

22, Ch. 18, App. (2010). Oral argument was held on October 7, 2010. Appellant raised a single proposition of error on appeal:

Proposition

The State failed to prove its case for certification with evidence that was “clear and convincing.” Accordingly, the trial court’s decision to certify Appellant as an adult should be reversed as an abuse of discretion.

After hearing oral argument and after a thorough consideration of Appellant’s proposition of error and the entire record before us on appeal, by a vote of three (3) to two (2), the court reverses the juvenile court’s order certifying Appellant as an adult. The certification statute applicable to Appellant’s case is found at 10A O.S.Supp.2009, § 2-2-403. Under that statute’s certification procedures, after the district attorney has established prosecutive merit on those alleged offenses that would be felonies if committed by an adult, the State then has the further burden of proving by clear and convincing evidence that the child should be held accountable as an adult if ultimately found to have committed those acts or omissions on which prosecutive merit was found. 10A O.S.Supp.2009, § 2-2-403(A). In this regard, the statute presents seven criteria for determining the issue of certification. The Court has reviewed the record of the evidence presented, and following these statutory provisions, the Court **FINDS** that the State failed to present clear and convincing evidence that Appellant should be prosecuted as an adult.

In making this finding, the Court is guided by the following principles:

We begin with the principle that the “provision that permits the juvenile court to waive its exclusive jurisdiction and certify a child to stand trial as an adult contemplates the exceptional case in which the child is not amenable to treatment under the juvenile facilities and programs available to the court.”

. . . “[T]here is no presumption that a child who has committed a very serious act is not receptive to rehabilitative treatment.”

T.C. v. State, 1987 OK CR 151, ¶¶ 14-15, 740 P.2d 739, 742 (citations omitted). Although the question of whether a child is amenable to rehabilitative treatment in the juvenile system is a discretionary decision within the purview of the trial court, “the trial court must first determine if the evidence is sufficient to meet the burden of proof before discretion can be exercised in rendering a decision.” *W.C.P. v. State*, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100.

In Appellant’s matter, the undisputed evidence revealed that for several years Appellant had been prescribed a generic form of Ritalin and while taking that medication was misdiagnosed in November of 2009 for depression and prescribed an additional medication, Prozac. On receiving this additional prescription, Appellant’s condition worsened, and on February 6, 2010, when Appellant drank alcohol while taking these medications, he committed the delinquent acts on which he was certified.¹ While in detention and within two weeks of the delinquent behavior, Appellant was properly diagnosed and prescribed the appropriate medications for his condition.

Prior to the Prozac prescription, Appellant had no delinquent history other than minor traffic offenses. Since discontinuing the Prozac and receiving the correct medication, Appellant has displayed nothing but appropriate behavior. In this regard, Appellant, in addition to submitting to management of his medications and seeing his treating physician as directed, placed himself under treatment plans with a youth and family services organization that included the involvement of Appellant’s mother and included Appellant’s daily

¹ The psychological examination submitted by the State in support of its certification motion described Appellant’s behavior as the likely result of a “toxic psychosis” that arose from the combination of Prozac, Ritalin, and alcohol and where “the individual can lose the ability to determine right or wrong.” (O.R. 30.)

participation in a twelve-step program to address his alcohol consumption. Appellant was in full compliance with these efforts and expected to complete them by the end of this year, months before his 19th birthday. Further evidence revealed that Appellant addressed his education needs and enrolled in a state college.

The State's only certification witness, an Office of Juvenile Affairs (OJA) Juvenile Justice Specialist, testified that if Appellant would continue to do that which he had been doing in the community since the February 6th incident, the public could be adequately protected and the prospects for rehabilitation were "very good." (May 3, 2010, Tr. 20-21.) This witness' main concern, however, was Appellant's age, for the juvenile system's authority over Appellant would lapse after Appellant reached his 19th birthday, and should he remain in the juvenile system, OJA would have few tools to ensure Appellant's continued compliance in his rehabilitation efforts should Appellant chose not to continue in those efforts.

We find the foregoing evidence compelled denial of the State's certification motion, for all of that evidence presented revealed Appellant amenable to treatment, that the necessary treatment was available if Appellant were left in the juvenile system, and that Appellant would likely be rehabilitated.² Only if it is flatly presumed that Appellant will not continue his rehabilitation efforts is

² The trial court seems to have been troubled by the OJA specialist's testimony that Appellant's lack of juvenile history would likely cause him to score too low for placement in any of OJA's secure institutions or in an OJA residential facility. The trial court therefore apparently believed there was no way to ensure Appellant could get the treatment he needed if kept in the juvenile system and placed in OJA custody. This, however, is contrary to the testimony as Appellant was fully accessing the treatment resources necessary for his rehabilitation, and there was no evidence that he could not continue to do so if he remained a child. Consequently, the evidence that Appellant's lack of previous delinquent behaviors would likely disqualify him for OJA controlled resources was given inappropriate significance by the trial court in determining whether there was likelihood for reasonable rehabilitation through the juvenile court.

