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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-887**

In the Matter of the Welfare of: J. R. L., Child.

**Filed November 17, 2009
Affirmed
Worke, Judge**

Chisago County District Court
File No. 13-JV-09-25

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Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his adult certification, arguing that the record does not support the certification and that the district court abused its discretion by (1) considering evidence outside of the juvenile proceedings while evaluating the prior-record-of-delinquency factor, and (2) denying his motion to supplement the record as it relates to his Fetal Alcohol Spectrum Disorder. We affirm.

DECISION

Certification

On January 26, 2009, a juvenile petition was filed charging then-17-year-old appellant J.R.L. with first-degree aggravated robbery. Following a certification hearing, at which appellant stipulated that he met the criteria for presumptive adult certification, the district court issued an order certifying appellant for prosecution as an adult. “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 charges against the child are accepted as true. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

The general rule is that children charged with a crime are to remain in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2008). However, “[c]ertification . . . is presumed if the child was [at least] 16 . . . years old at the time of the offense and the

delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes.” *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007). Once the state establishes the presumption, “the juvenile may rebut the presumption of certification by clear and convincing evidence that retaining the proceeding in juvenile court serves public safety.” *Id.* (quotation omitted). The clear-and-convincing standard “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (quotation omitted).

Whether retaining the proceedings in juvenile court serves public safety is governed by Minn. Stat. § 260B.125, subd. 4 (2008), which instructs courts to 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.

A certification may not be based solely on the seriousness of the alleged offense. *In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). But “the court shall give greater weight to the seriousness of the alleged offense and the child’s prior record of delinquency than to the other factors.” Minn. Stat. § 260B.125, subd. 4 (2008). If the child rebuts the presumption, the proceedings remain in juvenile court. *Id.*, subd. 3(2) (2008). If the presumption is not rebutted, the case must be certified. *Id.*

Seriousness of Offense

In considering the seriousness of the offense, the district court looks to (1) the presence of aggravating factors, (2) the use of a firearm, and (3) the impact on any victim. *See Id.*, subd. 4(1). Appellant correctly argues that certification cases usually involve crimes of violence. *See In re Welfare of H.S.H.*, 609 N.W.2d 259, 262 (Minn. App. 2000) (“Certification cases generally involve violent crimes against persons, such as murder or assault.”). Appellant does not, however, advance any argument pertaining to the district court’s determination that, based on the nature of the offense and impact on the victims, the seriousness of the crime involved in this case greatly favors certification. Appellant was charged with committing first-degree aggravated robbery with three other participants, an aggravating factor under the sentencing guidelines. Furthermore, because the charges are presumed to be true for the sake of the certification proceeding, appellant committed the robbery with a firearm. Finally, the district court found that the impact on the victims was substantial, specifically referring to a victim-impact statement recounting nightmares and sleepless nights since the offense. The district court concluded that the

seriousness of the offense heavily favored certification. The district court did not abuse its discretion in weighing this factor in favor of certification.

Culpability

Under the culpability element of the certification analysis, the district court considers the presence of any mitigating factors under the sentencing guidelines in addition to the juvenile's participation in planning the crime. *See* Minn. Stat. § 260B.125, subd. 4(2). Appellant argues that the district court failed to properly appreciate the effect his Fetal Alcohol Spectrum Disorder (FASD) diagnosis played in his participation of the offense.

An impairment qualifies as a mitigating factor when “[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.” Minn. Sent. Guidelines II.D.2.a.(3) (2008). In *State v. McLaughlin*, the supreme court stated that the impairment must be so extreme that the juvenile is deprived of control over his actions. 725 N.W.2d 703, 716 (Minn. 2007). Here, the district court concluded that “there was no demonstration as to how [appellant’s] FASD diagnosis caused an ‘extreme’ deprivation of control over his actions.” The record does not support appellant’s contention that the district court abused its discretion in this regard, and thus weighing this factor in favor of certification was not an abuse of discretion.

Prior Record of Delinquency

The third factor in the certification analysis is the juvenile’s prior record of delinquency which, along with the seriousness of the crime, is required to be weighed more heavily by the court than the other factors. *See* Minn. Stat. § 260B.125, subd. 4(3).

