STATE OF MINNESOTA
IN COURT OF APPEALS
A11-117

In the Matter of the Welfare of: A. T. Y., Child.

Filed August 8, 2011
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-JV-10-9343

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant A.T.Y.)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent State of Minnesota)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges the district court's decision to certify him as an adult on charges of first-degree criminal sexual conduct and kidnapping, arguing that the district court abused its discretion because the state failed to prove by clear and convincing evidence that retaining him in the juvenile system did not serve public safety. We affirm.

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* 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.T.Y. is charged with raping a 40-year-old female stranger at gunpoint on June 7, 2010. Appellant allegedly approached the woman, who was standing alone at a bus stop in north Minneapolis in the early morning hours, wielded a pistol, and said "Bitch, follow me and do what I say," and, "Give me your pussy, or I'm a kill your ass." Appellant took the woman behind a nearby house, where he forced her to perform oral sex on him while he continued to hold the gun, saying, "Bitch, don't you look at me, I'll kill you." He then placed a condom on his penis and raped the woman vaginally. After he ejaculated, he instructed the woman to remove the condom, which she did, intentionally throwing it in a place where she could easily locate it later. After appellant fled, the victim called the police, who searched the scene, found the condom, and obtained a DNA sample.

At the time of the rape, appellant was 14 years old—three weeks shy of his 15th birthday. His background includes both delinquent conduct and difficulties in school and at home. In August 2008, appellant was adjudicated delinquent of misdemeanor domestic assault; in September 2008, he was adjudicated delinquent of gross misdemeanor domestic assault. Both assaults involved his mother. In conjunction with the two offenses, appellant was twice ordered to complete the sentence to service (STS) program; he admits that he did not complete the program either time. In approximately November 2008, appellant was placed on administrative probation. In May 2009, appellant committed another assault, this time involving a non-family victim.

In addition to his delinquent acts, appellant has a history of truancy and other school-related misconduct. In January 2009, appellant was transferred to a different school after he was involved in a fight on a bus and seen making gang signs and threatening gestures. The next month, he was briefly suspended for tobacco possession; two days after he returned, he was suspended for ten days for possession and distribution of illegal drugs. In early June, he was again suspended for throwing an apple at a teacher.

During this same time frame, appellant's administrative probation officer concluded that appellant's truancy and failure to come home at night were "red flags" that indicated he needed to be more closely monitored. Appellant was assigned to an individual juvenile probation officer (PO), and was promptly arrested for violating curfew. Appellant's PO imposed an earlier curfew and instructed appellant to call him from home every night. Four nights later, appellant violated curfew, and the PO obtained an arrest warrant. Three more warrants issued in July. In mid-August, appellant was placed in the St. Joseph's Shelter; he ran away the day he arrived. Following his arrest, appellant was placed on electric home monitoring (EHM), which he promptly violated. In mid-September, appellant was adjudicated delinquent of gross misdemeanor fifth-degree assault related to the May 2009 incident. As part of the disposition, appellant was ordered to complete Hennepin County's Monitoring, Education, and Training (MET) program, which involves participation in STS and EHM, and school attendance. Appellant did not complete MET, in part because his mother was unwilling to transport him to the facility.

On October 7, 2009, appellant enrolled in the Hennepin County Home School Short-Term Adolescent Male Treatment Program (STAMP), a 90- to 120-day treatment program for teenage males assessed as a moderate or high risk to reoffend. Appellant was involved in assaults or fights with other residents three times during the 115 days he spent at STAMP. Appellant completed the program, but his discharge summary indicates that he did only a "minimal amount of work," that none of his family members came to see him while he was there, and that "he is at high risk for anti-social behaviors when it comes to external factors, particularly in gang association and drug use. And that he is at high risk to re-offend again." Appellant ran away from home the day he was discharged from STAMP.

In early February 2010, appellant told his PO that he was attending Henry High regularly; in fact, appellant attended just one day, was suspended for smelling of marijuana, and never returned. Appellant was eventually arrested, and ordered to attend school at Success Academy and participate in the Evening Reporting Center (ERC) program, a detention alternative that allows juvenile offenders to continue living at home provided they report to, and remain at, a designated facility every afternoon and evening.

Appellant attended the intake meeting at Success Academy with his PO in early March but did not return. His failure to attend school led to his termination from ERC, and another arrest warrant issued. When his PO went to find appellant at his house on April 1, appellant's mother, who was visibly injured, informed him that appellant had been home the previous night and had assaulted her. Appellant was arrested later that day. He was returned to the St. Joseph Shelter in mid-April and ran away upon arrival.

In early July 2010, appellant's PO recommended that appellant be considered for a long-term out-of-home placement (such as a group home or foster home), citing his "[c]riminal behavior, drug dealing, absenting, defiant behavior, truancy, [and] associating with older criminals." The PO noted that community-based services had "failed."

On July 13, 2010, appellant was back in court due to multiple probation violations, including running away from home. The district court ordered appellant to reside at the Vintage Place Group Home. On July 14, appellant provided a DNA sample to the Bureau of Criminal Apprehension (BCA). On July 15, appellant ran away within ten minutes of his arrival at Vintage Place. Appellant was arrested and screened for placement at the Woodland Hills residential treatment center. Despite the PO's recommendation, the district court ordered appellant to remain at home, complete 60 days of EHM and participate in ERC again. Appellant apparently participated in ERC after August 6, but refused to ride in the county-provided van and consistently arrived late.

On September 21, 2010, appellant was arrested in connection with an armed robbery. A witness identified appellant as the person who pointed a silver handgun at another male and pulled the trigger, but the gun malfunctioned, and no shot fired. When the police arrived, they approached appellant, who dropped a gun similar to the one described by the victim of the June 7 rape. Appellant was arrested and charged with being a person under 18 in possession of a firearm, in violation of Minn. Stat. § 624.713 (2010). By that time, the BCA had discovered that appellant's DNA matched the sperm-cell DNA sample collected at the scene of the June 7 rape. Accordingly, appellant was also charged in connection with the rape.

The state filed a petition for non-presumptive adult certification pursuant to Minn. Stat. § 260B.125 (2008). The court ordered a certification study and a psychological evaluation. During the contested certification hearing, the district court heard testimony from the investigating probation officer who prepared the certification study, the psychologist who evaluated appellant, the Hennepin County Attorney's Office legal advocate who spoke with the rape victim, and appellant's PO.

Timothy Turrentine prepared the certification study. In the study, Turrentine noted that since June 2009, ten separate arrest-and-detain warrants had been issued for probation violations, as well as three bench warrants; that appellant's whereabouts had been largely unknown for the seven previous months; and that appellant had been detained at the Hennepin County Juvenile Detention Center 14 separate times. Turrentine described appellant as "clearly out of control at home, in school, and in the community," and characterized the subject crime as "extremely alarming" because of its particular cruelty, its sexual nature, and appellant's use of a gun. Turrentine observed that appellant has three violent-crime adjudications, a lengthy programming history with only one successful discharge (from STAMP, which concluded that appellant was nonetheless a high risk to reoffend), and five out-of-school suspensions.

Turrentine commented on the six statutory public-safety factors courts consider in determining whether to certify a case for adult proceedings. Turrentine recognized that if appellant were designated as an extended jurisdiction juvenile (EJJ), he would have more than five years of programming and supervision in the juvenile system, but recommended adult certification because "there is nothing in [appellant's] recent history to suggest that

he could be successful in a therapeutic setting." Turrentine stated that in light of the "alarming and violent" June 2010 kidnapping and rape, as well as appellant's attempt to shoot someone (as alleged in the September charge), "public safety should be considered primarily over [appellant's] therapeutic needs."

Rebecca Reed, Ph.D., did not opine concerning certification, but testified about appellant's mental health, his amenability to treatment, and his risk for re-offending. Dr. Reed interviewed appellant and reviewed his relevant records. Dr. Reed noted that in the three previous years, appellant had changed schools many times and been out of school for significant periods of time, such that he has one-third of the high-school credits he should have at his age; that appellant has been suspended multiple times for drugs and fighting; that appellant reports using marijuana "every day or every other day" since age 13; and that appellant had been on probation for two years but frequently failed to follow court orders or probation rules.

Dr. Reed testified that appellant's intelligence is in the average or low average range and that he lacks clinically significant psychopathology. Dr. Reed found that appellant's risk for violent re-offense under the SAVRY (Structured Assessment of Violence Risk in Youth) assessment (which measures known risks and protective factors) was "high" and that none of the deterrents to risk were present. Under the J-SOAP-II (Juvenile Sex Offender Assessment Protocol), Dr. Reed found that appellant's risk of sexual re-offense is moderate. Dr. Reed noted that about 15% of juvenile sex offenders re-offend, and recommended residential treatment if appellant stayed in the juvenile system. In summarizing her opinions, Dr. Reed stated that appellant is "at high risk for

further delinquency and violence," and observed that appellant "does not voice interest in making changes which might help him avoid legal entanglements in the long run, and has been quick to return to a delinquent lifestyle as soon as he has been released from detention or placement."

The legal advocate testified about the substantial impact the June 7 offense has had on the victim. The advocate reported that the rape victim suffers from major anxiety and insomnia and is only able to leave her home when accompanied by her adult son.

Appellant's PO, Kenneth VanOverbeke, testified about his work with appellant beginning in June 2009. VanOverbeke testified about appellant's numerous probation violations, warrants, his general failure to avail himself of community-based services, and his borderline-satisfactory participation in the longer-term STAMP program. During his period of supervision, appellant was on the run for approximately 150 days (the first half of 2010). In light of the failure of less-restrictive alternatives to restore appellant to law-abiding behavior, VanOberbeke opined that appellant is resistant to services and probation.

Following the certification hearing, the district court granted respondent's motion. The court meticulously considered the evidence in light of the six statutory certification factors and concluded that retaining the proceeding in the juvenile court does not serve public safety. This appeal follows.

D E C I S I O N

"A district court has considerable latitude in deciding whether to certify a case for adult prosecution. Its decision will not be reversed unless [the district court's] findings

are clearly erroneous so as to constitute an abuse of discretion." *In re Welfare of D.T.H.*, 572 N.W.2d 742, 744 (Minn. App. 1997) (quotations and citations omitted), *review denied* (Minn. Feb. 19, 1998). Findings of fact that reflect erroneous application of the law may be set aside. *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 650 (Minn. App. 2000). But it is not this court's function to weigh evidence or second-guess a district court's credibility findings. *See In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (stating that "[w]here the experts' testimony is at issue, we defer to the juvenile court's credibility determinations").

Generally, children alleged to have committed a crime remain in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2008). But when a child who is at least 14 years of age and under age 16 is alleged to have committed an offense that would be a felony if committed by an adult, the court may certify the juvenile proceeding for adult prosecution if "the prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety." Minn. Stat. § 260B.125, subds. 1, 2(6)(ii), 3.

The certification statute sets out six factors that the court must consider when determining whether retaining the proceeding in juvenile court serves public safety:

> (1) the seriousness of the alleged offense[1] 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

[1] "For purposes of the certification hearing, the charges against the child are presumed to be true." *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

> in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
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> (3) the child's prior record of delinquency;
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> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
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> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
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> (6) the dispositional options available for the child.

Id., subd. 4. The statute further directs the court to give "greater weight" to factors (1) and (3), the seriousness of the offense and the child's prior record of delinquency. *Id*. The purpose of the public-safety factors is to determine whether the child presents a risk to the public and whether the child is likely to reoffend. *In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000). Certification is appropriate if, in the end, the factors "show that a risk to public safety exists because the juvenile's behaviors are likely to continue." *Id*.

Appellant argues that the district court abused its discretion by certifying him as an adult and that this court should reverse and remand for EJJ prosecution. *See* Minn. Stat. § 260B.130, subd. 1 (2008). We address each certification factor in turn.

1. Seriousness of offense

The district court found the offense to be "very serious" and that aggravating factors were present, including "allegations of particular cruelty due to the fear caused to the victim, the use of a gun, and the sexually violent nature of the crime." The court concluded that this factor weighs in favor of certification.

Appellant argues first that the district court's finding is erroneous because the court impermissibly used elements of the crime—fear, the use of a gun, and the sexually violent nature of the crime—as aggravating factors. *See State v. Heath*, 685 N.W.2d 48, 63 (Minn. App. 2004) (stating that for the purpose of sentencing departures, aggravating factors may not duplicate elements of the crime charged), *review denied* (Minn. Nov. 16, 2004). Appellant contends that because fear is an "inherent element" of first-degree criminal sexual conduct, *State v. Casady*, 392 N.W.2d 629, 635 (Minn. App. 1986), *review denied* (Minn. Sept. 24, 1986), and because he was charged with committing criminal sexual conduct while armed, causing fear and using a gun are not legitimate aggravating factors.

Appellant conceded at trial that this factor weighs in favor of adult certification or EJJ designation, and has therefore likely waived the issue on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that a party's failure to argue a matter before the district court waives consideration of the issue on appeal). But even if we consider appellant's argument, it fails on the merits. The certification statute explicitly states that "the use of a firearm, and the impact on any victim" are to be considered in addition to aggravating factors recognized by the sentencing guidelines. Minn. Stat. § 260B.125, subd. 4(1). The district court therefore properly considered these two aspects of appellant's crime when determining whether the seriousness of appellant's crime favors adult certification.

Appellant also argues that the district court erred in considering the "sexually violent" nature of the act as an aggravating factor because it comprises an element of the

offense. But Minn. Stat. § 609.342, subd. 1 (2008), does not use the words "sexually violent" in enumerating the elements of first-degree criminal sexual conduct. And we cannot conclude that the district court clearly erred by finding that the circumstances of appellant's commission of the crime were more "sexually violent" than a typical act of first-degree criminal sexual assault: appellant forced his victim to perform sexual acts while pointing a gun at her and threatening—with obscene and humiliating language—to kill her if she did not follow his orders. The district court also cited the multiple forms of penetration used by appellant, a valid aggravating factor in the sentencing context, which is arguably more stringent than the certification standard. *State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008), *review denied* (Minn. Nov. 25, 2008). On this record, the district court did not clearly err in finding that the seriousness of the offense weighs in favor of adult certification.

2. Child's culpability

The district court found that this factor favors certification. Appellant does not challenge this determination.

3. Prior record of delinquency

The district court found that appellant has three prior assault-related delinquency adjudications. Reasoning that the crimes all involved physical violence, that two incidents were close in time to each other, and that the level of violence escalated over time, the district court found that this factor weighs in favor of certification.

Appellant challenges this finding, asserting that because his delinquency record is short, involves no felonies or gang-related activity, and includes two domestic

altercations involving appellant and family members, this factor weighs against certification. We disagree. The fact that appellant's mother was the victim in two of his three adjudicated assaults does not make the nature of his conduct less serious. And the record supports the district court's finding that the level of violence increased over time.

Appellant further contends that the juvenile justice system failed him by repeatedly returning him to his home, which contributed to his violent conduct. Again, we disagree. Appellant's PO explained that the decision to return appellant to his home was consistent with correctional policy that encourages placing young misdemeanor-level offenders at home (while participating in community-based programs). Appellant ran from his shelter and group-home placements. And the record is clear that any harmful effect of appellant's home environment was mitigated by the fact that appellant was rarely at home from June 2009 until his September 2010 arrest. The district court's finding that appellant's prior delinquency record weighs in favor of adult certification is not clearly erroneous.

4. Programming history

The district court made numerous findings concerning appellant's extensive programming history, noting that appellant twice failed to complete the STS program; that he violated the EHM rules; that he was terminated from the ERC; that he ran away from group homes three different times within a day of arriving; that his whereabouts were unknown for the first seven months of 2010; that he failed to complete the MET program; that the STAMP administrators stated that appellant was at a high risk to reoffend even after completing the program; and that appellant consistently failed to

maintain contact with his PO. The district court found that this factor weighs in favor of certification.

