STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0218

In the Matter of the Welfare of: K. B. K., Child.

Filed August 27, 2012
Affirmed
Harten, Judge*

Crow Wing County District Court
File No. 18-JV-11-4054

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant K.B.K.)

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

Donald F. Ryan, Crow Wing County Attorney, Anne Marie Soberg, Assistant County Attorney, Brainerd, Minnesota (for respondent state)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.

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

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

HARTEN, Judge

Appellant, age 15 at the time of his offense, asserts that the district court abused its discretion by certifying him for adult prosecution for the crime of second-degree murder. Because we see no abuse of discretion, we affirm.

FACTS

On the evening of 15 September 2011, appellant K.B.K., then 15, picked up a shotgun, walked into his father's bedroom, and shot his father twice, killing him. Appellant then turned the gun on his mother, who pleaded with him not to shoot her. The mother eventually talked appellant into placing the shotgun in the trunk of her car; she then drove appellant to a gas station, where she abandoned him. The police located appellant shortly thereafter and arrested him.

The shooting had followed a series of arguments between appellant and his father. On the night of the shooting, appellant had argued with his father about whether appellant could visit his girlfriend, whose responsibility it was to feed the family dogs, and whether appellant could use his father's tools. They also argued about an incident where appellant's father slapped appellant in the face.

On 16 September 2011, the state filed a delinquency petition against appellant charging him with second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2010). On 20 September, the state moved to certify appellant as an adult. The district

court held a hearing on 3 October at which appellant admitted that probable cause existed to support the charge.

On 16 and 21 December, the district court conducted a two-day certification hearing. The state called two witnesses, Brian Loch, a probation officer with Crow Wing County Community Corrections who had interviewed appellant following the shooting, and Frank Weber, a licensed psychologist at a counseling agency who also had interviewed appellant.

Loch's certification study was admitted into evidence. In the study, Loch ultimately concluded that appellant should be tried as an adult, reasoning: "There is not an adequate punishment, length of programing, or long enough term of community supervision to address the seriousness of this offense in the juvenile justice system or extended jurisdiction juvenile." Loch testified that appellant had previously been charged with third-degree burglary and underwent a diversion program for that offense. Loch also explained that appellant had been charged with, and adjudicated for, disorderly conduct. Loch reasoned that appellant was showing an escalating pattern in the seriousness of his delinquent behavior. Loch explained that appellant was attending an alternative school and was making insufficient progress on three out of the four goals in his Individual Education Plan (IEP).

Weber's psychosocial evaluation report was also admitted into evidence. In it, Weber wrote that appellant had been "physically abused multiple times per month over several years." But appellant "denied ever being the victim of sexual abuse." Weber found that "[appellant] meets criteria for Posttraumatic Stress Disorder (PTSD) due to his

long history of being abused physically and emotionally by his parents." Weber determined that appellant is "likely to have difficulty taking responsibility for his behaviors," and that "[appellant] is likely to view therapy as a threat." Weber wrote that appellant "lacks appropriate remorse for his behavior" or an "understanding of the severity of his actions," based on appellant's belief that an appropriate consequence for his offense would be house arrest or a 90-day detention program. Weber opined that appellant poses a high risk for future violence and concluded that "the juvenile justice system cannot address the seriousness of [appellant]'s behavior adequately."

After the state rested, appellant called five witnesses—Bob O'Neil, a licensed psychologist who had previously diagnosed and treated appellant; Dr. James Gilbertson, a licensed psychologist who had interviewed appellant; Shon Thieren, acting associate warden of operations at Red Wing Correctional Facility (Red Wing); Raymond Horton, an attorney who had previously represented appellant in this case and a prior case; and Phillip Kuehn, a dispositional advisor for the Office of the Public Defender.

Gilbertson's psychosocial risk assessment of appellant was admitted into evidence. Gilbertson reported that appellant had explained that he had been "'pushed around'" by his father and appellant believed that this constituted physical abuse. Appellant specifically recalled that "his father hit him in the face on two separate occasions." Appellant also related a history of psychological abuse, including name calling, by both his parents. Gilbertson spoke with appellant's maternal grandmother and confirmed occasions of slapping and name calling. But appellant denied any history of sexual abuse.

Gilbertson testified that appellant had a "reactive," "knee-jerk," "explosive" form of anger. Gilbertson agreed with Weber that appellant poses a moderate-to-high risk of violent re-offense. Gilbertson's ultimate recommendation was that an extended jurisdiction juvenile (EJJ) disposition for appellant could adequately protect public safety while sufficiently punishing and rehabilitating appellant. Gilbertson testified that the juvenile-justice system would have 58 months (until appellant's 21st birthday) to treat appellant, and that length of time may be sufficient. And Gilbertson was "emboldened" in his recommendation because he recognized that an adult prison term could be imposed if appellant was still a threat at age 21.

Thieren testified that Red Wing offers programs to juveniles who have been involved in crimes involving loss of life. Juveniles who are adjudicated of those offenses typically stay at Red Wing for two to three years. But Thieren was unable to say whether appellant could successfully complete the Red Wing program.

O'Neil testified that he had diagnosed appellant with attention deficit hyperactivity disorder (ADHD) when appellant was eight years old, but had not treated appellant in six years.

On 3 January 2012, the district court certified appellant to stand trial as an adult. Two weeks later, appellant moved for reconsideration. On 26 January, the district court heard his motion for reconsideration. Appellant's attorney explained that six days after the district court certified appellant as an adult, he informed his defense team that he had been sexually abused by his father. Appellant's attorney asserted that appellant would testify at an evidentiary hearing that the sexual abuse: (1) began prior to his eighth

birthday; (2) consisted of anal rape by his father; (3) occurred every week in the year prior to the shooting; and (4) was discovered by his mother who stumbled upon a rape two years before the shooting. Appellant's attorney explained that an expert could testify that appellant did not disclose this information at an earlier point because of his shame and "twisted" sense of devotion to his father.

On 27 January, the district court denied appellant's motion for reconsideration. The district court found that it lacked jurisdiction to grant the motion because the juvenile court's jurisdiction over the matter terminated upon certification. The district court also found that, because the proffered information was known by appellant before the certification hearing, it would not constitute newly discovered evidence, and concluded that "even if the information presented in the defense's offer of proof is true, it would not be sufficient to warrant a modification of the previous [certification] order."

Appellant challenges the district court's certification order and the order denying his motion for reconsideration.

D E C I S I O N

1. Certification

Children accused of criminal conduct are generally tried in the juvenile court division of the district courts. Minn. Stat. § 260B.101, subd. 1 (2010). But a child accused of a felony who is 14 years old or older may be certified for prosecution as an adult. Minn. Stat. § 260B.125, subd. 1 (2010). Certification is not presumptive in cases of children who are 14 or 15 years old at the time of the offense. *Id.*, subd. 3. Certification requires a district court finding that "the prosecuting authority has

demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety." *Id.*, subd. 2(6)(ii) (2010). "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 determining whether a juvenile should be certified for adult prosecution, a district court must consider the following 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;
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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
>
> (6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4. The statute directs a district court to give greater weight to the first and third factors. *Id.* "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 apply an abuse-of-discretion standard of review to the district court's certification decision. *See, e.g.*, *N.J.S.*, 753 N.W.2d at 711.

A. First Factor: Seriousness of the Offense

The first factor concerns the seriousness of the alleged offense. Minn. Stat. § 260B.125, subd. 4(1). The district court must also consider any aggravating factors, such as the impact on any victim and whether a firearm was used in the offense. *Id.*

Appellant killed his father with a shotgun while his father was lying in bed. The district court found that "there are few offenses more serious than that with which [appellant] is charged, murder with the use of a firearm." In *N.J.S.*, a 15-year-old juvenile shot his grandmother in the back of the head while she was watching television. 753 N.W.2d at 706. The seriousness of that offense weighed in favor of N.J.S.'s certification. *Id.* at 711. The district court did not err in making the same decision here.

B. Second Factor: Child's Culpability

The second factor concerns the child's culpability. Minn. Stat. § 260B.125, subd. 4(2). The district court must consider the existence of any mitigating factors recognized by the sentencing guidelines. *Id.*

The sentencing guidelines do not recognize physical or emotional abuse as a mitigating factor. *See* Minn. Sent. Guidelines II.D.2.a. (2011). But a mitigating factor may be found where the defendant, "because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed," Minn. Sent. Guidelines II.D.2.a.(3), or when "[o]ther substantial grounds exist which tend to excuse

or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5).

Appellant claims two mitigating factors: his status as a victim of physical and mental abuse and his history of ADHD. But the record contains no evidence that appellant killed his father because of the ongoing abuse or that appellant's history of medical issues caused him to lack substantial capacity for judgment. The district court noted that "[a]ll parties recognize that [appellant] suffered emotional abuse and neglect at the hands of his father" and that "there were some physical altercations" between appellant and his father, but it did not err in finding that appellant's culpability for the shooting favored prosecution as an adult.

C. Third Factor: Prior Record of Delinquency

The third factor concerns a juvenile's prior record of delinquency. Minn. Stat. § 260B.125, subd. 4(3).

The district court found that appellant was previously involved in the juvenile-justice system for third-degree burglary after robbing an abandoned house and for disorderly conduct after threatening a teacher at school. The district court noted that, although the seriousness of appellant's offenses was escalating, his "prior delinquency record is not extensive and his prior offenses are not serious or violent in nature." The district court found that this did not weigh in favor of certification, and appellant does not challenge this finding.

D. Fourth Factor: Programming History

The fourth factor concerns "the child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4).

The district court noted that appellant's programming history was not extensive and was limited to placement in an alternative school, community service, and probation after previous offenses. The district court found that appellant successfully completed community service but had obviously violated probation by killing his father. The district court therefore found that the fourth factor weighed slightly in favor of certification. Appellant does not challenge this finding.