The court is required to examine the record of juvenile delinquency petitions and the adjudication of alleged violations of the law by the minor. *N.J.S.*, 753 N.W.2d at 710. Ongoing and escalating delinquency threatens public safety and favors certification. *H.S.H.*, 609 N.W.2d at 263.

The Minnesota Supreme Court recently addressed this factor in *N.J.S.* The juvenile had never been charged or adjudicated as delinquent prior to being charged with the underlying offense at issue in the certification proceeding. *N.J.S.*, 753 N.W.2d at 706. During the certification hearing, the state sought to elicit testimony pertaining to the juvenile's school and institutional disciplinary records in order to demonstrate that the criminal behavior at issue was ongoing and escalating. *Id.* at 707. Over the juvenile's objections, the district court admitted evidence of numerous uncharged incidents reported in the juvenile's school and institutional records. *Id.* The district court certified the juvenile as an adult partly because these reports exhibited violent and inappropriate behavior. *Id.* The supreme court held that the plain meaning of Minn. Stat. § 260B.125, subd. 4(3) pertained only to records and adjudications of juveniles in the juvenile court system, and that the district court erred by "consider[ing] uncharged behavior reflected in school and institutional records when evaluating the prior-record-of-delinquency factor." *Id.* at 710.

Appellant cites to an excerpt from the district court's analysis of the prior-record-of-delinquency factor to illustrate that the court improperly considered information outside of the parameters set forth in *N.J.S.* The district court noted:

Dr. Gilbertson stated there are numerous citations in [appellant's] clinical records addressing concerns over his dangerousness, i.e., his aggressive actions within his family; recommendations for anger management; his tendencies to disorganize under particular stress; his argumentativeness and confrontational attitudes toward authority figures, particularly when they were applying consequences or attempting to intervene on a course of his behavior Dr. Gilbertson utilized the Structured Assessment of Violence Risk in Youth (SAVRY) as an additional rating measure of [appellant's] risk Dr. Gilbertson concluded, based upon [appellant's] SAVRY ratings, that he is found to evidence a multitude of factors that substantially increase his risk for future acts of violent offense or [] being involved in a delinquency with a violent context.

Similar to *N.J.S.*, appellant's clinical records and SAVRY ratings are not part of appellant's juvenile record or adjudications. While the state contends that the district court did not rely on this information in reaching its conclusion on the prior-record-of-delinquency factor, there is nothing supporting this contention in the district court order. Indeed, the district court explicitly stated its reliance on Dr. Gilbertson's testimony when it found that appellant evidenced a multitude of factors that substantially increase his risk for future acts of violence or delinquency. Accordingly, the district court's inclusion of Dr. Gilbertson's testimony regarding appellant's SAVRY assessment and clinical records within the prior-record-of-delinquency analysis was an abuse of discretion.

Programming History

Next, the court considers the child's programming history. Appellant has a lengthy track record of unsuccessful experiences with probation programs, chemical treatment facilities, and other voluntary out-of-home placements. Appellant attributes his previous treatment program failures to the fact that he has yet to participate in a

program designed for juveniles suffering from FASD, and argues that the district court failed to properly appreciate his diagnosis when weighing this factor.

This court has stated that “[r]ejection 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). The district court specifically noted that while appellant’s explanation for his previous failures in juvenile rehabilitation programs “may or may not be the case, it appears, based upon the evidence . . . that [appellant] was not willing to participate meaningfully in past available programming.” Accordingly, the district court permissibly relied on appellant’s history of unsuccessful participation in several rehabilitation programs in concluding that similar programming efforts in this case would produce similar unsuccessful results, and therefore did not abuse its discretion in concluding the fourth factor favors certification.

