STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0045

In the Matter of the Welfare of: B. C. L., Child.

Filed August 9, 2021
Affirmed
Worke, Judge

Kandiyohi County District Court
File No. 34-JV-20-218

Shane D. Baker, Kandiyohi County Attorney, Julianna F. Passe, Assistant County Attorney, Willmar, Minnesota (for appellant State of Minnesota)

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Considered and decided by Gaïtas, Presiding Judge; Segal, Chief Judge; and Worke, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court erred in determining that respondent established by clear and convincing evidence that retaining the proceeding in juvenile court serves public safety. We affirm.

FACTS

Appellant State of Minnesota filed a juvenile delinquency petition charging respondent B.C.L. with first-degree criminal sexual conduct, third-degree criminal sexual

conduct, and fifth-degree criminal sexual conduct. The state alleged that B.C.L. drove an underaged girl that he had known for a long time to a park where he "aggressively force[d] [her] to perform oral sex on him" and then forced her to have vaginal intercourse. B.C.L. left the girl at the park without her shoes or cellphone. She walked to a nearby residence, told the residents what happened, and the police were called. The girl told the police that she "froze," did not know what to do, and "just gave in." She also reported that she was in pain and rated it a seven out of ten on the pain scale.

The state moved for a presumptive certification for B.C.L. to be prosecuted as an adult. B.C.L. was 16 years old at the time of the alleged offense.

B.C.L. submitted to two juvenile presumptive certification evaluations. The first was done by Dr. Tricia Aiken, a licensed psychologist. Dr. Aiken concluded that extended juvenile jurisdiction (EJJ) was the appropriate course of action rather than certification because B.C.L "is at relatively low risk to reoffend, he has no prior adjudicative history, and he has a very limited programming history as well."

The second evaluation was done by April Jones, a probation officer for Kandiyohi County. Jones outlined two outpatient sex-specific treatment programs that B.C.L. could attend. She concluded that "it appears public safety can be served and there is adequate time to provide supervision and programming through EJJ designation," and recommended that B.C.L. be designated EJJ.

Following a hearing, the district court denied the state's petition and retained the matter under EJJ. This appeal followed.

DECISION

The state challenges the district court's determination that B.C.L. established by clear and convincing evidence that retaining the proceeding in juvenile court serves public safety. "A district court has considerable latitude in deciding whether to certify, and this court will not upset its decision unless its findings are clearly erroneous so as to constitute an abuse of discretion." *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Oct. 24, 2007). "We will not disturb a finding about whether public safety would be served by retaining the proceeding in juvenile court unless it is clearly erroneous." *In re Welfare of J.H.*, 844 N.W.2d 28, 35 (Minn. 2014).

Certification as an adult is presumed for a 16- or 17-year-old child who is alleged to have committed a crime that involves a "presumptive commitment to prison under the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 3 (2020). It is undisputed that a presumption of adult certification arose in this case because B.C.L. was 16 years old at the time of the offense and his charges include a presumptive prison sentence.

When there is a presumption of certification, the child has the burden to rebut the presumption by "demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety. If the court finds that the child has not rebutted the presumption by clear and convincing evidence, the court shall certify the proceeding." *Id.* There are six factors that the district court must consider when determining whether public safety is served by certifying the matter:

> (1) the seriousness of the alleged offense in terms of community protection, including the existence of any

> aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
> (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
> (3) the child's prior record of delinquency;
> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
> (6) the dispositional options available for the child.

Id., subd. 4 (2020). While the district court weighs all of the factors, "the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors." *Id.*

The state argues that the district court failed to give enough weight to the first factor and abused its discretion in weighing the fourth, fifth, and sixth factors. We address each argument in turn.

First factor—seriousness of the alleged offense

The state first argues that the district court abused its discretion by "failing to accord due weight to the first factor." A district court does not need to weigh the factors in a rigid mathematical formula. *In re Welfare of D.M.D., Jr.*, 607 N.W.2d 432, 438 (Minn. 2000). But "public safety is the touchstone of the analysis," and the district court is statutorily required to place a greater emphasis on the first and third factors. *In re Welfare of P.C.T.*, 823 N.W.2d 676, 685 (Minn. App. 2012), *review denied* (Minn. Feb. 19, 2013).

In considering the first factor, the district court noted that B.C.L.'s charges "are very serious . . . . [and] create a significant concern for public safety." The district court also

noted the aggravating factors of particular cruelty and multiple forms of penetration. The district court stated that it placed greater weight on the first and third factors in its conclusion, but still found that B.C.L. demonstrated by clear and convincing evidence that EJJ serves public safety.

The state relies on *P.C.T.* to support its argument that, even though the district court found this factor in favor of certification, it failed to apply appropriate weight to the severity of the crime and impact on the victim. *See* 823 N.W.2d at 678. In *P.C.T.*, we reversed a district court's order granting EJJ. *Id*. at 678-79. The 16-year-old defendant was charged with six counts of aiding-and-abetting second-degree attempted murder based on three incidents of drive-by shootings. *Id.* The district court concluded that the first three factors favored adult prosecution, and the last three favored EJJ. *Id.* at 682. This court concluded that the district court abused its discretion in part because it did not apply enough weight to the first and third factors, emphasizing that "[t]he first statutory factor weigh[ed] particularly heavy here, given the extreme gravity of respondent's offenses." *Id.* at 685. This was because the respondent used a firearm in committing the offenses for the benefit of a gang and shot multiple rounds at multiple people on three separate occasions in a highly populated area. *Id.* But this court was careful to note that certification is not automatically required if the first and third factors favor certification. *Id.* at 686. If this were the case, the statute would have been written differently. *Id.*

This case is distinguishable from *P.C.T.* in that here, the third factor—prior record of delinquency—weighed in favor of EJJ. The state does not cite any case suggesting that a district court abused its discretion when the two factors that must be weighed most

heavily are on different sides of the scale. This case also did not involve a gang, a firearm, multiple victims, or multiple incidents. The state has not met its burden in showing that the district court abused its discretion.

