

**ARKANSAS COURT OF APPEALS**DIVISION I  
No. CA11-1172

STEPHEN E. COLE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 25, 2012

APPEAL FROM THE LONOKE  
COUNTY CIRCUIT COURT  
[No. CR2011-238]HONORABLE PHILLIP T.  
WHITEAKER, JUDGE

AFFIRMED

**LARRY D. VAUGHT, Chief Judge**

The State of Arkansas filed a felony information in Lonoke County Circuit Court against Stephen Cole, charging him with second-degree murder. In response, Cole filed a motion to transfer his case to juvenile court. The motion was considered at a juvenile-transfer hearing, after which the trial court denied the motion. Cole brings this interlocutory appeal, arguing that the trial court erred. We affirm.

A prosecuting attorney has the discretion to charge a juvenile, sixteen years of age or older, in the juvenile or criminal division of circuit court if the juvenile has allegedly engaged in conduct that, if committed by an adult, would be a felony. Ark. Code Ann. § 9-27-318(c)(1) (Repl. 2009). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court having jurisdiction. Ark. Code Ann. § 9-27-318(e). 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. *Neal v. State*, 2010 Ark. App. 744, at 6, \_\_\_ S.W.3d \_\_\_\_, \_\_\_\_. We will not reverse a trial court's determination of whether to transfer a case unless that decision is clearly erroneous. *Id.* at 6, \_\_\_ S.W.3d at \_\_\_\_. 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.*, \_\_\_ S.W.3d at \_\_\_\_.

At a juvenile-transfer hearing, the trial court must consider, and issue written findings on, the following factors: (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); *Neal*, 2010 Ark. App. 744, at 6–7, \_\_\_ S.W.3d at \_\_\_\_\_. The trial court does not have to give equal weight to each factor. *Id.* at 7, \_\_\_ S.W.3d at \_\_\_\_\_.

According to the information filed against Cole, the second-degree murder allegedly occurred on May 16, 2011. Cole's date of birth is August 5, 1993, making him seventeen at the time of the alleged offense. At the hearing, the parties stipulated to the introduction of seven witness statements. Cole introduced (1) photographs taken of him following the accident that showed a knot on his forehead and swelling and bruising around his left eye, (2) the medical examiner's report, ruling the victim's death a homicide caused by multiple stab wounds and determining that the victim's urine contained cannabinoids, and (3) witness testimony.

Cole's first witness was Matthew Edwards, a detective with the Lonoke County Sheriff's Office. Detective Edwards testified that his investigation revealed that on May 16, 2011, the victim, Brandon Scott, was angry with Cole because of something he said about Scott's girlfriend. The detective learned that Scott tracked down Cole to fight him. The parties stipulated that Cole knew that Scott was looking for him. There were at least seven witnesses to the altercation and, based on their statements, Detective Edwards concluded that Scott approached Cole, they argued, and then a fight ensued. During the fight, Cole produced

a knife and stabbed Scott eight times. Scott died at the scene. While Cole contended that Scott had a weapon, none of the witnesses saw it. Cole and Scott were the only individuals involved in the altercation. The detective added that Cole and his family cooperated with the investigation.

The next witness to testify for Cole was the chief intake officer for the juvenile department, April Gill. She testified about the programs available through the juvenile system. She stated that because Cole's eighteenth birthday was approaching, his options in the juvenile system were limited to probation or placement in the Department of Youth Services until Cole's twenty-first birthday. She added that she had never had a juvenile convicted of second-degree murder sentenced to probation, although there was no rule precluding it.

Cole's father, mother, and grandmother also testified. Together, they said that Cole had no prior behavior problems, that he completed his school work and received good grades, that he acted immature, and that he was remorseful about Scott's death.

The trial court took the matter under advisement and later entered an order denying Cole's motion to transfer. The order addressed each of the factors set forth in section 9-27-318(g):

- a. The Defendant is charged with Murder in the Second Degree, a Class A felony in violation of A.C.A. § 5-10-103. The Court finds and concludes that the seriousness of this alleged offense requires prosecution in the criminal division of the circuit court.
- b. There is evidence that the alleged offense was committed in [a] violent and premeditated manner. On the day of the alleged victim[']s death, the alleged victim and the Defendant had been exchanging hostilities. The Defendant was aware that the alleged victim was coming to his location. Prior to the alleged victim arriving, the Defendant had armed himself with a knife. The alleged victim received eight stab

wounds to his body which resulted in his death. Other than the multiple stab wounds and old scarring, the alleged victim's body was atraumatic upon examination.

c. The offense was against a person with resulting death and greater weight is afforded as a result.

