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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0565**

In the Matter of the Welfare of:
M. L. H., Child.

**Filed October 29, 2018
Reversed and remanded
Halbrooks, Judge**

Hennepin County District Court
File No. 27-JV-16-6178

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

Mary F. Moriarty, Fourth District Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for respondent M.L.H.)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's order designating the instant case as an extended jurisdiction juvenile (EJJ) prosecution, arguing that the district court did not correctly analyze the public-safety factors that support certification. Because the district court erred in determining that there is adequate programming available in the juvenile-justice system, we reverse and remand.

FACTS

On December 5, 2016, appellant State of Minnesota filed a petition in juvenile court charging respondent M.L.H. with three counts of first-degree criminal sexual conduct, one count of third-degree criminal sexual conduct, and one count of use of minors in sexual performance/pornographic work. The charges were based on allegations that M.L.H. sexually abused a minor female relative on multiple occasions between December 2014 and September 2016. The state moved to certify M.L.H. for adult prosecution, arguing that there was a presumption of certification because M.L.H. was 17 years old and the alleged offense would result in a presumptive commitment to prison under the sentencing guidelines. The district court ordered that certification studies be prepared by probation and psychological services. Dawn Peuschold, Ph.D., a forensic psychologist, and Timothy Turrentine, a probation officer, submitted reports.

On January 24, 2017, the district court held a pretrial hearing. The parties reached an agreement in which M.L.H. would waive his right to a contested certification hearing and plead guilty to one count of first-degree criminal sexual conduct. In exchange, the state would request a stay of execution on the presumptive 144-month prison sentence and M.L.H. would be placed on probation for seven years. M.L.H. was released on conditional release pending the plea hearing. One of the terms of his conditional release was that he not have unsupervised contact with minor females. On February 14, M.L.H. pleaded guilty to one count of first-degree criminal sexual conduct. The district court accepted the plea and scheduled a sentencing hearing for April 11.

On March 10, the state charged M.L.H. with two new counts of third-degree criminal sexual conduct. By the date of the new offense, M.L.H. had turned 18 and was charged as an adult. The new charges were the result of an incident that occurred on February 27, during which M.L.H. was found engaging in sexual intercourse with a 15-year-old female in a school bathroom. Based on the new charges, the state withdrew the plea agreement. M.L.H. moved to withdraw his guilty plea, and the district court granted the motion. M.L.H. then moved to withdraw his waiver of a contested certification hearing. On November 28, the district court granted the motion and ordered probation, and psychological services to submit updated evaluations. Dr. Peuschold and Kim Johnson,¹ a probation officer, submitted updated reports.

On February 6 and 23, 2018, the district court held a contested certification hearing. The district court heard testimony from Dr. Peuschold and Officer Johnson and received the evaluations and reports prepared by Dr. Peuschold, Officer Johnson, and Officer Turrentine into evidence. On March 22, the district court denied the state's motion to certify M.L.H. as an adult and designated the case to proceed as an EJJ prosecution. The state appeals.

D E C I S I O N

In juvenile-delinquency proceedings, adult certification is presumed if the child was at least 16 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

¹ Officer Turrentine had retired and therefore was not available to update his initial report.

applicable sentencing guidelines. Minn. Stat. § 260B.125, subd. 3 (2016). The child bears the burden of rebutting this presumption “by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety.” *Id.* In determining whether public safety is served, the district court must consider the following 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.

Id., subd. 4 (2016). In analyzing these factors, the district court must give greater weight to the seriousness of the alleged offense and prior record of delinquency. *Id.*

The district court has “considerable discretion” in determining whether a child should be certified for adult prosecution. *In re Welfare of K.M.*, 544 N.W.2d 781, 784 (Minn. App. 1996). This court will not reverse the district court’s decision unless the district court’s findings are “clearly erroneous so as to constitute an abuse of discretion.” *In re Welfare of P.C.T.*, 823 N.W.2d 676, 681 (Minn. App. 2012) (quotation omitted), review denied (Minn. Feb. 19, 2013). A finding is clearly erroneous only if there is no reasonable evidence to support the finding in the record or this court is left with the

“definite and firm conviction that a mistake occurred.” *In re Welfare of J.H.*, 844 N.W.2d 28, 35 (Minn. 2014) (quotation omitted). The record must be viewed in the light most favorable to the district court’s decision. *Id.*

The state argues that the district court abused its discretion in addressing the public-safety factors. The district court determined that the first two factors, seriousness of the offense and culpability of the child, weigh in favor of certification. But the district court determined that the remaining four factors weigh against certification. The state assigns two errors to the district court’s analysis. First, the state argues the district court erred in refusing to consider M.L.H.’s new charges in its analysis. Second, the state argues the district court abused its discretion in determining that there is adequate juvenile programming available to M.L.H. when the record establishes that M.L.H. does not have sufficient time to complete the available sex-offender program before EJJ expires.

I.

The state argues that the district court erred in refusing to consider M.L.H.’s pending adult charges when evaluating his prior record of delinquency. The district court noted that M.L.H. had pending adult charges but declined to consider those charges because they were not delinquency charges and did not show “a deeply ingrained or escalating behavior.” The district court cited *In re Welfare of N.J.S.* for the proposition that “prior records of delinquency” refers to “records of petitions to juvenile court and the adjudication of alleged violations of the law by a minor.” 753 N.W.2d 704, 710 (Minn. 2008). The district court concluded that M.L.H.’s pending adult charges do not meet this definition and declined to consider the charges as a prior record of delinquency.