Appellant contends, as he did in contesting the district court's determination concerning his prior record of delinquency, that his many compliance failures are attributable to his family and the system. Specifically, appellant argues that repeatedly sending him home deprived him of a fair opportunity to succeed and that the district court failed him by declining to place him in Woodland Hills in August 2010. We are not persuaded. Appellant acknowledges that his placement options were limited because he had only been adjudicated of misdemeanor-level offenses. Moreover, the Woodland Hills alternative was not recommended until two months after the subject rape offense. And appellant's undisputed near-total failure to respond to programming—including 115 days in the STAMP program—undercuts his family and system-failure arguments. On this record, we conclude that the district court's finding that appellant's programming history favors adult certification is not clearly erroneous.

5. & 6. Adequacy of juvenile justice punishment or programming and dispositional options

The final two certification factors are often considered together. *See D.T.H.*, 572 N.W.2d at 745. The district court found that if appellant is designated EJJ, he will be eligible for over five years of treatment, punishment, and supervision, and that appellant's stayed 144-month adult sentence could be executed should he violate his juvenile probation. The district court found that the adequacy of juvenile programming factor weighs in favor of EJJ, and the state does not dispute this determination. In terms

of dispositional options, the court found that if appellant is designated EJJ, he could be ordered to the Hennepin County Home School Sex Offender Program or the Minnesota Correctional Facility at Red Wing, which has sex-offender-specific programming. The district court did not make a finding as to whether the dispositional-options factor weighs in favor of EJJ or adult certification.

The district court's finding that the adequacy of the programming available favors EJJ, and the absence of a specific finding concerning the sixth factor, must be considered in light of the expert testimony and other evidence addressing appellant's amenability to therapeutic programming compared to appellant's danger to the public. Turrentine specifically rejected the EJJ dispositional options, stating that "there is nothing in [appellant's] recent history to suggest that he could be successful in a therapeutic setting," and recommending "that public safety should be considered primarily over [appellant's] therapeutic needs." Dr. Reed found that appellant is at a high risk to re-offend, which makes him a danger to the public.

Appellant contends that the district court wrongly ignored Turrentine's acknowledgement that "there are programs available for long term residential programming should a[] [juvenile] adjudication occur." But this statement simply acknowledges that there are available options in the event the court concludes that EJJ is appropriate, an outcome Turrentine specifically recommended against. Nor does the record support appellant's argument that EJJ is appropriate because of Dr. Reed's conclusion that appellant's risk for violence stems in part from factors that can be

addressed in therapy. Dr. Reed, Turrentine, and appellant's PO all emphasized that appellant has repeatedly resisted therapeutic programming.

Appellant's argument that there are sufficient time and adequate placement options within EJJ for rehabilitating him is essentially an argument that the district court should have weighed and credited the expert opinions differently. But determining "[t]he weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder." *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005). There is no basis, on this record, for us to disturb the district court's findings and determination that the certification factors, on balance, favor adult certification.

The certification order, which includes extensive findings, reveals that the district court carefully considered the six statutory factors and applied the requisite balancing test. The district court found that the two most heavily weighed factors—the seriousness of the offense and the prior record of delinquency—favor certification. The evidence supports the district court's findings, which support the court's determination that certification of the matter for adult proceedings is appropriate.

Finally, appellant argues that the district court applied the wrong standard of proof when it stated, in its conclusions of law, that "the state has demonstrate[d] by clear and convincing evidence that *certifying the matter* to adult court *serves public safety*." Appellant is correct that the challenged terminology differs from the statutory language, which requires the state to prove "by clear and convincing evidence that *retaining the proceeding* in the juvenile court *does not serve public safety*." Minn. Stat. § 260B.125, subd. 2(6)(ii) (emphasis added). Appellant asserts that the court's erroneous statement of

the legal standard lowered the state's evidentiary burden. We disagree. First, appellant does not explain how the district court's statement altered the state's burden or how the alleged change affected the court's analysis. And on at least two other occasions in the order, the district court states the standard exactly as it appears in the statute. It is clear from the order, considered in its entirety, that the district court applied the correct legal standard.

Because clear and convincing evidence supports the determination that retaining appellant in the juvenile system does not serve public safety, we conclude that the district court did not abuse its discretion by certifying this case for adult prosecution.

Affirmed.