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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Family Court
The Honorable Nancy McLin

Court of General Sessions
The Honorable Diane S. Goodstein

Case No.: 2021-000280

State of South Carolina,

Respondent,

vs.

Isaac Duran,

Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Did the Family Court abuse its discretion by transferring jurisdiction to the Court of General Sessions when evidence showed Appellant did not meet the requirements for transfer?

STATEMENT OF THE CASE

On June 1, 2018, Appellant Isaac Duran, then aged 15, was arrested on suspicion of murder pursuant to an indictment issued by the Dorchester County Grand Jury (2018-JU-18-1025). The State filed a motion with the court seeking to have Appellant waived up or transferred from the family court to general sessions court. The Honorable Anne Jones signed such an order, including a requirement for a pre-waiver evaluation, on June 21, 2018. The Honorable Nancy McLin of the Dorchester County Family Court heard the transfer motion February 11-13, 2019. At this hearing, Vergil Deas, Esquire represented the State and Mitchell Farley, Esquire represented Appellant. At the close of testimony, Judge McLin found that Appellant met the criteria for transfer and ordered that his case be sent to general sessions court.

Appellant, still represented by Mr. Farley, pleaded guilty to the lesser-included offense of voluntary manslaughter on October 19, 2020 before the Honorable Diane Goodstein. Sentencing was deferred until November 18, 2020, at which time Judge Goodstein sentenced Appellant to twenty-five years' incarceration with credit for 186 days in the Department of Juvenile Justice (DJJ) and 687 days on house arrest. The next day, Mr. Farley filed a motion for reconsideration that was heard March 9, 2021 by Judge Goodstein and denied. Appellant filed a notice of appeal on March 12, 2021, and this initial brief follows.[1]

[1] Due to the number of transcripts required, delays were encountered in obtaining a full record.

STATEMENT OF FACTS

On May 30, 2018, Matthew Zalenski lured his girlfriend Miriam Bortz, Damacian Middleton, and Appellant into a plot to gain retribution on victim for having stolen a handgun from a family member. Two of them were to begin shooting while the other two came from around a building in the apartment complex. (Transfer Hrg., p.43, line 24- p.44, line 14) As a result of this, the twenty-year-old man in question was killed. All four individuals were charged with murder.

STANDARD OF REVIEW

South Carolina Code Ann. § 63-19-1210(5) authorizes the family court to determine whether it is appropriate to transfer a juvenile charged with murder to the general sessions court. The appellate court will affirm a transfer order unless the family court has abused its discretion. *Sanders v. State,* 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984); *State v. Wright,* 269 S.C. 414, 420, 237 S.E.2d 764, 767 (1977). "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d. 804, 807.

ARGUMENT

The Family Court abused its discretion by transferring jurisdiction to the Court of General Sessions when evidence showed Appellant did not meet the requirements for transfer.

S.C. Code Ann. § 63-19-1210(5) provides the family courts of this state the ability to transfer cases to general sessions court in which a juvenile aged fourteen or older is charged with a crime for which they could serve fifteen or more years. Bound up in this ability is the requirement to undergo a full investigation and hearing, as well as to determine that keeping the defendant in family court would not be in the best interest of them or the public.

The litmus test established by the Supreme Court of the United States and adopted by our appellate courts is found in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966). This provides eight factors family court judges are required to consider:

> (1) The seriousness of the alleged offense.
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
>
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> (4) The prosecutive merit of the complaint.
>
> (5) The desirability of trial and disposition of the entire offense in one court.
>
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
>
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

Id., 383 U.S. at 566-67, 86 S.Ct. at 1060; *see also State v. Avery*, 333 S.C. 284, 509 S.E.2d 476 (1998), *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007).

Appellant does not contest that Judge McLin applied the *Kent* factors during Appellant's transfer hearing; however, her analysis and conclusion are in contravention of the evidence presented during the hearing, thus constituting an abuse of discretion.

At the outset, it may seem that Appellant was charged with the most serious offense there is – murder. When delving into the facts, though, it is not as clear cut. Appellant was charged with murder via accomplice liability, or hand of one, hand of all. There is no allegation that his actions directly caused the death of the victim. His attorney argued the idea of mere presence during the transfer hearing. (Transfer Hrg., p.127, line 14 – p.128, line 12) Because of this, Appellant could not have formed the *mens rea* needed to commit murder. There is no evidence that Appellant had actual malice or even intent to harm anyone. He testified during the entry of his plea that he fired a gun one time but not at the victim. (Plea Hrg., p.19, lines 9-25) He provided a statement earlier that he tried to shoot the gun and it jammed, potentially leading to the live ammunition found at the crime scene.

This is clearly a crime against a person, rather than property, as considered in the third *Kent* factor. Appellant's clear decision not to shoot at the intended victim shows a desire not to engage in the criminal act at hand. It shows the opposite of willful and premeditated action because it was a choice to break from the group. This would certainly work against an accomplice liability argument had Appellant gone to trial. Now, it works in his favor when considering the *Kent* factors.

Similarly, Appellant did not participate in the planning of this crime, thus preventing him from showing actions that are premeditated or willful. As described several times through the transcripts, Appellant barely knew these co-defendants. He experienced his first use of marijuana

with them and was swept up in the appeal of cooler, older kids. (Transfer Hrg., p.118, lines 5-22) His attorney offered that when he asked Appellant why he stayed when the guns were being handed out, Appellant responded, "I'm a kid. I didn't know where I was, I didn't know where I was going to go." (Sentencing Hrg., p.31, line 23 – p.32, line 8) This was confirmed during his evaluation, which is discussed further below. (Transfer Hrg., p.83, line 19 – p.84, line1; p.84, lines 7-14)

Combined in the consideration of these factors is the finding that Appellant had a hard time "connecting dots" – processing data in order to make a rational decision. (Sentencing Hrg., p.32 lines 9-16) Dr. Candice Dunn, supervising psychologist for the Coastal consultation and Evaluation Services division of the South Carolina Department of Juvenile Justice, performed the waiver evaluation on Appellant and testified at both the transfer and sentencing hearings. She described this as being concrete in his thinking but did not believe that it would lead to issues in the future in terms of reoffending. (Transfer Hrg., p.79, line 21 – p.80, line 22)

Dr. Dunn testified there were many positive indicators in the items found in the sixth factor of *Kent* - sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. He was cooperative in the detention center and seemed able to follow rules and guidelines in the future. (Transfer Hrg., p.79, lines 7-15) There are many opportunities for positive influences on his personality as it continues to develop, including strong, warm, and positive family support. (Transfer Hrg., p.81, lines 1-8) Dr. Dunn testified that his family was willing to do what was needed to support Appellant and that their genuine relationships served as deterrents against engaging in negative behaviors. (Sentencing Hrg., p.13, lines 15-24) Dr. Dunn noted that a significant risk indicator would be prior violence toward others, which Appellant does not have. (Transfer Hrg., p.80, lines 14-22) His parents testified that he was always a good child who helped at home, had decent grades, and was

involved in sports. His uncle spoke compassionately about his good character and ability to bring good to the world. (Sentencing Hrg., p.20)

One factor spoken of both positively and negatively is that Appellant acted as a follower during this incident. (Transfer Hrg., p.84, line 23 – p.85, line 14) Though his parents provided that Appellant is a leader among his siblings, Dr. Dunn and Appellant's own statements show that he was clearly a follower with these codefendants. Again, this greatly detracts from the idea that Appellant acted willfully or had any premeditated intent to cause harm, especially when combined with his actions to minimize his involvement. He was clearly influenced by adults to get into the car and to participate (to whatever degree) in the crime.

However, Dr. Dunn testified that there was a noted absence of many negative risk factors, including no self-harming behaviors, no history of childhood abuse, and no peer rejection. He had an average IQ and no major mental health issues. These would set him up for success in rehabilitative programs such as the ones offered through DJJ. (Sentencing Hrg., p.14, line 7 – p.15, line 7) She testified that the sentencing guidelines would place him in in DJJ for 36-54 months. While there, he would have access to social workers, group therapy, educational resources, psychiatric medication management, vocational rehabilitation and more. (Transfer Hrg., p.81, line 14 – p.82, line 2) On the contrary, Appellant is now serving a twenty-five-year sentence on a most serious, violent, no-parole crime in the Department of Corrections where he gets no good time credit and very limited access to any rehabilitative services. He stands to be released around age forty with little, if any, progress to show.

Regarding protection of the public, Dr. Dunn testified only that when someone is removed from the public for rehabilitative purposes, the public is safer as a matter of course. (Transfer Hrg., p.87, lines 4-9) As this weighs in with ability to be rehabilitated, Dr. Dunn found very little

standing in Appellant's way, as mentioned briefly above. She found "a number of positive indicators" that Appellant would be cooperative with programs and guidelines. She also testified that he felt empathy and accountability which help engage in programs. (Transfer Hrg., p.78, line 21 – p.79, line 15)

One potential negative mentioned is that Appellant may not have, in essence, learned from his prior mistakes. He has a brief history of property crime as a juvenile in Texas, limited to spray painting a barn and breaking the window of a car in a junkyard. Both of these occurred when he was with other juveniles. Dr. Dunn felt that because he had no history of violence toward others, had never taken the lead in a crime, and had not embraced a delinquent mindset, the risks were minimal. (Transfer Hrg., p.80, lines 14-22) In further positives, Appellant completed his probationary sentence, including when it was transferred to South Carolina, without any incident. While on house arrest and GPS monitoring, he completed that supervision without any incident.

