

IN THE DISTRICT COURT OF RILEY COUNTY, KANSAS

**In the Matter of
COLE E. DRAKE**

Case No. 11 JV 35

**ORDER ON MOTION TO AUTHORIZE
PROSECUTION AS AN ADULT**

FILED
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JULIA A. BROWN
CLERK
RILEY CO. KS.

NOW, on this 16th day of February 2012, this case comes on for a ruling on the State's motion to authorize prosecution of the Juvenile, Cole E. Drake, as an adult, pursuant to K.S.A. 38-2347. Both the state and the Juvenile presented evidence on the motion on February 2 and 3 and the Court took the question under advisement to review the evidence and arguments. At the hearing, the state appeared by Riley County Attorney, Barry R. Wilkerson and Assistant Riley County Attorney, James W. Garrison. The Juvenile appeared in person and by his attorney, Brenda M. Jordan.

The Charges

The state has charged the Juvenile with first degree, premeditated murder, and aggravated robbery. Premeditated murder is an off-grid person felony and aggravated robbery is a severity level three person felony. The crimes allegedly were committed on or about April 13, 2011. As the Juvenile was born in May 1996, he was 14 years, 11 months old at the time of the events charged in the complaint.

The Presumptions

Cole Drake is a "juvenile" under Kansas law because he is 10 or more years of age but is less than 18 and he is alleged to be a juvenile offender, meaning he is charged with crimes that,

if committed by an adult, would be either felonies or misdemeanors. K.S.A. 38-2302(i) and (n). When a prosecutor files a motion for prosecution as an adult, a person who meets the definition of a juvenile is generally presumed to be subject to prosecution under the Revised Kansas Juvenile Justice Code (the Juvenile Code).

When certain criteria are met, however, the Juvenile Code directs that a juvenile will be presumed to be an adult for prosecution. As applicable to this case, the relevant criteria are that: the Juvenile was 14, 15, 16, or 17 at the time of the alleged crimes *and* the crimes charged include crimes that if committed by an adult would constitute an off-grid crime, a person felony, or a crime committed while in possession of a firearm. For this prosecution, therefore, the Juvenile Code presumes Cole Drake should be prosecuted as an adult. In that case, the Juvenile Code directs that the burden is on the Juvenile to rebut the presumption that he is an adult by a preponderance of the evidence. K.S.A. 38-2347(a)(2). Proof by a preponderance of the evidence is:

“ ‘evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.’ Black’s Law Dictionary 1182 (6th ed.1990). In other words, a “preponderance of the evidence” means that evidence which shows a fact is more probably true than not true.’ *Ortega*, 255 Kan. at 527–28, 874 P.2d 1188; see PIK Civ. 4th 102.10.”

In re B.D.-Y., 286 Kan. 686, 691 (2008).

The Factors

Presumptions aside, the Court must consider eight factors in deciding whether to authorize prosecution of a juvenile as an adult. The factors are:

"(1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult or designating the proceeding as an extended jurisdiction juvenile prosecution;

(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(3) whether the offense was against a person or against property. Greater weight shall be given to offenses against persons, especially if personal injury resulted;

(4) the number of alleged offenses unadjudicated and pending against the juvenile;

(5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender under this code or the Kansas juvenile justice code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or desire to be treated as an adult;

(7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction under this code; and

(8) whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.

The insufficiency of evidence pertaining to any one or more of the factors listed in this subsection, in and of itself, shall not be determinative of the issue. ..."

K.S.A. 38-2347(e).

The Court has considered the evidence presented on each of these factors. It is not necessary to review all the evidence, but as considered for the eight factors, it is summarized below.

(1) Seriousness of the alleged crimes; protection of the community

This factor presents two considerations, one that is beyond challenge and another that is disputed. The one beyond challenge, of course, is the seriousness of the alleged crimes. As the state argued, only capital murder is treated more seriously than premeditated murder in the structure of criminal charges in Kansas. Aggravated robbery, as a severity level three, person felony, is obviously a less serious charge than murder, but nonetheless one for which the legislature has assigned a presumed prison term of almost five years for an adult who has had no prior convictions at any level.

The second consideration for this factor is whether the community's protection requires prosecution as an adult. The state contends that prosecution as an adult, with an extended prison term if convicted, is necessary for the safety of the community, whether that is this community or some other. The state supported that view with evidence from Dr. John Fajen, a licensed psychologist who evaluated the Juvenile in August 2011. Dr. Fajen found this juvenile to have a "remarkable absence of guilt or empathy [that] defines him as a predator who shares more in common with adult criminals than misbehaving juveniles." He expects that if the Juvenile were to return to the community in the near future, he would revert to his previous criminal lifestyle "almost immediately, in spite of any efforts by the family or community to set boundaries and provide support for responsible behavior."

