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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1999**

In the Matter of the Welfare of: A. M. S., Child

**Filed May 16, 2011
Affirmed
Larkin, Judge**

Stearns County District Court
File No. 73-JV-10-5798

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori A. Swanson, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's determination that he failed to rebut the presumption for adult certification by clear and convincing evidence. Because the district court did not abuse its discretion, we affirm.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Appellant A.M.S., born December 2, 1993, was charged by amended petition with one count of attempted murder in the second degree under Minn. Stat. §§ 609.19, subd. 1(1), .17 (2008); one count of assault in the first degree under Minn. Stat. § 609.221, subd. 1 (2008); and one count of assault in the second degree under Minn. Stat. §§ 609.222, subd. 1, .11, subd. 4 (2008), for stabbing 17-year-old M.S. in the chest at a graduation party.

The district court held a certification hearing to determine whether to certify the proceeding for adult prosecution. The court received a number of exhibits, including documents pertaining to A.M.S.'s delinquency history, a psychological evaluation of A.M.S., and a certification study. A.M.S. called three witnesses: his therapist, James Prijatel; Dr. Timothy Tinius, who prepared a psychological evaluation; and Minnesota Correctional Facility-Red Wing employee Eric Meier. The state called three witnesses: M.S.; M.S.'s mother, L.S.; and Stearns County Community Corrections Agent Carey L. Janisch, who prepared a certification study. Prijatel and Dr. Tinius recommended that the district court deny the motion to certify the proceeding for adult prosecution. They recommended that A.M.S. be ordered to complete residential treatment in a juvenile facility. Janisch recommended that the proceeding be certified to adult court.

The district found that A.M.S. and M.S. attended the same graduation party on July 3, 2010. A.M.S. approached M.S. and said that he wanted to fight. A.M.S. pulled out a knife and swung at M.S. multiple times. First, A.M.S. swung at M.S.'s head and missed. Next, A.M.S. cut M.S.'s hip area. Finally, A.M.S. jabbed the knife into M.S.'s

chest causing a six to eight inch laceration. M.S. was transported to a hospital for emergency care. He underwent cardiovascular surgery and received a blood transfusion.

Witnesses at the party identified A.M.S. as the person who stabbed M.S. Police officers located A.M.S. sitting in the driver's seat of his vehicle, which was parked near the party. A.M.S. provided a statement to the police in which he admitted that he had consumed alcohol and that he felt intoxicated. A.M.S. claimed he did not remember anything about the stabbing. He denied threatening M.S., or even seeing M.S., that evening.

The police subsequently learned that A.M.S. disliked M.S. because M.S. had dated A.M.S.'s ex-girlfriend, B.M. In the weeks leading up to the stabbing, A.M.S. had threatened to kill M.S. And prior to the stabbing, A.M.S. told B.M. to tell M.S. to leave the party because he was going to kill him. After the stabbing, A.M.S. called B.M. and told her he had stabbed M.S.

The district court's order contains findings on all of the factors that must be considered when determining whether to certify the proceeding for adult prosecution. The district court concluded that every factor except for one weighed in favor of certification. The district court granted the motion for adult certification, and this appeal follows.

DECISION

A.M.S. claims that he "established by clear and convincing evidence that retaining his case in juvenile court serves public safety, he rebutted the presumption of certification, and the [district] court's certification order must be reversed."

“A district court’s decision to certify a juvenile for adult prosecution is entitled to considerable latitude.” *In re Welfare of H.S.H.*, 609 N.W.2d 259, 261 (Minn. App. 2000) (quotation omitted). This court will not reverse a “certification order unless the district court’s findings are clearly erroneous so as to constitute an abuse of discretion.” *Id.* (quotation omitted). For purposes of the certification hearing, the charges against the juvenile are accepted as true. *In re Welfare of J.L.B.*, 435 N.W.2d 595, 598 (Minn. App. 1989), *review denied* (Minn. Mar. 17, 1989).

There is a statutory presumption that proceedings against a juvenile will be certified for adult-court prosecution where the juvenile was at least 16 years old at the time of the offense and the offense would result in a presumptive prison sentence if committed by an adult. Minn. Stat. § 260B.125, subd. 3 (2008). Because A.M.S. was 16 years old at the time of the offense and the presumptive sentence for the charged offenses under the sentencing guidelines and applicable statutes is commitment to the commissioner of corrections, it is presumed that the proceeding will be certified for adult prosecution. A.M.S. may rebut the presumption by providing “clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety.” *See id.*

To determine whether public safety is served by certifying a proceeding involving a presumptive offense, the court must consider (1) the seriousness of the alleged offense; (2) the child’s culpability; (3) the child’s prior record of delinquency; (4) the child’s programming history; (5) the adequacy of punishment or programming available in the juvenile system; and (6) the available dispositional options. *Id.*, subd. 4 (2008). In considering these factors, the district court is required to give greater weight to the

seriousness of the alleged offense and the child's prior record of delinquency, than to the other factors. Minn. R. Juv. Delinq. P. 18.06, subd. 3.

