

STATE OF MICHIGAN
COURT OF APPEALS

In Re TRAVIS HENDRICKS.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

TRAVIS HENDRICKS,

Respondent-Appellant.

UNPUBLISHED

December 12, 2013

No. 312764

Jackson Circuit Court

Family Division

LC No. 08-000699-DL

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right from an order of the circuit court, family division, waiving jurisdiction of respondent¹ to the circuit court having general criminal jurisdiction. This matter arises out of a petition filed against respondent on a charge of torture, MCL 750.85, which was based on burns suffered by the then 13-day-old victim while the victim was in the company of respondent but out of view of the victim's mother. We affirm.

Respondent first argues that the order waiving jurisdiction should be set aside because the record indicates that the motion to waive jurisdiction was not properly served. Pursuant to MCR 3.950(C)(2), "[a] copy of the motion seeking waiver must be personally served on the juvenile and the parent, guardian, or legal custodian of the juvenile, if their addresses or whereabouts are known or can be determined by the exercise of due diligence." The proof of service indicates that respondent, respondent's mother, and respondent's attorney were served by ordinary mail. Although this may not have satisfied the court rule's requirements, these individuals "plainly were informed of the purpose and nature of th[e] proceeding." *Harmsen v Fizzell*, 351 Mich 86, 100; 87 NW2d 161 (1957). Respondent therefore had actual notice and an actual opportunity to be heard, so he was not deprived of fundamental due process. See *Krueger v Williams*, 410 Mich 144, 158; 300 NW2d 910 (1981), citing *Mullane v Central Hanover Bank & Trust Co*, 339 US

¹ Respondent was 16 years old at the time of the waiver hearing. Some documents filed in the trial court incorrectly listed respondent's year of birth as 1994, rather than 1996.

306, 313; 70 S Ct 652; 94 L Ed 865 (1950). Respondent fails to articulate how he was in any way prejudiced. Because the mailed notice sufficiently notified respondent of the proceedings for the purposes of due process, the fact that the notice did not technically comply with the court rule did not prejudice him. See *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).

Respondent next argues that he was denied effective assistance of counsel. Specifically, respondent argues that trial counsel should have objected to the motion to waive jurisdiction on the basis of improper service, called an expert witness to testify regarding his cognitive impairment, objected to the prosecutor's reference to his charged offense as an "adult crime," and not stipulated to respondent's culpability at the second phase of the waiver hearing. We disagree. To establish ineffective assistance of counsel, a defendant must show "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and that there is a reasonable probability that the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Because respondent did not move for a *Ginther*² hearing or a new trial in the lower court, our review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Respondent's first two contentions are meritless. As discussed, respondent received actual notice and cannot establish an objection to the lack of personal notice would have ultimately affected the outcome of the proceedings. Likewise, it was not disputed that respondent had a cognitive impairment. However, respondent offers at most speculation that expert testimony at the second phase of the waiver hearing "might have better assisted the trial court in making its determinations." Beyond being speculation, this does not even rise to the level of speculation as to any effect such testimony would have had on the ultimate outcome of the proceedings. Even if we were to presume—which we do not—that counsel's performance was objectively deficient, respondent fails to show that either alleged error affected him in any practical way.

Respondent argues that the prosecutor's reference to an "adult crime" was objectionable because of the emotional impact of the term. Respondent does not object to the technical factual accuracy of the reference except insofar as it might incorrectly imply the existence of a juvenile criminal code. This argument might have some validity if the reference had been made before a jury. However, "[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (internal quotation marks and citation omitted). And "[i]n the absence of proof to the contrary trial judges are presumed to follow the law." *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). In any event, the family court is required to consider a number of factors during a waiver hearing, including the seriousness of the alleged offense. MCR 3.950(D)(2)(d)(i). It was not improper for the

² *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973).

prosecutor to refer to the crime as an “adult crime” in order to highlight the seriousness of the offense.

Finally, the purpose of the second phase waiver hearing is “to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction” to the circuit court. MCL 712A.4(4); MCR 3.950(D)(2). In making its determination, the court must consider the six factors listed in the statute and court rule. MCL 712A.4(4); MCR 3.950(D)(2)(d). Included among the six factors is the juvenile’s culpability in the committing the alleged offense. MCL 712A.4(4); MCR 3.950(D)(2)(d). Counsel’s decision to stipulate to respondent’s culpability was likely a matter of trial strategy. Rather than focus on respondent’s culpability, counsel focused on the adequacy of programming available to respondent in the juvenile systems, a factor to be considered under MCL 712A.4(4) and MCR 3.950(D)(2)(d). We conclude that this was a reasonable strategy given the circumstances of the alleged offense.

