

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

**THE STATE OF OKLAHOMA,**

**Appellant,**

**-vs.-**

**R.J.T.,**

**Appellee.**

**NOT FOR PUBLICATION**

**No. J-2011-394**

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**  
**OCT 28 2011**

**MICHAEL S. RICHIE**  
**CLERK**

**ACCELERATED DOCKET OPINION**

**C. JOHNSON, JUDGE:**

Appellee, having reached his fifteenth birthday six days before the alleged offenses, was charged as a youthful offender in Cleveland County District Court, Case No. CF-2011-154, with Count 1: Arson-First Degree, Count 2: Arson-First Degree, Count 3: Arson-Second Degree, Count 4: Arson-Third Degree, Count 5: Arson-Third Degree, and Count 6: Arson-Third Degree.<sup>1</sup> Under the Youthful Offender Act, an individual charged as a youthful offender “may file a motion for certification to the juvenile justice system before the start of the criminal preliminary hearing,” or “[i]f no motion to certify the accused person to the juvenile justice system has been filed, at the conclusion of the criminal preliminary hearing the court may on its own motion hold a hearing on the matter of the certification of the accused youthful offender to the juvenile system.” 10A O.S.Supp.2010, § 2-5-206(F)(1) & (F)(2). The Youthful Offender Act further requires that the trial court rule on the issue of certification “before ruling on whether to bind the accused over for trial,” and when

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<sup>1</sup> Under 10A O.S.Supp.2010, § 2-5-206, a fifteen, sixteen, or seventeen-year-old may be prosecuted as a youthful offender for Arson in the First Degree. Joinder of the non-first-degree arson offenses as part of that youthful offender prosecution is permitted under the conditions described in 10A O.S.Supp.2010, § 2-5-203(A)(2).

deciding a certification motion, that it consider seven guidelines enumerated within the statute. 10A O.S.Supp.2010, § 2-5-206(F)(3).

The State's prosecution came on for preliminary hearing on May 4, 2011, before the Honorable Steve Stice, Special Judge, sitting as magistrate. At that time, a youthful offender study and psychological evaluation had been prepared and submitted; however, Appellee's counsel had not filed a motion for certification as a juvenile. Instead, the parties announced a plea agreement had been reached, wherein Appellee would waive preliminary hearing and enter a guilty plea as a youthful offender in return for sentencing being deferred for five years and the State recommending that Appellee be placed on probation in his mother's home under the supervision of the Office of Juvenile Affairs (OJA).

On hearing this announcement, Judge Stice expressed concern about accepting such a plea agreement and asked the parties to address the trial court's authority to certify Appellee to the juvenile system on the trial court's own motion under Section 2-5-206. The Assistant District Attorney argued that a waiver of preliminary hearing by Appellee would prohibit the trial court from entering a juvenile certification order. After questioning Appellee's mother as to her wishes and her understanding of the proposed plea agreement and its ramifications, Judge Stice rejected the plea agreement. Judge Stice further rejected the State's interpretation of the law concerning a magistrate's authority over the certification issue if preliminary hearing be waived. The trial court pronounced that it would accept a waiver of Appellee's preliminary hearing and allow the case to "move on to the next level" (Tr. 28), but that the court would retain its power to address the certification issue on its own motion as permitted by the statute. After making this pronouncement and informing Appellee and his counsel that the trial court would not accept any

conditional waiver of the preliminary hearing, and that if the preliminary hearing was waived, the trial court would then proceed to hear evidence on the certification issue, Appellee waived preliminary hearing. (Tr. 39.)

Proceeding then to the issue of certification, Judge Stice advised the parties that he would be taking "judicial notice" of the court ordered Youthful Offender Study prepared by the Juvenile Services Unit (JSU), including the psychological report on Appellee and those other exhibits that were attached to that Study. (Tr. 40.) Neither party offered any objection to this or to the trial court otherwise considering that document. The trial court further permitted the parties to offer any evidence they wished to present concerning the certification issue or the accuracy of the Youthful Offender Study and its attachments.

From that certification evidence appearing within the appeal record, the following is revealed concerning Appellee: Appellee's biological father has not been involved with Appellee but Appellee otherwise has strong family support; Appellee suffers from ADHD, has been on medication since age five, but approximately six months prior to the alleged offenses, he was removed from that medication because he was very physically underdeveloped, could not grow, and achieved a weight of only 80 pounds; Appellee was on his school's honor roll, and he was described as being intelligent but having simplistic concepts of right and wrong; Appellee was found to be very shy, self-centered, and not socially adept; Appellee had no previous criminal history, police contacts, or juvenile system contacts; Appellee had not previously demonstrated any aggressive or violent behaviors; and there were no personal injuries as a result of the alleged arsons.

At the State's request and over Appellee's objection, Judge Stice considered the probable cause affidavit prepared by a city fire inspector concerning the acts of arson of which Appellee was accused. (Tr. 51-52.) Testimony by the Juvenile Justice Specialist who prepared the Youthful Offender Study confirmed statements in her report that "the facilities and/or services that would be available to [Appellee] as a youthful offender would be identical, if not almost identical, to those that would be available to him if he were placed in juvenile delinquent system"; and that "[a]dequate protection of the public could be achieved within the juvenile delinquent system or the Youthful Offender System" (Tr. 55-56), but that in either system, the treatment providers would be the same.

This witness further asserted that it was OJA's recommendation that custody be given to OJA for an out-of-home placement and that both the juvenile system and the youthful offender system were adequate for accomplishing that objective. The witness explained that she recommended OJA custody and an out-of-home placement both for public safety and for treatment reasons. Judge Stice also questioned the Juvenile Justice Specialist's supervisor, who stated that she did not have any disagreements or concerns about the findings reached by the psychologist who had prepared Appellee's psychological evaluation.

At the conclusion of this hearing, Judge Stice certified Appellee to the juvenile system and made specific findings of fact and conclusions of law as to each of the certification guidelines that the trial court found compelled that result. The State now appeals that final order, and its appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Oral

argument was held on August 11, 2011, and Appellant raised two propositions of error on appeal:

Proposition I

The trial court abused its discretion in rejecting the Appellee's waiver of preliminary hearing and depriving the Appellee of the opportunity to avail himself of a negotiated disposition with the State of Oklahoma.

Proposition II

The trial court abused its discretion in certifying the Appellee as a juvenile delinquent and the trial court improperly considered factors outside of the seven enumerated factors in Section 2-5-208 of Title 10A of the Oklahoma Statutes.

After hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, by a vote of three (3) to two (2), the Court affirms the magistrate's order certifying Appellant as a juvenile. As previously noted, the applicable certification statute is found at 10A O.S.Supp.2010, § 2-5-206. That statute permits a magistrate to consider the issue of certification "on its own motion" at the conclusion of the criminal preliminary hearing prior to any bind-over order in cases where "no motion to certify the accused person to the juvenile justice system has been filed." 10A O.S.Supp.2010, § 2-5-206(F)(2).

At oral argument, the State conceded that the magistrate was not bound to accept the proffered plea agreement.<sup>2</sup> Thus it appears that Appellant's Proposition I complaint is that the magistrate could not receive Appellee's waiver of preliminary hearing without also being required to enter an order binding Appellee over for trial as a youthful offender.

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<sup>2</sup> *Pack v. State*, 1986 OK CR 133, ¶ 8, 725 P.2d 870, 871 ("[I]t is well settled that a defendant has no constitutional right to have his guilty plea accepted by the court.").

