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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2048**

In the Matter of the Welfare of: T. L. H.

**Filed April 1, 2013
Affirmed
Hudson, Judge
Kirk, Judge, dissenting**

Hennepin County District Court
File No. 27-JV-12-7017

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Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this appeal from an order denying certification of respondent for prosecution as an adult, appellant state argues that the juvenile court abused its discretion by failing to adequately consider respondent's prior offense history and the adequacy of available programming, given the outcome of previous interventions. Because we conclude that

the juvenile court did not abuse its discretion by determining that respondent met his burden to rebut the presumption of certification by clear and convincing evidence, we affirm.

FACTS

A few weeks before his 18th birthday, respondent T.L.H. was arrested and charged by petition as a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2010). On July 31, 2012, police officers reported seeing three juvenile males walking in the street and apparently violating curfew. When the officers approached the individuals, one individual fled. One of the remaining individuals, T.L.H., attempted to place one of his hands in his pocket. T.L.H. was ordered onto the ground, and as the officer approached, T.L.H. stated, “Sir, I have a gun in my pocket.” The officer reached into T.L.H.’s pocket and removed a .32 caliber revolver, which was not loaded. The state’s petition, filed August 1, 2012, alleged that T.L.H. had been adjudicated delinquent on February 1, 2012 of third-degree assault, making it unlawful for T.L.H. to possess a firearm.

The state filed a motion for presumptive certification to adult court. *See* Minn. Stat. § 260B.125, subd. 3 (2012).¹ A certification study was prepared by Tim Turrentine, a Hennepin County probation officer. Turrentine did not interview T.L.H. or his mother for the study due to a family emergency that arose. Rather, Turrentine’s study relied heavily on a pre-plea investigation from February 2012. The study recommended

¹ Although T.L.H.’s alleged offense occurred prior to August 1, 2012, because the relevant portions of the adult-certification statute have not changed, we cite to the current version of that statute, Minn. Stat. § 260B.125 (2012).

certifying T.L.H. as an adult based on the severity of the instant crime, T.L.H.'s prior juvenile record, and the fact that further programming under extended jurisdiction juvenile (EJJ) would duplicate T.L.H.'s prior programming. The study indicated that T.L.H.'s record contains three petty theft adjudications; eight misdemeanor delinquency adjudications for offenses including providing false information to police, disorderly conduct, theft, receiving stolen property, and fleeing a police officer; and one prior felony adjudication for third-degree assault. The study also demonstrated that T.L.H. had significant success in residential placement programs but that this success did not translate into the community. T.L.H. was ordered to participate in the Hennepin County Home School STAMP program for violating his probation in April 2011. There, he achieved the "highest level of successful completion," and was discharged in July 2011. Following his adjudication for felony assault in February 2012, T.L.H. was required to complete the Rite of Passage Program in Nevada. He received positive reports from that program and was discharged in June 2012 after completing about four months in the program.² However, T.L.H. failed to complete court-ordered Sentence to Serve, mentoring, outpatient chemical-dependency treatment, and had positive UAs while on probation. The instant offense occurred just one month after T.L.H. was released from residential treatment. And the felony assault offense occurred in December 2011, just a few months after T.L.H. was released from STAMP.

² T.L.H. was discharged only because Hennepin County terminated its contract with the Rite of Passage program.

A psychological evaluation of T.L.H. was prepared by Dr. Patricia K. Orud, M.A., L.P. Dr. Orud interviewed T.L.H. for her report and administered psychological testing. Dr. Orud concluded that T.L.H. is at a “moderately high risk for same or similar violent or criminal behavior.” Dr. Orud observed that T.L.H. “returned to conduct-disordered illegal behavior at release from residential treatment interventions,” and that “he tended to blame others for his actions, deflected his responsibility onto others, and did not fully appreciate the need for substantial changes in his life functioning.” Dr. Orud diagnosed T.L.H. with Conduct Disorder, Adolescent-Onset Type; Cannabis Abuse and Dependence; and Antisocial Personality Traits. The report stated that T.L.H. is an average student, and he completed his GED while in the STAMP program. At home, T.L.H. is used to structuring his own time. T.L.H.’s father had been incarcerated, and his mother suffered from chemical dependency but achieved sobriety two years ago. T.L.H.’s grandmother actively parented T.L.H., and her recent death created a significant loss of stability in the family. Dr. Orud concluded that T.L.H. would require a very structured environment and could receive services either in the juvenile or adult systems.

A certification hearing was held on October 23, 2012. The parties stipulated to the admission of Turrentine’s study and Dr. Orud’s report. The only witness was Turrentine, whose testimony was consistent with his study. In addition, Turrentine testified that if T.L.H. were under EJJ he would likely be accepted into several different long-term residential treatment programs, including Woodland Hills or Hennepin County Home School for between 6 to 12 months, and if ordered by the court, he would have to be accepted at Red Wing for a period of at least 9 months. Under EJJ, T.L.H. would have

34 months, or just under 3 years, to rehabilitate and avoid an adult sentence. In the adult system T.L.H.'s presumptive sentence is 60 months in prison.

In a November 6, 2012 order, the district court denied the state's motion to certify T.L.H. as an adult. The district court considered the six statutory factors under Minn. Stat. § 260B.125, subd. 4. The district court concluded that the first two factors, the seriousness of the offense and the culpability of the child, weighed in favor of adult certification. However, the district court concluded that the remaining four factors weighed in favor of EJJ. Specifically, the district court concluded that T.L.H.'s juvenile delinquency history—a factor which, along with the severity of the offense, must be weighed more heavily than the others—tipped the scales in favor of EJJ. The district court concluded that the evidence was clear and convincing that retaining T.L.H. in the juvenile system would preserve public safety because his record contains mostly petty misdemeanors and status offenses. 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 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). “For purposes of certification, the juvenile is presumed guilty of the alleged offenses.” *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007). Whether to certify a juvenile as an adult offender is controlled by statute. *See* Minn. Stat. § 260B.125 (2012). Certification is presumed

when the juvenile was 16 or 17 years old at the time of the offense and when the offense would result in a presumptive commitment to prison under the sentencing guidelines or the offense involved a firearm. *Id.*, subd. 3. “The state bears the burden of showing that the juvenile is over 16 years old and that the offense alleged in the petition carries an adult sentence.” *In re Welfare of D.W.*, 731 N.W.2d 828, 833 (Minn. App. 2007). Once the state has met this burden, the burden shifts to the respondent to rebut the presumption of certification by clear and convincing evidence showing “that retaining the proceeding in the juvenile court serves public safety.” Minn. Stat. § 260B.125, subd. 3.

It is undisputed that a presumption of adult certification arose in this case because T.L.H. was 17 years old at the time he committed the offense, and the offense involved possession of a firearm, which results in a presumptive commitment to prison. The state argues that the district court abused its discretion when it concluded that T.L.H. met his burden to rebut the presumption by clear and convincing evidence. In making its determination of whether public safety is served by certification, the district court must consider six factors:

- (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.

Minn. Stat. § 260B.125, subd. 4. The district court is required to give greater weight to the first and third factors. *Id.*

The state argues that the district court clearly erred when it determined that T.L.H.'s prior record of delinquency, the third factor, did not favor adult certification. Specifically, the state contends that the district court clearly erred by minimizing the extent and escalating nature of T.L.H.'s delinquency history. In its conclusions of law, the district court stated that “[i]t is of some concern to the Court that the record of delinquency has elevated to the level of two recent felonies.” Nonetheless, the district court concluded that T.L.H. rebutted the presumption with clear and convincing evidence on this factor. Although the district court’s analysis on the third factor was somewhat conclusory, we see no clear error in the district court’s determination that T.L.H. rebutted the presumption of certification.

When balancing the statutory factors for adult certification, district courts are not expected to apply the factors as though they are a rigid, mathematical formula. *In re Welfare of J.H.*, ___ N.W.2d ___, ___, 2013 WL 777063, at *17 (Minn. App. Mar. 4, 2013) (quoting *In re Welfare of D.M.D., Jr.*, 607 N.W.2d 432, 438 (Minn. 2000)). “Juvenile courts should have the discretion to weigh the factors in the context they are presented.” *Id.* Here, T.L.H. demonstrated that his offense history is largely composed of petty offenses and property crimes, with the notable exception of the third-degree-assault offense in 2011 and the instant offense involving an unloaded firearm. It is

debatable whether T.L.H.'s two more recent offenses demonstrate an emerging pattern of escalating delinquent conduct, especially considering that the instant offense is derivative of the assault offense because it was the assault felony adjudication that rendered T.L.H. a prohibited person. See *In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000) (noting that adult certification cases often show a pattern of escalating delinquent conduct). This is not to diminish the seriousness of the instant offense, which the district court concluded weighed heavily in support of certification. We observe, however, that T.L.H.'s prior record is devoid of other gun-related adjudications or charges, and that only one of respondent's prior adjudications was a crime of violence involving harm to another person. Moreover, there is no indication that T.L.H. is involved in gang activity. Cf. *In re Welfare of P.C.T.*, 823 N.W.2d 676, 685 (Minn. App. 2012) (reversing the district court's denial of the prosecution's motion to certify, concluding that the juvenile's one prior gang-related felony and the seriousness of the instant gang-related offense outweighed the other factors), *review denied* (Minn. Feb. 19, 2013); *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 648 (Minn. App. 2000) (reversing the district court's denial of the state's motion for adult certification, noting that the juvenile was extensively involved in gang activity); *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (concluding that it was appropriate for the district court to consider the gang-related behavior of the juvenile's prior offense when it granted the prosecution's motion to certify). In *Welfare of K.M.*, this court affirmed the district court's adult certification where, as here, the charged offense involved a firearm. 544 N.W.2d at 786. However, unlike in this case, K.M.'s prior and instant offenses were gang-related, and the evidence

indicated that K.M. had been involved in violent gangs for at least seven years. *Id.* at 783–84. “Evidence of K.M.’s prior gang-related behavior was applicable to several factors, including his programming history, adequacy of punishment available, and dispositional options available,” as well as K.M.’s prior record of delinquency. *Id.* at 785. On this record, we conclude that the district court did not abuse its discretion by determining that T.L.H.’s delinquency history supports retaining him in the juvenile justice system.

The state also argues that the district court clearly erred when it determined that T.L.H.’s programming history, the fourth statutory factor, weighed in favor of EJJ. The state contends that T.L.H.’s failure to transfer his success in residential treatment programs to life in the community indicates that T.L.H. is a risk to public safety. “Rejection of prior treatment efforts indicates a juvenile’s unwillingness to submit to programming in a meaningful way.” *In re Welfare of U.S.*, 612 N.W.2d 192, 196 (Minn. App. 2000) (noting failure of juvenile to complete 5 out of 13 programs because he assaulted staff members, ran away, used illegal drugs, and threatened to kill a peer). Here, T.L.H.’s success in residential treatment programs supports the conclusion that he has not rejected treatment and is willing to submit to programming in a meaningful way. *Cf. In re Welfare of N.J.S.*, 753 N.W.2d 704, 711 (Minn. 2008) (concluding that the programming history factor weighed in favor of certification because “[a]ppellant demonstrated defiant and uncooperative behavior during his detention”). While acknowledging T.L.H.’s difficulties in the community, the district court found that this would be his “first opportunity for a true long-term out of home placement.” The record

supports this finding. T.L.H.'s two prior stays in residential treatment programs lasted no more than four months. We agree with the district court that T.L.H.'s successful performance in residential treatment, followed by poor performance in the community, is an indication that a longer residential stay may give T.L.H. an opportunity to fully internalize the lessons he has been taught and to mature more fully. Therefore, because of T.L.H.'s prior successes in treatment, it was not clearly erroneous for the district court to determine that T.L.H.'s programming history supports EJJ.³

The state also argues that the district court abused its discretion by determining that, under the fifth factor, there are sufficient programming options available for T.L.H. Specifically, the state argues that a return to residential treatment would largely “rehash” the treatment T.L.H. has already received. For the reasons previously stated, we concur with the district court that a longer period of residential treatment may be beneficial for T.L.H., even if T.L.H. has already undergone some of the programming now available to him. Because T.L.H. has demonstrated success in residential treatment, and because T.L.H. has shown that he would be accepted into a program that could retain him for a period of at least 6 to 9 months, and, if necessary, for a period as long as 34 months, we conclude that the district court did not clearly err by determining that the available

³ The dissent urges that this factor weighs in favor of adult certification because T.L.H. has not demonstrated that he has internalized the lessons he has learned in past treatment efforts. However, as the dissent admits, success in the community following treatment is just one factor among others to consider, including the child's attendance and completion of programming. *See In re Welfare of P.C.T.*, 823 N.W.2d at 683. Because T.L.H. has successfully completed two programs, it was not clearly erroneous for the district court to find that this factor weighs in favor of providing T.L.H. an opportunity at a longer-term out-of-home placement through EJJ.

programming options weighed in favor of EJJ. *Cf. In re Welfare of L.M.*, 719 N.W.2d 708, 714 (Minn. App. 2006) (concluding that the available programming was insufficient because the juvenile had been rejected from several programs and no suitable program had been found).

Finally, we observe that “[t]he purpose behind EJJ is to give the juvenile ‘one last chance at success in the juvenile system, with the threat of adult sanctions as an incentive not to reoffend.’” *In re Welfare of S.J.G.*, 547 N.W.2d 456, 461 (Minn. App. 1996) (Randall, J., dissenting) (quoting Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System, Final Report, at 33 (1994)), *review denied* (Minn. Aug. 6, 1996). If T.L.H. fails to remain law-abiding while on EJJ, his adult sentence may be executed immediately. *See* Minn. Stat. § 260B.130, subds. 4(a), 5. Therefore, providing T.L.H. with his first and last opportunity at long-term out-of-home treatment conforms to this purpose, serves public safety, and is not clearly erroneous.

Affirmed.

KIRK, Judge (dissenting)

I respectfully dissent. I would find a clear abuse of discretion in the district court's findings as to the third and fourth factors. This child's prior record of delinquency favors certification because it demonstrates "deeply ingrained, escalating criminal behavior that presents a threat to public safety." *In re Welfare of H.S.H.*, 609 N.W.2d 259, 263 (Minn. App. 2000); *see also In re Welfare of R.D.M., III*, 825 N.W.2d 394, 400 (Minn. App. 2013). T.L.H. has been involved in significant juvenile programming, including two out-of-home placements. While he has done well when he is in correctional custody, he has not been able to apply the lessons and life skills he was taught in his programming and placements to demonstrate the ability to remain law abiding for any significant period of time after release from custody. It is troubling that after each of two out-of-home placements, the seriousness of his crimes has escalated.

I. T.L.H. did not meet his burden of showing that his record of delinquency supports EJJ.

Despite eight prior delinquency adjudications, including a brutal felony assault, and now a felony charge involving a firearm, the district court found that T.L.H.'s prior record favored retaining this child under juvenile jurisdiction. The district court wrote that:

[T.L.H.] has a record of delinquency, although this is partially comprised of status offenses and includes four petty misdemeanor offenses. It is of some concern to the [c]ourt that the record of delinquency has elevated to the level of two recent felonies. Notwithstanding the foregoing, this court finds that [T.L.H.] has rebutted the presumption of adult certification by clear and convincing evidence[.]

These findings are confusing. T.L.H. committed four separate misdemeanor offenses that were treated as juvenile petty offenses, pursuant to Minn. Stat. § 260B.007, subd. 16 (2012).¹ They were not petty misdemeanors. Nor should they be part of the record of delinquency used in the district court's analysis of this factor, as they are not delinquency adjudications. *See id.*, subd. 6(a)(1) (excluding juvenile petty offenders from the definition of "delinquent child"). However, the district court's findings and analysis ignores seven adjudications of delinquency for seven different crimes committed on seven different dates between May 1, 2010, and February 23, 2011.

T.L.H. was adjudicated delinquent for the following seven misdemeanors: providing a false name to a peace officer on May 1, 2010; disorderly conduct occurring on May 24, 2010; theft occurring on June 24, 2010; fleeing a peace officer occurring on July 22, 2010; possession of stolen property occurring on August 3, 2010; theft occurring on December 23, 2010; providing a false name to a peace officer occurring on February 23, 2011.

The juvenile adjudication that precedes the charge now before this court was for a felony third-degree assault occurring on December 6, 2011. T.L.H. and two friends chased another young man into a department store and beat him into unconsciousness, continuing to kick and stomp his head while he lay helpless on the floor. They only stopped and fled when a Minneapolis police officer working off-duty security approached

¹ The district court was incorrect when it stated that T.L.H.'s record is partially made up of status offenses. There are no adjudications for status offenses on his record, although 21 charges were dismissed between May 6, 2009 and January 10, 2012, including some status offenses. Those charges included: eight curfew violations, four tobacco violations, four thefts, four trespass violations, and one possession of stolen property charge.

to investigate the disturbance in the store. Had they not been interrupted, this easily could have been a homicide. As it was, in addition to being beaten into unconsciousness, the victim suffered severe lacerations to his forehead, a broken nose, a sinus injury, and an orbital fracture.