Respondent’s final argument is that the trial court abused its discretion when it granted the prosecutor’s motion to waive jurisdiction to the circuit court of general criminal jurisdiction. We disagree.

Generally, the family court has exclusive jurisdiction over proceedings concerning any child less than 17 years old who is accused of violating a law or a municipal ordinance. MCL 712A.2(a)(1); *People v Conat*, 238 Mich App 134, 139; 605 NW2d 49 (1999). However, upon motion of the prosecutor, the family court may waive its jurisdiction over a child who is at least 14 years old if the alleged offense is a felony. MCL 712A.4(1); *People v Thenghkam*, 240 Mich App 29, 37; 610 NW2d 571 (2003), overruled in part on other grounds in *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003). The trial court must first find probable cause; the second phase of a waiver hearing is “to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction.” MCL 712A.4(4); MCR 3.950(D)(2). In deciding whether these interests merit waiver of jurisdiction, the family court must consider six factors enumerated at MCL 712A.4(4)(a)-(f) and MCR 3.950(D)(2)(d)(i)-(vi). Of those factors, the court must give greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency than to the other criteria. MCL 712A.4(4); *People v Whitfield (After Remand)*, 228 Mich App 659, 662 n 1; 579 NW2d 465 (1998).

We have carefully reviewed the record, and we conclude that the trial court did not abuse its discretion when it determined that waiver would serve the best interests of the juvenile and the public. MCR 3.950(D)(2)(c). The trial court considered the six enumerated factors in MCL 712A.4(4) and MCR 3.950(D)(2)(d), and it properly placed its findings on the record. We will affirm an order waiving jurisdiction whenever the family court’s findings, “based on substantial evidence and on thorough investigation, show either that the juvenile is not amenable to treatment” or is likely to be “dangerous to the public if he were to be released at the age of nineteen or twenty-one.” *Whitfield*, 228 Mich App at 662. [T]here must be evidence on the record, to which the [family] court must refer, regarding the relative suitability of programs and facilities available in the juvenile and adult correctional systems.” *People v Dunbar*, 423 Mich 380, 388; 377 NW2d 262 (1985). The family court’s findings of fact are reviewed under the clearly erroneous standard. MCR 3.902(A); MCR 2.613(C). The ultimate decision whether to

waive jurisdiction is reviewed for an abuse of discretion. *In re Fultz*, 211 Mich App 299, 306; 535 NW2d 590 (1995), rev'd on other grounds 453 Mich 937 (1996).

The first factor concerns the seriousness of the offense. MCL 712A.4(4)(a); MCR 3.950(D)(2)(d)(i). Torture is a serious crime “punishable by imprisonment for life or any term of years.” MCL 750.85. Additionally, there were several aggravating factors in this case, including the victim’s extremely young age. The second factor is respondent’s culpability, which respondent conceded. MCL 712A.4(4)(b); MCR 3.950(D)(2)(d)(ii). The third factor is respondent’s prior school record and record of any kind of delinquency. MCL 712A.4(4)(c); MCR 3.950(D)(2)(d)(iii). Respondent has several prior petitions of varying degrees of severity and a grim school record; in combination, his prior record is unfavorable to him. The fourth factor is respondent’s programming history and willingness to participate meaningfully in programming. MCL 712A.4(4)(d); MCR 3.950(D)(2)(d)(iv). Respondent has been unwilling to participate in any meaningful or enduring way and only complied with probation while on intensive probation. The fifth and sixth factors are the adequacy of the punishment, programming, and dispositional options available from within the juvenile justice system. MCL 712A.4(4)(e)-(f); MCR 3.950(D)(2)(d)(v)-(vi). Although respondent correctly points out that services *are* available to him, the trial court concluded that the services available are “not sufficient to fully address the behavior involved here.” The juvenile system can only hold someone until they are 21 years old, regardless of the person’s state of rehabilitation. Therefore, the court concluded that there was no way to ensure that respondent would not revert to dangerous and harmful conduct upon reaching the age of 21.

Respondent takes issue with the court’s conclusion, arguing that the court was only concerned with punishing respondent past the age of 21. The record simply does not support respondent’s argument. The court was not concerned with punishing respondent. Rather, the court was concerned that respondent would require programming past the age of 21. Because the juvenile system can only hold someone until they are 21 years old, there was no way of ensuring that respondent would be rehabilitated before being released back into society. In other words, the trial court was properly concerned with the safety of the general public. In conclusion, following a thorough review of the record as applied to the enumerated factors, substantial evidence demonstrates that respondent is not either amenable to treatment in the juvenile system or is likely to be “dangerous to the public if he were to be released at the age of nineteen or twenty-one.” *Whitfield*, 228 Mich App at 662. Accordingly, we conclude that the trial court properly waived jurisdiction of respondent to the circuit court to be tried as an adult.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause