Cite as 2010 Ark. App. 144

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-84

D. A. S. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 11, 2010 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. CR-08-57] HONORABLE RALPH EDWIN WILSON, JR., JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Appellant D.A.S. appeals from a decision of the Crittenden County Circuit Court denying his motion to transfer his criminal case to juvenile court. He was charged by information on January 16, 2008, with residential burglary, criminal mischief in the first degree, and theft arising out of acts allegedly committed on December 27, 2007, two days before his seventeenth birthday. After a hearing, the trial court denied appellant's motion to transfer. This appeal followed. Appellant contends that the trial court erred by denying his motion to transfer to juvenile court. We affirm.

While the Deese family was away for two days over the 2007 Christmas holiday, vandals broke into their home and caused $160,000 worth of damage. Joseph Quinn, a student at Marion High School, confessed to the crime and implicated appellant as one of his

accomplices. On September 25, 2008, following Quinn's convictions for the offenses, appellant filed a motion to transfer to juvenile court.

The transfer hearing took place on September 29, 2008, and the trial court denied appellant's motion to transfer from the bench. An order was entered on October 3, 2008, making the following findings on the factors set forth in Ark. Code Ann. § 9-27-318(g) (Repl. 2008):

> 4. The first factor is the seriousness of the alleged offense and whether the protection of society requires prosecution in criminal division. The Court notes that residential burglary is a serious offense. It is a class B felony which carries a range of punishment from 5 to 20 years imprisonment in the state penitentiary. Criminal mischief is also a serious felony because it is a felony and carries a range of punishment from 3 to 10 years in the state penitentiary. In reviewing this factor, the Court makes notice that the victims felt violated. This was a home invasion and the Court finds that it was a serious criminal offense. As to whether the protection of society requires prosecution in criminal division, the Court finds that this factor weighs in favor of the State based on the nature and seriousness of the offense. The amount of damage was $160,000. Damages which the insurance paid.
>
> 5. The second factor is whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner. The Court having heard the co-defendant's case earlier this month, the Court felt that the crime was committed in a vicious and malicious manner. The defendant's father, after reviewing the pictures to the Deese home, testified, at hearing, that he though[t] it was committed in a violent manner. . . . It was aggressive, violent, and premeditated. This was not done on the spur of the moment. It took time to do the damage that was done in a willful manner. Even though Mr. West points out from case law, and the Court is taking his word on this, that criminal mischief and residential burglary are not violent offenses, the Court finds that this is not dispositive in this case. The key is what type of manner was the crime committed; and the Court finds that it was committed in a very aggressive, violent, premeditated and willful manner.
>
> 6. The third factor is whether the offense was against a person or property with greater weight being given to offenses agianst persons, especially if personal injury resulted. In this case there is no question that this is a property crime and there was no physical injury to the victims. . . . The Court does note that even in this property

crime there was major monetary damages. As the State points out, there was some emotional damages to the family. . . . Even though this was a property crime, the crime was directed actually at people. According to Joseph Quinn's testimony, Mr. Deese had flipped him off at a traffic situation and he was going to get back at Mr. Deese. According to Mr. Deese's testimony, some of his clothes were bleached and peroxided which leaves the Court to believe that this was personal at least from Joseph Quinn to Mr. Deese. However, . . . this factor probably would weigh in favor of the Defendant since it was property as opposed to personal.

7. The fourth factor is the culpability of the juveniles including the level of planning and participation in the alleged offense. . . . The Court believes that there was some level of planning in this case based on common sense. One person could not have done all the damages by himself or herself. The Court thinks that all of the parties were culpable. This factor weighs in favor of the State.

8. The fifth factor is the previous history of the juvenile including whether the juvenile has been adjudicated a juvenile offender and if so whether the offenses were against person or property and any other previous history of antisocial behavior or patterns of physical violence. The first prong of the factor weighs in favor of the Defendant. He has no previous adjudicated juvenile offenses, nor criminal offenses for that matter. Regarding the second prong, previous history of antisocial behavior, . . . the only antisocial conduct or behavior of the defendant was several years ago, and the Court finds that this factor weighs in favor of the Defense.

9. The sixth factor is the sophistication or maturity of the juvenile as determined by a consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult. . . . The defendant . . . is in the eleventh grade and he is 17 years old. He will be 18 years of age in 90 or 92 days. He has access and probably is the sole possessor of the 2005 Ford F-150 pickup truck so he has some freedom of movement. He goes to school; he does play football; he associates with others; he gets to travel; gets to go to football camps at ASU and the University of Alabama, at least this past summer. He seems to come from a middle to upper middle class family in Marion, Arkansas. There has been evidence of his church roots of growing up in church. Both parents are married to each other and obviously testified they wanted to supervise and shelter their son. . . . The Court find[s] no weight toward the State or Defense in this case.

