FILED BY CLERK
SEP 24 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2009-0064
	)	DEPARTMENT A
	)	
IN RE MICHAEL N.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17345302

Honorable Ted B. Borek, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Erica Cornejo
Tucson
Attorneys for State

Sanders & Sanders, P.C.
By Ken Sanders
Tucson
Attorneys for Minor

H O W A R D, Chief Judge.

¶1 The minor appellant, Michael N., appeals from the juvenile court's written disposition order entered on June 9, 2009, committing him to the custody of the Arizona Department of Juvenile Corrections (ADJC) for a period of not less than one year. Michael

contends the court abused its discretion in sending him to ADJC because it had not first given him "the opportunity to prove himself on intensive probation, or *any* other less-restrictive dispositional alternative."

¶2 The juvenile court has broad discretion to determine the proper disposition of a delinquent juvenile. *In re Maricopa County Juv. Action No. JV-510312*, 183 Ariz. 116, 118, 901 P.2d 464, 466 (App. 1995). "[W]e will not disturb a disposition order absent an abuse of the court's discretion." *In re Themika M.*, 206 Ariz. 553, ¶ 5, 81 P.3d 344, 345 (App. 2003). In the analogous context of adult sentencing, an abuse of discretion occurs if the court acts arbitrarily or capriciously or fails to conduct an adequate investigation into the facts relevant to sentencing. *See State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). In a delinquency case, the juvenile court also abuses its discretion by failing to consider the advisory guidelines established by the Arizona Supreme Court for the commitment of minors to ADJC. *See* Ariz. Code of Jud. Admin. § 6-304(C); *see also In re Melissa K.*, 197 Ariz. 491, ¶ 14, 4 P.3d 1034, 1038 (App. 2000) (requiring juvenile court to consider commitment guidelines before entering disposition order). None of those events happened here, and we affirm.

¶3 The disposition order at issue encompassed three separate delinquency petitions filed in June and September 2008. In between the filing of those petitions and the juvenile court's eventual disposition order in June 2009, the court granted Michael's motion for a competency evaluation pursuant to A.R.S. § 8-291.01. *See generally* A.R.S. §§ 8-291

through 8-291.11. After a hearing in February 2009, the court found Michael was not competent to participate in the delinquency proceedings and ordered him placed in a "restoration to competency program" at the Arizona State Hospital.

¶4 At a status hearing in mid-May, the juvenile court noted it had received "a report from the Arizona State Hospital indicating the minor is competent," a fact Michael's counsel acknowledged at a subsequent review hearing. Pursuant to a plea agreement, Michael thereafter admitted responsibility for the following three offenses: possession of marijuana and public sexual indecency, both class one misdemeanors, and burglary, an undesignated, class six felony. He was adjudicated delinquent at a trial review hearing on May 29, and the disposition hearing followed on June 4 and June 5, 2009.

¶5 Michael contends he "was never offered any less-restrictive alternative to ADJC. Instead, for his first and only disposition, [he] was sent directly to ADJC," reflecting "a clear abuse of the court's discretion." But the juvenile court expressly considered our supreme court's commitment guidelines, as *Melissa K.* requires. 197 Ariz. 491, ¶ 14, 4 P.3d at 1038. The record also reflects a number of extenuating circumstances supporting the court's disposition decision.

¶6 First, intensive probation was not a realistic alternative for Michael because, as the juvenile court had already determined, Michael's mother was "unable to control and supervise [Michael] in a home environment, despite her efforts to do so." As a consequence, finding "no parent able to care for" Michael and finding him "in need of services," the court

had previously denied a predisposition motion for release and had ordered that Michael remain in detention. Child Protective Services had some involvement in the case, and Michael's guardian ad litem had filed a position statement with the court on May 20, stating in part:

> 2) Counsel will file a private dependency immediately in the event that the minor is released to the custody of his mother.
>
> 3) Counsel recommends that the minor be provided with an evaluation while in custody and that he not be released (for public safety reasons) until such time as an appropriate facility be located.

Without a stable home environment and a parent or guardian able to provide appropriate care and supervision, plainly Michael was not a candidate for juvenile intensive probation supervision. *See* A.R.S. § 8-351 (defining "'juvenile intensive probation'" as program emphasizing, inter alia, "home detention").

¶7 Second, although Michael faults the juvenile court for "not heeding the recommendation of Dr. [Thomas] Fisher," who reportedly "believed the most appropriate outcome for [Michael] was intensive probation and placement in a treatment facility," the court heard evidence on the first day of the two-day disposition hearing that the facility Dr. Fisher apparently favored for Michael—Casa de Tucson, a group home specifically for sex offenders—was either unwilling or unable to accept him for treatment.[1]

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[1]Dr. Fisher did not testify at the disposition hearing, and his written report was not included in the record on appeal. Although Michael has attached to his opening brief what appears to be Fisher's written report of a psychosexual evaluation of Michael performed in

¶8 At the disposition hearing, the juvenile court discussed at length the various factors it had considered and weighed in reaching its ultimate decision. Its extensive explanation of its reasoning convincingly refutes Michael's claim that the court acted arbitrarily or capriciously or failed to consider our supreme court's commitment guidelines.

¶9 As the juvenile court's comments reflect, before reaching its decision, it had taken into account not only the commitment guidelines but Michael's individual circumstances and the lack of suitable, less-restrictive placement alternatives. Only after it had considered all available information and deliberated at length did the court reluctantly conclude that sending Michael to ADJC was the best option available for protecting the community while insuring that Michael received the structure, treatment, and other services he needed. *See generally In re Niky R.*, 203 Ariz. 387, ¶ 19, 55 P.3d 81, 85 (App. 2002) ("[T]he guidelines do not mandate that the less restrictive alternative be ordered."); *Melissa K.*, 197 Ariz. 491, ¶ 14, 4 P.3d at 1038 (juvenile court must consider but is not bound by

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May 2009, and although the state has not objected, the document is not included in the official record transmitted to this court by the juvenile court. Nor does it appear that counsel sought to designate the report for inclusion in the record on appeal using the procedure outlined in Rule 104(E), Ariz. R. P. Juv. Ct. "Because our court does not act as a fact-finder, we generally do not consider materials that are outside the record on appeal." *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997); *see also State v. Fischer*, 219 Ariz. 408, n.13, 199 P.3d 663, 674 n.13 (App. 2008) (same). Similarly, although the state refers in its answering brief to a predisposition report prepared by the juvenile probation department, that likewise does not appear in the record on appeal. We therefore do not consider the state's assertions concerning its contents. And we presume that any missing portions of a record support the lower court's ruling. *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995); *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990).

guidelines). The record supports the court's factual findings and shows clearly that its decision was not arbitrary or capricious but considered, fully informed, and appropriate. The juvenile court did not abuse its discretion, and its disposition order is therefore affirmed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge