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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-584**

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

**Filed September 14, 2010
Reversed
Bjorkman, Judge**

Morrison County District Court
File Nos. 49-JV-09-2019, 49-JV-09-2044

Brian Middendorf, Morrison County Attorney, Dana D. Erickson, Assistant County Attorney, St. Cloud, Minnesota (for appellant State of Minnesota)

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Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and
Collins, Judge.*

UNPUBLISHED OPINION

BJORKMAN, Judge

In this presumptive-certification case, the state challenges the denial of its motion to certify J.A.S. as an adult on charges of assault and other felonies stemming from two drive-by shootings. Because the district court (1) did not presume the charges against

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

J.A.S. are true, (2) miscalculated J.A.S.'s prospective adult sentence, and (3) erred in weighing the statutory public-safety factors, we reverse with directions to certify J.A.S. as an adult.

FACTS

On October 2, 2009, 16-year-old J.A.S. broke into a garage and stole a .22 caliber rifle. He illegally modified the rifle by sawing off the barrel, adding a pistol grip, and filing off the serial number.

Four days later, J.A.S. was riding in a car in St. Cloud with two other juveniles when he pulled out the modified rifle and shot at a street sign. As the vehicle approached a house, the driver slowed down, and J.A.S. fired a single shot into an illuminated window. The bullet passed through the living room where two adults and a six-year-old child were sitting, missing the child by two or three feet.

After the shooting, J.A.S. told the driver to drive away. Farther down the road he told the driver, "Stop right here," and J.A.S. fired the rifle at another occupied home. This time J.A.S. aimed at an illuminated window. The bullet shattered the window and narrowly missed the two adults who were watching television in the room.

A victim of the first shooting tracked down J.A.S.'s car and contacted the police, who initiated a stop. While searching the car, the police recovered the modified rifle and two .22 caliber shell casings. J.A.S. admitted shooting the rifle into the two houses. He told the officers that he knew that he shouldn't have shot at the houses, but that he got caught up in the moment and thought it was fun.

J.A.S. was charged with 13 felony counts, including two counts of drive-by shooting in violation of Minn. Stat. § 609.66, subd. 1e(b) (2008), possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2008), and other firearms-related charges. The delinquency petition was later amended to add five counts of second-degree assault with a dangerous weapon, Minn. Stat. § 609.222, subd. 1 (2008). J.A.S. was also charged with first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(b) (2008), and felony firearm theft in violation of Minn. Stat. § 609.52, subds. 2(1), 3(1) (2008), related to the October 2 incident.

J.A.S. has a lengthy history of criminal activity, including five felony burglary delinquency adjudications and three misdemeanor adjudications. He has been on probation and in numerous placements since the age of 12 and has participated in ten different treatment programs designed to address his chemical dependency and criminal behavior. Despite these repeated treatment efforts, J.A.S. has consistently relapsed into criminal behavior and chemical use.

The district court conducted a certification hearing on January 28, 2010. Prior to the hearing, J.A.S. agreed to waive his arguments as to probable cause. The parties presented witness testimony, reports from two psychologists, and other documents. Both psychologists diagnosed J.A.S. with mental-health issues including polysubstance abuse and conduct disorder. Roger L. Carten, Ph.D., the state-retained psychologist, opined that “there is no compelling reason why this matter should not be certified to the adult court,” but observed that J.A.S. would not likely receive treatment in prison. Tim Tinius, Ph.D., whom J.A.S. retained, did not express an opinion as to whether J.A.S. should be

certified, but recommended residential treatment, stating that J.A.S. “is clearly on the borderline of chances of success.” J.A.S.’s probation officer testified about J.A.S.’s past delinquent conduct, his failed treatment and other programming, and the escalating severity of his illegal behavior. The probation officer recommended certification.

The district court declined to certify J.A.S. as an adult on the grounds that the extended jurisdiction of the juvenile court would exceed the duration of J.A.S.’s presumptive adult prison sentence, J.A.S. would receive appropriate treatment in a juvenile placement, and J.A.S. did not intend to cause harm when he shot at the two houses. 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 for abuse of the district court’s discretion. *St. Louis Cnty. v. S.D.S.*, 610 N.W.2d 644, 650 (Minn. App. 2000).

Generally, children alleged to have committed an offense remain in the juvenile system. Minn. Stat. § 260B.101, subd. 1 (2008). But when a child is charged with committing an offense at age 16 or 17 that would result in a presumptive commitment to prison under the Minnesota Sentencing Guidelines for an adult, or is charged with a felony firearm offense, there is a presumption that adult certification serves public safety.

Minn. Stat. § 260B.125, subd. 3 (2008); Minn. R. Juv. P. 18.06, subd. 1. When the presumption applies, the child has the burden of showing by clear and convincing evidence that retaining juvenile court jurisdiction serves public safety. Minn. Stat. § 260B.125, subd. 3. In deciding whether or not to certify, the district court must presume that the charges against the child are true. *In re Welfare of N.J.S.*, 753 N.W.2d 704, 708 (Minn. 2008).

To determine whether public safety is served by certifying a child as an adult, 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 (2008). The statute directs the court to give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency. *Id.*

In concluding that J.A.S. overcame the certification presumption, the district court stated:

If [J.A.S.] is certified as an adult and received a 48-month (Guidelines) prison sentence upon conviction, he would serve 32 months with credit for good time. He would receive credit for time served, which the Court estimates at 150 days. Thus, he would be discharged from prison shortly after his 19th birthday. Under EJJ jurisdiction, the Court will have supervision over [J.A.S.] until he is 21. Additionally, and more importantly, [J.A.S.] can receive the kind of treatment that Dr. Carten states does not exist in an adult prison setting and that Dr. Tinius believes has a better than 50-percent chance of success.

While [J.A.S.'s] prior delinquency record is significant, the Court does note that this is the first assaultive conduct. It was not committed with intent to cause harm, but recklessly and in disregard of the injury or death that it might have caused. In the Court's opinion, placement in a secure, long-term detention and treatment facility under EJJ will just as adequately ensure public safety than if [J.A.S.] were sentenced in adult criminal court.

The state argues that the district court committed legal error in analyzing the public-safety factors and that the determination that J.A.S. rebutted the presumption of certification is clearly erroneous. Because the determination of whether error requires reversal of a certification order turns on the weight given to the public-safety factors affected by the error and the weight given the other factors, we first consider the evidence and findings as to each public-safety factor. *See N.J.S.*, 753 N.W.2d at 710 (stating that when error affects the court's findings as to one of the six factors, whether reversal is required "depends on the weight given to the inadmissible records and the weight given the five other factors"). We note that the district court did not make express

determinations as to whether each of the six public-safety factors favors certification.¹ But we reject the state's assertion that this omission requires reversal, because the order discloses the evidentiary and legal bases for the district court's decision in a manner that is sufficient for us to review.

Seriousness of the offense

The state argues that the district court erred in calculating J.A.S.'s presumptive prison sentence and that this error affects the court's determination with respect to the seriousness of the offense public-safety factor. We agree. The district court found that J.A.S.'s presumptive prison commitment would be 48 months based on a criminal-history score of zero. But J.A.S.'s prior delinquency adjudications increase his criminal-history score to one. *See* Minn. Sent. Guidelines II.B.4 (Supp. 2009) (noting criminal-history score calculations for felony delinquency adjudications).² Furthermore, the presumptive commitment on each of the five second-degree assault charges and the ineligible-possession-of-a-firearm charge is a minimum of three years on the first offense and not less than five years on the subsequent offenses. Minn. Stat. § 609.11, subds. 5, 9 (2008). And because the burglary and assault offenses were not part of "a single behavioral incident or course of conduct," a burglary conviction could also increase J.A.S.'s

¹ The district court's findings of fact with respect to each of the public-safety factors essentially recite the evidence.

² While J.A.S. has five felony-level delinquency adjudications, one occurred before his fourteenth birthday and does not count toward his criminal-history score. The remaining four adjudications were for crimes that did not carry a presumptive commitment to prison. A child may receive only one criminal-history point for delinquency adjudications unless the child was adjudicated for a crime that would result in a presumptive commitment to prison. Minn. Sent. Guidelines II.B.4(d) (Supp. 2009).

criminal-history score. *See State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981). On this record, we agree with the state that J.A.S.’s presumptive prison sentence is at least 108 months and that the district court’s contrary finding is clearly erroneous.

More importantly, the district court’s consideration of the seriousness of the offense, a paramount public-safety factor, is legally flawed. For the purpose of a certification hearing, the district court must presume that the charged offenses are true, once probable cause has been ascertained. *See* Minn. Stat. § 260B.125, subd. 3; *N.J.S.*, 753 N.W.2d at 708. An assault is defined as “an act done with intent to cause fear in another of immediate bodily harm or death” or “the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2008). J.A.S. waived all objections to probable cause. The district court’s express finding that J.A.S. did not commit the offenses “with intent to cause harm, but recklessly” is inconsistent with the presumption of guilt and constitutes legal error.

The district court’s legal error and flawed finding of fact on this weighty public-safety factor are significant. Based on our review of the charged offenses and record, we conclude that the seriousness of the offenses with which J.A.S. is charged strongly favors certification.

Culpability of the child

The district court described J.A.S.’s culpability with respect to the offenses as “almost complete.” J.A.S. does not contest this finding and did not submit evidence of any mitigating factors during the certification hearing. This public-safety factor favors certification.

Prior record of delinquency

J.A.S. has five felony burglary adjudications, four third-degree offenses and one second-degree offense. He also has three misdemeanor adjudications. The district court did not make an express finding that this public-safety factor favors certification but stated that this history is “significant.” We agree. J.A.S. committed his prior offenses over a two-year period during which numerous services and programs were provided to him. J.A.S.’s probation officer testified that J.A.S.’s criminal behavior was increasing in severity despite the numerous treatment efforts. Escalating criminal behavior is a consideration in determining whether a child’s prior delinquency record favors certification. *See In re Welfare of H.S.H.*, 609 N.W.2d 259, 262-63 (Minn. App. 2000) (holding that prior record of delinquency did not favor certification in the absence of escalating criminal conduct that threatened public safety).

The district court noted that J.A.S. does not have a record of assaultive conduct. J.A.S. argues that this fact favors retaining juvenile jurisdiction. We disagree. The legislature expressly identified the burglary offenses as “crimes of violence.” Minn. Stat. § 624.712, subd. 5 (2008). While this court considers third-degree burglary a property crime when it is a potential certifying offense, *H.S.H.*, 609 N.W.2d at 262, it does not follow that a lengthy record of burglary offenses cannot support certification. J.A.S.’s history of numerous felony and misdemeanor delinquency adjudications favors certification. To the extent the district court concluded otherwise, it would constitute abuse of discretion.

Programming history

The district court's findings regarding J.A.S.'s programming history note his lengthy history of treatment and relapse over the years and his escalating pattern of criminal behavior. J.A.S.'s past programming includes individual counseling, psychological and chemical health assessments, therapeutic foster-home placement, juvenile-consequence programs, and repeated outpatient and inpatient treatment programs. Although the district court did not make an express finding as to whether or not this public-safety factor supports certification, J.A.S. does not dispute the state's argument that J.A.S.'s programming history favors certification. On this record, we conclude that this public-safety factor clearly supports certification.

Adequacy of punishment or programming and dispositional options

The final public-safety factors are often analyzed together. *See, e.g., D.T.H.*, 572 N.W.2d at 745. One important consideration is whether the accountability available in the juvenile system is adequate. The state argues that the district court erred in assessing this issue because it miscalculated J.A.S.'s presumptive adult sentence. We agree. Based on a presumed 48-month adult sentence, the district court concluded that J.A.S. would be accountable for a longer period of time if he were retained in the juvenile system, stating: "the [district c]ourt will have supervision over [J.A.S.] until he is 21," but under the adult system J.A.S. would be released "shortly after his 19th birthday." The prospect of a significantly longer prison term clearly impacts the comparison between the punishment available in the adult and juvenile systems and renders the district court's finding on the adequacy of punishment factor clearly erroneous.

Ultimately, the district court based its certification decision on its finding that J.A.S. is more likely to obtain treatment in the juvenile system. The district court expressly adopted Dr. Carten’s statement that “one reason for considering EJJ in this case is that there is no treatment in the adult system and there is a possibility that by using appropriate treatment that [J.A.S.’s] problems can be resolved.” The district court also noted Dr. Tinius’s opinion that J.A.S. has “greater than a 50 percent chance” of being successful as an EJJ.