For the purposes of this youthful offender prosecution, it matters not whether a defendant's waiver of preliminary hearing in the context of a regular criminal prosecution would require a magistrate, as a matter of law, to bind the defendant over for trial as the State now contends. This Court need not decide the validity of that contention because this is not a regular criminal case but a youthful offender prosecution, and the controlling youthful offender statute specifically recognizes an intermediate step between a magistrate's finding of probable cause and the magistrate's bindover order. This intermediate step is the issue of whether the child's prosecution should be as an adult, a youthful offender, or as a juvenile; and by statutory fiat, resolution of that issue is placed with the magistrate at the preliminary hearing stage of the prosecution with the decision to be made prior to bindover.<sup>3</sup> Moreover, because the statute permits a magistrate to consider the issue of certification on the court's own motion, certification has been made an issue that cannot be unilaterally waived by the juvenile/youthful offender.<sup>4</sup> For these reasons, Appellant's Proposition I

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<sup>3</sup> Compare 10A O.S.Supp.2010, § 2-5-206(F) (statute applicable to Appellee's case) with 10A O.S.Supp.2010, § 2-5-101(E) (allowing juveniles of specified ages and charged with certain enumerated offenses to be prosecuted as an adult, but permitting the accused juvenile to "file a motion for certification as a child before the start of the criminal preliminary hearing" and requiring the magistrate to "rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial") and with 10A O.S.Supp.2010, § 2-5-205(D) – (E) (requiring thirteen and fourteen year olds charged with First Degree Murder to file any motions for certification as a youthful offender or a juvenile before the start of preliminary hearing and requiring the magistrate to rule on such certification motions before ruling on whether to bind the accused over for trial). See also 10A O.S.Supp.2010, § 2-2-403 (allowing the district attorney to ask, or the court with juvenile responsibilities on its own motion, to determine "if a child is charged with a delinquent act as a result of an offense which would be a felony if committed by an adult" should be held accountable as an adult, but requiring such determination to be made following "a preliminary hearing to determine whether or not there is prosecutive merit to the complaint," and if prosecutive merit exists, to then determine if the child should be certified as an adult and if certified, then "held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of the offense if committed by an adult").

<sup>4</sup> See generally *Bishop v. State*, 1979 OK CR 42, ¶¶ 3-4, 595 P.2d 795, 796 (holding that in proceedings to certify a juvenile as an adult, "it is not possible for a juvenile to confess a

fails to demonstrate any procedural error occurring in the magistrate receiving the waiver of preliminary hearing while reserving and then ultimately deciding the issue of certification before binding Appellee over to the juvenile court for further proceedings.

This Court also finds Appellant's Proposition II is without merit, as Appellant shows no abuse of discretion occurring in the magistrate's decision to certify Appellee to the juvenile system. In this regard, the Court would first note that the State neglected to designate the Youthful Offender Study, the psychological report, or any of the other exhibits attached to that report which the magistrate plainly considered in making his certification order.<sup>5</sup> Without a complete appeal record of all of the evidence considered by the magistrate, this Court is unable to review whether there was sufficient evidentiary support for the magistrate's findings of fact.<sup>6</sup>

Nevertheless, even if this Court limits its consideration to only the designated transcript of the May 4th proceedings, it would still require a

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motion to certify" as the juvenile court by statute is ultimately required to find whether there is probable cause and whether the juvenile is amenable to rehabilitation; hence, "it is not permissible for the juvenile to stipulate to the two ultimate findings of fact").

<sup>5</sup> The necessity of the psychological evaluation being made a part of the record in any appeal claiming abuse of discretion in the certification of a youthful offender is seen from the fourth certification guideline that requires the magistrate to give "consideration of the accused person's psychological evaluation." 10A O.S.Supp.2010, § 2-5-206(F)(3)(d).

