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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1491**

In the Matter of the Welfare of: E. G. M.-P., Child

**Filed February 2, 2010  
Affirmed  
Worke, Judge**

Hennepin County District Court  
File No. 27-JV-09-2266

Marie L. Wolf, Interim Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant E.G.M.-P.)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent state)

Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and  
Worke, Judge.

**UNPUBLISHED OPINION**

**WORKE**, Judge

Appellant challenges his adult certification, arguing that the district court abused its discretion by certifying him when he rebutted the presumption in favor of certification by presenting evidence that extended juvenile jurisdiction (EJJ) will serve public safety. We affirm.

## DECISION

In March 2009, a complaint was filed charging then-16-year-old appellant E.G.M.-P. with two counts of attempted second-degree murder committed for the benefit of a gang. The state simultaneously petitioned for appellant's certification for adult prosecution. Following a certification hearing, the district court issued an order certifying appellant as an adult. "A district court has considerable latitude in deciding whether to certify a case for adult prosecution. Its decision will not be reversed unless the court's findings are clearly erroneous so as to constitute an abuse of discretion." *In re Welfare of D.T.H.*, 572 N.W.2d 742, 744 (Minn. App. 1997) (quotations and citations omitted), *review denied* (Minn. Feb. 19, 1998). For purposes of certification, the charges against the child are accepted as true. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

The general rule is that children charged with a crime are to remain in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2008). However, "[c]ertification is presumed . . . if the child was [at least] 16 . . . years old at the time of the offense and the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes." *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007).

Appellant was 16 years old at the time of the offense and is currently 17 years old. Appellant was charged with attempted second-degree murder committed for the benefit

of a gang, which would result in a presumptive prison sentence. Therefore, certification is presumed.

Once the state establishes the presumption, “the juvenile may rebut the presumption of certification by clear and convincing evidence that retaining the proceeding in juvenile court serves public safety.” *Id.* (quotation omitted). The clear-and-convincing standard “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (quotation omitted). Whether retaining the proceeding in juvenile court serves public safety is governed by Minn. Stat. § 260B.125, subd. 4 (2008), which instructs courts to consider six factors:

- (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.

A certification may not be based solely on the seriousness of the alleged offense. *In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). But “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." Minn. Stat. § 260B.125, subd. 4. If the child rebuts the presumption, the proceeding remains in juvenile court. *Id.*, subd. 3 (2008). If the presumption is not rebutted, the case must be certified. *Id.* Appellant claims that he has rebutted the presumption.

#### *Seriousness of Offense*

In considering the seriousness of the offense, the district court looks to (1) the presence of aggravating factors, (2) the use of a firearm, and (3) the impact on any victim. *See id.*, subd. 4(1). Certification cases usually involve crimes of violence. *See In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000) ("Certification cases generally involve violent crimes against persons, such as murder or assault.").

This case involves crimes of violence—two counts of attempted second-degree murder committed for the benefit of a gang. The district court concluded that the offenses were "extremely serious." The court found that appellant fired multiple shots at two intended victims, resulting in life-threatening injuries; endangered the lives of innocent civilians by committing the offenses at a crowded public mall; and that appellant's gang involvement elevated the seriousness of the offense.

The district court's findings are supported by the record. On February 27, 2009, appellant was at a shopping mall with a juvenile companion. A verbal confrontation between appellant and his companion and rival gang members developed. Both groups went to the parking lot to fight. Appellant took out a gun and, at the urging of his companion, fired several shots at two victims before fleeing. Victim A suffered a gunshot wound to the abdomen and required emergency surgery and hospitalization; he

was subsequently readmitted after additional injuries were detected. Victim B suffered a gunshot wound to his leg.

Evidence and witnesses at the scene confirmed that at least five shots were fired. A witness identified appellant as the shooter. Officers executed a search warrant at appellant's home and found numerous articles in appellant's bedroom confirming his gang membership. Appellant admitted that he shot the victims and that he picked up the discharged casings after the shootings. Appellant does not challenge the district court's conclusion that the seriousness-of-the-offense factor strongly supports certification. Because the record supports the district court's findings, this factor weighs in favor of certification.

#### *Culpability of the Child*

Under the culpability element, the district court considers the presence of any mitigating factors under the sentencing guidelines in addition to the juvenile's participation in planning the crime. *See* Minn. Stat. § 260B.125, subd. 4(2).

The district court concluded that appellant was "extremely culpable." And the record supports the district court's findings that appellant admitted to taking a loaded handgun to the mall, participating in a verbal altercation that progressed into a physical confrontation with a rival gang, voluntarily shooting two people, and then picking up shell casings before fleeing.

