STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1325

In the Matter of the Welfare of: D. D. A., Child.

Filed February 4, 2013
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-JV-12-3476

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Crippen, Judge.*

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

WORKE, Judge

Appellant challenges the district court's order designating him as an extended jurisdiction juvenile (EJJ), arguing that the state failed to meet its burden of proof

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

because a probation officer recommended that appellant be retained in the juvenile system, and the district court failed to treat appellant as a juvenile. We affirm.

D E C I S I O N

In April 2012, the state alleged that 16-year-old appellant D.D.A. committed first-degree aggravated robbery and moved the district court, pursuant to Minn. Stat. § 260B.130, subd. 1(3) (2012), to designate the proceedings as an EJJ prosecution. In June 2012, following a hearing, the district court granted the state's motion to designate appellant an EJJ, and appellant pleaded guilty to aiding and abetting first-degree aggravated robbery. Appellant challenges the EJJ designation.

The state is required to show by clear and convincing evidence that EJJ prosecution will serve public safety. *Id.*, subd. 2 (2012). When considering EJJ designation, a district court weighs six public-safety factors. *Id.*; .125, subd. 4 (2012). We review a district court's EJJ determination under a clearly erroneous standard. *In re Welfare of D.M.D., Jr.*, 607 N.W.2d 432, 437 (Minn. 2000) (citing *In re Welfare of J.F.K.*, 316 N.W.2d 563, 564 (Minn. 1982)).

Appellant contends that the district court was overly concerned about appellant's potential to reoffend; he asserts that the district court should have relied on the EJJ study recommendation that he be retained in the juvenile system under delinquency jurisdiction and the psychologist's note that he is amenable to treatment. The record, however, supports the district court's weighing of the six public-safety factors.

Seriousness of offense

The first public-safety factor is "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." Minn. Stat. § 260B.125, subd. 4(1); *see* Minn. R. Juv. Delinq. P. 19.05(A).

The district court found that appellant was alleged to have participated in an aggravated robbery with a group of 10 males. Appellant was alleged to have told the group, "Watch this. I'm about to crack [the victim]." Appellant struck the victim, a vulnerable adult, from behind on the side of the head. The group assaulted the victim while he was on the ground. The victim suffered bleeding from his mouth and nose, abrasions on his body, and a mild concussion. Appellant admitted that the group planned to beat and rob someone and that the attack was unprovoked.

The district court found that the seriousness of the offense supported a designation of EJJ—the victim is a vulnerable adult, the attack occurred on a public street, and the offense was aggravated because it was carried out by more than three persons. In the EJJ study, the probation officer (PO) agreed that the offense is very serious. As the district court found, this factor supports EJJ designation.

Culpability

The second public-safety factor is 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." Minn. Stat. § 260B.125, subd. 4(2); *see* Minn. R. Juv. Delinq. P. 19.05(B).

The district court found that appellant was fully culpable, and did not find the existence of any mitigating factors. The EJJ study reached the same conclusion. As the district court found, this factor supports EJJ designation.

Delinquency record

The third factor is the "child's prior record of delinquency." Minn. Stat. § 260B.125, subd. 4(3); *see* Minn. R. Juv. Delinq. P. 19.05(C).

Appellant's case history includes an adjudication for receiving stolen property, a petty misdemeanor, in August 2009; a stay of adjudication for third-degree assault committed in June 2010; and an adjudication for misdemeanor disorderly conduct in February 2012. The PO indicated that appellant cooperated with probation and that the third-degree-assault case was dismissed. The district court considered this assault as past delinquent behavior, but also gave it little weight because the case had been dismissed. The district court noted, however, that the current charge was "an escalation of strikingly similar allegations" from the third-degree assault. The district court's determination that this factor supports EJJ designation is not clearly erroneous because appellant's offenses are similar and the current offense is an escalation in conduct from the prior offense.

Programming history

The fourth factor is the "child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4); *see* Minn. R. Juv. Delinq. P. 19.05(D).

The district court found that appellant successfully completed all programming. While the district court determined that this factor did not support EJJ designation, the

court was concerned because appellant committed the current offense after successfully completing programming. As the district court found, this factor does not support EJJ designation.

Adequacy of available programming & Available dispositional options

The final factors are the "adequacy of the punishment or programming available in the juvenile justice system" and "dispositional options available for the child." Minn. Stat. § 260B.125, subd. 4(5), (6); *see* Minn. R. Juv. Delinq. P. 19.05(E), (F).

The district court found that appellant would likely receive the same programming and have several available dispositions under juvenile or EJJ jurisdiction. If designated EJJ, however, appellant would be on probation for an additional two years and have a stayed sentence to the commissioner of corrections. The district court determined that the additional two years of programming and probation would benefit public safety; thus, this fifth factor supports an EJJ designation.

While appellant argues that the district court should have relied on the EJJ study recommendation that appellant be retained in the juvenile system under delinquency jurisdiction, the recommendation is just that and the district court is not required to rely on it. *See* Minn. R. Juv. Delinq. P. 19.03, subd. 1 (stating that the court *may* order a study concerning the child who is the subject of the EJJ proceeding). Appellant also argues that the district court should have relied on a psychologist's note that he is amenable to treatment. However, the psychologist did not make a recommendation regarding EJJ, nor did the psychologist state that appellant is amenable to treatment. The psychologist commented on appellant's "depressive symptoms which are serious enough to warrant

additional assessment and intervention," his "fairly passive and conforming" behavior that makes him "liable to adhere to the desires of other more powerful peers," his discomfort in "discussing potential issues or faults," and his notable lack of "self-insight." The psychologist summarized that appellant should be assessed for potential depressive symptoms and for suicidal ideation, and that he may require intensive educational interventions.

Appellant also argues that at his dispositional hearing he "personally spoke to the court and explained that he was remorseful and wanted to change." But the district court also spoke at appellant's dispositional hearing expressing concern about the "gratuitous violence" of the offense, noting that the vulnerable victim could have died as a result of the assault. The district court also commented on the fact that appellant claimed to have assaulted the victim because he wanted to impress people, stating that appellant's explanation "was weak," and that EJJ was necessary partly because "we need extra time with you." Because the psychologist expressed concern regarding appellant's likely adherence to group pressures, the district court did not clearly err in determining that appellant would require more intensive probation under EJJ. Therefore, the district court did not clearly err in finding that the state met its burden of showing by clear and convincing evidence that public safety is served by designating appellant an EJJ.

Finally, appellant argues that because he was "designated to stand trial as an adult under EJJ . . . . [t]he [district court] erred in failing to allow appellant, a juvenile, to be treated differently than an adult." Appellant contends that the district court's treatment of him as an adult is unconstitutional. But appellant neither raised nor implied a

"constitutional issue" in the district court. Therefore, this issue is waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that even constitutional issues are waived if not raised before the district court). Moreover, appellant was treated differently than an adult. An adult would have been sentenced to 48 months in prison. The district court stayed appellant's 48-month sentence until appellant turns 21 years old, placed appellant on EJJ probation, and sentenced him to three weeks at an adventure therapy program. Thus, appellant's argument is meritless.

Affirmed.