<sup>6</sup> An appealing party "must at least bring up enough of the proceedings of the lower court to enable this court to pass intelligently and safely upon the questions presented for decision." *O'Neal v. State*, 1970 OK CR 24, ¶ 11, 468 P.2d 59, 62-63. The appeal record cannot be supplemented by a party attaching items to its brief as Appellant has attempted to do in this appeal. See *Graves v. State*, 1994 OK CR 23, ¶¶ 1-7, 878 P.2d 1075, 1076-77 (finding that documents which an appellant attached to Brief in Chief in a desire to supplement the appeal record was improper and should have first be submitted in compliance with Rule 3.11 of this Court's Rules and then receive a ruling from this Court for the documents could be considered on appeal); cf. *Dolese Bros. v. State ex rel. Oklahoma Tax Comm'n*, 2003 OK 4, ¶ 38, 64 P.3d 1093, 1107 ("A deficient record may not be supplemented by material physically attached to a party's appellate brief.").

finding that there was no abuse of discretion, for the transcript presented shows testimony sufficient to support the magistrate's findings on each of the statutory guidelines. The State's main argument is that the evidence is lacking as concerns the guideline at 10A O.S.Supp.2010, § 2-5-206(F)(3)(e), the guideline requiring the magistrate to compare the youthful offender system and the juvenile system for "the prospects for adequate protection of the public." The State contends that the public can only be protected by retaining Appellee as a youthful offender because such will permit imposition of a lengthy adult sentence should Appellee violate his probation under the plea agreement deferring sentencing for five years. Under the State's proposal, however, Appellee would be placed on probation back into the community in the mother's home rather than being placed into OJA custody. If certified to the juvenile system and adjudicated a delinquent, the likely outcome, according to the testimony, was that Appellee would be placed in OJA custody and removed from the home/community to the first available secure treatment facility for rehabilitation. The magistrate, in his discretion, could have easily concluded that this latter scenario better provided for both the immediate and future safety of the public.<sup>7</sup>

### **DECISION**

The May 4, 2011, order of the Cleveland County District Court, Case No. CF-2011-154, certifying Appellee to the juvenile system for prosecution as an

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<sup>7</sup> In appeals of certification orders under the Youthful Offender Act, the standard of review is whether the magistrate abused his discretion in reaching his decision. See 10A O.S. Supp.2010, § 2-5-202(B) ("It is the purpose of the Youthful Offender Act to better ensure the public safety by holding youths accountable for the commission of serious crimes, while affording courts methods of rehabilitation for those youths the courts determine, *at their discretion*, may be amenable to such methods.") (emphasis added). Moreover, the Court has held that "[t]he 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.

alleged delinquent child is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY  
BEFORE THE HONORABLE STEVE STICE, SPECIAL JUDGE

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

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**LEWIS, JUDGE, DISSENTS:**

I dissent to the Court's decision in this case. I would remand this case to the trial court and direct that the court be directed to complete Findings of Fact and Conclusions of Law on the following:

- 1) Was a preliminary hearing conducted?
- 2) Was a motion for certification as a juvenile filed? If not, what authority did the court rely on to conduct its certification hearing?

**LUMPKIN, J.: DISSENT**

Judges are bound by their oath to make decisions on the law and evidence in each case they decide. From this record it appears the magistrate had prejudged this case due to the fact no evidence was presented upon which he could arrive at the decision that was made. The preliminary hearing was waived, no exhibits were admitted, and all the judge had before him were the announcements of counsel as to the plea agreement and some reports that had not yet been proffered by a party to be considered as evidence in the case. On his own, the magistrate considered the probable cause affidavit by a city inspector concerning the acts of arson, which was nothing more than hearsay in the format of this hearing. If it were the Appellee who was appealing this action, this Court would be very concerned regarding the denial of due process. That same due process should be afforded to the state.

As to Proposition II, the Court finds no abuse of discretion due to the fact the state failed to designate certain studies for the record. These are the studies the magistrate considered without any of the items being admitted into evidence during the course of the proceedings. When a magistrate considers matters outside the offered and admitted evidence in a case, that magistrate has abused his discretion.

The magistrate must realize a judge is not to take on the role of an advocate. The parties have a right to present their case. In this matter it

appears the magistrate took control and orchestrated the entire proceeding.  
Regretfully, I must dissent to this abuse of discretion.