We have previously held that if the outcome of treatment or other programming in the juvenile system is unlikely or equivocal, then public-safety factors five and six favor certification. *Id.* The record here presents a close call as to whether the district court’s findings regarding J.A.S.’s probable success in treatment are clearly erroneous. Dr. Carten’s opinion that “there is a possibility” that appropriate treatment could resolve J.A.S.’s problems is equivocal, at best. Although Dr. Tinius opined that J.A.S.’s likelihood of success as an EJJ is better than 50 percent, later in the same report, Dr. Tinius characterized J.A.S.’s prospects of success as “borderline.” But because some evidence supports the district court’s findings as to the dispositional options available in the juvenile and adult systems, we conclude that the court’s implicit determination that this public-safety factor weighs against certification is not clearly erroneous.

Weighing of public-safety factors

The state asserts that the district court did not give the weight the law requires to the seriousness of the offense and prior delinquency record in evaluating the public-safety factors. We agree. In its two-paragraph summary of the six factors, the district court

repeated its erroneous conclusion that J.A.S. would have a longer period of accountability in the juvenile system and characterized as “more important[.]” the fact that J.A.S. can only receive treatment in a juvenile placement. The district court did not indicate that it weighed factors one and three more heavily than the other public-safety factors, and it appears to us that the district court focused on the disposition that will best meet J.A.S.’s treatment needs. But the most important consideration in determining whether to certify a child for adult prosecution is public safety, not which disposition may be preferable from the child’s perspective. Minn. Stat. § 260B.125, subd. 4. The district court erred in understating the significance of J.A.S.’s prior record of delinquency and the seriousness of the charged offenses.

Having determined that the district court committed numerous errors in analyzing and weighing the public-safety factors, we next consider whether these errors require reversal of the order denying certification. As noted above, our analysis turns on the weight given to the factors affected by the errors and the weight given the other public-safety factors. *See N.J.S.*, 753 N.W.2d at 710.

The district court’s determination that J.A.S. did not intend to cause harm and miscalculation of J.A.S.’s presumptive adult sentence relate to the seriousness of the offenses, one of the two public-safety factors given the most weight in certification cases. The significance of this error is compounded by the district court’s failure to give the required weight to both this factor and to J.A.S.’s prior record of delinquency. Because these two factors as well as the culpability and programming-history factors favor

certification, we conclude that the district court abused its discretion and reversal is warranted.

Finally, we consider whether we should remand the certification issue for further consideration of the public-safety factors by the district court. We recognize that it is not this court's function to weigh evidence or second-guess a district court's credibility findings in certification cases. *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"). But we may reverse without remand when proper application of the public-safety factors to the evidence dictates a different outcome. *See S.D.S.*, 610 N.W.2d at 650. In *S.D.S.*, this court concluded that the district court failed to weigh the seriousness of the offense and the child's history of delinquency more heavily than the other public-safety factors. We reversed the denial of adult certification without remanding for a new certification hearing because "the evidence dictates a different result when the factors are properly weighed." *Id.*

Likewise, the district court here failed to appropriately weigh the seriousness of the offenses and J.A.S.'s prior record of delinquency. While it is undisputed that treatment and other disposition options are available to J.A.S. within the juvenile system and there is evidentiary support for the district court's findings on the disposition public-safety factor, these findings are strongly outweighed by the seriousness of J.A.S.'s offenses and his prior delinquent conduct. J.A.S. is charged with extremely serious offenses that presented substantial personal and property risk to the community. His prior delinquency record is extensive and, most importantly, demonstrates escalating

criminal behavior despite extensive treatment-related and punitive interventions. Even deferring to the district court's credibility determinations regarding J.A.S.'s potential for success in treatment through the juvenile system, those findings must yield to the most weighty public-safety factors, both of which favor certification. Because the seriousness of the offense, the prior record of delinquency, and at least two other public-safety factors favor certification and because this is a presumptive-certification case, we conclude that, as in *S.D.S.*, a different result is dictated.

We are mindful that certification decisions are complex and that tension exists between a child's best interests and the need to protect public safety. But by weighting the seriousness of the offense and prior record of delinquency factors more heavily than the other public-safety factors, the legislature emphasized the primary importance of protecting the public. The fact that this is a presumptive-certification case is significant. On this unique record, where the only evidence that weighs against certification is the treatment options that are available to J.A.S. in a juvenile placement, we conclude that J.A.S. did not meet his burden of proving, by clear and convincing evidence, that public safety is served by retaining juvenile jurisdiction. Accordingly, we reverse and direct the district court to certify J.A.S. for adult prosecution.

Reversed.