E. Fifth Factor: Adequacy of Juvenile System

The fifth factor concerns "the adequacy of the punishment or programming available in the juvenile justice system." Minn. Stat. § 260B.125, subd. 4(5). The amount of time a juvenile will spend in programming is an appropriate consideration when there may be "[i]nsufficient time for rehabilitation under the juvenile system." *In re Welfare of U.S.*, 612 N.W.2d 192, 197 (Minn. App. 2000).

The district court noted one expert's conclusions that appellant represents "a high risk to act out a threat" and "the juvenile justice system cannot address the seriousness of [appellant's] behavior adequately," and another expert's conclusion that appellant represents "a moderate to high risk for violent re-offense" and that the 58 months remaining until he reaches age 21 may not provide enough time to treat him. The district court also noted that, if appellant were an adult, he would face a presumptive sentence of

306 months' imprisonment. The district court therefore concluded that this factor weighs in favor of certification.

Appellant challenges the district court's decision to credit the evidence of these experts and contends that the district court should have credited the evidence provided by two other experts, who testified that appellant could successfully be rehabilitated through participation in EJJ and that adequate programming exists at Red Wing for juveniles who have been involved in homicide. But when the record contains conflicting expert testimony on the adequacy of punishment or programming available in the juvenile system, we defer to the district court's credibility determinations. *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 650 (Minn. App. 2000). The finding that this factor weighs in favor of certification was not erroneous.

F. Sixth Factor: Dispositional Options Available

A district court also must consider "the dispositional options available for the child." Minn. Stat. § 260B.125, subd. 4(6).

The district court found that, while Red Wing has programs to address appellant's needs, there is inadequate time before appellant's 21st birthday to successfully rehabilitate him.

Appellant challenges this finding. Again, we defer to the district court's credibility findings on expert testimony regarding program and treatment options for a juvenile in a certification hearing. *S.D.S.*, 610 N.W.2d at 650.

The district court's decision to certify appellant as an adult resulted from a careful weighing of the evidence and dutiful application of the factors in Minn. Stat. § 260B.125,

subd. 4. We conclude that the district court did not abuse its discretion by deciding that retention of appellant in the juvenile-justice system would not serve public safety and by certifying him as an adult.

2. Reconsideration

Appellant argues that the district court erred by denying his motion for reconsideration.

A. Jurisdiction to Reconsider Certification

> If the child is detained at the time certification is ordered [and] [i]f the alleged offense was committed in the same county where certification is ordered, *juvenile court jurisdiction terminates immediately* and the prosecuting attorney shall file an appropriate adult criminal complaint at or before the time of the next appearance of the child . . . .

Minn. R. Juv. Delinq. P. 18.08, subd. 2(A) (emphasis added). "When the juvenile court enters an order certifying an alleged violation, the prosecuting authority shall proceed with the case as if the jurisdiction of the juvenile court had never attached." Minn. Stat. § 260B.125, subd. 7.

Appellant argues that Minn. R. Juv. Delinq. P. 16.01, subd. 3, allows the district court to reopen the certification hearing because appellant's motion to reconsider was filed within the timeframe for *post-trial* motions. But a certification hearing is not a trial. Certification hearings and trials are governed by different rules. *Compare* Minn. R. Juv. Delinq. P. 18 *with* 13. The rules contain specific provisions governing post-trial motions, Minn. R. Juv. Delinq. P. 16, but there is no analogous provision for post-certification motions.

Appellant also argues that "[f]ailing to allow a juvenile to file a motion for reconsideration would violate due process" and that "[a] juvenile should have no less procedural due process than an adult." But certification hearings are held only for juveniles, not for adults. *See generally* Minn. R. Juv. Delinq. P. 18. Adults would never face certification.

The district court correctly determined that the juvenile court's jurisdiction terminated upon issuance of the certification order.

B. Newly Discovered Evidence

In any event, a motion for reconsideration after either juvenile trials or adult trials requires newly discovered evidence. Minn. R. Juv. Delinq. R. 16.01, subd. 1(E); *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). Appellant cites no legal authority indicating his recollection of sexual abuse qualifies as newly discovered evidence.

The district court did not err in ruling that appellant's recollections of sexual abuse are not newly discovered evidence because they were known to him prior to his certification hearing.

C. Prejudice

Finally, evidence of appellant's sexual abuse would not have changed the district court's analysis under Minn. Stat. § 260B.125, subd. 4. Appellant offers no authority for his claim to the contrary. The district court's decision not to reconsider is not erroneous.

3. Additional Policy Arguments

Appellant argues that the district court erred by not finding, prior to certification, that appellant "was incorrigible—unamenable to treatment—and, the 'worst of the worst'

as compared to other juveniles." Specifically, appellant argues that the district court erred by ignoring recent Supreme Court pronouncements on juvenile-justice policy in the contexts of capital punishment and life in prison without the possibility of parole. *See, e.g., Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005).

But juvenile delinquency certifications in Minnesota are governed by the statutory framework of Minn. Stat. § 260B.125, and Minnesota caselaw does not require a specific finding that a juvenile is "incorrigible—unamenable to treatment—and, the 'worst of the worst'" prior to certification. Appellant's policy-based arguments concerning the juvenile-justice system are for the legislature or a policy-making court.

Affirmed.