

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE :
 :
 :
 v. :
 :
 :
 JOSHUA MOORE, :
 (I.D. No. 0304018595) :
 :
 Defendant. :

Submitted: September 22, 2003
Decided: December 31, 2003

Stephen R. Welch, Jr., Esq., Department of Justice, Dover, Delaware. Attorney for the State of Delaware.

Deborah L. Carey, Esq., Public Defender's Office, Dover, Delaware. Attorney for the Defendant.

*Upon Defendant's Motion For Transfer
of The Case To Family Court*
GRANTED

VAUGHN, Resident Judge

ORDER

Upon consideration of the Defendant's application to transfer the case to Family Court, the State's opposition, and the record of the case, it appears that:

1. By indictment filed in June 2003, the Defendant was charged with two counts of Rape in the Second Degree and one count of Unlawful Sexual Contact in the Second Degree. The indictment charges that the alleged offenses occurred between February 1, 2003 and April 28, 2003. The Defendant's birth date is February 28, 1988. Therefore, he went from 14 to 15 years of age during that period. The Defendant has filed an application pursuant to 10 *Del. C.* § 1011(b) requesting that the case be transferred to Family Court.

2. The case is brought in this Court pursuant to 10 *Del. C.* § 1010(a). The statute provides that a child shall be proceeded against as an adult where the acts alleged to have been committed constitute Rape in the Second Degree.

3. A rebuttable presumption exists that a child charged with Rape in the Second Degree should be tried as an adult and the burden is on the defendant to rebut that presumption.¹ In acting upon the Defendant's application, the Court is required to consider the following factors and such other factors as are relevant: (1) the nature of the present offense and the extent and nature of the defendant's prior record; (2) the nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) whether the interests of society and the defendant

¹ *State v. Mayhall*, 659 A.2d 790, 795 (Del. Super. 1995); *State v. Wysznski*, 1994 Del. Super. LEXIS 220 (Del. Super. 1994).

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would be best served by trial in the Family Court or in the Superior Court.²

4. In considering the nature of the offense, the court must determine whether the State has established a *prima facie* case.³ A *prime facie* case is established if there is a fair likelihood that the defendant will be convicted.⁴ The evidence, both prosecution and defense, must be viewed in its totality, and a *prima facie* case is not proven if the evidence does not establish a fair likelihood of conviction.⁵ If a *prima facie* case has not been established, the case should be transferred to the Family Court.

5. The Defendant's alleged victims are his cousins, aged 13 and 10 at the time. The cousins' mother had become the Defendant's guardian and taken him in to her and her daughters' residence shortly before the alleged offenses occurred. After having considered the testimony and exhibits introduced at the hearing, I find that the State established a *prima facie* case that the Defendant committed the charged offenses.

6. The Defendant's prior record consists of Family Court adjudications of delinquency for Offensive Touching in 1999 and Attempted Robbery in the Second

² 10 *Del. C. Sec.* 1011(b).

³ *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*).

⁴ *Marine II* at 1185; *State v. Mayhall*, 659 A.2d 790, 791 (Del. Super. 1995).

⁵ *Marine II* at 1185; *State v. Mayhall*, 659 A.2d at 791.

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Degree in 2001. Family Court records, including probable cause affidavits describing the incidents, were introduced as exhibits and I have reviewed them. The Defendant was placed at Level II and Level III, respectively, for those offenses. The Defendant did not do everything that he was supposed to do while on Level III, but he was deemed to have successfully completed both probations.

7. The Defendant has not previously had the occasion to undergo any rehabilitative program relating to sex offenses. Through Family Court, several out-of-state, Level IV sex offender programs are available, generally ranging in length from nine to 18 months. It would appear that there is still time for the Defendant to be considered for entry into one of such programs and to complete such a program before he becomes 18 years of age.

8. After taking into account the nature of the present offense, the nature and extent of the Defendant's prior record, the Defendant's age, his response to past probation through Family Court, which was at least adequate, the lack of any prior treatment for sex offenses, the availability of sex offender programs through Family Court for which this Defendant would seem to be eligible, and all other relevant facts and circumstances, I am persuaded that the interests of society and the Defendant would be best served by having the pending charges tried in Family Court.

9. Therefore, the Defendant's motion is *granted* and the case is transferred to Family Court for trial and disposition.

IT IS SO ORDERED.

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/s/ James T. Vaughn, Jr.
Resident Judge

JTVJr:dmh

oc: Prothonotary

cc: Order Distribution
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