Dr. Stephen Peterson, the psychiatrist presented by the Juvenile, sees him differently. He sees the Juvenile as "quite malleable" and without a "hardened criminal (or antisocial)

mindset.” He characterized the Juvenile’s actions as: “Despite being an extraordinarily serious alleged offense, Cole’s actions were those of a misguided obsessive young teenager” who “has never had psychiatric intervention for his family difficulties,” and “can benefit from educational and therapeutic interventions available in the Juvenile Justice system.”

(2) Manner in which alleged offense was committed

The second factor considers whether the alleged offense was committed “in an aggressive, violent, premeditated or willful manner.” Murder is an aggressive, violent, and willful act. The state alleged that this murder also was committed with premeditation. The manner of killing was described by Dr. Fajen, Dr. Peterson, and by the Juvenile in his statement to the police as involving a first shot to the back of the head, followed by a second when Tyler Dowling was not killed immediately by the first shot. Dr. Fajen reported the Juvenile stated that he fired the second shot because he couldn’t let him use his cell phone or leave him as a witness. The victim was described as one of the Juvenile’s friends, although not within his closest group.

(3) Person or property crime

This statutory consideration directs that greater weight should be given to person crimes, especially when personal injury results. The applicability to this case is apparent.

(4) Number of alleged offenses unadjudicated and pending

Other than the charges in this case, there was no evidence of any charges pending against the Juvenile.

(5) Prior history of juvenile offender adjudication or antisocial behavior or violence

The Juvenile has no prior adjudications as a juvenile offender. Dr. Fajen noted the Juvenile reported to him that "at times he would try to aggravate social conflicts into fights among peers." Dr. Peterson stated simply that "Cole Drake does not have an antisocial behavior pattern." There was evidence, however, of what apparently were repeated episodes of "carhopping," a term used by the Juvenile and some others, but which actually refers to vehicular burglaries. Evidence also referred to shoplifting and the use and sale of marijuana and the use of alcohol from age 12. If not in a formal psychological sense, then at least in common usage of the term, any of those activities may be thought of as "antisocial."

(6) Sophistication or maturity of the Juvenile

The perspectives from which this factor directs the Court to view sophistication or maturity are "home, environment, emotional attitude, pattern of living or desire to be treated as an adult." Again, the source of particularized evidence relating to this factor came from Drs. Fajen and Peterson. Both pointed out significant deficits in the Juvenile's home life and a lack of parental supervision, participation, and mentoring. Dr. Peterson declared in his report that the Juvenile "is not psychologically sophisticated." He wrote that "He has the abstract capacity of a young teenager" and that he "thrusts forth the attitude that he was 'tough,' or a 'gangster,'" arising from a "severe sense of social displacement, lack of reliable family, and need for a group to identify with."

Dr. Fajen saw “the clinical picture of a youth who gradually developed from a typical child of divorce into an alienated youth who then found a new ‘family’ outside of the standards of the community.” The Juvenile described himself to Dr. Fajen as starting to act like a gangster beginning in the sixth grade, when he changed schools. In middle school he started spending weekends away from home with a friend and eventually began sleeping with the friend’s sister. After several “pregnancy scares” the girl became pregnant and, some months following his arrest for these crimes, she bore a child. The Juvenile told Dr. Peterson that “To him [the Juvenile] ‘they [he and his girlfriend] were like married people’ even though he was 14 years old.” The Juvenile told Dr. Fajen that during the eighth grade he began sneaking out frequently with friends to burglarize cars. He would look for money or other things to steal and sell for drugs, such as iPods, which he reported were sold easily at school. It was in that way in December 2010 that he found the pistol, which he often began to carry with him.

The Court further received evidence that the Juvenile had persistent school attendance problems from middle school into 10th grade. Although school officials who testified did not characterize him as a regular discipline problem, the Juvenile told Dr. Fajen he once was suspended for fighting and was removed from his ninth grade English class for disrespect of the teacher. Both Dr. Fajen and Dr. Peterson noted very early, consistent, and frequent use of marijuana and alcohol, beginning around age 12, as well as the early sexual activity. Both also referred to the Juvenile’s stated plan to quit school when allowed, to then live “off the street.”