Fourth factor—programming history

The state next argues that the district court abused its discretion in weighing the fourth factor in favor of EJJ because the district court failed to note B.C.L.'s two past diversion programs and his lack of candor about these programs during his evaluations.

The fourth factor considers "the child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4). This factor "broadly refers to programming history consisting of a specialized system of services, opportunities, or projects designed to meet a relevant behavioral or social need of the child." *J.H.*, 844 N.W.2d at 39.

The state is referring to a disclosure by B.C.L.'s mother to Dr. Aiken about two past diversion programs that B.C.L. took part in. The two incidents leading to the diversion programs occurred when B.C.L. was 11 or 12 years old. The first was for breaking someone's fishing pole, and the second was for sending a naked photograph of himself to some girls who spread it around. According to B.C.L.'s mother, "he was not given probation or adjudicated delinquent of either incident," but he "had to remain law abiding and complete some other conditions of the court," like a written apology. Dr. Aiken still concluded that the fourth factor supports EJJ, but she did not mention the diversion programs in her analysis of this factor.

The state relies on two nonprecedential opinions from this court that mention diversion programs in analyzing this factor. The first case is *In re Welfare of S.J.R.*, in which we noted the child's failure to appear for referral to a diversion program. No. A04-773, 2005 WL 354011 at *2 (Minn. App. Feb. 15, 2005) ("S.J.R.'s failure to appear for referral to a diversion program and her failure to comply with the conditions of probation do not bode well for treatment."). The second case is *In re Welfare of D.S.M.*, in which we, in affirming the district court's order for EJJ, noted that the district correctly listed the child's successful completion of a diversion program in support of the fourth factor favoring EJJ. No. A03-949, 2004 WL 771680 at *2 (Minn. App. Apr. 13, 2004), *review denied* (Minn. June 29, 2004). Further, *D.S.M.* was a substantially different case. The juvenile was appealing the district court's designation of EJJ, and the state had the burden of showing that EJJ was appropriate. *Id.* at *1. We affirmed the EJJ despite the child having the fourth factor weigh in his favor. *Id.* at *3.

On appeal, the complaining party must not only show that the district court erred, but that they were harmed by the error. *See Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979). Even if the district court erred by not mentioning these two diversion programs in its order, the record suggests that B.C.L. successfully completed the diversion programs both times. A successful completion would weigh in favor of EJJ as it shows his "past willingness to participate meaningfully in available programming." *See* Minn. Stat. § 260B.125, subd. 4(4). But even if the past diversion programs weighed in favor of certification, it is unlikely that two diversion programs from several years earlier would cause the district court to change the outcome of the factor.

The state argues that this was a serious error because one incident that resulted in diversion is sexual in nature. But this incident was when B.C.L. was in sixth grade, and it only loosely relates to the current alleged offense. Because the state has not shown prejudice, the district court did not abuse its discretion on this factor.

Fifth factor—adequacy of punishment/programming

The state argues that the district court abused its discretion in weighing this factor in favor of EJJ because it considered the adequacy of punishment in isolation without considering the seriousness of the offense. In other words, the state argues that the 54-months remaining on EJJ "is a woefully inadequate punishment for a first-degree criminal sexual conduct conviction, particularly in light of the 144-month presumptive sentence and ten-year mandatory conditional release term" if convicted as an adult.

The fifth factor considers "the adequacy of the punishment or programming available in the juvenile justice system." *Id.*, subd. 4(5). In weighing this factor, the district court reviewed the results of multiple testing instruments which mostly indicated that B.C.L. was a low risk to reoffend. However, one test indicated a higher risk to reoffend, and the district court noted that Dr. Aiken reported that the low scores may be due to B.C.L. asserting his innocence. Dr. Aiken also stated that this denial may mean that B.C.L requires more than the four and one-half years under EJJ to complete any programming. But the district court also noted that Jones testified that there was sufficient time for B.C.L. to complete programming. After considering all of this information, the district court found that this factor favored EJJ.

The state's sole argument is comparing the presumptive sentence of adult prosecution with the four and one-half years remaining under EJJ. A district court may look at the presumptive adult sentence under the sentencing guidelines in considering the adequacy of EJJ punishment. *See In re Welfare of A.J.F.*, No. A06-303, 2007 WL 92843 at *4 (Minn. App. Jan. 16, 2007). But this is not the only consideration. Here, the record shows that the district court considered the available programs and Jones's opinion that B.C.L. could complete those programs within the four and one-half years of EJJ. The district court found Jones credible. *See J.H.*, 844 N.W.2d at 39 (stating that appellate courts defer to credibility determinations of the district court). Based on this evidence, the district court found that this factor favored EJJ. While the difference in punishment between adult sentencing and the length of EJJ is something that a district court may consider, the state has not shown that the district court abused its discretion by not considering it, especially when the decision was sufficiently based on facts in the record.

Sixth factor—dispositional options

Finally, the state argues that the district court abused its discretion by concluding that the sixth factor favors EJJ because the "same treatment and dispositional options are available if B.C.L. were to be certified as an adult," so this factor should be neutral.

The sixth factor considers "the dispositional options available for the child." Minn. Stat. § 260B.125, subd. 4(6). The state has not provided, and we cannot find, any support for its argument that this factor considers whether the adult prosecution system also has dispositional options. Because this factor considers only whether the juvenile system has

appropriate dispositional options, the state has not shown that the district court clearly erred by weighing this factor in favor of EJJ.

Affirmed.