

IN THE SUPERIOR COURT OF THE State OF DELAWARE

IN AND FOR KENT COUNTY

State of Delaware,	:
	: ID No: 0503018691
v.	:
	:
Hareem D. Mitchell,	:
	:
Defendant.	:

ORDER

Upon consideration of the Defendant's application that this case be transferred to Family Court pursuant to 10. Del. C. §1011 (b), the testimonial record of the case, and the arguments of counsel, the following appears:

1. By indictments filed in June, 2005, the Defendant was charged with a total of sixteen counts (eleven felonies and five misdemeanors) of various offenses including: Robbery in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Assault Second Degree, Wearing a Disguise During the Commission of a Felony, Conspiracy in the Second Degree, Aggravated Menacing, Criminal Mischief, Malicious Interference with Emergency Communication, and Offensive Touching. At that time he was fifteen years of age. Defendant turned sixteen on July 16, 2005. The indictments charge that the alleged offenses occurred between January, 2005 and March, 2005 when the Defendant was fifteen years old. On June 17, 2005, the Defendant filed his application that the case be transferred to Family Court pursuant to 10 Del. C. § 1011 (b). A hearing on the application was held on September 12, 2005 and October 12, 2005.

2. In acting upon the Defendant's application, I am required to consider the following factors and such other factors as are relevant: (1) the nature of the present

offense; (2) the extent and nature of the Defendant's prior record; (3) the nature of past treatment and rehabilitative efforts; (4) the nature of the Defendant's response thereto, if any; (5) whether the interests of society would be best served by trial in the Family Court or in the Superior Court and; (6) whether the interests of the Defendant would be best served in the Family Court or in the Superior Court.¹

3. Regarding the nature of the offense, the Court must consider whether the State has established a *prima facie* case.² A *prima facie* case is established if there is a fair likelihood that the Defendant will be convicted.³ A fair likelihood of conviction is established when, considering the totality of the evidence, and bearing in mind that the defense has yet to be presented, the likelihood of a conviction is real if the defense does not sufficiently rebut the State's evidence.⁴ A real probability must exist that a reasonable jury could convict on the totality of the evidence, assuming that the evidence introduced at the hearing stands unrebutted by the Defendant at trial.⁵

4. According to the evidence presented at the hearing, the Defendant confronts charges related to two separate sets of events: one set occurring on January 18, 2005; the other on March 24, 2005. The events and the State's position regarding Defendant's association therewith were described in the testimony of Cpl. Mark K.

¹ 10 Del. C. Sec. 1011 (b)

² *Marine v. State*, Del. Supr., 602 A. 2d 185, 1211 (1992), *cert. Dismissed*, 505 U.S. 1247 (1992) (Marine I); *Marine v. State*, Del. Supr., 624 A. 2d 1181, 1185 (1993)(Marine II).

³ *State v. Walker*, Del. Super., JK 95-04-0023, Terry, Jr. (June 12, 1995)(ORDER)

⁴ *Id.*

⁵ *Id.*

Csapo of the Delaware State Police. The evidence for the March event, in its unrebutted, *prima facie* posture, included the statements of Mark A. Kelly and Tyson O. Henry as recounted by Officer Csapo. According to Kelly's Statement, he was the "driver" for several people, including Defendant Mitchell, for a robbery of the Kenton Store in Kent County Delaware. He described that Defendant Mitchell was part of a group who committed the robbery at the Kenton Store. Tyson O. Henry also participated in the Kenton Store robbery. Henry's statement described the events inside the store. Some members of the group, which included Defendant Mitchell, used masks and knives to perpetuate the robbery. Evidence also was described by Officer Csapo as coming from individuals who observed several young males fleeing the store and going to a "getaway" car. The witnesses followed the car for plate identification, which was found to be owned by Kelly.

The defense educed evidence that Defendant Mitchell, after apprehension never admitted his involvement. Additionally, no "physical evidence" (Defendant's finger prints at the scene; no surveillance tapes; etc.) inculpated Defendant.

Ten *Del. C.* §1010 States that any child accused of, among other offenses, robbery first degree shall be tried as an adult. Defendant Mitchell has been charged with robbery first degree. Nevertheless, pursuant to 10 *Del. C.* §1011, on Defendant's burden to refute the statutorily created presumption of amenability to adult prosecution,⁶ Defendant may pursue this "reverse amenability."

Together with that presumption, Defendant must show that the State's presented evidence, without consideration of what the defense might utilize to rebut the State's case, fails to create a likelihood of conviction. In this case, the defense could chip away at the State's offering, as suggested in its cross-examination, and in

⁶ *State v. Mayhall, Del. Super.*, 659 A. 2d 790 @ 795 (1995).

the credibility problems with the State's witnesses. However, the unrebutted evidence presented is of Defendant entering the Kenton Store with others, committing a robbery where masks and weapons were used, and fleeing to escape. A *prima facie*, or likelihood of conviction under the totality of the State's evidence exists.

As to the January 18, 2005 events, the State's evidence is not as strong. No evidence of any "followed fleeing" exists. Additionally, the defense points out that the elderly victim identified her assailants as Caucasian, whereas Defendant is African-American. Although that certainly constitutes fodder for jury argument, it does not eradicate the likelihood of conviction by unrebutted State evidence, which includes statements of admitted co-Defendants describing Defendant's actions and admissions/proclamations of involvement in the January event.

