not served by retaining the case in juvenile court.

1. *Seriousness of the Offense*

“Certification cases generally involve violent crimes against persons, such as murder or assault.” *H.S.H.*, 609 N.W.2d at 262. Appellant acknowledges that second-degree murder is a serious offense, but he argues that because the fact that he fired six shots into a crowd of teenagers is not an aggravating factor recognized by the sentencing guidelines, the district court impermissibly considered that fact when evaluating the seriousness of the offense. But the district court did not consider the risk to others when evaluating the seriousness of the offense; it only considered the risk to others when evaluating appellant’s culpability. In evaluating the seriousness of the offense, the district court considered only the impact on the victim, the seriousness of murder in terms of community safety, and the fact that a firearm was used. These three considerations are authorized by the statute, and the district court properly concluded that the seriousness of the offense favored certification.

2. *Culpability of the Child*

Appellant argues that the district court incorrectly determined that there were no mitigating factors present in the commission of the offense. Citing Orud’s diagnoses of depression and post-traumatic stress disorder and the fact that he is physically small and felt threatened by the victim, who was a member of a rival gang, appellant argues that his crime was mitigated under the sentencing-guidelines provision that allows the court to consider evidence that “[o]ther substantial grounds exist which tend to excuse or mitigate the offender’s culpability.” Minn. Sent. Guidelines II.D.2.a.(5).

But the record does not establish “substantial grounds” mitigating appellant’s culpability. Although appellant and the victim previously had been in a fight and were in rival gangs, appellant willingly went to the party expecting that rival gang members would be there. Despite diagnosing appellant with depression and post-traumatic stress disorder, Orud concluded that appellant had no limitations on his ability to think, plan, and make choices and judgments. Lee’s report and testimony also indicated that there were no factors mitigating appellant’s culpability. Thus, the record supports the finding that there were no mitigating factors, and the district court did not err by concluding that the culpability factor weighed in favor of certification.

Appellant argues that his age is, by itself, a mitigating factor. But the statute does not permit the court to consider age as a mitigating factor and, instead, takes age into account by allowing certification only for those who have attained the age of 14 years and limiting presumptive certification to juveniles who are 16 or 17 years old. Minn. Stat. § 260B.125, subds. 1, 3(1).

3. Prior Record of Delinquency

A court may consider the gang-related nature of an offense when weighing this factor. *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996). However, courts may consider only “records of petitions to juvenile court and the adjudication of alleged violations of the law by minors.” *N.J.S.*, 753 N.W.2d. at 710. It is “error to consider uncharged behavior reflected in school and institutional records when evaluating the prior-record-of-delinquency factor.” *Id.*

Appellant argues that the district court erred by considering his gang-related activities because that conduct was not the subject of a juvenile court petition. Both experts' reports discussed appellant's gang-related behavior and his truancy. However, none of appellant's charged delinquent behavior pertained to either gang activity or truancy. Therefore, the district court erred by considering appellant's gang-related behavior and his truancy under the prior-record-of-delinquency factor.

Appellant's record of delinquency was limited to two misdemeanor petitions and an offense that resulted in a petition charging one misdemeanor and one felony. Appellant pleaded guilty to the misdemeanor charge, and the felony charge was dismissed. This factor does not favor certification.

4. *Programming History*

"Rejection of prior treatment efforts indicates a juvenile's unwillingness to submit to programming in a meaningful way." *In re Welfare of U.S.*, 612 N.W.2d 192, 196 (Minn. App. 2000). The juvenile court determined that "[appellant's] lack of programming history favors [appellant] in [EJJ]." Respondent concedes that appellant has little programming history. Appellant argues that although the juvenile court found that this factor weighs in favor of EJJ prosecution, the court erred because it considered irrelevant information concerning school attendance, gang membership, and his MAYSI-2 score. Appellant argues that, under *N.J.S.* only charged offenses can be considered when determining programming history. But *N.J.S.* only prohibits considering uncharged behavior when evaluating the child's prior record of delinquency. *N.J.S.*, 753 N.W.2d at 710. When weighing programming history, the *N.J.S.* court concluded that the district

court did not err by considering the juvenile's "demonstrated defiant and uncooperative behavior during his detention and civil commitment, as well as during pre-offense voluntary programming." *Id.* at 711.

The record supports the district court's conclusion that the lack of programming history favors EJJ. The references to gang membership, school attendance, and the MAYSI-2 score were all in the context of reports prepared by appellant's probation officer regarding appellant's compliance with the conditions of his probation. Because this previous experience with probation is relevant to appellant's programming history, the district court did not err by considering this information as support for its conclusion that appellant's lack of programming history favored EJJ.

