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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-17-470

DE’KOTA DESPAIN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 24, 2018

APPEAL FROM THE COLUMBIA
COUNTY CIRCUIT COURT
[NO. 14CR-16-58]

HONORABLE DAVID W. TALLEY,
JR., JUDGE

AFFIRMED

PHILLIP T. WHITEAKER, Judge

Appellant De’Kota Despain, a sixteen-year-old juvenile, was charged as an adult in the Columbia County Circuit Court with capital murder, aggravated residential burglary, aggravated robbery, and felony theft of property valued at over \$25,000. Despain filed a motion to transfer the case to the juvenile division of the circuit court under its extended juvenile jurisdiction (EJJ). The circuit court denied Despain’s motion to transfer, and Despain has timely appealed. We affirm.

I. Background

On April 13, 2016, Douglas Harwell, Despain’s neighbor, died of gunshot wounds. The Arkansas State Police investigated Harwell’s death and developed Despain as a possible suspect. Despain admitted that he and his friend, Keaton Taylor, planned an attack on

Harwell several days in advance and that the motive for the shooting was theft. Despain intended to use the stolen goods to enter the drug business.

On the day of Harwell's death, Despain and Taylor went to Harwell's home. Despain walked behind Harwell, who was seated outside in a chair, and shot him once in the back and once in the head. Despain and Taylor then dragged Harwell inside the home and left him. Despain returned later that evening and stole several guns, a watch, and a cell phone. He loaded the guns into Harwell's truck and drove to Magnolia, Arkansas, where he gave the guns to someone else. Despain's home was searched pursuant to a warrant, and Harwell's wallet, watch, and cell phone, as well as the gun used in the murder, were recovered.

II. *Procedural History*

The State charged Despain as an adult with capital murder, aggravated residential burglary, aggravated robbery, and felony theft of property valued at over \$25,000. *See* Ark. Code Ann. § 9-27-318(c)(1) (Repl. 2009) (A prosecuting attorney has the discretion to charge a juvenile sixteen years of age or older in the criminal division of circuit court if the juvenile has allegedly engaged in conduct that, if committed by an adult, would be a felony.). Despain filed a motion seeking to have his case transferred to juvenile court under EJJ.

Upon filing the motion to transfer, the circuit court fulfilled its statutory duty to conduct a hearing to determine whether to transfer the case to another division of circuit court having jurisdiction. *See* Ark. Code Ann. § 9-27-318(e). At the transfer hearing, Despain presented evidence concerning his character, his demeanor, his level of maturity, and his home environment. Several former teachers and school officials testified on his behalf. They

testified that, academically, Despain was an average student who did not live up to his potential.¹ Behaviorally, Despain was described by these witnesses as polite, well mannered, helpful, and knowing right from wrong. Despain did not exhibit any real discipline problems until he reached the high school campus. After he became a teenager, Despain became disrespectful in his home, struggled in some of his classes, and was eventually dropped from school for truancy. Socially, Despain was described as a little immature in his interactions, seeking attention from both his teachers and his peers. Despain was considered neither a follower nor a leader, and there was evidence he was bullied.²

Despain also presented testimony from family members concerning the make up of his family and his home environment. Despain's biological parents are Sarah Caldwell and Kevin King. Despain's adoptive parents are his grandparents, Elizabeth and Anthony Despain.³ Caldwell and King voluntarily terminated their parental rights to Despain but did not do the same with another child, Amy, Despain's biological sister.⁴ The witnesses opined that Despain was troubled and resentful that his biological parents would choose to terminate their rights to him but not to his sister. As a result, Despain's contact with Caldwell and King was limited and sporadic. However, Despain's contact with Caldwell became more frequent as

¹Ariana King, his sixth-grade homeroom teacher, characterized him as somewhat lazy.

²His former bus driver, Marilyn Hunt, did not share this assessment. She never saw him bullied and testified that he was a follower who could be talked into anything.

³Elizabeth and Anthony Despain are the mother and stepfather of King.

⁴Amy currently lives with her godmother.

he got older, and they spoke on the phone regularly. He was even allowed to drive unaccompanied to visit her in Oklahoma during one spring break.

Despain was described by his family as sensitive, kindhearted, fun loving, gullible, and generous. They further described him as being a follower—an insecure kid, who tried and wanted to fit in, but really did not. They all agreed that he was bullied at school, which led to problems both at school and at home, including an attempted suicide at the age of twelve.⁵ In response to the bullying, Despain switched school districts. Despite the new school environment, Despain exhibited behavioral issues. He began to skip school; he became disrespectful; he stole money and credit cards from his grandmother; he was sending inappropriate texts to a girl; and he was accused of raping two young boys. As a result, his adoptive parents filed a family-in-need-of-services (FINS) petition to help deal with his issues, and a juvenile-delinquency action was later filed after the rape allegation emerged.

Concerning his juvenile history, Ellana Stuart, the juvenile intake officer, testified that Despain's initial contact with the department was a diversion plan as a result of the inappropriate contact with a girl in the fall of 2014. A FINS case was later opened in the spring of 2015 after he stole a credit card from his grandmother, was accused of being disrespectful to his mother, and because of truancy; and in the fall of 2015, he was charged as a juvenile for rape. Scott Tanner, the juvenile ombudsman, explained the alternatives available in the juvenile system. He explained the option of sentencing Despain under EJJ. He testified that an EJJ designation would allow Despain to be treated in the juvenile system

⁵As a result of the suicide attempt, Despain was placed in counseling, but he later began skipping his counseling appointments.

until the age of 21 and that if rehabilitation did not occur, he could be placed in the adult system.

Lastly, Despain presented the testimony of Dr. James Moneyppenny. Dr. Moneyppenny testified that he had reviewed the literature on adolescent brain development and opined that Despain had the brain development of a 13- to 14-year-old and, while not intellectually stunted, was immature in his development.⁶

In addition to the evidence from Despain, the court received evidence from the Arkansas State Police. Investigator Louis Imsler testified regarding his investigation, the incriminating statements given by Despain and Taylor, and the search of Despain's home as outlined above.

After the hearing, the circuit court issued a written order denying the motion to transfer. Despain appeals the denial. He argues that the circuit court improperly disregarded the testimony of his expert witness, Dr. James Moneyppenny, and erroneously determined that he was unlikely to be rehabilitated by his twenty-first birthday.

III. *Standard of Review*

In juvenile transfer proceedings, the court shall order the case transferred to another division of circuit court only upon a finding by clear and convincing evidence that the case should be transferred. Ark. Code Ann. § 9-27-318(h)(2). Clear and convincing evidence is the degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Lewis v. State*, 2011 Ark. App. 691. Despain, as the moving party,

⁶There is also some evidence that Despain had a micropenis diagnosis and that his refusal to discuss this abnormality was further evidence of his immaturity.

bore the burden of proving that his case should be transferred to the juvenile division of circuit court. *See Magana-Galdamez v. State*, 104 Ark. App. 280, 291 S.W.3d 203 (2009).

In deciding whether to transfer, the circuit court must consider and issue written findings on the ten factors set forth in Ark. Code Ann. § 9-27-318(g):

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- (10) Any other factors deemed relevant by the judge.

Ark. Code Ann. § 9-27-318(g).

We will not reverse a circuit court's determination of whether to transfer a case unless that decision is clearly erroneous. *R.W.G. v. State*, 2014 Ark. App. 545, 444 S.W.3d 376. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* However, the circuit court does not have to give equal weight to each factor. *Harris v. State*, 2016 Ark. App. 293, at 9, 493 S.W.3d 808, 813.

IV. *Analysis*

A. Expert Testimony

Despain first contends that the science involving the immaturity of the adolescent brain has been explicitly and fully accepted by the United States Supreme Court and that the circuit court therefore erred by improperly disregarding or disbelieving the testimony of Dr. Money Penny in that regard. Despain's argument, however, misapprehends the substance of the court's ruling. With regard to Dr. Money Penny's testimony, the court's order states:

F. The sophistication and maturity of the Defendant is of such a level that he should be treated as an adult. . . . The main defense evidence going to the sophistication and maturity level of the Defendant came from Dr. James Money Penny, a practicing psychologist. He testified that he had worked on the case of the Defendant during the past 2 months during which he had reviewed school records, witness statements, research on adolescent brain development, and met with the Defendant on January 5, 2017 for 2 ½ to 3 hours. His research on adolescent brain development consisted of reading one article which contained summaries of 40+ researchers and then reading the abstracts of several of them. Based on this, Dr. Money Penny concluded that the Defendant was behaviorally immature against the norm and that his development was below the norm. Dr. Money Penny had the opportunity to listen to all the testimony presented. He said the most impressive testimony was the statements of the Defendant's former school bus driver, Marilyn Hunt, that she thought he could be talked into anything, and by his adoptive father that the Defendant was mature enough to drive alone to Oklahoma. Dr. Money Penny thought this testimony supported his conclusion of the Defendant's immaturity. The Court questions why Dr.

Money Penny did not consider the testimony of the investigating officer to be impressive on the issue of maturity in light of the Defendant's statements concerning planning, execution, and motivation. The adoptive father, who has spent more than 3 hours with the Defendant, felt the Defendant was mature and responsible enough to drive alone to Oklahoma. The school bus driver knew the Defendant from riding her bus for 2-3 years and visiting her home on several occasions and from this contact opined he could be talking into anything; however, no examples were cited and the Court disagrees with her conclusion. Dr. Money Penny seemed to have little basis for his conclusions and the Court disagrees with them.

As shown above, the court did not question the science of adolescent brain development. It merely questioned Dr. Money Penny's understanding and application of that science to his evaluation of Despain—a credibility determination. Thus, the circuit court did not ignore or disregard the evidence as argued by Despain; it simply weighed the evidence differently than Despain desired. *See Brown v. State*, 2016 Ark. App. 254, 492 S.W.3d 126.

B. Likelihood of Rehabilitation

Next, Despain argues that the circuit court's finding that the resources available would not likely rehabilitate him before his twenty-first birthday was clearly erroneous. He asserts that the testimony of Juvenile Ombudsman Scott Tanner revealed the availability of resources under an EJJ designation. He argues that the General Assembly enacted EJJ to give the courts flexibility to deal with juveniles who have committed serious offenses, but who nonetheless demonstrate that they can be rehabilitated. He takes the position that the circuit court disregarded Tanner's testimony. Again, this argument misapprehends the substance of the court's ruling. In regard to this issue, the court's order states:

G. There are facilities or programs available to the Judge of the Juvenile Division of the Circuit Court to rehabilitate juveniles, but they are unlikely to rehabilitate the Defendant before the expiration of his twenty-first birthday. In November of 2014, he had contact with the juvenile office concerning unwanted text

messages to a female. A diversion was used which involved contact with the juvenile office and counseling. He did fine until February of 2015 when his father reported he had stolen \$200.00 from his mother and was bullying his mother. The juvenile office worked with him with more restrictions. Later it was reported he was skipping school and a Family in Need of Services case was opened. He appeared before the Juvenile Court Judge on May 1, 2015 and was ordered to comply with court rules including counseling and school attendance. He attended counseling until sometime in December of 2015. He reported to his parents he was attending school and his counseling, but was not. In March of 2016, the parents reported he had stolen credit cards and a truck. He was scheduled for adjudication on May 20, 2016; the homicide occurred April 14, 2016.

Again, as shown above, the court did not disregard the testimony of Mr. Tanner. Instead, it focused on Despain's prior juvenile history and the steps taken which had failed to rehabilitate him thus far.

Additionally, Despain was charged with premeditated capital murder—a serious and violent crime—for purposely shooting his neighbor twice—once in the back and once in the head. Our supreme court has held that a juvenile may be tried as an adult solely because of the serious and violent nature of the offense. *See C.B. v. State*, 2012 Ark. 220, 406 S.W.3d 796.

Based on its consideration of the statutory factors, the court denied Despain's transfer motion. On the whole, we cannot find that this was clearly erroneous. *See Harris v. State*, 2016 Ark. App. 293, 493 S.W.3d 808 (“We will not reverse a circuit court's determination of whether to transfer a case unless that decision is clearly erroneous.”).

Finally, there can be no EJJ designation unless the case is either already in the juvenile division or is transferred to the juvenile division. *J.S. v. State*, 2009 Ark. App. 710, 372

S.W.3d 370. Once the circuit court found that Despain's transfer motion should be denied, EJJ was no longer available. *Id.*

Affirmed.

HARRISON and HIXSON, JJ., agree.

Jeff Rosenzweig; and *Katherine Streett*, Arkansas Public Defender Commission, for appellant.

Leslie Rutledge, Att'y Gen., by: *Jason Michael Johnson*, Ass't Att'y Gen., for appellee.