Despite T.L.H.'s impressive history of delinquency adjudications and escalating criminality, the district court found that this factor supports EJJ rather than certification. This results in T.L.H. being treated no differently than a juvenile appearing before the court with no record of delinquency at all. Yet this court has repeatedly found that juveniles with delinquency records less robust than T.L.H.'s merit adult certification. In *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996), a child with only one prior adjudication—a gang-related misdemeanor fifth-degree assault—was certified as an adult. This court in *In re Welfare of S.J.G.*, 547 N.W.2d 456, 457-58 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996), affirmed the adult certification of a child with only one adjudication for an aggravated robbery offense. There, like here, the child engaged in an escalating pattern of criminality that tipped the scales on his delinquency record in favor of adult certification. *S.J.G.*, 547 N.W.2d at 458. In *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 649 (Minn. App. 2000), this court held it error to not find this factor favored certification where the prior record of S.D.S. included just four gang-related misdemeanor juvenile delinquency adjudications. T.L.H., in contrast, has been adjudicated delinquent for eight separate crimes leading to two out-of-home placements.

The felony firearm charge T.L.H. now faces is a serious crime. Whether the current charge derives from an earlier, unrelated felony assault does not detract from the

fact that his conduct indicates escalating criminal behavior. While it is a more serious felony crime to possess a pistol after being convicted or adjudicated guilty of committing a felony crime of violence, T.L.H.'s actions would have still constituted a felony firearm crime even without a prior record. *See* Minn. Stat. § 624.713, subds. 1(1), 2(a) (2012).

More importantly, for very good reasons, the legislature has determined that possession of a firearm by those who have committed a crime of violence is a serious threat to public safety and calls for a presumptive sentence of 60 months in prison. Minn. Stat. § 609.11, subd. 5(b) (2012). Federal law often treats this offense even more harshly than the 60-month presumptive sentence found in Minnesota law. *Compare* 18 U.S.C. § 922(g) (2006), *and* U.S. Sent. Guidelines Manual § 2K2.1 (2012), *with* Minn. Stat. § 624.713, subd. 1(2) (2012), *and* Minn. Sent. Guidelines 5 (2012). There is significant legislative intent behind this gun law, and the fact that T.L.H.'s current charge descends from an earlier felony does not render his crime any less serious.

If this child's extensive and escalating record of delinquency, coupled with his current charge of felon in possession of a firearm, do not constitute deeply ingrained and escalating criminal behavior, what does? This heavily weighted factor supports certification. In the context of a statutory scheme whose touchstone is public safety, it is clearly erroneous to weigh this factor in favor of EJJ.

II. T.L.H. has not demonstrated that additional juvenile programming will lead to behavioral changes and support public safety.

T.L.H. has a lengthy history of probationary and placement programming in the juvenile system. He has failed at a number of programming efforts including chemical-

dependency treatment programming. At times he has responded appropriately to programming, especially when he has been in a structured, out-of-home placement, but he has not been able to avoid continuing criminal conduct after his release from out-of-home placement. Rejecting the lessons of his prior out-of-home placements indicates an unwillingness to meaningfully participate in programming. *See In re Welfare of U.S.*, 612 N.W.2d 192, 196 (Minn. App. 2000).

T.L.H.'s first out-of-home placement at the Hennepin County Home School lasted three-and-one-half months and was completed on July 27, 2011. A few months later on December 6, 2011, he was involved in the brutal felony assault. For this felony assault he was placed at the Rite of Passage Program in Nevada. He spent almost five months in this program and did very well while in custody. However, he returned to the use of an illegal controlled substance within a few days of his release from the program, and the current offense occurred about a month later.

In sum, T.L.H.'s first dose of structure in a custodial setting was followed shortly by an offense more serious than any he had committed in the past. His second, longer out-of-home placement was almost immediately followed by this even more serious felony firearm charge. How can this programming history be construed as a clear-and-convincing prelude to T.L.H.'s success following a longer juvenile placement?

T.L.H.'s meaningful participation in past programming is but one consideration relevant to this factor. "Other considerations necessarily include the child's attendance at programming events, completion of the events, and demonstrated behavioral changes

correlated with the programming.” *In re Welfare of P.C.T.*, 823 N.W.2d 676, 683 (Minn. App. 2012), *review denied* (Minn. Feb. 19, 2013).

While this child has done well in structured correctional placement, he has twice proved that he lacks the ability to apply the lessons of this programming when he is released to the streets. On this record, T.L.H. has not met his burden to show by clear and convincing evidence that his programming history merits EJJ designation. Giving T.L.H. another chance in the juvenile system simply means we are trying the same approach over, and over, and, now, over again, expecting a different result.

It is time to try another approach. It is the approach intended by the legislature in these circumstances, and the one more focused on public safety. I dissent from the result reached today.