

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 14 2014

MICHAEL S. RICHIE
CLERK

C.E.B.,)
)
 Appellant,)
v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. J-2014-108

SUMMARY OPINION

SMITH, VICE-PRESIDING JUDGE:

On January 27, 2012, Appellant, C.E.B., was charged as a Youthful Offender with four counts of Lewd Molestation in Tulsa County Case No. YO-2012-7. Appellant was 15 years, 2 months and 4 days old at the time the offense was committed. On April 9, 2012, Counts 3 and 4 of the Information were dismissed and Count 1 was amended to First Degree Rape. Count 2 remained as a Lewd Molestation charge. On May 7, 2012, C.E.B., represented by counsel, entered a guilty plea to the charges. Upon agreement of the parties, and receipt of a sentencing report from the Office of Juvenile Affairs (O.J.A.), the District Court of Tulsa County, the Honorable James Caputo, District Judge, sentenced C.E.B. as a youthful offender to fifteen years in the custody of the Office of Juvenile Affairs. O.J.A. recommended a treatment plan, and C.E.B. was

remanded to the custody of O.J.A. to begin the rehabilitation program.¹ C.E.B.'s sentences were ordered to run concurrently, and the court advised him that he would be subject to being bridged to the Department of Corrections (D.O.C.) if he did not complete his rehabilitation plan.

On December 2, 2013, the final review hearing was conducted before Judge Caputo. The State asked the court to bridge C.E.B. to the Department of Corrections despite the substantial completion of his rehabilitation plan, or alternatively to set the case for an additional hearing in January 2014. The court continued the review hearing to January 21, 2014.

In January 2014, C.E.B. completed his rehabilitation program and O.J.A. recommended that his case be closed. On January 21, 2014, after conducting a review hearing, the District Court of Tulsa County, the Honorable Linda G. Morrissey, District Judge, sentenced C.E.B. to fifteen years in D.O.C. custody for each count, with all but the first six years suspended. She also ordered C.E.B. to register as a sex offender. From this judgment and sentence C.E.B. appeals raising the following propositions of error:

1. The District Court erred in sentencing Appellant as an adult since the State failed to timely file a Motion for Imposition of an Adult Sentence in accordance with 10A O.S.Supp.2009, § 2-5-208;
2. The District Court erred in transferring Appellant to D.O.C. custody resulting in an adult conviction when the State never filed a

¹ The State agreed that it would not seek to bridge C.E.B. to the Oklahoma Department of Corrections (D.O.C.) if his plan had not been completed due to time constraints. The State's forbearance to do what it could not do under the statute has no bearing on whether the trial court's action was proper.

Motion to Transfer the Youthful Offender to the custody of the Department of Corrections in accordance with 10A O.S.Supp.2009, § 2-5-210 (b-d);

3. If the District Court relied on 10A O.S.Supp.2009, § 2-5-209 to place Appellant in D.O.C. custody upon successful completion of the treatment program prior to his attaining the age of eighteen (18) years five (5) months, the District Court abused its discretion;

4. Appellant received ineffective assistance of counsel when counsel failed to raise that Appellant could not be sentenced as an adult since the State failed to timely file a motion for imposition of an adult sentence in accordance with 10A O.S.Supp.2009, § 2-5-208;

5. Appellant received ineffective assistance of counsel at the January 21, 2014 hearing when counsel failed to raise the issue that the State agreed not to bridge Appellant if he was unable to complete the program due to time constraints; and

6. The District Court erred when it ordered Appellant to register as a sex offender upon placing him in D.O.C. custody when procedures for transferring a juvenile sex offender to the adult sex offender registry were not followed.

Pursuant to Rule 11.2(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), this appeal was automatically assigned to this Court's Accelerated Docket. The propositions and issues were presented to this Court in oral argument on May 8, 2014, pursuant to Rule 11.2(E). At the conclusion of oral argument, the parties were advised of the Court's decision.

The District Court's order sentencing C.E.B. to D.O.C. custody and ordering him to register as a sex offender is **REVERSED** with instructions to **DISMISS** C.E.B.'s case, to **REMOVE** his name from the sex offender registry and to **EXPUNGE** C.E.B.'s record. C.E.B. is to be released from D.O.C. custody immediately.