Turning now to the procedural elements - the prosecutive merit of the complaint and the desirability of trial and disposition of the entire offense in one court. Overall, there was a high probability that at least one of the codefendants would be found guilty of murder based on the evidence found by law enforcement, including confessions. Therefore, there was also a probability that Appellant could be convicted via accomplice liability. However, as his trial counsel argued and has been argued above, Appellant's lack of willing participation could be used as a mere presence defense. Ultimately, Appellant pleaded guilty based on the advice of counsel who had the benefit of knowledge of a global picture regarding all codefendants and their status. This should not be weighed when considering the fact that Appellant's individual actions were so contrary to the ringleader's.

Another consideration is the severity of this crime. Homicide is undoubtedly the most serious of crimes. However, this was a blitz shooting. It was not the brutal, premeditated murder of grandparents in *Pittman* or the carefully planned armed robbery and murder in *Avery*. It seems unreasonable to characterize it as "particularly aggravated" like Judge Goodstein did. (Reconsideration Hrg., p.6, line 25 – p.7, line 8) Again, any planning necessary for this crime was done by Appellant's codefendants. He was pulled in at the last minute and did what he was able to minimize the effects of his actions.

Regarding the ability or desire to try all of the cases together, the State maintained throughout that its goal was to try all four codefendants jointly. Appellant's counsel maintained that this would be difficult, if not impossible. It would require the co-defendants testifying against each other and thereby implicating themselves. The majority of the evidence that the prosecutions were based on was statements, which can only go so far in these situations. (Transfer Hrg., p.122, lines 2 – 21) Interestingly, in its closing at the transfer hearing, the State's first argument for transfer is, "we're seeking to have Isaac waived up to the court of general sessions, Your Honor, because we think it should all happen in one forum." (Transfer Hrg., p.112, lines 5-8) No actual reasons were given for why disposition in one forum is desirable, and the State went on to argue why it believed all of the *Kent* factors were met. This is contrary to the order issued by Judge McLin, which states that the evidence shows a joint trial is highly desirable. (Transfer Order, p. 6, ¶18.)

Important in this analysis is a comparison of the reasoning above to that provided by the court justifying transfer to general sessions. Judge McLin began by listing the eight *Kent* factors, then went through and stated that evidence indicated support of the first few factors. (Transfer Hrg., p.132, line 8 – p.134, line 17) As described above, Appellant vehemently disagrees with

these assertions. Regarding protection of the public, Judge McLin found that, because any supervision by DJJ would end upon Appellant's 21st birthday, general sessions prosecution afforded significantly greater protection to the public. (Transfer Hrg., p.135, lines 3-13; Transfer Order, p.7, ¶21) Appellant argues that, given the ability to rehabilitate through DJJ, there would be no need for protection from the public. This is especially true combined with the research and Dr. Dunn's testimony that juvenile offenders rarely reoffend and Appellant's exemplary record while on home detention.

Judge McLin placed a great amount of weight on the testimony that Appellant can be seen as a "follower" to be negative because she believed that it showed "lack of resiliency" and future difficulty in "diverging from the group." (Transfer Hrg., p.135, line 25 – p.136, line 13, Transfer Order, p.8-9, ¶22) However, this does not take into account the entirety of Dr. Dunn's testimony as reflected more fully above. Further, it ignores that the personality of someone Appellant's age is still developing and, especially with the appropriate rehabilitative support, he has the ability to grow in a very positive direction. Unfortunately, this is unlikely given Appellant's current incarcerative placement.

Despite noting numerous positive indicators, transfer to general sessions was still granted. Appellant argues that Judge McLin misapprehended the testimony of Dr. Dunn and evaluated the *Kent* factors in a manner that constitutes an abuse of discretion. The overwhelming weight of the evidence was in favor of denying transfer to general sessions court and allowing Appellant to be prosecuted as a juvenile. It is apparent that, as a fifteen-year-old, he did not have the requisite capacity to understand his actions and their consequences. Now he cannot experience the specifically crafted rehabilitative measures for juvenile offenders unless, in its wisdom, this court overturns his conviction and corrects this abuse of discretion.

CONCLUSION

For the above stated reasons, this court must vacate Appellant's convictions.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions

Diane Goodstein, Circuit Court Judge

CASE NO.: 2021-00028

The State,

Respondent,

v.

Isaac Duran,

Appellant,

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Appellant, does hereby certify that I emailed a copy of the Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal to:

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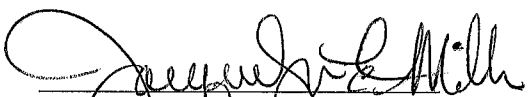

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THOMAS LAW

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RE: State v. Isaac Duran
Appellate Case No.: 2021-00028

Dear Ms. Allen:

Enclosed please find the Initial Brief of Appellant, Designation of Matter to be Included in the Record of Appeal and a Certificate of Service.

Kindly return a clocked copy to me by email. Thank you for your assistance in this matter. Please feel free to contact me should you have any questions.

Yours truly,

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