5. Based upon the evidence presented at the hearing, for both sets of charges, I find that the State has met its burden of establishing a fair likelihood of conviction of the offenses charged.

6. The natures of the multiple offenses are egregious. They represent not some ill-conceived, spur-of-the-moment rashness. Rather, they are, if the allegations prove to be correct, calculated and conspired events on two separate occasions, involving attacks upon women, at least one of whom was substantially over 62 years of age, while wearing masks, frequently carrying weapons, sometimes causing physical injury, and terrifying the victims.

According to the allegations and *prima facie* evidence, certainly in advance of any dispute by the Defendant, there was no childlike aspect to these crimes. All were frighteningly full-grown.

7. The Defendant's prior record is not merely extensive, it is replete with crimes of similar natures, continuing since Defendant was 14 years old as is

demonstrated by the State's Exhibit 1, a nine page litany of Defendant's involvement with the Justice system.

8. As described by Steven Corso, a Probation Officer of Defendant's, and a 26 year veteran of Youth Services, efforts at rehabilitation concerning Defendant have been extensive. They began in September of 2002, followed an adjudication related to an assault with an enrollment in the "Back on Track" program. That concluded in March of 2003, only to be following in June of 2003 with multiple firearm-involved robberies. Because of Family Court adjudications involving those latter incidents, Defendant was removed to a "level IV-like" residential facility in Iowa.

After 10 months of what was described as very intense resident treatment for delinquents (including: education, group interaction, community service, victim awareness programs, and so on), Defendant was released in May of 2004, returning to Delaware. He was then placed on a "comprehensively supervised and monitored after-care program" for three months, going into August of 2004.

At that point, Defendant began level III supervision by Mr. Corso, and was placed at PEAK, a public school "alternative" program. In the first couple of months, Defendant was not recorded as having created difficulties. Things began deteriorating towards the close of 2004. Beginning with substance problems, Defendant's acts quickly moved (again, by the instant allegations) on to the January, 2005 and March, 2005 events. These commenced, of course, only 8 months after Defendant's release of the intense Iowa placement release, which was nearly a year in duration; and while Defendant was at PEAK and on level III probation. Since his arrest, Defendant has been at Stevenson House.

Accordingly, Defendant's response to rehabilitative efforts has been dreadful.

At this juncture, the only remaining rehabilitative avenue would be Ferris School. That is a fully locked, Level V facility. It is charged with educational requirements, as well as the intense supervision. Additionally, Ferris has substance abuse programs, in which Defendant, presumably, would partake. Mr. Corso opined that a person who commits himself to succeed in those efforts can free himself of substance problems, which would ultimately benefit himself and society as well. Moreover, Defendant has shown some positive levels of response to intense supervision. That was true during his actual involvement in the “Back on Track” program, his months in the Iowa facility, and his handling of the intensive after care supervision in August of 2004.

Unfortunately, as each of those efforts demonstrated, no carry-over appears to take place. Rather, in less time than Defendant has been intensely supervised, historically he has reverted, once at large. Additionally, Mr. Corso pointed out that Ferris, which is typically (though not always) about a 6-month engagement, offers nothing that had not been attempted for Defendant at the 10-month Iowa facility. Ferris is not considered to be a “next step” to the Iowa program. It is essentially an alternative, with the same sorts of substance counseling.

Testimony was also provided by Dr. Joseph Zingaro, Ph. D., a psychologist with extensive credentials, who is the clinical director of People’s Place Counseling. Relying largely on the interview material which he gleaned in his meetings with Defendant, and the results of a battery of tests to which he subjected Defendant, he initially opined that Defendant could benefit by further Family Court involvement. Dr. Zingaro stated, Defendant was “at a crossroads,” with lots of potential for “pro-social” activity; whereas the Superior Court process, if resulting in a conviction, would expose him to “real criminals,” who presumably would lead Defendant astray.

As it turns out, however, Defendant had been decidedly less than candid with Dr. Zingaro. When confronted with Defendant's actual past (quantity and types of events; Defendant's role in the events; dangerousness of activity; Defendant's evident efforts of distortion), Dr. Zingaro Stated that his own opinion had to be altered. Moreover, even the professional interpretation of the testing results would have to be reassessed. Indeed, he would be "hard pressed" to conclude that Defendant's return to Family Court would be appropriate.

Thus, the ultimate expert opinions on Defendant's amenability to further Family Court involvement were not in essential dispute. Neither expert, the State's nor the Defendant's, could say that Defendant appropriately should be referred back to Family Court. No available further rehabilitation efforts appear to be extant.

9. Given the menacing nature of the alleged charges; and given the similarity of prior adjudications of Defendant; and given Defendant's evident absence of amenability to Family Court rehabilitation; the interests of Society would be served by Defendant's being treated, if convicted, as an adult.

10. Defendant's own interests, while always superficially seeming to be served by less (as Dr. Zingaro stated) "real criminal" exposure, and maintenance in the Family Court, are not necessarily so benefitted. Here, as noted, Defendant has only managed to be productive and successful when under longer term, highly structured supervision. In this case and at this point, that requires, if Defendant is convicted of these charges, Defendant's being subject to adult treatment.

11. Therefore, Defendant's application to have his case transferred to Family Court is DENIED.

SO ORDERED.

/S/ ROBERT B. YOUNG
JUDGE

Dated: October 18, 2005

oc: Prothonotary
cc: Counsel
File