C.E.B. was fifteen years old when he sexually molested his eleven year old male cousin. There is no dispute that the acts perpetrated by C.E.B. were serious, reprehensible, criminal and caused significant injury to the young victim in this case. At oral argument, the State advised this Court that it offered C.E.B. a plea agreement to avoid having the victim testify. The State agreed that C.E.B. would be treated as a youthful offender. C.E.B.'s rehabilitation plan was established, with the understanding that his failure to complete the plan, or his violation of its terms and conditions, could result in his being bridged to D.O.C. to serve the fifteen year sentence imposed in his plea agreement. In the alternative, successful completion of the rehabilitation plan would result in dismissal of the charges and his release from custody. The State alleged that it never intended for C.E.B. to escape service of time in D.O.C. custody and that it always intended to seek C.E.B.'s transfer to D.O.C. regardless of the completion of his treatment plan.²

As required by statute, the District Court conducted review hearings every six months during the time C.E.B. was in O.J.A. custody. The reports were positive, noting C.E.B.'s successes, some minimal setbacks, and his continued progress toward completion of the recommended rehabilitation plan. Each time he appeared for a review hearing, Judge Caputo advised C.E.B. that continued compliance with his rehabilitation plan would "pay off for him in the long run", implying that the charges in his case would be dismissed if he successfully

² The State's intentions notwithstanding, this claim does not appear anywhere in the written appeal record provided to this Court.

completed his treatment plan. C.E.B. graduated from high school in May 2013. On May 30, 2013, the State filed a motion seeking to either bridge C.E.B. to D.O.C. (because he had reached 18 years of age) or to extend O.J.A.'s custody of C.E.B. until he reached the age of 18 years and 5 months to allow him additional time to complete his treatment program. Judge Caputo granted the request to extend O.J.A.'s custody of C.E.B. until January 2014.

On December 2, 2013, the parties appeared for what was initially described as a final review and sentencing hearing. It was at this time that the State revealed its intent to petition the court to bridge C.E.B. to D.O.C., whether he completed his rehabilitation plan or not. A final review hearing was then set for January 21, 2014, a week prior to C.E.B. reaching the age of 18 years and 5 months.

C.E.B.'s Youthful Offender Progress Report, prepared by O.J.A. and submitted to the District Court as part of the January 2014 review hearing documentation, verified that C.E.B. had completed his rehabilitation plan. Upon graduating from high school in May 2013, C.E.B. had spent six months preparing for the A.C.T. and had been accepted to Southwestern Oklahoma State University (SWOSU) in Weatherford, Oklahoma. C.E.B. had obtained school financial aid, met with his advisor, secured college housing, set up a meal plan, and had begun classes at SWOSU in the 2014 spring semester. During his time on campus he had been monitored with an ankle bracelet and supervised by a Custer County O.J.A. worker.

C.E.B. signed parole rules prior to moving to Weatherford confirming that he was to have no contact with the victim or the victim's family, and O.J.A. had received no reports that C.E.B. had contacted the victim or his family. C.E.B. had been successfully paroled by the Central Oklahoma Juvenile Center (COJC) in Tecumseh, Oklahoma in January 2014. O.J.A. advised the court that C.E.B. had successfully completed his treatment program and recommended that the court "successfully close C.E.B.'s Y.O. case effective 1-14-2014." The only other documentation presented to the court consisted of letters from the victim and his parents seeking C.E.B.'s confinement in D.O.C. custody for the entire fifteen year period, arguing that C.E.B.'s time in O.J.A. custody constituted insufficient punishment.

Judge Morrissey presided at C.E.B.'s final review hearing.³ She acknowledged receipt of O.J.A.'s report and its recommendations, noted that she had read the letters from the victim and his family, and then made the following statement:

"The Youthful Offender Progress Report dated January 14, 2014, recommended that the Court successfully close [C.E.B.'s] youthful offender custody case with the Office of Juvenile Affairs.

Based upon the very serious nature of these offenses, the age of the victim, who was victimized by this man, and the nature of these offenses and the premeditation with which these offenses were carried out, the court declines to follow the

³ The State advised this Court that Judge Caputo was in jury trial at the time of the review hearing, and Judge Morrissey took his docket for that day, which included C.E.B.'s review hearing. Despite being given the option to wait for Judge Caputo to hear the matter, C.E.B. agreed to have Judge Morrissey conduct the review hearing. Again, while this Court does not question the State's rendition of these events, none of this is part of the written appeal record provided to this Court for review.

recommendation of the Office of Juvenile Affairs.”...(emphasis added)

The court then listened to argument from the parties. At the conclusion of the argument, Judge Morrissey sentenced C.E.B. to fifteen years, with all but the first five years suspended, for each count, and assessed fines and costs against him. C.E.B.'s sentences were ordered to run concurrently. Upon being reminded by defense counsel that C.E.B. was, by statute, entitled to credit for time served while in O.J.A. custody, the court amended its original sentence and re-sentenced C.E.B. to fifteen years, with all but the first six years suspended, and again assessed fines and costs. C.E.B. was also ordered to register as a sex offender.