Seriousness of the Alleged Offense

The first factor the district court must consider is “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.” Minn. Stat. § 260B.125, subd. 4(1). A.M.S. argues that because his offense is a “typical case of attempted second-degree murder” without aggravating factors, the district court should have weighed this factor against certification.

The district court determined that the seriousness of the alleged offense “strongly weighs in favor of certification.” The district court properly factored in the impact of the offense on the victim, stating that “[t]he crime had tremendous impact on [M.S.] and his family.” *See id.* The district court also observed that the attempted murder included “three highly dangerous attempts to injure/kill [M.S.]. The third and last strike included stabbing [M.S.] in the chest and coming within a quarter inch of [his] heart.” These findings are supported by the record. Witnesses told law enforcement officers that A.M.S. swung the knife at M.S.’s head, cut M.S.’s hip, and then jabbed the knife into M.S.’s chest. M.S. testified that he thought he was going to die and that he endured great pain from the stabbing and surgery. M.S.’s mother testified that she was afraid her son would die. She was informed that if the blade of the knife had gone a quarter inch in another direction, her son probably would have died.

A.M.S. urges this court to adopt a new standard for the seriousness-of-the-alleged-offense factor, under which the analysis focuses only on the presence or absence of aggravating factors under the sentencing guidelines. A.M.S. argues that because this is a “typical case of attempted second-degree murder” and there are no aggravating factors, the seriousness-of-the-alleged-offense factor must weigh against certification. We disagree. Minn. Stat. § 260B.125, subd. 4(1), clearly states that aggravating factors are to be considered in conjunction with other factors, including the use of a firearm and the impact on the victim. Moreover, A.M.S.’s only legal support for this argument is dicta from an unpublished opinion of this court, which is not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2008) (stating that “[u]npublished opinions of the [c]ourt of [a]ppeals are not precedential”). The district court’s findings on this factor were not clearly erroneous, and its determination that the factor favors certification was not an abuse of discretion.

The Child’s Culpability

The second factor the district court must consider is “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.” Minn. Stat. § 260B.125, subd. 4(2). The district court determined that this factor “strongly weighs in favor of certification.” The district court found that A.M.S. “was the sole planner of the attack, he planned it for a significant period of time, initiated the contact, and carried out the act. There are no mitigating

factors present.” A.M.S. does not challenge the district court’s determination as to this factor.

Prior Record of Delinquency

The third factor the district court must consider is “the child’s prior record of delinquency.” *Id.*, subd. 4(3).

Over the past four years, A.M.S. has been charged with eleven offenses: nine felonies, one gross misdemeanor, and one misdemeanor. He was adjudicated delinquent for four separate felony offenses and two misdemeanor offenses. The district court noted that A.M.S.’s offenses have escalated “from conflict at home to a plan to beat a person unconscious and rob him to this offense, which came close to killing someone.” The district court determined that this factor “strongly weighs in favor of certification.”

A.M.S.’s record of delinquency supports this determination. On February 28, 2006, A.M.S. was charged with second-degree assault and terroristic threats for threatening his mother’s boyfriend with a butcher knife because he had taken A.M.S.’s football away. He was adjudicated delinquent of terroristic threats. On October 1, 2007, A.M.S. was charged with felony domestic assault by strangulation, felony terroristic threats, and gross misdemeanor domestic assault for choking his mother’s boyfriend and punching him in the nose because he had turned off a television that A.M.S. was watching. He was adjudicated delinquent of terroristic threats. On October 31, 2008, A.M.S. was charged with felony domestic assault for hitting his mother’s boyfriend in the mouth and eye because he threatened to take A.M.S.’s cell phone away. He was adjudicated delinquent of disorderly conduct. On November 14, 2008, A.M.S. was

charged with two counts of felony theft of a firearm and one count of misdemeanor theft for stealing two 12-gauge shotguns. A.M.S. sawed off the stocks of the shotguns, brought them to a friend's house, and planned to sell them. He was adjudicated delinquent of one count of felony theft of a firearm and one count of misdemeanor theft. On December 19, 2008, A.M.S. was charged with first-degree aiding and abetting aggravated robbery and second-degree assault. These charges stemmed from his participation, with four others, in a plan to beat an individual unconscious and steal his money. A.M.S. followed through on the plan and participated in the beating by hitting the victim with a metal baseball bat. He was adjudicated delinquent of second-degree felony assault.