5. and 6. Adequacy of the Juvenile System and Dispositional Options

With regard to the adequacy of punishment or programming, the juvenile court determined that "[a] longer period of confinement for [appellant] is justified under the facts of this case because the juvenile system's jurisdiction would be too limited due to [appellant's] age and violent nature." The court concluded that "[t]he gravity of [appellant's] offense and his engrained gang-like lifestyle favors adult certification in order to protect public safety and punish him for his violent crime." With regard to dispositional options, the juvenile court concluded that "[t]here is no single program that will meet [appellant's] therapeutic needs in the time available under an [EJJ] status" and, accordingly, that this factor favors adult certification.

Appellant argues that the state failed to meet its burden of proof regarding the adequacy of juvenile punishment or programming because it focused on the length of the

potential sentence available, not the nature of the treatment itself. But because the statute permits the court to consider the adequacy of “punishment,” the length of a sentence is relevant. Lee’s report states that retention in juvenile court would not provide adequate consequences for appellant’s conduct or adequate protection of public safety. And Orud testified that adequacy of punishment is beyond her scope of expertise as a psychologist.

Appellant argues that “the retribution of an adult sentence is not proportional when imposed on a juvenile whose culpability or blameworthiness is diminished by youth and immaturity.” But as we have already stated, the statute accounts for age and allows the court to make a determination regarding culpability and does not permit the court to separately consider age as a factor affecting the adequacy of punishment. Minn. Stat. § 260B.125, subds 1, 3(1), 4.

Appellant also argues that the court improperly considered uncharged behaviors when weighing these factors. Appellant asserts that “this conduct is irrelevant because only petitions to juvenile court and adjudications are relevant considerations.” But as we have already discussed, *N.J.S.* applied the prohibition against considering uncharged behaviors only to the prior-record-of-delinquency factor, and there is no authority indicating that courts may not consider uncharged conduct when considering other factors.

Appellant argues that the state failed to cite any specific programs that were inadequate to serve his needs. But the record supports the conclusion that there are no adequate dispositional options to meet appellant’s needs. Orud testified as follows:

Q: As it relates to programming, do you know of any treatment program that would adequately address [appellant's] treatment needs in the juvenile system . . . ?

A: Okay. I do not name a specific program in my recommendations, I outline what I believe are the necessary components of the program. And so [appellant] needs very long term, two years or more of residential programming, with a high level of services transitioned back to the community with a high level of monitoring after he is done with the residential portion. Thus, my limited knowledge of programming in the juvenile justice system indicates that that's a rare set of programming components in Minnesota or even out-state programming, it's a much longer time than the usual programming that's offered.

Q: So at this point you cannot name a program that would meet his treatment needs?

A: I could not name a program that would meet all of the needs as I outlined them.

Lee testified:

Q: What had you concluded regarding the adequacy of punishment within the juvenile system?

A: We concluded that in the juvenile system it was not sufficient and that the adult system could provide for a longer period of public safety. And that difference, as indicated in the certification study, was I believe about 20 years compared to EJJ, about 22/23 years compared to straight juvenile.

....

Q: Mr. Lee, are you aware of any programs that are available within the juvenile system within Ramsey County that would address the treatment needs of [appellant] that were described by Ms. Orud?

A: No, not as described by Ms. Orud.

This testimony supports the juvenile court's conclusion that the dispositional options available in juvenile court are not adequate.

Appellant argues that the Minnesota Correctional Facility at Red Wing would be adequate to meet the needs described by Orud. But there is no evidence of this facility as

a dispositional option in the record, and the district court was not given an opportunity to consider it as a potential dispositional option.

Remedy

Because the district court erred by considering appellant's gang-related activity and truancy when weighing the prior-record-of-delinquency factor, we must consider whether this error warrants reversal. "[W]hether the error requires reversal depends on the weight given to the inadmissible records and the weight given the five other factors." *N.J.S.*, 753 N.W.2d at 710. In *N.J.S.*, because all five other factors weighed in favor of certification, the court affirmed the certification despite erroneous consideration of uncharged behavior. *Id.* at 711.

Here, the district court acknowledged that appellant had a "minimal juvenile record." The weight given to the inadmissible records was substantial, because without considering gang-related activity, the prior-record-of-delinquency factor would not favor certification, and that factor is one of the two factors mandated by statute to be given greater weight. Minn. Stat. § 260B.125, subd. 4. Unlike *N.J.S.*, where all five other factors weighed in favor of certification, only four of the other factors here weighed in favor of certification. This distinction, however, is not sufficient to warrant reversal. The other factor that is to be given greater weight, the seriousness of the offense, weighed heavily in favor of certification. The charged offense was extremely serious; it resulted in the loss of the victim's life, presented a serious threat to community safety, and involved the use of a firearm. Furthermore, the record supports the conclusion that appellant's culpability, adequacy of the juvenile system, and dispositional options all

favor certification. Under these circumstances, despite the district court's error, the record supports the conclusion that retaining the proceeding in juvenile court does not serve public safety.

Affirmed.