d. The Defendant has presented evidence that the alleged victim was the initial aggressor and argues that the Defendant was attempting to protect his person in the event. The Defendant also had presented evidence that the alleged victim tested positive for a controlled substance at the time of his death. This evidence and arguments have weight as they pertain to culpability and a defense of justification. However, the court's conclusion that the alleged offense was committed in a violent and premeditated manner have weight in assessing the Defendant's level of planning and participation in the alleged offense.

e. The Defendant has no previous history for juvenile delinquency. There is no evidence of any patterns of physical violence or any other previous history of antisocial behavior.

f. The Defendant's family describes the Defendant as immature and dependent, lacking the sophistication, maturity, or desire to be treated as an adult.

g. Based upon the Defendant's age, alleged offense, juvenile facilities and programs, prosecution of delinquency pursuant to Extended Juvenile Jurisdiction is the only juvenile rehabilitation remedy available prior to the Defendant's twenty-first (21st) birthday.

h. While many people were present at the time of the alleged offense, the Court concludes that the Defendant acted alone with the alleged victim in the commission of the alleged offense.

i. In reaching its conclusion, the Court has considered the exhibits received at the hearing. Other than the facts, factors, and conclusions listed above, the Court considered no other factors.

On appeal, Cole argues that the trial court clearly erred in its denial of his motion to transfer the case to juvenile court. Specifically, he argues that the trial court "abdicated [its] judicial responsibility and acceded to the prosecutor's unfettered discretion" by improperly focusing on only one factor—that Cole was charged with the violent crime of second-degree

murder—and ignoring the acknowledged affirmative defense of justification. For support, Cole relies on *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991).

In *Pennington*, two juveniles were charged as adults with first-degree criminal mischief, after knocking over thirty tombstones in a cemetery. At the conclusion of the hearing on the juveniles' motion to transfer, the trial court made findings in favor of granting the motion to transfer, stating that the crime was not violent in nature; that the act did not appear to be part of a pattern of past or future criminal activity; that the juveniles showed no history of problems "other than problems that most kids go through"; and that there was no reason to believe they could not be rehabilitated. *Pennington*, 305 Ark. at 315, 807 S.W.2d at 662. However, the trial court ultimately denied the motion stating, "The prosecutor chose to charge these individuals as adults and charged them with felonies rather than with misdemeanors and I'm not going to upset that charge. I'm not going to substitute my judgment in this case for that of the prosecutor. If he wants to proceed with felony charges . . . he certainly may do so." *Id.*, 807 S.W.2d at 662. On appeal, our supreme court reversed, holding that the trial court erred in ignoring its own findings favorable to the juveniles and deferring solely to the prosecutor's judgment in selecting a forum for trial. *Id.*, 807 S.W.2d at 662. The court held that such action on the part of the trial court defeated the purpose of the Arkansas Juvenile Code that recognizes the need for careful, case-by-case evaluation when juveniles are charged with criminal offenses. *Id.*, 807 S.W.2d at 662.

The facts in *Pennington* are clearly distinguishable from those herein. The only findings made by the trial court in *Pennington* supported the motion to transfer, but the trial court

expressly stated that it was going against those findings based solely on the prosecutor's decision to charge the juveniles as adults. The trial court in the instant case did not defer to the decision made by the Lonoke County prosecutor to charge Cole as an adult. Moreover, contrary to Cole's argument, the trial court did not elevate any one factor over the others. Rather, the trial court complied with the mandate of section 9-27-318(g) by considering all of the required factors and making findings for each. Some of the findings favored Cole's motion to transfer,<sup>1</sup> while other factors did not.<sup>2</sup> The trial court weighed all of the findings and ultimately found the greater weight supported a conclusion to deny the motion to transfer. To the extent that the trial court's findings involved credibility determinations, we note that the credibility of witnesses is an issue for the finder of fact. *R.M.W. v. State*, 375 Ark. 1, 8, 289 S.W.3d 46, 51 (2008). On appeal, we have no means to assess witness credibility and may not act as the finder of fact. *Id.*, 289 S.W.3d at 51. Accordingly, we hold that the trial court's denial of Cole's motion to transfer to juvenile court was not clearly erroneous.

Affirmed.

GLADWIN and WYNNE, JJ., agree.

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<sup>1</sup>Scott tested positive for cannabinoids; Cole asserted that he acted in self-defense; Cole had no prior history of juvenile delinquency, no patterns of physical violence or antisocial behavior; and Cole was immature and dependent, lacking the sophistication, maturity, or desire to be treated as an adult.

<sup>2</sup>Cole was charged with second-degree murder, a violent offense; the alleged offense was committed in a premeditated manner; the offense was against a person and resulted in death; juvenile-rehabilitation remedies available to Cole were limited due to the fact Cole was almost eighteen years old at the time of the hearing; and Cole acted alone.