Appellant does not challenge the fact that he brought a loaded gun to the mall and shot two individuals. Appellant argues, instead, that he shot at the victims in self-defense because one of the victims was wielding a knife. Appellant asserts that his self-defense

claim was a mitigating factor that the district court clearly erred in failing to consider. But the district court did consider appellant's self-defense claim; the court was not persuaded that this claim was a mitigating factor.

The investigating probation officer who submitted a certification study did not believe that appellant's self-defense claim was viable because no weapon was recovered from the victims and no witness mentioned seeing either victim wielding a knife. The district court found that there was no evidence of a knife, and even if one of the victims had a knife, appellant was required to retreat if he could safely do so, and not to respond by firing several shots at the victims.

Appellant claims that the district court should have considered that it was reasonable for him to believe that one of the victims had a weapon and it was reasonable for him to have felt threatened or intimidated. However, appellant showed no evidence to support his claim; thus, he has failed to meet the clear-and-convincing-evidence burden. And appellant's actions demonstrate culpability. He admitted to bringing a loaded gun to the mall, shooting at each victim multiple times, and retrieving shell casings before fleeing. The record supports the district court's findings; thus, the district court did not clearly err in dismissing appellant's self-defense claim, and, as a result, the culpability factor weighs in favor of certification.

#### *Prior Record of Delinquency*

The third factor in the certification analysis is the juvenile's prior record of delinquency which, along with the seriousness of the crime, is required to be weighed more heavily by the court than the other factors. *See id.*, subd. 4. The court is required to

examine the record of juvenile delinquency petitions and the adjudication of alleged violations of the law by the minor. *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.* Ongoing and escalating delinquency threatens public safety and favors certification. *H.S.H.*, 609 N.W.2d at 263. 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).

Despite finding that appellant’s criminal behavior is escalating, the district court concluded that this factor weighs in favor of EJJ. The district court found that the offenses were appellant’s first felony-level offenses, and that, for the most part, appellant complied with the conditions of his previously imposed probation. The record supports the district court’s findings; thus, this factor weighs in favor of EJJ.

#### *Programming History*

Next, the court considers the child’s programming history. This court has stated that “[r]ejection 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 district court concluded that the programming-history factor favors neither EJJ nor certification. Appellant argues that although the district court found that this factor did not weigh in favor of certification, the court should not have considered uncharged school conduct and should have focused on his little-to-no programming history. But the court did not err in considering appellant’s school conduct because a

court is prohibited from considering uncharged behavior only 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 district court was concerned with appellant's school records, which indicated 27 in-school referrals and four out-of-school suspensions in the past five years. The court also found that since his placement in the juvenile-detention center, appellant committed numerous infractions, including one for gang-related activity. Despite the court's concern, the court concluded that this factor favors neither certification nor EJJ. Based on the record, the district court did not clearly err in finding that this factor was neutral.

*Adequacy of Punishment or Programming Available in the Juvenile System and Dispositional Options Available*

The final two factors focus on the adequacy of punishment or programming available in the juvenile system and the dispositional options available. These factors are frequently considered together. *See, e.g., D.T.H.*, 572 N.W.2d at 745. Appellant argues that he is a good candidate for programming under EJJ and that there are several programs willing to accept him.

The district court concluded that the adequacy-of-the-punishment factor weighs in favor of certification. The district court found that EJJ supervision would last only four years. The court found that appellant's propensity for falling into gang activity calls for extensive supervision beyond four years. The court found that, given the disparity in



consequences, justice requires more than the juvenile system could provide. The court also found that although there were programs willing to accept appellant, appellant presented too high of a risk to public safety, and determined that the dispositional-options factor weighs in favor of certification.

The record shows that appellant's criminal behavior has escalated and that he participates in gang activity. Appellant is also 17 years old and EJJ would extend for only four years, which concerned the investigating probation officer who submitted a certification study and the doctor who submitted a psychological evaluation, both of whom recommended appellant's certification. Additionally, appellant's parents revealed that he is living in the United States illegally and is therefore not eligible for health-care benefits, which would affect his acceptance into programs. Further, compared to the prison sentence possible in the adult system, four years in EJJ does not provide adequate consequences for appellant's attempted-murder offenses. Appellant failed to show by clear and convincing evidence that public safety would be served by retaining his case in EJJ. Thus, the district court did not clearly err in finding that the final two factors favor certification.

The court concluded that appellant failed to show that retaining the proceeding in the juvenile system served public safety, and determined that public safety is better served by certification. The district court's findings are supported by the record; therefore, the district court did not abuse its discretion in certifying appellant as an adult.

**Affirmed.**