STATE OF MINNESOTA
IN COURT OF APPEALS
A14-1380

In the Matter of the Welfare of:
D. L. B., Child.

Filed January 20, 2015
Affirmed
Kirk, Judge

Ramsey County District Court
File No. 62-JV-14-930

Cathryn Middlebrook, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant D.L.B.)

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

John J. Choi, Ramsey County Attorney, Kathryn S. Richtman, Assistant County Attorney, St. Paul, Minnesota (for respondent State of Minnesota)

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

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

KIRK, Judge

The district court certified appellant D.L.B. for prosecution as an adult after he was charged with two counts of aggravated robbery in the first degree and one count of aiding and abetting motor vehicle theft. Appellant met the criteria for presumptive adult

certification because of his age and the offense. Because the district court did not abuse its discretion by certifying appellant for adult prosecution, we affirm.

FACTS

On the evening of September 22, 2013, appellant and two companions robbed D.R.S. and his friend, T.P.A., at gunpoint while they sat in D.R.S.'s 2006 Ford Mustang. Appellant put a gun to T.P.A.'s back and T.P.A. gave him his iPhone and wallet. Appellant fled with the two companions in D.R.S.'s vehicle and was apprehended by police shortly thereafter.

T.P.A. positively identified appellant as the person who had put a gun to his back and stolen his personal property. In February 2014, one of appellant's companions in the robbery gave a voluntary statement to police that he and the other individuals involved, including appellant, planned and actively participated in the robbery.

Respondent State of Minnesota charged appellant with two counts of aggravated robbery in the first degree and one count of aiding and abetting motor vehicle theft. A defendant convicted of first-degree aggravated robbery with a firearm shall be committed to the commissioner of corrections for not less than three years. Minn. Stat. § 609.11, subds. 5, 9 (2012). Under Minnesota's Sentencing Guidelines, the presumptive sentence for first-degree aggravated robbery is 48 months. Minn. Sent. Guidelines 4 (2012). The state moved to certify the case for adult prosecution because appellant was 17 years old at the time of the offense and the charged offenses carried a presumptive commit to prison.

The district court held a three-day contested certification hearing. Appellant presented the testimony of Patricia Orud, M.A., a licensed psychologist; Cynthia Felter, a probation officer; Catherine Blake, appellant's case manager at Boys Totem Town; and

Kevin Cummings, appellant's group facilitator in the Phoenix program at Boys Totem Town. The state presented the testimony of Timothy Moore, a police officer with the St. Paul Police Department, and Cory Barth, a parole agent with the Minnesota Department of Corrections. The district court granted the state's motion. This appeal follows.

D E C I S I O N

"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).

Neither party disputes that the state met its burden in this presumptive-certification proceeding of showing that appellant was over the age of 16 years at the time of the offense and he is charged with a crime carrying a presumptive prison sentence under the sentencing guidelines and applicable statutes. Minn. Stat. § 260B.125, subd. 3 (2014); *see also In re Welfare of L.M.*, 719 N.W.2d 708, 710 (Minn. App. 2006). Appellant may rebut the presumption of certification "by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety." Minn. Stat. § 260B.125, subd. 3. If he does so, the juvenile court retains the case as an extended-jurisdiction juvenile (EJJ) proceeding. *Id.*, subd. 8(b) (2014). But if appellant fails to provide sufficient evidence to rebut the presumption, the matter must be certified. *Id.*, subd. 3.

In determining whether public safety is served by retaining the proceeding in juvenile court, the district court must consider six factors: (1) the seriousness of the alleged offense;

(2) the culpability of the child in committing the alleged offense; (3) the child's prior record of delinquency; (4) the child's programming history; (5) the adequacy of punishment or programming available in the juvenile system; and (6) the dispositional options available for the child. *Id.*, subd. 4 (2014). Of these six factors, the court must give greater weight to the first and third factors. *Id.*

On appeal, appellant argues that he rebutted the presumption that the fourth, fifth, and sixth factors favored adult certification. The district court found that all six factors weighed in favor of adult certification.

A. Fourth factor: the child's programming history

Minn. Stat. § 260B.125, subd. 4(4), directs the district court to consider "the child's programming history, including the child's past willingness to participate meaningfully in available programming." "Available programming" includes "the child's attendance at programming events, completion of the events, and demonstrated behavioral changes correlated with the programming." *In re Welfare of P.C.T.*, 823 N.W.2d 676, 683 (Minn. 2012), *review denied* (Minn. Feb. 19, 2013). Appellant argues that the district court erred by concluding that he had an extensive programming history, when in fact his limited programming history demonstrated a track record of success.

The district court characterized appellant's programming history "as extensive as his record of delinquency" and concluded that appellant failed to internalize any meaningful changes from his participation in the programming that he had successfully completed. The district court noted that despite being diagnosed with a chemical dependency, appellant failed to complete treatment and continued to abuse illegal substances. After appellant's

placement at Boys Totem Town, which is a highly structured residential program, the district court found that appellant continued to support the gang lifestyle. The district court also noted appellant's numerous school behavior and attendance problems and his poor track record on probation.

The record supports the district court's determination. "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). While appellant has participated in numerous programs, he has failed to internalize positive behavioral changes as he has not addressed his chemical dependency problem and continues to associate with gang members. A district court may also consider a juvenile's school performance when weighing this factor. *See P.C.T.*, 823 N.W.2d at 683. Appellant's public school record from 2002 through 2013 contains over 35 pages detailing a history of truancy, tardiness, willful disobedience, defiance, and a weapons violation. Since the tenth grade, appellant's school attendance has been increasingly sporadic and in December 2013 he stopped attending altogether. For these reasons, the district court did not err by finding that this factor weighed in favor of adult certification.

B. Adequacy of punishment or programming in the juvenile system

The fifth public-safety factor involves "the adequacy of the punishment or programming available in the juvenile justice system." Minn. Stat. § 260B.125, subd. 4(5). Appellant argues that the district court erred by weighing this factor in favor of adult certification because it demanded a guarantee from Orud and Felter that appellant would

internalize positive behavioral changes from any future juvenile programming if he were designated for EJJ prosecution.

The district court expressed skepticism that appellant would internalize any positive changes from future programming in the juvenile system, and stated that "[s]imply participating in programming is not enough." The district court concluded that it was not convinced that the juvenile system could provide the level of treatment and supervision needed to alter appellant's conduct and protect the public. The district court also reasoned that placing appellant in a juvenile residential correctional facility was not adequate punishment for his conduct as he was a principal participant in a crime that threatened the lives of two victims and left them traumatized.

We agree. Although it is true that appellant has never been placed in a long-term juvenile residential program, there is a lack of clear and convincing evidence in the record demonstrating that such an alternative would adequately address the significant safety risk appellant poses to the public when compared to the guaranteed benefit to public safety of incarceration. *See P.C.T.*, 823 N.W.2d at 684. In her report, Orud deferred to the district court in determining the adequacy of punishment for the charged offense and acknowledged that appellant had a moderately high known risk for violations of public safety.

Moreover, the district court acted appropriately in considering whether or not designating appellant for EJJ prosecution was appropriate in light of the fact that he was a principal participant in a violent crime. Since 2010, appellant's criminal history demonstrates 34 separate contacts with law enforcement and an escalation in offense

severity over time. For these reasons, the district court did not err by finding that this factor weighed in favor of adult certification.

C. Available dispositional options

The sixth public-safety factor considers the dispositional options available for the child. Minn. Stat. § 260B.125, subd. 4(6). Appellant argues that when the district court compared the amount of time he would spend in a juvenile facility to a possible adult sentence, it failed to consider the additional seven months that he could have spent on EJJ probation had the state promptly filed the petition for adult certification. But appellant does not provide any caselaw to support the proposition that the district court must consider this fact under Minn. Stat. § 260B.125, subd. 4(6). Moreover, there is no evidence that he was prejudiced by the delay or that the state delayed charging him as an adult in order to gain a tactical advantage. *See In re Welfare of R.J.C.*, 419 N.W.2d 636, 638-39 (Minn. App. 1988) (stating that a juvenile must prove both actual prejudice and an improper state purpose to establish a violation of the due process clause due to a pre-indictment delay in certifying juvenile for adult prosecution).

Here, the district court concluded that public safety would be best served by certifying appellant for adult prosecution as he would receive a longer sentence than if he were designated for EJJ prosecution. In light of the fact that there is not clear and convincing evidence that cognitive behavioral programming in a long-term juvenile treatment program will adequately address the significant risk of appellant's continued and escalating violence, the district court did not err by favoring a guaranteed longer adult prison sentence. *See P.C.T.*, 823 N.W.2d at 684. Given the considerable latitude that this

court gives the district court in certification matters, the district court did not abuse its discretion by certifying appellant for adult prosecution.

Affirmed.