The question before this Court is whether the trial court abused its discretion sentencing C.E.B. to D.O.C. custody.

An “abuse of discretion” has been defined by this Court as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application. . . . The trial court’s decision must be determined by the evidence presented on the record, just as our review is limited to the record presented.

A.R.M. v. State, 2011 OK CR 25, ¶ 7, 279 P.3d 797 799, *W.C.P. v. State*, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100. *Accord*, *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. Because we find Judge Morrissey’s actions constituted an abuse of discretion under the facts and circumstances of this case, we are compelled to reverse the District Court’s ruling.

It is the purpose of the Youthful Offender Act to better ensure the public safety by holding youthful offenders accountable for the commission of serious crimes, while affording courts methods of rehabilitation for young offenders the courts determine, at their discretion, may be amenable to such methods. 10A O.S.2011, § 2-5-202(B); *K.M.C. v. State*, 2009 OK CR 29, ¶ 6, 221 P.3d 735, 737. As this Court has noted on more than one occasion, the Legislature has determined that eligible youthful offenders should have the opportunity to be held accountable through the various provisions of the Youthful Offender Act for custody, institutional placement, supervision, extended jurisdiction within the Office of Juvenile Affairs, and the ability to transfer youthful offenders to the Department of Corrections when incarceration or additional supervision is required beyond the maximum age allowed in O.J.A. custody. *Id.*, 10A O.S.Supp.2010, § 2-5-207.

In addition to accountability, the Youthful Offender Act focuses upon rehabilitation, reserving transfer to D.O.C. custody for those instances where the youthful offender requires incarceration or additional supervision beyond the maximum age allowed in O.J.A. custody. *See*, 10A O.S.2011, § 2-5-202(B); 10A O.S.Supp.2010, § 2-5-207. These portions of the Youthful Offender Act appear to have been ignored in this case. By statute, C.E.B. was required to be prosecuted as a Youthful Offender. *See*, 10A O.S.Supp.2009, § 2-5-206(A)(6) and (A)(9). Nevertheless, the State had several options when it came to his prosecution. If, as the State argues, it always intended for C.E.B. to be

sentenced to D.O.C. custody because of the nature and severity of his offense, it could have petitioned the court to sentence him as an adult. See, 10A O.S.Supp.2009, § 2-5-208(D). No such motion was filed, and the time for filing such a motion expired when C.E.B. entered his plea.

Title 10A O.S. 2009, § 2-5-210 allows the court, either on its own motion or a motion filed by the State, O.J.A. or the youthful offender, to transfer a youthful offender to D.O.C. custody upon finding by clear and convincing evidence that the youthful offender has committed any of the enumerated violations or engaged in specified behavior as set forth in the statute.⁴ Once

⁴ This section provides in relevant part:

B. The court shall schedule an annual review hearing in open court for every youthful offender in the custody of the Office of Juvenile Affairs. Such hearing may be scheduled either upon the court's own motion. . . The court, at its discretion, may schedule other review hearings as the court deems necessary, after notice to the parties. . . .The court shall hold a review hearing for good cause shown, . . . for the purpose of making a determination to:

5. Transfer the youthful offender to the custody or supervision of the Department of Corrections if the court finds by clear and convincing evidence that the youthful offender has:

- a. after certification as a youthful offender, seriously injured or endangered the life or health of another person by such person's violent behavior,
- b. escaped from the facility from which the youthful offender is being held,
- c. committed a felony crime while in the custody or under the supervision of the Office of Juvenile Affairs as shown by a judgment entered following a verdict of guilty, a plea of guilty or nolo contendere, or as shown by clear and convincing evidence,
- d. committed battery or assault and battery on a state employee or contractor of a juvenile facility while in the custody of such facility,
- e. caused disruption in the facility, smuggled contraband into the facility, caused contraband to be smuggled into the facility, or engaged in other types of behavior which have endangered the life or health of other residents or staff of the facility, or
- f. established a pattern of disruptive behavior not conducive to the established policies and procedures of the program.

C.E.B. entered his plea and agreed to a treatment plan, the State could only file a motion to bridge him to D.O.C. based on the statutory criteria.

The State filed a motion to bridge C.E.B. to D.O.C. custody alleging C.E.B. would be unable to complete his planned rehabilitation by his 18th birthday.⁵ The motion requested in the alternative that O.J.A.'s custody over C.E.B. be extended until he reached the age of 18 years and 5 months. The request for extension of custody was granted to allow C.E.B. time to complete treatment. It is apparent from the record in this case that even the State recognized that C.E.B. was complying with the terms and conditions of his plan, and was on his way to successfully completing rehabilitation.