The state relies on *In re Welfare of K.A.P.* to support its assertion that the district court was required to consider the pending adult charges. 550 N.W.2d 9 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). In *K.A.P.*, the district court granted the state’s motion to certify K.A.P. as an adult for prosecution. *Id.* at 11. In doing so, the district court considered that K.A.P. had two pending assault petitions and was a possible suspect in three other incidents. *Id.* at 10-11. The district court emphasized that it was considering the unadjudicated conduct because the conduct reflected a pattern. *Id.* at 12. This court concluded that requiring the district court to ignore the pending assault petitions “would unduly limit the court’s ability to accurately assess the risk to public safety.” *Id.*

Here, the district court determined that the pending adult charges were not evidence of M.L.H.’s prior record of delinquency. In *N.J.S.*, the supreme court analyzed the phrase “prior records of delinquency” and determined that the phrase “unambiguously refers to records of petitions to juvenile court and the adjudication of alleged violations of the law by minors.” 753 N.W.2d at 710. M.L.H.’s pending adult charges do not meet this definition. The district court therefore did not err in determining the charges were not prior records of delinquency. But we note that the pending adult charges may be relevant to other public-safety factors. *See id.* at 711 (Page, J., concurring) (noting that the uncharged conduct may be relevant to the culpability of the child and adequacy of programming available); *K.A.P.*, 550 N.W.2d at 12 (stating that “[a]t the least, the pending charges are relevant to the conclusions in the psychological evaluation”).

II.

The state argues the district court abused its discretion in determining that the adequacy of programming available in the juvenile-justice system weighs against certification. In reviewing the district court's determination, the record must be viewed in the light most favorable to the district court's decision. *J.H.*, 844 N.W.2d at 35. The district court found that adequate programming is available because both Dr. Peuschold and Officer Johnson testified that M.L.H. needs inpatient sex-offender treatment, and such treatment was available at MCF-Red Wing.

The state argues the district court abused its discretion because it is undisputed that M.L.H. will not have enough time to complete sex-offender programming before EJJ jurisdiction expires. We agree. At the time of the certification hearing, M.L.H. had approximately 21 months until he turned 21 and EJJ jurisdiction would expire. Dr. Peuschold and Officer Johnson testified that it generally takes 12-18 months to complete the sex-offender program at MCF-Red Wing, followed by additional time for aftercare and community supervision. But Dr. Peuschold expressed concern that it may take M.L.H. longer than the average person to complete the program based on his lower cognitive functioning and the need to address additional issues caused by his complicated history of family instability and mental-health concerns. Dr. Peuschold and Officer Johnson indicated that it was possible that M.L.H. could complete the primary program before he turned 21, but neither believed that he would have enough time for aftercare requirements or community supervision. Notably, Dr. Peuschold testified that M.L.H.

would be unlikely to succeed if he did not have a step-down approach, meaning an intensive program followed by aftercare and community supervision.

The district court reasoned that if M.L.H. failed to complete treatment, it would be a basis for the district court to revoke his EJJ status and impose an adult sentence. M.L.H. contends that by doing so, the district court “could acquire a longer period of probation” and allow him to complete aftercare and community supervision. But M.L.H. does not cite to any precedent or authority that authorizes such a sentence. Under Minn. Stat. § 260B.125, subd. 4(5), the district court is required to consider the adequacy of programming available “in the juvenile justice system.” The procedure that M.L.H. advocates, and that was contemplated by the district court, involves programming that would span both juvenile and adult court jurisdiction. This exceeds the scope of programming available “in the juvenile justice system.” Minn. Stat. § 260B.125, subd. 4(5). The parties agree that appropriate programming would consist of a primary program followed by aftercare and community supervision. And the record establishes that M.L.H. will not have enough time to complete such programming. Because M.L.H. does not have time to complete the only appropriate programming available, there is not an adequate program within the juvenile-justice system.

The district court relied on Officer Turrentine’s report to support its decision to designate the case for EJJ prosecution. Officer Turrentine opined that M.L.H. needed a residential placement and recommended a program with both an inpatient and outpatient component. He, in contrast to Officer Johnson, ultimately recommended that the case proceed as an EJJ prosecution. This report is insufficient to support the determination that

there is adequate programming available. Officer Turrentine's report was prepared in December 2016—14 months before the certification hearing. And the report does not address how long it would take M.L.H. to complete the recommended programming. Accordingly, Officer Turrentine's recommendation supports the determination that M.L.H. needs intensive sex-offender programming, including an outpatient component. But it does not challenge the testimony that M.L.H. does not have enough time to complete appropriate programming.

On this record, we conclude that the district court abused its discretion in determining there is adequate programming available within the juvenile-justice system. It is undisputed that M.L.H. needs intensive sex-offender programming and that he does not have enough time to complete the only available juvenile programming. Therefore, there is not an adequate program available in the juvenile-justice system. The district court's conclusion that the sixth public-safety factor, dispositional options available, was similarly based on the conclusion that the program at MCF-Red Wing was a "viable option." Because the program is not a viable option, we conclude the district court abused its discretion in determining that this factor weighs against certification. Accordingly, the public-safety factors weigh in favor of certification, and the district court abused its discretion in denying the state's motion for certification.

Reversed and remanded.