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

The final two factors focus on the adequacy of punishment or programming available in the juvenile system and the dispositional options available. These factors are frequently considered together. *See, e.g., In re Welfare of D.T.H.*, 572 N.W.2d 742, 745 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). Appellant argues that there was no evidence presented of any prison programs equipped to handle the needs of a juvenile suffering from FASD, whereas he demonstrated several programs available within the juvenile system appropriate for individuals with FASD. Appellant argues that he met his burden in rebutting the presumption in favor of certification under these

factors because the juvenile programming is better suited for individuals suffering from FASD and the length of time remaining under a juvenile adjudication is roughly the same as the presumptive prison sentence.

The district court, however, adequately addressed appellant's concerns regarding FASD-gearred treatment options and still found that the factor favors certification. There is insufficient evidence to conclude that the district court abused its considerable discretion in regard to these two factors, and thus the record supports the district court's determination in both respects.

After analyzing the six factors, the district court concluded:

This [c]ourt has given greater weight to the seriousness of the offense, which weighs heavily in favor of certification, and to [appellant's] prior record of delinquency, which also weighs heavily in favor of certification. All of the other factors also favor certification, albeit some more than others. Public safety is better served by certifying this matter and the [c]ourt shall uphold the presumption of certification.

While the record supports the district court's determination in five of the six factors, appellant correctly argues that the district court improperly considered testimony presented by Dr. Gilbertson pertaining to appellant's clinical reports and SAVRY tests when considering the prior-record-of-delinquency factor. In *N.J.S.*, the supreme court did not reverse the certification at issue where the district court considered information outside the statutorily permitted scope. *N.J.S.* 753 N.W.2d at 710-11. Rather, the court noted that “[a]s the prior record of delinquency is one of six factors, whether the error requires reversal depends on the weight given to the inadmissible records and the weight given the five other factors.” *Id.* at 710. Each of the other five factors favored

certification, and the court concluded that the district court's improper consideration of records outside the juvenile process did not impact the outcome of the analysis. *Id.* at 711.

The facts and issues before the supreme court in *N.J.S.* are directly analogous to those presently challenged by appellant. The district court clearly erred in conducting its analysis of the prior-record-of-delinquency factor in this case, but this error is not enough to reverse the district court's overall determination that all the factors, weighed together, favored certification. Thus, the district court did not abuse its discretion in certifying appellant.

Appellant's Motion to Supplement the District Court Record

Appellant also argues that the district court abused its discretion by denying his motion to supplement the record with a report from Dr. Gilbertson regarding appellant's FASD diagnosis. *See Richardson v. Employers Mut. Cas. Co.*, 424 N.W.2d 317, 319 (Minn. App. 1988) (applying abuse-of-discretion standard in reviewing motions to supplement the record), *review denied* (Minn. Aug. 24, 1988). This report was prepared after the district court issued its order for certification. Dr. Gilbertson's report was considered in a subsequent certification proceeding stemming from another robbery charge in which appellant was not certified as an adult. Appellant argued to the district court that supplementing the record with the report was appropriate under Minn. R. Civ. App. P. 110.05. Under this rule, "[i]f anything material . . . is omitted from the record by error or accident or is misstated in it, . . . [the district court] may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be approved

and transmitted.” Minn. R. Civ. App. P. 110.05. “By language of that rule, the modification of the record should occur only to correct an omission or misstatement in the record due to an error or accident.” *State v. Larson*, 520 N.W.2d 456, 464 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994). This report does not serve to correct an error; thus, the district court did not abuse its discretion in denying appellant’s motion to supplement the record.

While appellant concedes that the district court was correct in its application of rule 110.05, he argues that Minn. R. Juv. Delinq. P. 21.01 should control. Rule 21.01 states that although the Minnesota Rules of Civil Appellate Procedure govern all appeals from juvenile proceedings, “[i]n order to expedite its decision or for other good cause shown, the court of appeals may suspend any of these rules, except the time for filing a notice of appeal.” Appellant contends that good cause exists to allow the record to be supplemented. We disagree. The district court made its determination for certification while noting the existence of appellant’s diagnosis in the analysis of each of the six statutory factors for certification and still soundly determined that the interests of public safety favored adult certification. Remanding this case back to the district court in order to supplement the record with a report that the court already declined to consider is unnecessary. Accordingly, the motion to supplement the record was properly denied by the district court.

Affirmed.