(7) Availability of facilities or programs likely to rehabilitate the juvenile prior to expiration of the court's juvenile jurisdiction

The Court heard evidence from one witness bearing on this question, Phillip Tongier. Mr. Tongier is the health services administrator at the Larned Juvenile Correctional Facility. He testified about the programming available within the Juvenile Justice Authority. Mr. Tongier commented that the primary goal of the correctional facility is public safety, with a secondary effort toward rehabilitation. Among its functions, the juvenile correctional facility offers therapy, cognitive-behavioral based programs, substance abuse programs, a violent offender program, and general education. The JJA staff determines a plan of programming after initial evaluation at the Topeka facility, considering pre-sentence reports, evaluations, and police reports or other information made available to them.

A juvenile who is adjudicated a juvenile offender for a crime which, if committed by an adult, would be an off-grid felony, may be sentenced to a juvenile correctional facility for a maximum period of the juvenile reaching the age of 22 ½ years, followed by six more months of aftercare. At 23 years of age, jurisdiction under the Juvenile Code terminates. K.S.A. 38-2369(a)(1); K.S.A. 38-2304(e); K.S.A. 38-2376.

(8) Whether interests of the juvenile or the community would be better served by criminal prosecution or prosecution under extended juvenile jurisdiction

The positions of the state and the Juvenile on this factor were as expected. The Juvenile argued that the controlling considerations should be the evidence concerning his loosely-supervised home life and Dr. Peterson's opinion of his amenability to treatment within a

structured setting, directed toward rehabilitation. The state focused on the crimes, the way they were committed, and the opinions of Dr. Fajen that the Juvenile is not likely to successfully rehabilitate in the near future.

Conclusions

The state and the Juvenile framed this motion in stark, either/or terms: Either (a) the Juvenile is a teenager without a conscience or the prospect of developing one, who committed a calculated and serious violent crime, and who is unlikely to be rehabilitated to a different life by any traditional methods, and certainly not within the time allowed for juvenile jurisdiction; or, (b) the Juvenile is a teenager who was severely affected by a deficient home life, lacking in boundaries and goals, but who is already showing marked signs of response to the structure and regularity of detention and who is completely amenable to traditional therapy and programs if the opportunity is presented. Each counsel presented a well-supported position, providing the Court with all the evidence needed to assess the choice.

Three options are available to the Court: (1) grant the motion, finding that the Juvenile has failed to rebut the statutory presumption that he should be prosecuted as an adult; (2) deny the motion, finding that the Juvenile successfully rebutted the presumption; or, (3) neither grant nor deny the motion for adult prosecution, but exercise the statutory option to designate the case for extended jurisdiction juvenile prosecution.

Extended jurisdiction juvenile prosecution

The term “extended jurisdiction juvenile” was used during the hearing on this motion, in

an “only if” context. Both the state the Juvenile suggested that if, and only if, the Court was not persuaded by their arguments, the Court could take what they inferred was a middle ground by designating the case for extended jurisdiction juvenile prosecution. While that is a statutory alternative for the Court, the words “extended jurisdiction” imply more for this case than is actually there. An extended jurisdiction juvenile proceeding is a blended, contingent approach to a juvenile prosecution, usually requested when crimes are charged that arguably could support a motion for adult prosecution. The Court’s jurisdiction over the juvenile is not, however, actually “extended.” The statute states that:

“(a) If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall:

- (1) Impose one or more juvenile sentences under K.S.A. 38-2361, and amendments thereto; and
- (2) Impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender not violate the provisions of the juvenile sentence and not commit a new offense.”

K.S.A. 38-2364.

If the juvenile successfully completes the juvenile sentence, the adult sentence never comes into play and the case ends. If the juvenile violates the conditions of the juvenile sentence or commits a new crime, juvenile jurisdiction is terminated and the adult sentence that had been imposed becomes effective.

For this case, only if the Juvenile were to be convicted and then violated his juvenile sentence would there be a distinction between extended jurisdiction juvenile proceedings and

denying the state's motion, retaining juvenile jurisdiction. On the charges in this case, a juvenile sentence would be served in confinement at a juvenile correctional facility. The Court does not consider extended jurisdiction juvenile prosecution to be a meaningful alternative in this case.

Juvenile or adult prosecution

After carefully considering the evidence and argument, and the available alternatives, the Court finds the presumption has not been rebutted and the state's motion to proceed with adult prosecution should be granted.

The seriousness and nature of the alleged crimes and the manner of commission are the dominant factors in this case. The evidence described a calculated killing of a friend, to demonstrate toughness and to impress another whom the Juvenile considered a closer friend. The evidence also described efforts by the Juvenile to remove from the victim any chance of seeking aid and then to conceal the crimes.

While the Juvenile cannot, and did not, dispute the gravity of the alleged crimes, he argued that the case should be left in juvenile jurisdiction so he can receive structure and remediation for a less than desirable home environment. Dr. Peterson focused on the Juvenile's good behavior while in the juvenile detention center for approximately 10 months, arguing that it presents a view into the Juvenile's ability to conform to requirements when given structure and direction. The Juvenile had not been arrested or adjudicated as a juvenile offender previously, and Dr. Peterson noted the absence of previous formal therapy or program

interventions to try to correct the Juvenile's behavior. Dr. Peterson testified that he saw the likelihood that substance abuse and other programming would successfully redirect the Juvenile's thinking and actions, as the Juvenile expressed remorse to him and a desire to redirect his life. Dr. Fajen, who evaluated the Juvenile about three months before Dr. Peterson, saw and focused on very different features and doubted to the point of exclusion any capacity for significant change.

Although the Juvenile had not been previously involved with law enforcement, he admittedly was involved in criminal activity, apparently including routine vehicular burglaries and substance abuse. Whether in defiance of restrictions on his actions, or in their absence, he pursued activities and made choices that were inconsistent with most age peers. Significantly, and fortunately, few adolescents who engage in the activities the Juvenile chose, and fewer still of those in the larger group who have experienced decidedly imperfect home environments, make the decisions and act on the thought processes that led to the charges now before the Court.

Even accepting Dr. Peterson's view, rather than Dr. Fajen's, on the possibility for rehabilitation by the Juvenile, the Court is not persuaded that rehabilitation would necessarily, or even likely, be accomplished by the time juvenile jurisdiction would expire. If that were the case, community interests would not have been well-served. Each time a motion of this nature is considered, the weight and applicability of the factors is different. In this case, the Court finds those factors, on balance, support the presumption rather than rebut it. The state's

motion should be granted.

Probable cause findings

The state's motion included a request under K.S.A. 38-2347(g) that, if the Court found this case should proceed as an adult prosecution, it would also find that the state has presented sufficient evidence to show probable cause that the two charged felonies were committed and probable cause that the Juvenile committed them, so that there is no further necessity for preliminary examination on the charges. Under that section, if the Court makes those findings, the Juvenile would be bound over for trial.

For a charge of premeditated first degree murder, the state must prove that: (1) Cole E. Drake intentionally killed Tyler Dowling; (2) that the killing was done with premeditation; and, (3) that the act occurred on or about April 13, 2011, in Riley County, Kansas.

For a charge of Aggravated Robbery, the state must prove that: (1) Cole E. Drake intentionally took property from the person of Tyler Dowling; (2) that the taking was by force; (3) that Cole E. Drake took the property after inflicting bodily harm on Tyler Dowling in the course of that conduct; and, (4) that the act occurred on or about April 13, 2011, in Riley County, Kansas.

"A preliminary examination is not a trial of the defendant's guilt; it is rather an inquiry whether the defendant should be held for trial. *State v. Jones*, 233 Kan. 170, Syl. ¶ 1, 660 P.2d 965 (1983)."

State v. Sherry, 233 Kan. 920, Syl. ¶ 4, 667 P.2d 367 (1983).

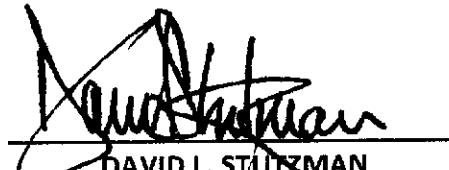
"An analysis of the existence of probable cause requires the trial court to

determine whether the evidence is sufficient 'to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.' *Romo-Uriarie*, 33 Kan.App.2d at 27, 97 P.3d 1051. When reviewing the evidence, the district court must draw inferences in favor of the State. *State v. Anderson*, 270 Kan. 68, 71, 12 P.3d 883 (2000)."

State v. Beaver, 41 Kan. App. 2d 124, 128, 200 P.3d 490 (2009).

Considering the evidence presented by the state on the alleged crimes, distinct from that which focused on the other factors related to the motion, the Court finds that the evidence supports probable cause to believe the two charged crimes were committed, and probable cause to believe that Cole E. Drake committed those crimes. Accordingly, the Court finds there is no necessity for further preliminary examination as provided in K.S.A. 22-2902 and the Juvenile should be bound over for further proceedings consistent with this order.

IT IS SO ORDERED.



DAVID L. STUTZMAN
District Judge