While the State has many ways to maintain control over a youthful offender's treatment plan, what the State cannot do is induce a youthful offender to enter into a plea agreement, have the offender pursue a plan of rehabilitation with the understanding that successful completion of the program will result in dismissal of the charges, and then renege on that agreement when the defendant completes the program with a valid recommendation for dismissal. Likewise, the District Court cannot accept and acquiesce in a plea agreement and plan of treatment for a youthful offender and upon the offender's successful completion of the program impose an adult

See, 10A O.S.Supp.2009, § 2-5-210(B)(5)(a)-(f).

⁵ This motion was filed May 30, 2013.

sentence absent some clear and convincing evidence warranting transfer to D.O.C. custody.

Judge Morrissey stated that she was transferring C.E.B. to D.O.C. custody because of the serious nature of his offenses, the age of the victim and the premeditation with which the crimes were carried out. While these are factors to be considered in deciding whether youthful offender treatment is appropriate in any given situation, the issue was rendered moot when the State acquiesced in C.E.B.'s treatment as a youthful offender and when it failed to seek imposition of an adult sentence. See, 10A O.S.Supp.2009, § 2-5-205(E)(1-7) and 10A O.S.Supp.2009, § 2-5-208(D).

Judge Caputo set C.E.B.'s final review hearing pursuant to 10A O.S.2011, § 2-5-209(B).⁶ There was no evidence presented at the hearing contradicting

⁶ This section provides in relevant part:

B. 1. After the hearing and consideration of the report of the presentence investigation, the court shall impose sentence as a youthful offender, and such youthful offender shall be subject to the same type of sentencing procedures and duration of sentence, except for capital offenses, including suspension or deferment, as an adult convicted of a felony offense, except that any sentence imposed upon the youthful offender shall be served in the custody or under the supervision of the Office of Juvenile Affairs until the expiration of the sentence, the youthful offender is discharged, or the youthful offender reaches eighteen (18) years of age, whichever first occurs. If an individual sentenced as a youthful offender attains eighteen (18) years of age prior to the expiration of the sentence, such individual shall be returned to the sentencing court. At that time, the sentencing court shall make one of the following determinations:

a. whether the youthful offender shall be returned to the Office of Juvenile Affairs to complete a treatment program, provided that the treatment program shall not exceed the youthful offender's attainment of eighteen (18) years of age and five (5) months. At the conclusion of the treatment program, the individual shall be returned to the sentencing court for a determination under subparagraph b, c or d of this paragraph,

b. whether the youthful offender shall be placed in the custody of the Department of Corrections,

O.J.A.'s recommendation that C.E.B.'s case be closed or disputing the finding that C.E.B. had completed his rehabilitation plan as agreed. The appeal record submitted to this Court in this matter clearly supports a finding that C.E.B. "reasonably completed the rehabilitation plan and objectives". Likewise, there is nothing in the record to support Judge Morrissey's conclusory assertion that C.E.B. "represents an ongoing threat to society and to other potential victims that are vulnerable because of their age or mental capacity." If such evidence existed, the State should have presented it at the review hearing.

There was no order setting forth findings of fact and conclusions of law in this case, but it is quite clear from the record that Judge Morrissey sentenced C.E.B. to serve time in D.O.C. custody despite the completion of his rehabilitation plan and O.J.A.'s recommendation that the case be closed.

We find merit in C.E.B.'s claim that the trial court abused its discretion when it sentenced him as an adult and transferred him to D.O.C. custody based on these facts and circumstances. The order of the District Court transferring C.E.B. to D.O.C. custody is **REVERSED**.

DECISION

The order of the District Court of Tulsa County sentencing Appellant as an Adult and ordering him to register as a sex offender in Tulsa County Case No.

c. whether the youthful offender shall be placed on probation with the Department of Corrections, or

d. whether the youthful offender shall be discharged from custody.

YO-2012-7 is **REVERSED**. The District Court of Tulsa County, the Honorable Linda G. Morrissey, is directed to enter orders **DISMISSING** C.E.B.'s case, **REMOVING** C.E.B.'S name from the sex offender registry, **EXPUNGING** C.E.B.'s record, and **ORDERING** C.E.B.'s immediate release from D.O.C. custody.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE LINDA G. MORRISSEY, DISTRICT JUDGE

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LEWIS, P.J.: Concurs
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concur
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