

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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR - 2 2005

MICHAEL S. RICHIE
CLERK

C.J.,)
)
Appellant,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Appellee.)

No. J-2004-1117

ACCELERATED DOCKET ORDER

Appellant was charged as an adult with one (1) count of First Degree Murder and three (3) counts of Assault with Intent to Kill, in Case No. HCF-2004-5051 in the District Court of Okmulgee County. Appellant filed a motion to be certified as a Youthful Offender. On September 1, 2004, and October 13, 2004, a preliminary hearing was conducted, and held in abeyance pending a certification hearing based on Appellant's Motion. The certification hearing was held October 13 through October 21, 2004. On October 25, 2004, the District Court, the Honorable Duane Woodliff, Special Judge, entered Findings of Fact and Conclusions of Law, denying Appellant's motion for certification and determining that Appellant should be tried as an adult. On November 4, 2004, Judge Woodliff filed a Bind Over Order, finding that Appellant should be bound over for trial on one (1) count of First Degree Murder and three (3) counts of Assault with Intent to Kill, to be tried as an adult on all charges. From these rulings, Appellant appeals.

On appeal Appellant raised three propositions of error:

1. The trial court abused its discretion in not certifying Appellant as a Youthful Offender as the State offered no evidence that controverted the testimony of the expert witnesses that Appellant could be rehabilitated and the public could be protected if Appellant was to remain in the Youthful Offender System;
2. The Special Judge erred by failing to recuse and the Presiding Judge erred by failing to remove the case from the Special Judge's docket; and
3. The trial court erred by binding Appellant over as an Adult on Counts II, III and IV, Assault with Intent to Kill, as these Counts are Youthful Offender crimes and the State has never filed a Motion to Sentence Appellant as an Adult on Counts II, III and IV.

Pursuant to Rule 11.2 (A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004) this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument February 17, 2005, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

The order denying Appellant's Motion to Be Certified as a Youthful Offender is **AFFIRMED**. We find merit in Appellant's claim that Counts II, III and IV were improperly charged. We **REVERSE** the District Court's bind over order with respect to these three (3) charges, with instructions that Appellant be bound over for these offenses charged as a Youthful Offender.

We note first that, by operation of law, Appellant was charged, for the offense of murder, as an adult. 10 O.S.2001 §7306-2.5(D). Pursuant to 10 O.S.2001 §§ 7306-2.5(A) Appellant filed a motion to be certified to be treated

either as a juvenile or youthful offender. The burden to sustain the motion to be certified as a juvenile or youthful offender falls upon the accused. *J.D.P. v. State*, 1999 OK CR 5, ¶ 6, 989 P.2d 948, 949; 10 O.S. § 7306-2.6(A)(6). It is not the State's responsibility to show that Appellant is *not* amenable to treatment as a juvenile or youthful offender. It is Appellant's burden to overcome the presumption that he should be tried as an adult by showing that he is amendable to treatment as a juvenile or youthful offender and should be certified as such.

The question before this Court is whether or not the trial court abused its discretion in denying Appellant's motion for certification as a juvenile or youthful offender. "[A]buse of discretion" is 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.

(citations omitted.) *W.C.P. v. State*, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100. See also, *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 70 OBJ 946, 946 (Okl.Cr. 1999).

One of the purposes of the Youthful Offender Act is to hold youths accountable for the commission of serious crimes while affording the courts methods of rehabilitation for those offenders amenable to rehabilitation. See, Tit. 10 § 7306-2.2(B); *C.L.F. v. State*, 1999 OK CR 12, ¶ 6, 989 P.2d 945; *G.G. v. State*, 1999 OK CR 7, ¶ 6, 989 P.2d 936; *C.R.B. v. State*, 1999 OK CR 1, ¶ 6, 973 P.2d 339. The Legislature intended that those offenders amenable to treatment,

upon taking advantage of the opportunity for rehabilitation and showing good conduct and progress in complying with a rehabilitation plan, would avoid a criminal conviction. *Id.* Failure to substantially comply with a rehabilitation plan will result in an offender being bridged to the adult penal system.

