

RENDERED: SEPTEMBER 8, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-000337-MR

TASIA HOOTEN

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 04-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: SCHRODER, JUDGE; KNOFF AND ROSENBLUM, SENIOR JUDGES.¹

SCHRODER, JUDGE: This appeal is before us upon a conditional guilty plea pursuant to Kentucky Rules of Civil Procedure (RCr) 8.09. Reserved for our review is whether the trial court properly transferred appellant Tasia Hooten's first-degree robbery case from juvenile court to circuit court pursuant to

¹ Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580

Kentucky Revised Statutes (KRS) 640.010 and KRS 635.020. For the reasons stated below, we affirm.

Hooten was born on January 8, 1988. On April 8, 2004, when Hooten was sixteen-years old, she and her two cousins took part in the robbery of a Best Western Hotel in Clark County, Kentucky. Evidence presented at the youthful offender hearing established that Hooten went into the hotel asking for room rates just before it was robbed. Hooten matched the physical description given to the police and was implicated by her cousins in the robbery. One of Hooten's cousins/co-defendants allegedly raped the hotel clerk in the course of the incident; however, Hooten was not implicated in that crime.

On April 21, 2004, the Clark District Court conducted a youthful offender hearing pursuant to KRS 635.020(2) and KRS 640.010(2). The district court ruled that its jurisdiction should be waived and that Hooten should be proceeded against as an adult in circuit court.

Following the transfer, Hooten was indicted for first-degree robbery² on May 13, 2004. Thereafter, on August 10, 2004, Hooten moved to dismiss the indictment for lack of jurisdiction. The Clark Circuit Court denied the motion on August 26, 2004. From that denial, on September 1, 2004, Hooten filed an original action for a writ of prohibition in this Court pursuant to

² See KRS 515.020.

Kentucky Rules of Civil Procedure (CR) 76.36 seeking to block the transfer. On September 24, 2004, this Court entered an order denying the writ. See Hooten v. Jennings, Case No. 2004-CA-001774-OA. Hooten subsequently appealed the denial of the writ to the Supreme Court.

On November 23, 2004, Hooten entered a conditional guilty plea pursuant to RCr 8.09 to an amended charge of facilitation³ to commit first-degree robbery, a Class D felony, and was sentenced to a five-year prison term. The plea was conditioned on her being able to appeal the district court's waiver of jurisdiction. Hooten then filed the present appeal from her guilty plea on February 15, 2005, challenging the district court's waiver of jurisdiction to circuit court. On June 16, 2005, the Supreme Court rendered an unpublished opinion affirming this Court's denial of Hooten's writ of prohibition. See Hooten v. Jennings, Case No. 2004-SC-000871-MR, WL 1412486 (Ky. 2005).

Turning now to the merits of her appeal, Hooten first contends that the district court erroneously construed KRS 640.010 when it waived jurisdiction to circuit court. Specifically, Hooten contends that the district court erroneously "held that the legislature authorized it to waive jurisdiction based on the alleged charge alone, 'despite what

³ See KRS 506.080.

may be true for [the juvenile] personally.'" ; erred by transferring the case "despite the fact that [Hooten] is amenable to rehabilitation and not a danger to the community[.]" ; erred by failing to consider the requisite contained in KRS 600.010(d) that "any child brought before the court under KRS Chapters 600 to 645 shall have a right to treatment reasonably calculated to bring about an improvement of his or her condition." ; and failed to consider that KRS 600.010(f) requires that Chapter 640 should be specifically interpreted "in an effort to rehabilitate delinquent youth."

KRS 640.010(2) requires that, upon motion by the Commonwealth to transfer a juvenile case from district court to circuit court, a preliminary hearing be held to determine whether probable cause exists. KRS 640.010(2)(b) provides as follows:

- (b) If the District Court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the Circuit Court:
 - 1. The seriousness of the alleged offense;
 - 2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;
 - 3. The maturity of the child as determined by his environment;

4. The child's prior record;
5. The best interest of the child and community;
6. The prospects of adequate protection of the public;
7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and
8. Evidence of a child's participation in a gang.

In its transfer hearing order of April 21, 2004, the district court concluded that factors one, two, and five favored transfer. The district court also, in a hand-written notation, stated "[t]he seriousness of the offense, committed against a person, outweighs the factors in the juvenile's favors [sic]. In addition, the best interest of the community demands that offenses of this seriousness are addressed by the justice system as a whole."

In its opinion of June 16, 2005, in Case No. 2004-SC-000871-MR affirming this Court's denial of a writ of prohibition to prevent the transfer to circuit court, the Supreme Court stated as follows:

[T]he question of whether the District Court could properly transfer the case to Circuit Court and whether that Court could properly exercise jurisdiction over the Appellant must be based on consideration of

the eight factors set out in KRS 640.010(2)(b): the seriousness of the alleged offense; whether the offense was against persons or property, with greater weight being given to offenses against the persons; the maturity of the child as determined by her environment; the child's prior record; the best interest of the child and community; the prospects of adequate protection of the public; the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and evidence of a child's participation in a gang. If two or more of the factors favor transfer, the child may be transferred to Circuit Court. KRS 640.010(2)(c).

Here, the District Court relied on three of the eight factors favoring transfer. The court found that the seriousness of the offense, the offense being committed against the person rather than property, and the fact that the best interest of the community outweighed the best interest of the child were sufficient reasons to transfer the case to Circuit Court. Thus, the fact that the District Court complied with the requirements of KRS 635.020 and KRS 640.010 would justify the transfer to Circuit Court and would support a decision of this Court to affirm the Court of Appeal's denial of the writ of prohibition.

Further, this Court has reviewed the trial court's reasoning behind the use of these factors to transfer the case to Circuit Court as these factors are essential to the question of whether or not the Circuit Court properly exercised jurisdiction.

With regards to the District Court's application of 640.010, this Court finds that it completed a full investigation.

After considering each of the eight factors, the District Court stated with adequate specificity the reasons for transferring the case to Circuit Court. The lower court also provided sufficient reasons in both the record and the order to provide for meaningful review. *Harden v. Commonwealth*, 885 S.W.2d 323, 324 (Ky.App. 1994).

The Appellant contends that two of the three factors the District Court gave do not warrant transfer. There is no dispute over the seriousness of the offense, and this clearly justifies the use of one of the three factors considered for transfer. With regards to the second factor of giving more weight to an offense against the person than to one against property, the appellant would propose that the Court of Appeals did not properly consider the specific evidence in deciding if she was committing a crime against the person. This Court agrees with the decision of the lower Court that the offense of first-degree robbery and the particular circumstances of the case justified utilizing such a factor to support transfer to Circuit Court.

Also, the Appellant's argument that the third factor utilized by the District Court was not adequately explained in order to allow for proper review is without merit. The third factor was that the interest of the community outweighed the interest of the child. The District Court could properly decide this issue by taking the individual facts of the case into consideration, and the evidence presented supports the contention that the court proceeded with a thorough investigation by considering each of the eight factors in order to determine which ones supported transfer. *Id.* at 325.

(Emphasis added).

A final decision by an appellate court, right or wrong, is the law of the case and is conclusive of the questions therein resolved and is binding upon the parties and lower courts. Hogan v. Long, 922 S.W.2d 368, 370 (Ky. 1995). Based upon the thrust of the Supreme Court's discussion of the district court's transfer decision in its June 16, 2005, opinion, we believe it to be a settled issue that the district court acted appropriately and in accordance with its statutory duties in transferring the cause to circuit court. As such, the issues of whether the district court erroneously construed KRS 640.010 and abused its discretion when it waived jurisdiction to circuit court are likewise settled adversely to Hooten's argument.

Hooten also contends that KRS 640.010 violates procedural due process. Hooten states her due process argument as follows:

Tasia takes issue with the following portion of KRS 640.010(2)(c):

If, following the completion of the preliminary hearing, the District Court finds, after considering the factors enumerated in paragraph (b) of this subsection, that two (2) or more of the factors specified in paragraph (b) of this subsection are determined to favor transfer, the child may be transferred to Circuit Court . . .

. . . .

Tasia argues that this procedure creates a risk of erroneous deprivation of her statutory interests as a juvenile. More specifically, the fact that a district court need only find two of the factors before being authorized to transfer creates a risk of waiving jurisdiction without proper attention to the rehabilitative purpose of the juvenile system. Based on this procedural framework, a court has too much room to make arbitrary decisions based on whether it likes the color of the defendant's shirt or, more insidious, the color of the defendant's skin. Moreover, a district court can waive its jurisdiction for the sole purpose of punishment.