A.M.S. argues that the district court "failed to give adequate consideration to the fact that all but one of appellant's prior delinquency adjudications involved his mother's abusive boyfriend." But the fact remains that A.M.S.'s delinquency history includes two serious felony offenses that did not involve his mother's boyfriend and raise significant concerns regarding A.M.S.'s threat to public safety. The district court's finding on this factor is not clearly erroneous, and its determination that this factor favors certification was not an abuse of discretion.

Programming History

The fourth factor the district court must consider is "the child's programming history, including the child's past willingness to participate meaningfully in available programming." *Id.*, subd. 4(4). A.M.S. asserts that he "has never been offered any programming, much less the chance for meaningful participation in it." The

record refutes this assertion. A.M.S. has been ordered to participate in family and individual therapy. His therapist, Prijatel, testified that he met with A.M.S. once every two weeks when therapy began in December 2008. Prijatel testified that A.M.S. was engaged in therapy and never missed appointments. Prijatel worked on coping skills and cognitive behavioral therapy with A.M.S. Because Prijatel thought A.M.S. was doing well, he later reduced their sessions to once a month. A.M.S.'s therapy with Prijatel was ongoing at the time of the offense.

Although A.M.S. has been the subject of multiple juvenile court dispositional orders, he has never been ordered to a juvenile residential treatment facility. The district court concluded that the “fact that the child has never been in residential treatment weighs against certification.” But the district court concluded, “[h]owever, this is tempered by [A.M.S.’s] lack of willingness to participate in meaningful treatment.” The district court reasoned that although A.M.S. appeared to be sincere in his treatment with Prijatel, he was at the same time threatening to kill M.S. and never discussed his anger towards M.S. in therapy. Moreover, A.M.S. never informed Prijatel that he had started drinking. Prijatel was fooled. He testified that A.M.S. was progressing well in therapy and that A.M.S. gave no indication that “he was going to turn.” Prijatel also testified that he recommended against a four-month, long-term programming option for A.M.S. at the time of the disposition hearing on A.M.S.’s theft, disorderly conduct, and second-degree assault adjudications because he believed placement was not necessary for community safety. Finally, Prijatel testified he was surprised by the offense, suggesting that

A.M.S.'s participation in treatment was not sincere. This testimony supports the district court's finding that A.M.S.'s participation in therapy was not meaningful.

The district court did not specify whether it weighed this factor for or against certification. Even if we assume the district court weighed this factor against certification, the other factors tip the balance in favor of certification.

Adequacy of the Punishment or Programming in the Juvenile Justice System and Dispositional Options

The fifth factor that the district court must consider is “the adequacy of the punishment or programming available in the juvenile justice system.” *Id.*, subd. 4(5). And the sixth factor is “the dispositional options available for the child.” *Id.*, subd. 4(6). The district court reviewed these factors together because they “substantial[ly] overlap.” A.M.S. argues that the district court erred by weighing these factors in favor of certification.

Although the district court recognized that placement and programming at MCF-Red Wing for 12-18 months is an option, it also noted that “[a]lthough there is some probability, there is not a high probability [A.M.S.] would no longer be a public safety risk if he were given the chance to attend that program.” The district court ultimately determined that these factors weigh in favor of certification, stating “the seriousness of [A.M.S.’s] offense is such that twelve to eighteen months, followed by probation, is not adequate punishment for this attempted second degree murder, which carries a

[g]uideline sentence of 163 months.”¹ Insufficient time for supervision in the juvenile system is an appropriate consideration when determining whether to certify a juvenile. *See In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). The district court’s finding that placing A.M.S. at MCF-Red Wing would not provide adequate punishment was not clearly erroneous, and its determination that this factor favors certification was not an abuse of discretion.

In summary, not one of the district court’s findings in support of certification is clearly erroneous. And given the considerable evidence that supports the district court’s decision to certify this proceeding for adult prosecution, we cannot say that the district court abused its discretion. Accordingly, we affirm.

Affirmed.

Dated:

Judge Michelle A. Larkin

¹ The district court stated that A.M.S. would be subject to a guideline sentence of 163 months for this offense. A review of the guidelines show that the presumptive sentence for this offense is actually 165 months. *See* Minn. Sent. Guidelines IV (2008).