The record in this matter consisted of more than 1,400 pages of transcripts, over 450 pages of original record and testimony from more than 30 witnesses. There were opinions from three (3) experts who assessed Appellant's amenability to treatment within the juvenile system. All agreed that Appellant was, at some level, amenable to treatment. However, there was disagreement as to the level of amenability. Appellant's expert, Dr. Dean Montgomery, Ph.D., testified that Appellant's chances for rehabilitation were good, and that the Youthful Offender System was capable of providing the needed supervision and rehabilitation that Appellant required. He was confident that Appellant could complete a plan of rehabilitation within 13 months. The State's experts, Dr. John Call, Ph.D., J.D., and Dr. Curtis Grundy, Ph.D., found Appellant's amenability to treatment to be in the low to moderate level, and opined that any plan of rehabilitation would require at least 3 to 5 years to complete. The experts' recommendations were based upon various factors, including psychological evaluations, interviews with Appellant, review of Appellant's school records, Appellant's age, his required rehabilitative needs, his family life, his lack of prior contacts with the juvenile system, various test results, Appellant's drug and alcohol problems, and review of the testimony presented at Appellant's

preliminary hearing. The State also presented testimony from Texanna James, a Juvenile Justice Specialist the with Oklahoma Juvenile Authority, who agreed with Drs. Call and Grundy that Appellant was not amenable to treatment within the Youthful Offender program.

In a most thorough and complete order, Judge Woodliff's Findings of Fact and Conclusions of Law set forth, in great detail, his reasons for denying Appellant's Motion to Certified as a Youthful Offender. We cannot say, after reviewing the extensive record in this matter, and Judge Woodliff's order, that Appellant has met his burden of showing that Judge Woodliff abused his discretion in denying Appellant's request. We find nothing in the record presented to this Court which requires reversal of the District Court's order finding Appellant should be tried as an adult.

With regard to Appellant's second claim that Judge Woodliff erred by failing to recuse from hearing Appellant's case, we find no error here. On October 25, 2004, Appellant appealed this same issue to this Court in a pleading styled *C.J. v. State of Oklahoma, ex rel. Charles M. Humphrey, et al*, Case No. MA-2004-1085. Appellant's request for relief was denied by this Court in an order entered November 2, 2004. As this matter has previously been addressed by this Court, we will not address it again.

Finally, Appellant alleges that he was improperly charged as adult with regard to Counts II, III and IV of the Amended Information filed against him in Case No. HCF-2004-5051. Appellant was charged with Assault with Intent to

Kill, and was bound over to stand trial as an adult on these three charges. Pursuant to 10 O.S. § 7306-2.6(A)(11), any person 15, 16, or 17 years of age, charged with Shooting with Intent to Kill, shall be held accountable for his acts as a Youthful Offender. Appellant alleges that he should have been charged for these offenses as a Youthful Offender, not as an adult. We agree. Appellant should have been charged as a Youthful Offender for the three (3) counts of Assault/Shooting With Intent to Kill. The District Court is instructed to modify its bind over order to conform to this Court's ruling with regard to Counts II, III and IV.

IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of three (3) to zero (0) that the order of the District Court of Okmulgee County denying Appellant's request for certification as a Youthful Offender in Case No. HCF-2004-5051 is **AFFIRMED**. The bind over order directing that Appellant be tried as an adult on the three (3) counts of Assault with Intent to Kill is **REVERSED** with instructions that the District Court modify the order to show that Appellant is to be tried as a Youthful Offender for Counts II, III and IV of the Amended Information.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of March, 2005.



CHARLES S. CHAPEL, Presiding Judge



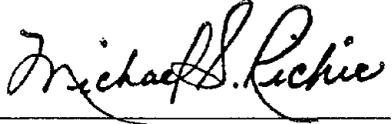
Concur in Results -
GARY L. LUMPKIN, Vice Presiding Judge

I Concur in the result of the bindover in C II, III, & IV as an adult only because the STATE failed to file a motion which the Court granted Appellate Trial as an adult.



CHARLES A. JOHNSON, Judge

ATTEST:



Clerk