there anything contra to amenability. Such a presumption has no basis in the applicable certification statute and can arise only from assuming that Appellant will not continue his treatment once there is a reduction in the legal incentive for compliance. Given that there is no evidence suggesting Appellant's desire for treatment is insincere or that he intends to discontinue treatment, and given that there is nothing in the law rendering the District Court wholly powerless to enforce any recommended treatment plan, and given further that a great portion of Appellant's "rehabilitation" occurred with his proper diagnosis and prescription of appropriate medications; the speculative fear that Appellant might discontinue the remainder of his treatment is not great enough to override the statute's favoring of juvenile retention nor great enough to amount to that clear and convincing evidence required for certification.³

IT IS THEREFORE THE ORDER OF THIS COURT that the June 25, 2010, order of the Juvenile Division of the Washita County District Court, Case No. JDL-2010-4, sustaining the State's motion to certify Appellant as an adult, is **REVERSED WITH INSTRUCTIONS** to retain Appellant as a child concerning the acts alleged in the State's delinquency petition filed on February 10, 2010. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY
BEFORE THE HONORABLE CHRISTOPHER S. KELLY,
ASSOCIATE DISTRICT JUDGE

³ "The emphasis of the Juvenile Court must be upon the prospects for the rehabilitation of the youthful offender within the juvenile system." *J. T. P. v. State*, 1975 OK CR 242, ¶ 10, 544 P.2d 1270, 1275.

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OPINION BY: C. JOHNSON, P.J
A. Johnson, V.P.J.: CONCUR
Lumpkin, J.: DISSENT
Lewis, J.: CONCUR
Smith, J.: DISSENT

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LUMPKIN, JUDGE: DISSENT

The majority correctly cites *W.C.P. v. State*, 1990 OK CR 24, ¶¶ 4 & 9, 791 P.2d 97, 98, 100, for the principle that the finding that a child is not amenable for rehabilitation is a discretionary decision to be made by the judge, but the decision must be based on substantial evidence against the child's claim to the benefit of juvenile treatment. However, the trial court must first determine if the evidence is sufficient to meet the burden of proof before discretion can be exercised in rendering a decision. *Id.* In reversing the trial court's decision in this case, this Court has completely disregarded the actions of D.R.F. which constituted the basis of the charges contained in this Petition.

At approximately 1:30 a.m., Appellant awoke Police Chief Cannon and his wife by loudly banging on the front door of their home. When Mrs. Cannon opened the door, Appellant shouted and screamed at her, giving a false name and threatening to kill her husband. Appellant then went over to Chief Cannon's patrol vehicle, parked approximately 15 to 20 feet away from the home, and beat on the driver's side windows and broke off the driver's side mirror. He picked up a gas can, poured gasoline on the front windshield and down the driver's side of the car, and set the car on fire. Appellant then placed a lit item in the car's gas tank and poured more gasoline on the car. Appellant resisted Chief Cannon's efforts to restrain him, repeatedly kicking the chief and screaming that he was going to kill the chief and his family and that he almost succeeded. Mrs. Cannon shouted at her husband and Appellant to move away

from the car lest it explode. Appellant's threats very nearly came to fruition as there were eight children inside the home only feet away from the burning car.

In applying the abuse of discretion standard of review to these facts, we must first place ourselves in the position of the trial judge. It is well established that when reviewing a trial court's ruling for abuse of discretion, the appellate court will defer to the trial court's factual findings unless the findings are clearly erroneous. See *Love v. State*, 2009 OK CR 20, ¶ 4, 217 P.3d 116, 117-118; *Williams v. State*, 2008 OK CR 19, ¶ 57, 188 P.3d 208, 221. "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.'" *R.J.D. v. State*, 1990 OK CR 68, ¶ 16, 799 P.2d 1122, 1125 quoting *Stevens v. State*, 94 Okl.Cr. 216, 232 P.2d 949, 959 (1951). The juvenile judge, as trier of fact, has the discretion and the prerogative to assess the credibility of the witnesses and to weigh and value their testimony and opinions. *Id.* This Court traditionally accords the trial court substantial deference on issues requiring assessment of the evidence. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670; *Wyatt v. State*, 1988 OK CR 58, ¶ 10, 752 P.2d 1131, 1133-34. It is not within the purview of our abuse of discretion review to re-adjudicate the facts. We are to review the record and determine if the record reveals facts from which the trial judge could have made his/her decision.

The trial judge in this case was faced with the fact that D.R.F. was 17½ years old on the date the crimes were committed. The crimes were not

included as a part of the crimes enumerated within the Youthful Offender Act. The order certifying Appellant to stand trial as an adult was entered June 25, 2010, just 43 days prior to Appellant's 18th birthday. In effect, the Court would lose jurisdiction of Appellant on August 7, 2010, when he turned 18. Regardless of the fact that he could be supervised within the juvenile system until he was 19 years old, the Court would have no enforcement powers, other than indirect contempt enforcement of any orders entered. Thus, the incentive to continue the path that was started upon the filing of these charges would be removed and no leverage to enforce the court's orders would be in place. This places Appellant in the position of being able to just thumb his nose at the entire system, with no punitive or curative action ever being imposed by the court.

