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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1109**

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

**Filed January 22, 2008
Affirmed
Randall, Judge**

St. Louis County District Court
File No. 69DU-JV-06-1389

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Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

RANDALL, Judge

Appellant S.A.C. challenges an order certifying him as an adult on two counts of attempted first-degree murder and two counts of first-degree assault. Appellant argues that the state failed to prove by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety. We conclude the district

court properly exercised its discretion in weighing the public safety factors under Minn. Stat. § 260B.125 (2006). We affirm.

FACTS

On the evening of November 6, 2006, appellant S.A.C. allegedly shot two store clerks in a convenience store robbery. Closed-circuit security video from within the store depicts appellant entering the store, requesting change from one of the two clerks behind the register, and then exiting. Moments later, appellant reenters the store and makes another pass around the sales counter to observe the layout of the store and customers present before leaving. Almost immediately after exiting, appellant again reenters the store and stands a short distance from the service counter while observing the remaining customers. As the last customer proceeds toward the exit door, appellant reaches into his pocket for a handgun and approaches the clerks who are both behind the circular counter. While standing in front of the only walkway for egress from behind the counter, appellant, without warning, shoots store clerk Christopher Davis three times. The second clerk Daniel Warner immediately dives over the front of the service counter toward the front exit door to escape. Appellant chases after Warner and shoots him three times in the back before he is able to exit the store. Appellant then reaches over the counter, takes cash from the register, and flees.

By juvenile delinquency petition, appellant was charged with two counts of attempted first-degree murder, two counts of attempted first-degree murder while attempting to commit aggravated robbery, two counts of first-degree assault, and two counts of first-degree aggravated robbery. The state later filed a certification motion requesting that the proceedings be referred to adult court for prosecution.

Less than a month after the events at the convenience store, psychologist Anita Schlank performed an initial psychological evaluation of appellant. Dr. Schlank diagnosed appellant with disruptive behavior disorder, possible cocaine abuse, and attention deficit/hyperactivity disorder. Dr. Schlank also examined the six statutory public safety factors. She opined that the offenses committed were severe and that appellant was culpable for his actions because there was no evidence that he did not understand right from wrong. Dr. Schlank noted that appellant had no programming history and only a minor record of delinquency. Without making a formal recommendation as to certification, she opined that appellant was a candidate for juvenile programming and identified several programming options that would meet his needs.¹

In March 2007, the state requested and received a second psychological evaluation from certified psychologist James Gilbertson. Dr. Gilbertson diagnosed appellant with emergent conduct disorder, antisocial behavior, depressive disorder, and chemical dependence. Dr. Gilbertson also provided an analysis of each public safety factor. He opined that the severity of the offenses and appellant's culpability supported certification as an adult, but his limited history of programming and the punishment and dispositional

¹ In April 2007, Dr. Schlank supplemented her earlier report after she received more background information about appellant and had the opportunity to meet with him again. During the second session, appellant told Dr. Schlank that he had not been forthright about his drug use during their previous encounter, and admitted to having an addiction to cocaine. Schlank modified her diagnosis to include cocaine dependence and cannabis abuse, but her analysis of the certification factors remained the same.

options available through juvenile jurisdiction did not support certification. Analysis of the remaining factor—appellant’s prior record of delinquency—was inconclusive.²

The certification study was performed by probation officer Rhonda Zacher. Zacher believed that, due to the serious nature of the crimes, appellant’s lack of remorse, and the unlikelihood of successful rehabilitation through the juvenile justice system, appellant should be certified as an adult.

A three-day certification hearing was held in early April 2007. Respondent called several witnesses, including Dr. Gilbertson, Dr. Schlank, and Zacher. Dr. Gilbertson was questioned about his report, which was admitted into evidence. He testified that his diagnosis of emergent conduct disorder and antisocial disorder indicates that appellant poses a risk of becoming more prone to engage in criminal behavior. Appellant’s Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A) test indicated that he was experiencing “significant depression and significant impulsivity and anger mixed,” and his Global Assessment of Functioning (GAF) score was 40, which signified “severe impairment” to his mental health. Appellant also scored very high on “negative treatment indicators,” which tends to indicate that he would not respond well to treatment. Dr. Gilbertson identified appellant as a “moderate to high risk for future acts of violence,” but concluded that he was not a high risk for psychopathy. He stated that appellant, as a “treatment-naïve, immature kid,” would be amenable to behavioral change

² With regard to appellant’s delinquency, Dr. Gilbertson noted that, despite a limited criminal record that included a fifth-degree assault charge, appellant had exhibited a “trajectory toward increased violent and aggressive behavior” at school. Dr. Gilbertson opined that some of these violent tendencies are common for adolescents like appellant who have experienced domestic violence and live an independent lifestyle devoid of accountability.

and suggested that programs were available to meet his needs. However, he believed that the remaining time for juvenile jurisdiction would be inadequate to effect change. He also concluded that the necessary treatment period for rehabilitation would be “precariously close” to exceeding the six years remaining for EJJ.

Dr. Schlank provided testimony about her report. Her diagnosis of disruptive behavior disorder, which was less severe than Dr. Gilbertson’s, indicated that appellant was displaying “some oppositional and defiant behaviors.” She assessed appellant as being a moderate risk for reoffense. With regard to the public safety factors, she noted the serious nature of the offenses and believed that appellant was culpable because he understood right from wrong and was of at least average intelligence. She also reported that appellant was amenable to treatment and that juvenile programming was available to meet appellant’s needs. Unlike Dr. Gilbertson, Dr. Schlank did not have any reservations about rehabilitating appellant within the time remaining in EJJ. In her opinion, several of the factors, including prior record of delinquency and programming history, did not weigh in favor of certification because appellant did not have a lengthy history of delinquency or programming. Overall, she believed that public safety would best be served through rehabilitation in the juvenile system.

In comparison, Zacher testified that appellant should be certified as an adult because he could not be rehabilitated within the EJJ time period. She based her opinion on several “aggravating factors,” including the vulnerability of the victims, the impact the crimes had on the victims’ lives, and the particular cruelty involved. She also expressed concern that it would be difficult to supervise appellant’s probation after he had served his time in the juvenile system. In her opinion, appellant posed as a risk to reoffend. On

cross-examination, Zacher admitted that this was only her second certification hearing, and in preparing her report she had not reviewed the individual family assessment, rule 25 assessment, or psychological reports.

Davis and Warner testified about their injuries and the impact appellant's actions had on their lives. Davis suffered three gunshot wounds and a collapsed lung. One bullet remains in his mid-back next to his spine. As a result of his injuries, he missed several months of work and was required to find a new job. Like Davis, Warner also suffered three gunshot wounds and was treated for a collapsed lung. One bullet remains lodged against a vertebra. He reported being bedridden for a month due to pain, and now has emotional problems and difficulty sleeping. He decided not to return to work at the store because he feared for his safety.

Following the hearing, the juvenile court found that public safety would not be served by retaining the matter in juvenile court, and certified appellant for adult proceedings. This appeal followed.

D E C I S I O N

A district court has “considerable latitude” in deciding whether to certify a juvenile for adult prosecution. *In re Welfare of H.S.H.*, 609 N.W.2d 259, 261 (Minn. App. 2000) (quotation omitted). This court will not reverse an adult-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 a certification hearing, the charges against the juvenile are presumed true. *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000).

This case does not raise the presumption of certification because appellant was only 15 years old at the time of the offenses. *See* Minn. Stat. § 260B.125, subd. 3(1) (2006) (stating that it is presumed that a proceeding involving an offense committed by a child will be certified if the child was 16 or 17 years old at the time of the offense). Therefore, the burden is on the state to prove by “clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety.” *Id.*, subd. 2(6)(ii) (2006). In determining whether certification serves public safety, the district court considers the following six statutory factors: (1) the seriousness of the alleged offense in terms of community protection, including victim impact, use of a firearm, and the presence of aggravating factors recognized by the sentencing guidelines; (2) the culpability of the juvenile in committing the alleged offense, including planning, carrying-out, and the presence of recognized mitigating factors under the sentencing guidelines; (3) the juvenile’s prior delinquency record; (4) the juvenile’s programming history; (5) the adequacy of programming or punishment in the juvenile justice system; and (6) the available dispositional options. *Id.*, subd. 4 (2006). In considering these factors, the court must give greater weight to the seriousness of the alleged offense and the child’s prior record of delinquency. *Id.*

A. Seriousness of the Offense

Under the first key factor, the district court found in favor of adult certification. The district court concluded that the offenses were severe in light of the fact that a “display of the pistol and a verbal demand surely would have given [appellant] everything he asked, whether money or items from the store.” The impact on the victims and the use of a firearm were found to be “significant” because both Davis and Warner

suffered serious mental, physical, and economic injuries. An aggravating factor was also found. The victims were declared vulnerable because their backs were turned when appellant began shooting.³

Appellant argues that because all offenses involved in a presumptive certification case are serious, the facts of each case must be examined to determine whether the charged offense is more serious than the typical offense. We disagree. The presence of aggravating circumstances, which would tend to demonstrate that the offense in question is particularly egregious, is only one of several factors this court must consider in weighing the severity of the offense. The potential threat to public safety, the victim impact, and whether a firearm was used in commission of the offenses are all pertinent to the severity analysis. Minn. Stat. § 260B.125, subd. 4. Certification cases involving violent crimes against persons almost always satisfy this factor. *See H.S.H.*, 609 N.W.2d at 262 (noting that when a crime involves violence against persons “[t]he risk to public safety . . . is clear.”).

As mentioned above, appellant’s actions were violent, resulted in substantial injury to the victims, and involved the use of a firearm. The district court’s conclusion was not erroneous.

³ The victims’ physical positioning does not constitute an aggravating factor under the sentencing guidelines. The guidelines describe vulnerability as a product of age, infirmity, or reduced capacity. Minn. Sent. Guidelines II.D.2.b.(1). Here, the victims were in their early twenties and did not suffer from physical or mental impairment or incapacity. This finding, though incorrect, does not render the district court’s severity analysis erroneous.

B. Culpability of the Juvenile

Appellant argues that this factor does not weigh in favor of certification because there is no evidence that he engaged in any planning before committing the crimes. Although planning is a relevant factor in assessing culpability, the district court did not base its conclusion on the level of planning involved. Instead, the court found that this factor “strongly favored” certification because appellant was solely responsible for the attack, appeared “cold and calculated” while committing the crimes, did not display any emotion, remorse or conscience after being apprehended, and was “undaunted by law enforcement’s lengthy and hard questioning.” These findings are supported by the record.

Citing *Roper v. Simmons*, 543 U.S. 551, 568-569, 125 S. Ct. 1183, 1194 (2005), appellant also alleges that the district court erred by failing to acknowledge that appellant’s age is a mitigating factor. But *Roper* involved the narrow issue of whether execution of a 16 or 17-year-old offender who commits a capital crime violates the Eighth Amendment prohibition on cruel and unusual punishment. 543 U.S. at 555-56, 125 S. Ct. at 1187. *Roper* did not discuss the issue of certification or the appropriateness of adult sentences for minors. *Id.* The discussion and analysis in the *Roper* case is irrelevant to the determination of culpability under Minnesota’s certification statute.

The legislature did not identify age as a mitigating characteristic and, regardless, no evidence or testimony was presented to demonstrate that appellant’s age mitigated his culpability. Both Dr. Gilbertson and Dr. Schlank testified about the difference age can make in emotion and impulse control. In assessing his culpability for the offenses, neither concluded that appellant’s age constituted a mitigating factor. Because

appellant's culpability was evaluated under the factors enumerated by the legislature, and the findings are supported by the record, the district court's conclusion on this factor is not erroneous.

C. Prior Delinquency Record

Along with the first factor involving the seriousness of the offense, this factor is to be given greater weight. Minn. Stat. § 260B.125, subd. 4. The district court found that this factor was either neutral or weighed slightly in favor of adjudicating appellant under the juvenile system. Appellant asserts that he has no record of delinquency and also takes issue with the district court's consideration of his unadjudicated behavior. Appellant's argument regarding uncharged conduct is unpersuasive because this court has previously ruled that unadjudicated offenses and school disciplinary records may be considered for purposes of certification. *See, e.g., In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. App. 1996) (unadjudicated offenses), *review denied* (Minn. Aug. 20, 1996); *In re Welfare of K.M.*, 544 N.W.2d 781, 785 (Minn. App. 1996) (considering school disciplinary records pertaining to gang related activity). The lack of a substantial juvenile record also does not preclude certification. *See K.M.*, 544 N.W.2d at 785 (affirming that a juvenile's prior gang-related activity in conjunction with a minimal juvenile record supports certification).

Although appellant does not have a lengthy record of delinquency, the district court concluded that appellant's behavioral problems, which included an unresolved fifth degree assault charge in 2006 and a multitude of documented disciplinary problems at school, demonstrated "a pattern of escalation that creates some danger to public safety." With support in the record, the weight given this factor is not erroneous.

D. Programming History

Due to concerns about appellant's amenability to treatment, the district court found that this factor was "neutral or slightly favor[ed] EJJ." The court acknowledged that appellant did not have a juvenile programming history, but found that any support for EJJ under this factor was diminished by his conduct subsequent to his arrest. The findings indicate that appellant's post-arrest behavior suggested that "he would require a significant period of adjustment in a juvenile placement before true rehabilitation could begin."

This conclusion was reached by reviewing the inconsistencies in appellant's responses to questions regarding his use of controlled substances. Appellant initially denied any chemical dependency problems while participating in a rule 25 assessment. At the end of the assessment interview, appellant asked evaluator Susan Smalling "whether it would be better for his certification hearing if chemical dependency treatment was required." Shortly thereafter, appellant met with Dr. Schlank and again denied using controlled substances. Next, he was interviewed by Dr. Gilbertson and changed his story about his drug habits. During the interview, he disclosed that he had been using excessive amounts of crack cocaine at the time of the convenience store robbery. He later met with Dr. Schlank for a supplemental evaluation and acknowledged his abuse of controlled substances. Based on these inconsistent responses, the court questioned appellant's honesty and noted that such conduct would impede his rehabilitation. The court found that appellant's conduct during the psychological evaluations somewhat negated the likelihood of successful rehabilitation.

Appellant argues that this factor should weigh strongly in favor of EJJ. In doing so, appellant contends that he has never received therapeutic programming and notes that Dr. Gilbertson found him to be a good candidate for rehabilitation. We acknowledge that there is some evidence in the record to support appellant's argument. But it is not so overwhelming as to render the district court's conclusion clearly erroneous.

E. Punishment or Programming Available

The district court found that this factor favored certification because the punishment and programming available in juvenile jurisdiction were insufficient. Specifically, the district court expressed concern that the treatment available, which was generally limited to one to two years of institutional care, would not provide the extensive programming that appellant requires, and also ruled that the 66 months remaining in EJJ would not constitute appropriate punishment for offenses of this magnitude.

Appellant contends that the district court's comparison of the presumptive adult sentence with the amount of time remaining in EJJ was improper. According to appellant, such a comparison is "flawed because it would preclude [EJJ] for nearly all juveniles charged with offenses that carry lengthy sentences." Appellant's assertion is incorrect. The disparity in punishment available in the adult and juvenile systems is a valid consideration, but although this comparison carries some weight, it does not automatically preclude EJJ for serious offenses. The adequacy of punishment is only one of several factors that must be assessed by the district court in deciding whether certification is appropriate. Minn. Stat. § 260B.125, subd. 4.

Appellant also argues that the finding of inadequate programming is contrary to the evidence provided at the certification hearing. He relies on Dr. Gilbertson and Dr. Schlank's testimony that he is amenable to treatment within the juvenile system. Both doctors testified and provided reports indicating that this factor supports EJJ because appellant is a good candidate for juvenile programming.

Appellant is correct that some of the expert testimony supports his argument, but insufficient time for rehabilitation is an appropriate consideration when deciding whether to certify a juvenile. *U.S.*, 612 N.W.2d at 197. There is evidence in the record that the time remaining for EJJ is inadequate. For example, Dr. Gilbertson qualified his opinion by noting that the time remaining under EJJ is "precariously close" to the amount of time necessary to rehabilitate appellant. And Zacher testified that, due to the severity of the offenses, "juvenile programming, quite simply, is not long enough. I also have to take into consideration public safety." Conflicting opinions were offered, and some of the evidence tends to support EJJ, but we conclude the district court's findings under this factor are not clearly erroneous.

F. Dispositional Options Available

The district court identified four treatment centers that "could seek to address [appellant]'s specific needs," and determined that "this factor favors EJJ with serious caveats as to time, amenability to treatment, and whether the juvenile programming options could truly protect public safety, not to mention whether EJJ would provide adequate punishment."

The state disputes this finding and expresses reservations about the quality of treatment available through these facilities and disagreement with the amount of

punishment he would receive. Like the punishment and programming factor above, there is conflicting evidence that could be weighed both in favor of and against certification. Dr. Gilbertson and Dr. Schlank opined that facilities like the ones identified by the district court would effectively treat appellant through 12 to 24 months of residential treatment followed by a transitional program, such as a half-way house. Representatives from several of the treatment programs also testified that appellant would be amenable to rehabilitation in their facilities. Conversely, Zacher asserted that no treatment program within EJJ would be capable of rehabilitating appellant. With conflicting testimony on the record, the district court appropriately weighed the opinions of each medical professional and determined that some dispositional options had the potential to rehabilitate appellant. The district court's findings under this factor are not erroneous.

We acknowledge that this case is close. Only three of the factors were found to weigh in favor of certification, and some of the factors, including programming history and prior delinquency, did not offer support for adult prosecution. The district court performed a careful balancing of each factor,⁴ and its decision is supported by the record.

Affirmed.

⁴ In reaching its decision, the district court concluded that the severity of the crimes and the uncertainty of successful rehabilitation weighed in favor of certification:

Could [appellant] . . . lead a productive life? Certainly. . . . The future is never certain. The bottom line, at least for this judge, is that the horrific nature of these crimes, the cold-blooded way [appellant] has carried himself, his apparently entrenched resistance to authority and accountability, and the short-term and unsure nature of the juvenile and EJJ programming options available all lead to the conclusion . . . that public safety requires that [appellant] be tried as an adult.