10. The seventh factor is whether there are facilities and programs available to the Court that are likely to rehabilitate the juvenile prior to the expiration of the Court's jurisdiction. Under the juvenile law, the court does have jurisdiction until the juvenile is 21 years old if a criminal offense was committed prior to the juvenile's eighteenth

> birthday. Rehabilitation is a goal of the juvenile system. However, the criminal justice system, where this case is now filed, rehabilitation is only one of the four general aspects of sentencing. Aspects of sentencing are (1) deterrence, (2) incapacitation (take someone off the streets), (3) actually just des[s]erts (let the punishment fit the crime[)], and (4) rehabilitation. So rehabilitation is one of the four major factors involved in sentencing. In this case, there is no guarantee that the juvenile could be rehabilitated. The Court does not know when the juvenile court could hear this case. The juvenile will be 18 on December 29, 2008. The Juvenile Court could dispose of the case by committing [appellant] to the Division of Youth Services, but, as Mr. Barnes testified, the normal sentence there is only 8 to 12 months. In looking at the minimum sentence for criminal mischief 3-10 years, and the minimum sentence for residential burglary, 5-20 years, you are looking at 3 to 5 years incarceration as a minimum. Such period is longer than even the period of rehabilitation that is still available to the Defendant in this case. Taking into account the age of the juvenile, the seriousness of these offenses, whether rehabilitation is even appropriate in this case, the Court finds this factor weighs in favor of the State.
>
> 11. The eight factor is whether the juvenile acted alone or was part of a group in the commission of the alleged offense. There is no question to the Court that the Defendant did not act alone, and he was part of a group in the commission of these offenses with Joseph Quinn and [R.W.]. The Court disagrees with the defense that this factor was written regarding peer activity and gang activity. Being in a group is actually worse or more culpable than being alone. This factor weighs in favor of the State.
>
> 12. Factor nine is written reports and other materials relating to the juvenile's mental, physical, educational, or other social history. . . . The Court finds an average student with average grades who does well in sports and has satisfactory conduct. . . . This factor is either neutral or weighs in favor of the Defense.
>
> 13. Factor 10 is other factors deemed relevant by the Court. The court finds that there are no other factors that it can think of at this time.
>
> 14. Based on the totality of the factors; the evidence; the seriousness of the offenses; the way in which the offenses were committed which is primarily factors one, two, three, four, and eight, the Court finds that the defense did not prove its motion to transfer by clear and convincing evidence. Therefore, the Defense motion to transfer the case to the Juvenile Division of Circuit Court is denied, and the Criminal Division of Circuit Court retains jurisdiction.

This appeal followed.

Appellant argues that the trial court erred by denying his motion to transfer his case to juvenile court. Specifically, appellant contends: (1) that the court did not properly weigh the factors "because it should have given more weight to Factor (5) with the fact that Appellant had no prior criminal or juvenile history"; (2) that trial court's ruling that he could not be properly rehabilitated was erroneous because "there was no clear and convincing evidence to support this finding, in fact there was no evidence at all on that point"; (3) that the court's ruling under factor eight was clearly erroneous "when it stated that the group activity was to combat 'gang activity.'" There is absolutely no clear and convincing evidence to support that finding."

A prosecuting attorney has the discretion to charge a juvenile sixteen years of age or older in the juvenile or criminal division of circuit court if the juvenile has allegedly engaged in conduct that, if committed by an adult, would be a felony. Ark. Code Ann. § 9-27-318(c)(1) (Repl. 2008). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court. Ark. Code Ann. § 9-27-318(e). The court shall order the case transferred to another division of circuit court only upon a finding by clear and convincing evidence that the case should be transferred. Ark. Code Ann. § 9-27-318(h)(2). Clear and convincing evidence is the degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Richardson v. State*, 97 Ark. App.

52, 244 S.W.3d 736 (2006). We will not reverse a trial court's determination of whether to transfer a case unless that decision is clearly erroneous. *Id*.

The trial court specifically addressed the required factors in its decision denying appellant's motion to transfer. The court is not required to give equal weight to each of the statutory factors, and it may use its discretion in deciding the weight to be afforded to each factor. *Lofton v. State*, 2009 Ark. 341, 321 S.W.3d 255. Therefore, appellant's argument that the trial court should have given more weight to the fact that he did not have a criminal history is without merit.

Appellant's contention that the trial court erred in finding that he could not be properly rehabilitated is also without merit. In its order the trial addressed its concerns that rehabilitation may not be appropriate due to appellant's age and the seriousness of the offense. We cannot say that the trial court erred in this finding.

Finally, appellant argues that the trial court stated that "the group activity was to combat 'gang activity.'" No such language can be found in either the court's bench ruling or its order. Therefore, we do not address this argument.

The trial court's order denying appellant's motion to transfer is not clearly erroneous. Thus, we affirm.

Affirmed.

GRUBER and GLOVER, JJ., agree.