. . . .

Based on the way the statute is written and as it was applied in this case, a court can simply find the existence of an allegation of Robbery 1st and waive jurisdiction.

The only way to save this statute from being constitutionally infirm is for courts to read into it a standard of placing the child before the charge

We first note that Hooten has failed to cite us to her preservation of her challenge to the constitutional infirmities of KRS 640.010(2)(c) pursuant to CR 24.03 (when the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General). Further, our review of the circuit court record reflects that

such notification was not given. Hence, it appears that this issue was not properly preserved for our review. Nevertheless, we will address the issue on the merits.

In Stout v. Commonwealth, 44 S.W.3d 781 (Ky.App. 2000), the defendant argued that KRS 640.010 was unconstitutional because it did not provide a standard of proof. This Court determined that the statutory scheme established for the discretionary transfer of juvenile offenders to circuit court was not constitutionally infirm or violative of a juvenile's due process rights because it neglected to provide a standard of proof.

If anything, the constitutional challenge brought by Hooten is less compelling than the challenge brought in Stout. Formerly, KRS 640.010(2)(c), did not contain a two-factor minimum. The statute was amended effective July 15, 1998, to provide for discretionary transfer only if the district court finds "two (2) or more of the factors . . . are determined to favor transfer." The version of the statute under review in Stout did not contain this limitation. Hence, the version of the statute found constitutional in Stout was less restrictive of the district court's discretion than the present version.

"It is axiomatic that a juvenile offender has no constitutional right to be tried in juvenile court." Stout, 44 S.W.3d at 785. "[T]reatment as a juvenile is not an inherent

right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved." Id. at 785, n.9 (citing Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977), *cert. denied*, 434 U.S. 1088, 98 S. Ct. 1285, 55 L. Ed. 2d 794 (1978)). Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) is recognized as the seminal case concerning the transfer of jurisdiction in juvenile cases. "[I]n Breed v. Jones, [421 U.S. 519, 537, 95 S. Ct. 1779, 1790, 44 L. Ed. 2d 346, 360 (1975),] the United States Supreme Court specifically discussed its holding in Kent, and remarked that it had 'never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.'" Stout, 44 S.W.3d at 787 (footnote omitted).

Under Kentucky law no less than under federal law, the concept of procedural due process is flexible. [Smith v. O'Dea, 939 S.W.2d 353, 357 (Ky.App. 1997).] In determining which standard of proof is appropriate in any particular context, our Courts, and the United States Supreme Court, have utilized the due process analysis set forth in Mathews v. Eldridge, [424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)]. See Commonwealth v. Raines, 847 S.W.2d 724 (Ky. 1993) and Shaw v. Seward, 689 S.W.2d 37, 39 (Ky.App 1985)]. Mathews articulates three factors whose consideration is required by "the specific dictates of due process": (1) "the private interest that will be affected by the official action"; (2) "the risk of an

erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [Mathews v. Eldridge, supra, 424 U.S. at 335, 96 S. Ct. at 903, 47 L. Ed. 2d at 33.]

Stout, 44 S.W.3d at 787-788 (footnotes omitted).

Stout discussed the Mathews factors in detail. Id.

We are persuaded that the same analysis which led the Stout Court to determine KRS 640.010 constitutional, though lacking a standard of review, applies with equal force to the challenge raised by Hooten, and we need not repeat the analysis herein. "[T]he transfer scheme evinces the Legislature's intent that the district court judge have considerable discretion in balancing the needs of the juvenile with those of society." Stout, 44 S.W.3d at 788. The "two of eight" format contained in KRS 640.010(2)(c) provides this flexibility. Accordingly, we hold that the statutory scheme established for the discretionary transfer of juvenile offenders to circuit court is not constitutionally infirm or violative of a juvenile's due process rights because it requires a district court to find only two of the eight factors contained in KRS 640.010(2)(c) in order to waive jurisdiction to circuit court.

For the foregoing reasons the judgment of the Clark
Circuit Court is affirmed.

ALL CONCUR.

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