

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1127**

In the Matter of the Welfare of: M. D. T., Child

**Filed January 14, 2019
Reversed and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-JV-18-75

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Morgan Lee Miller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's extended jurisdiction juvenile (EJJ) designation, arguing that the state failed to prove by clear and convincing evidence that an EJJ designation would serve public safety. Because the record does not clearly and

convincingly establish that public safety would be served by an EJJ designation, we reverse and remand.

FACTS

In July 2017, then 16-year-old appellant M.D.T. and other individuals planned to rob a known drug dealer. Appellant contributed to the plan by setting up contact with the drug dealer. Appellant saw the other individuals passing around a gun on their way to the location of the purported drug deal. Upon arrival, appellant waited on the porch while another individual went to the side of the house with a gun. When the drug dealer arrived, the individual with the gun attempted to rob him. Appellant then heard gun shots and ran back to the car. Appellant did not call 911.

Appellant was subsequently charged, in a delinquency petition, with aggravated robbery in the first degree, a felony pursuant to Minn. Stat. § 609.245, subd. 1 (2016). Appellant was not charged until approximately five months after the alleged offense. She has since moved to Alabama and currently resides with her grandmother. She has remained law abiding since the date of the offense,

The state moved to designate appellant's charge an EJJ prosecution pursuant to Minn. Stat. § 260B.130, subd. 1(3) (2018). The state and appellant stipulated to the admission of four items of evidence: the probable-cause statement supporting the charge against appellant, an EJJ study by an officer from the Hennepin County Juvenile Probation Department, the probation officer's dispositional recommendations that had been prepared, and a psychological evaluation of appellant. No other evidence was submitted and no

witnesses to testify regarding the motion were called. Hearings were held on the motion in May 2018, where the parties argued their respective positions to the district court.

The EJJ Study Recommendation

The EJJ study recognized that appellant's alleged offense was serious. It acknowledged that appellant knowingly and intentionally contacted the victim to set up the drug deal, knew that the group's intention was to rob him, and knew that one of her companions possessed a firearm. The report indicated that appellant should be viewed as fully culpable for her role in the alleged offense. The report, however, also noted that appellant had no known record of delinquency and that the prospect of a successful intervention was unknown. While the study noted that jurisdiction would be longer if the proceeding was designated an EJJ prosecution, the report indicated that Hennepin County Juvenile Probation would be recommending community-based consequences and intervention. The report *recommended the proceeding not be designated an EJJ prosecution.*

Psychological Report

The psychological report indicated that appellant has some symptoms consistent with depression and had frequently used marijuana in the past. It stated that appellant reported interpersonal difficulties such as withdrawing from peers, mood changes, and difficulty getting along with others. However, the report went on to state that appellant's risk for engaging in future violent acts was *low*. It noted that the offense was her first interaction with the legal system and that the offense was completed with a group of negative peers with whom she was newly acquainted. The report stated that appellant had

distanced herself from those peers, moved to Alabama, and developed a strong and emotionally-supportive relationship with her grandmother. It also indicated that appellant had ceased using marijuana, demonstrated a balanced self-esteem and an ability to adapt to new environments, and was adjusting well to living in Alabama.

The report indicated that appellant has had no involvement in special education programming, has no history of mental-health treatment, and has not engaged in other supportive services. Like the EJJ study, the report stated that the prospect of successful intervention was unknown. The report ultimately recommended individual therapy, monitoring with respect to schooling, and that family therapy might also prove beneficial. The report did not give a specific recommendation as to whether appellant's proceeding should be designated an EJJ prosecution.

EJJ Order

The district court acknowledged that the EJJ study recommended the matter proceed as a juvenile delinquency prosecution. However, it found that public safety would best be served by designating the proceeding an EJJ prosecution, after it weighed the evidence according to the factors prescribed in Minn. Stat. § 260B.125, subd. 4 (2018).

Appellant filed a notice of appeal challenging the district court's order designating her proceeding an EJJ prosecution. Appellant argues that the district court had no basis to deviate from the EJJ study recommendation and that the record lacks clear and convincing evidence to support a finding that public safety would be served by an EJJ designation.

DECISION

The state is required to show by clear and convincing evidence that EJJ prosecution will serve public safety. Minn. Stat. § 260B.130, subd. 2 (2018). This court will not reverse unless the district court's findings are clearly erroneous. *In re Welfare of D.M.D., Jr.*, 607 N.W.2d 432, 437 (Minn. 2000). In determining whether the district court's findings are clearly erroneous, we view the record in the light most favorable to the district court's findings. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002).

The state could have designated appellant's prosecution EJJ without a hearing because appellant was "alleged to have committed an offense for which the Sentencing Guidelines and applicable statutes presume a commitment to prison." Minn. Stat. § 260B.130, subd. 1(2) (2018). However, the state chose to request that the proceeding be designated EJJ pursuant to Minn. Stat. § 260B.130, subd. 1(3). That meant that the district court would make the EJJ designation determination after a hearing was held on the issue. *Id.*

When considering EJJ designation pursuant to subdivision 1(3), the district court weighs six public-safety factors to determine if appellant is a risk to public safety,

- (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.

In considering these factors, 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 listed in this subdivision.

Minn. Stat. § 260B.125, subd. 4.

The district court weighed the six factors. It determined that of the two most important factors, the severity of the alleged offense in terms of community protection weighed in favor of EJJ designation, while the child's prior record of delinquency weighed against EJJ designation. The district court also found that because appellant has been cooperative and remained law abiding, factor four, the past willingness to participate meaningfully in available programming, went in her favor, while factor two, her culpability, did not. The record supports the district court's determination on these factors.

This district court also found that factor five, the adequacy of the punishment or programming available in the juvenile justice system, weighed in favor of EJJ designation, and that factor six, the dispositional options available, was neutral. But the record evidence does not support the district court's determination on these factors. As to factor five, the only suggestion of programming offered in the EJJ study recommendation was that Hennepin County Juvenile Probation would be recommending community-based consequences and interventions. There was not a recommendation for an out of home placement. The psychological report, additionally, only recommended appellant engage in individual therapy and monitoring in regards to her schooling. The programming recommended by the EJJ study and the psychological report are clearly available if the case

remained a juvenile delinquency prosecution. Also, in terms of the adequacy of the punishment, the EJJ study report indicates that the punishment would have been adequate under juvenile delinquency jurisdiction.

The district court, however, did not address what additional programming would be available if appellant was designated EJJ. Instead, it focused its analysis on the severity of the offense and the length of jurisdiction, noting that “[a]s an EJJ prosecution, [appellant] would be under the court’s jurisdiction until [she] turns the age of 21,” but if “the case were to proceed as a juvenile delinquency prosecution, [appellant] would only be on probation for a little over one year.” But, we noted in *In re Welfare of B.N.S.*, extending the length of jurisdiction is not, in and of itself, a justification for designating a case as EJJ, particularly when no evidence suggesting what additional programming would be available under an EJJ designation, which is not available under a juvenile delinquency prosecution. 647 N.W.2d 40, 43-44 (Minn. App. 2002). We conclude that the district court’s determination on factor five is clearly erroneous because there was no evidence, let alone clear and convincing evidence, as to what additional programming would have been available under an EJJ designation—or how that additional programming would serve public safety—that would not have been available under a juvenile delinquency prosecution.

We also conclude that the district court’s determination on factor six is clearly erroneous because the district court, again, failed to indicate what dispositional options would be available under EJJ designation that would not have been available under juvenile delinquency. The EJJ study report did not indicate that different dispositional options would have been available under an EJJ designation. The district court’s failure to find a

different dispositional option available under EJJ designation, other than to indicate EJJ would be longer, does not suggest a determination that an EJJ designation would serve public safety.

In concluding that the district court erred in its determination on factors five and six, and that factors three and four weigh against designation, we note that the six statutory public safety factors are not a rigid, mathematical equation and that the district court has discretion to weigh them in the context they are presented. *In re Welfare of D.M.D., Jr.*, 607 N.W.2d at 438. However, when the two most important factors indicated in the statute cancel each other out, the district court must then carefully weigh the remaining factors and only designate a child's prosecution EJJ if there is clear and convincing evidence that the designation serves public safety. *Id.*

While the district court was understandably troubled by the severity of the offense, as are we, it failed to explain how the remaining factors show by clear and convincing evidence that public safety would be served by an EJJ designation. As discussed, the only record evidence suggested that appellant was at a low risk to engage in future violent acts, has been law abiding since the offense, has distanced herself from negative peers, has developed a supportive relationship with her grandmother in Alabama, has stopped using marijuana, and could receive community-based consequences while on juvenile delinquency probation. While it is true that appellant should be seen as culpable for her role in what was a severe offense, it is also true that she is remorseful and has been cooperative with law enforcement.

The state argues in its brief that the district court was not required to follow the recommendation provided by the probation officer in the EJJ study report. *See* Minn. R. Juv. Delinq. P. 19.03, subd. 1 (stating the court *may* order a study concerning the child who is the subject of the EJJ proceeding). We agree. But if the district court is going to reject that recommendation, it must base its decision on the other record evidence while employing the proper standard of proof, which in this case is clear and convincing.

In this case, the key evidence before the district court was the stipulated reports, neither of which supported EJJ designation. The state could have called and cross-examined the probation officer to testify regarding why she did not recommend EJJ or to further inquire into the different programming or dispositional options available under an EJJ designation. But it did not. The state could also have called its own expert to recommend EJJ designation. But it did not. Although, the district court was not required to follow the recommendation in the EJJ study, it was required to base its determination on the evidence before it. Consequently, the district court's finding that the state proved by clear and convincing evidence that public safety would be served by designating the proceeding an EJJ prosecution is clearly erroneous.

Therefore, we reverse and remand this case to the district court for a juvenile delinquency prosecution.

Reversed and remanded.