

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1159**

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

**Filed March 13, 2023
Reversed and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-JV-20-3253

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant W.S.A.)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent county)

Considered and decided by Connolly, Presiding Judge; Cochran, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his extended jurisdiction juvenile (EJJ) disposition order, arguing that the district court erred by imposing a stayed adult sentence when appellant was convicted only of an offense that did not carry a presumptive prison sentence. We reverse the stayed adult sentence imposed on appellant and remand for the district court to impose a delinquency disposition with appropriate terms and conditions.

FACTS

Between September and November 2019, appellant W.S.A., then sixteen, abused his six-year-old sister. A delinquency petition was filed, charging appellant with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Respondent Hennepin County filed a presumptive certification motion to have appellant certified as an adult. In August 2021, the district court denied the motion and designated the matter as an EJJ prosecution.

In January 2022, the petition was amended to add another count of first-degree criminal sexual conduct. Following a court trial, appellant was found guilty of one count of second-degree criminal sexual conduct and not guilty of two counts of first-degree criminal sexual conduct. He was sentenced as an EJJ juvenile to an adult sentence of a stayed 36-month prison term and a juvenile disposition. He raised no objection to the sentence.

On appeal, he argues that the district court erred by imposing a stayed adult sentence on an EJJ defendant convicted only of an offense that did not have a presumptive prison commitment.

DECISION

As a threshold matter, respondent argues that appellant waived this issue by not addressing it to the district court. An issue is not properly before an appellate court when it is raised for the first time in a brief to that court, and “[g]enerally, when an issue has not been raised before the district court, we consider the issue forfeited.” *Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020). But a defendant cannot forfeit or waive by silence the

right to review of an illegal sentence. *See, e.g., State v. Maurstad*, 733 N.W.2d 141, 146-47 (Minn. 2007); *State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008). A juvenile should not be deprived of this protection. Moreover, a juvenile has no conviction, and therefore no possibility of a postconviction challenge to his sentence. We therefore address appellant's issue.

Whether a stayed adult sentence may be imposed on an EJJ defendant who has not been convicted of an offense with a presumptive prison commitment is an issue of statutory construction and is therefore reviewed de novo. *See State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019).

Any juvenile between 14 and 17 who is alleged to have committed any felony-level offense can be placed on EJJ. Minn. Stat. § 260B.130, subd. 1(2018). This may occur if the juvenile is between 14 and 17, a certification hearing is held, and the district court denies certification and designates the prosecution as EJJ. *Id.*, subd. 1(1). Appellant met these criteria, and his prosecution was designated EJJ by the district court. The statute also provides two other means of EJJ designation: first, the juvenile is 16 or 17, the offense is a presumptive prison offense or involved the use of a firearm, and the prosecutor designates the prosecution as EJJ in the delinquency petition; and second, the juvenile is between 14 and 17, the prosecutor requests EJJ designation, a hearing is held, and the court designates the prosecution as EJJ. *Id.*, subd. 1(2), (3).

Appellant was convicted of violating Minn. Stat. § 609.343, subd. 1a (2018) (providing that anyone who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if the complainant is under 13 and the actor

is more than 36 months older). The presumptive sentence for this crime was 36 months in prison, stayed. See Minn. Sent'g Guidelines 4.B (Supp. 2019). Thus, it was not a presumptive prison offense.

EJJ disposition of cases is set out in Minn. Stat. § 260B.130, subd. 4(a) (2018): when there is a finding of guilt or a guilty plea, the district court shall impose both (1) one or more juvenile dispositions and (2) “an adult criminal sentence, the execution of which shall be stayed on the condition that offender not violate the provisions of the disposition order and not commit a new offense.” However, there is an exception to the dual-sentence provision of subdivision 4(a):

If a child . . . is convicted of an offense after trial that is not an offense described in subdivision 1, clause (2), [i.e., a presumptive prison offense,] the court shall adjudicate the child delinquent and order a disposition under Minn. Stat. § 260B.198 [providing only dispositions for children adjudicated delinquent].

Minn. Stat. § 260B.130, subd. 4(b) (2018). The omitted language is the phrase “prosecuted as [EJJ] after designation by the prosecutor in the delinquency petition,” and is a reference to *id.*, subd. 1(2) (providing for EJJ designation by the prosecutor). This court declared that language unconstitutional in *In re Welfare of T.C.J.*, 689 N.W.2d 787, 796 (Minn. App. 2004) (“modify[ing] the disposition [of an EJJ defendant’s case] to vacate the stayed adult sentence”).

We read this language [“prosecuted as [EJJ] after designation by the prosecutor in the delinquency petition”] to require a disparately more severe sentence for every EJJ conviction that results from the juvenile court’s rejection of adult certification.

. . . .

. . . There is no evident connection between: (1) juveniles who were originally subjected to the adult certification process but who are not convicted of the presumptive [prison] offense and (2) a sentencing provision that subjects them to harsher punishment than others not convicted of a presumptive [prison] offense simply because the first group arrived in an EJJ court through the adult-certification route.

T.C.J., 689 N.W.2d at 795-96. Appellant was not convicted of a presumptive prison offense. Under *T.C.J.*, regardless of how appellant's EJJ designation occurred, the district court should have ordered only juvenile delinquency disposition of his case under Minn. Stat. § 260B.198 (2018).

We reverse his sentence and remand this case to the district court to impose a delinquency disposition with appropriate terms and conditions.

Reversed and remanded.