Defense counsel represented Appellant masterfully, and artfully crafted the only defense that was available for the Appellant, *i.e.*, treatment that would bring about evidence of change to present to the trial court. Yet, Appellant's actions posed extreme danger to the victims of these offenses. If the car that had been set on fire had exploded so near to a house where the family was sleeping, injury or death could have occurred. Appellant's "suicide" note can be interpreted that he knew what he was doing and planned the action, *i.e.*, "I got a gun 2 my head, a beer in my hand, a cigg in my mouth, I ain't got no friends - but it is all about to end - (he crossed through those words and wrote) - my life is about to end so tell my mama that I love her and I'm sorry. (*Resp. Exh. 4.*)

At this point the trial judge is put in an untenable position – leave Appellant as a juvenile with no one having control over him and free to do what he desires, or certify Appellant as the adult he already is and seek further treatment within the system that has some leverage to ensure the incentive for treatment is maintained. I cannot say that when all of the facts and evidence are considered, the trial judge abused his discretion. He saw Appellant, he heard the evidence, as the fact finder he determined the weight and credit of the witnesses, and there is evidence to support his decision.

The majority's decision ties the hands of trial judges all over the State of Oklahoma in the type of case this Court sees more and more, the 17 year old criminal defendant who ages out before the due process wheels have stopped moving and the system has no way to actually deal with the needs of the juvenile or the safety of the community. This Court's prior decisions reversing orders to sentence youthful offenders as adults when the primary evidence and only reasoning used to support the order is the age of the youthful offender are wrong. See *K.M.C. v. State*, 2009 OK CR 29, ¶ 7, 221 P.3d 735, 737 (Lumpkin, J. dissent); *V.J.A. v. State*, 1999 OK CR 40, ¶ 11, 993 P.2d 773, 776 (Lumpkin, V.P.J. dissent). These decisions have ignored the reality that is before trial judges. In some cases, age alone has to be sufficient as the trial court has no other options.

This Court seeks to devise a treatment option for these 17 year old offenders where none exists. While I agree that there should be an enforceable

treatment option for trial judges to select in situations of this type, the reality is there is not. This Court needs to recognize this fact or the Oklahoma Legislature needs to craft a mechanism to deal with this type of offender.

The trial judge in this case made the only decision available to him if Appellant was to be held accountable for his actions and, depending on the disposition of the case, the possible option of enforceable treatment requirements being imposed in the adult system. Appellant targeted a particular person and his family. The evidence revealed a knowing plan, otherwise the container of gasoline used to torch the car must have been mysteriously placed by the car by a vaporous phantom. I cannot find this experienced trial judge's decision "clearly erroneous" and would therefore affirm the trial court's decision.

SMITH, JUDGE, DISSENTING:

I dissent to the majority's decision reversing the trial court in this case because I do not believe that D.R.F. has established that the trial court abused its discretion when it certified him as an adult. Two of the six factors relevant to this case strongly supported the trial court's determination.¹ There can be no question that D.R.F. was charged with committing very serious offenses on February 6, 2010, which were committed in an aggressive, willful, and violent manner. *See* 10A O.S.Supp.2009, § 2-2-403(A)(1). In addition, the most serious of these offenses were against the person; and even some of the offenses involving property, in particular, lighting Police Chief Cannon's patrol vehicle on fire—as it sat outside his home at approximately 1:30 a.m., while ten persons were inside—could certainly have resulted in serious and even fatal injury to numerous persons. *See* 10A O.S.Supp.2009, § 2-2-403(A)(2). Furthermore, there was no evidence that D.R.F. was, in general, immature or incapable of distinguishing right from wrong, which likewise supported the trial court's certification decision. *See* 10A O.S.Supp.2009, § 2-2-403(A)(3).

D.R.F. was merely 6 months shy of his 18th birthday at the time of the events at the Cannon home, and there were real concerns in this case about how the juvenile system could address non-compliance with his prescribed rehabilitation plan, in the event that D.R.F. chose not to comply after his 18th

¹ The trial court specifically (and reasonably) noted that "Factor 7," involving escapes from a juvenile institution, was not given any consideration in its determination. *See* 10A O.S.Supp.2009, § 2-2-403(A)(7). D.R.F.'s lack of involvement in the juvenile system was properly considered as a factor against adult certification under 10A O.S.Supp.2009, § 2-2-403(A)(4).

birthday. In this regard, it should be noted that D.R.F. obviously did not choose to stop drinking or to seriously pursue rehabilitation in the 2 months prior to the events at the Cannon home—after he was charged with D.U.I. while Under 21 and Driving with a Suspended License on December 6, 2009. While D.R.F.'s commitment and progress appears to have been admirable in the 3 months prior to the trial court's June 25, 2010, certification decision (just prior to D.R.F.'s 18th birthday, on August 7, 2010), I simply cannot find that the trial court abused its discretion or rendered a clearly erroneous decision when it certified him as an adult. I would affirm the decision of the trial court.