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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1669-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.H.,¹

Defendant-Appellant.

Argued March 8, 2023 – Decided March 30, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Accusation No. 21-09-1277.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John P. Flynn, of counsel and on the briefs).

Kristen Pulkstenis, Assistant Prosecutor, argued the cause for respondent (William Reynolds, Atlantic County Prosecutor, attorney; Kristen Pulkstenis, of counsel and on the brief).

¹ We use defendant's initials pursuant to Rule 1:38-3(d)(8).

PER CURIAM

Defendant M.H., a juvenile, appeals from an August 5, 2021 order granting the State's motion to transfer jurisdiction of his criminal matter from the Family Part to the Law Division. We affirm.

We recite the facts from the probable cause and waiver hearing before the Family Part judge. On October 3, 2020, around 3:38 a.m., Atlantic City police officers responded to a 9-1-1 call regarding a fight at a fast-food restaurant. Angelo Branca told the responding officers that he and his friend, Joshua Wolfram, were assaulted by four people in a white Ford Fusion. Branca provided the license plate number of the Fusion. At about 3:53 a.m., the police stopped a white Fusion. Among the occupants of the Fusion were defendant, an adult driver, and two other juveniles.

During the hearing, the State submitted video footage from a security camera at the fast-food restaurant capturing the assault. The video showed the Fusion attempting to cut the drive-through line in front of a Volkswagen Passat. Branca occupied the driver's seat of the Passat, while Wolfram sat in the front passenger seat. The Passat's front passenger window was open.

Defendant and another juvenile, M.D., exited the Fusion and approached the Passat. Defendant splayed himself on the Passat's hood and M.D. stood in

front of the Passat so it could not move. Branca got out of the Passat and exchanged punches with M.D. The third juvenile in the Fusion joined the fray. The Fusion's adult driver pulled into a parking spot at the restaurant and got out of the car but did not join the fight.

Wolfram got out of the Passat and attempted to stop the fight. Wolfram was unable to deescalate the situation, and returned to the Passat's front passenger seat. Defendant, holding an object in his hand, approached the Passat, lunged twice at Wolfram through the car's open window, and returned to the Fusion. Immediately thereafter, the Fusion drove away with all four occupants.

Police officers subsequently recovered two bloody knives. One knife was discovered in the Passat. The other knife was found in the Fusion.

Wolfram, who had been stabbed in the jugular vein, was taken to the hospital. He required surgery, remained on life support for twenty-four hours, and stayed at the hospital for twelve days.

On October 3, 2020, defendant was charged in a juvenile complaint with four acts of delinquency which, if committed by an adult, would constitute the following: fourth-degree unlawful possession of a knife, N.J.S.A. 2C:39-5(d); first-degree attempted murder, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:11-3;

second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and third-degree possession of a knife for an unlawful purpose, N.J.S.A. 2C:39-4(d).

On June 8, 2021, the State moved for involuntary waiver of jurisdiction from the Chancery Division, Family Part, to the Law Division, Criminal Part, pursuant to N.J.S.A. 2A:4A-26.1 and Rule 5:22-1. On July 1, defendant opposed the State's waiver motion and provided his school records, two psychological evaluations, an Individualized Education Plan (IEP), a behavior intervention plan, and a learning evaluation report. On July 18, the State filed a supplemental letter reflecting its consideration of defendant's documents in opposition to the waiver motion.

The Family Part judge conducted the probable cause and waiver hearing on July 21 and July 22, 2021. During the hearing, defense counsel conceded probable cause. On the first hearing date, Dr. Gregory Gambone, a clinical psychologist, testified regarding his psychological evaluation of defendant. The doctor explained defendant suffered from alcohol abuse, cannabis abuse, attention deficit/hyperactivity disorder, conduct disorder, adjustment disorder with mixed anxiety and depressed mood, and adolescent antisocial behavior.

On August 5, 2021, the judge entered an order and issued a written decision granting the State's waiver motion. The judge found the State established probable

cause on the charge of second-degree aggravated assault and concluded the prosecutor did not abuse his discretion in seeking a jurisdictional waiver of defendant to adult court.

In the State's written submission in support of the waiver motion, the prosecutor addressed each of the statutory factors under N.J.S.A. 2A:4A-26.1(c)(3)(a)-(k). The prosecutor determined the following factors weighed heavily in favor of waiver: (a) the nature and circumstances of the offense charged; (b) whether the offense was against a person or property, allocating more weight for crimes against the person; (c) the degree of the juvenile's culpability; and (g) the nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications.

The prosecutor concluded the following factors weighed minimally in favor of waiver: (f) the degree of criminal sophistication exhibited by the juvenile; and (k) the input of the victim or the victim's family.

The prosecutor found the following factors did not weigh in favor of waiver: (d) age and maturity of the juvenile; (e) any classification that the juvenile is eligible for special education to the extent the information is provided to the prosecution by the juvenile or the court; (h) if the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the

response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission (emphasis added); (i) current or prior involvement of the juvenile with child welfare agencies; and (j) evidence of mental health concerns, substance abuse, or emotional instability of the juvenile.

After weighing the statutory factors under N.J.S.A. 2A:4A-26.1(c)(3), the judge, agreeing with the State's assessment, found that factors (a), (b), (c), (f), (g), and (k) weighed in favor of waiver and factors (d), (e), (h), (i), and (j) did not weigh in favor of waiver. The judge reviewed the information presented by the State "to ensure that the prosecutor's individualized decision about [defendant], as set forth in the statement of reasons, [was] not arbitrary or abusive of the considerable discretion allowed to the prosecutor by statute."

The judge found:

the State reviewed and considered all of the information that the [c]ourt and [d]efendant provided. The State determined that certain factors did not support transfer but in balancing the factors ultimately concluded that those in favor of waiver outweighed those that did not. Defendant may disagree with the emphasis placed on some of the factors but in the end cannot dispute that the prosecutor explained their view.

This [c]ourt is of the opinion that the State has sufficient evidence to support a finding of probable cause as to the charge of aggravated assault. The

[c]ourt is clearly convinced that the prosecutor did not abuse [his] discretion in considering the factors under N.J.S.A. 2A:4A-26.1(c)(3) and therefore grants the motion to waive jurisdiction of this juvenile delinquency case to the Criminal Part.

On September 29, 2021, the Criminal Part judge conducted a plea hearing and defendant pleaded guilty to second-degree aggravated assault in accordance with a conditional plea agreement. As part of his plea, defendant reserved the right to appeal the August 5, 2021 order granting the State's waiver motion.

On December 2, the judge sentenced defendant in accordance with the negotiated plea to a seven-year prison term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissed the remaining charges.

On appeal, defendant raises the following arguments:

POINT I

THE PROSECUTOR'S WAIVER DECISION WAS AN ABUSE OF DISCRETION BECAUSE IT RELIED ON LEGALLY AND FACTUALLY ERRONEOUS ASSESSMENTS OF THE STATUTORY FACTORS.

A. The Prosecutor Abused his Discretion in Finding that Factor (c) Weighed Heavily in Favor of Waiver by Employing a Legally Erroneous Analysis of the "Degree of the Juvenile's Culpability" and Discrediting Mitigating Evidence in the Record.

B. The Prosecutor Abused His Discretion in Finding that the Offense Reflected Criminal Sophistication under Factor (f).

C. The Prosecutor Abused his Discretion in Analyzing Factor (d) Because the Record Clearly Reflects [Defendant]'s Immaturity.

D. The Prosecutor's and the Family Part Judge's Analyses of Factors (h) and (i) were Incomplete and Incorrect.

E. The Prosecutor's Flawed Analysis of the Statutory Factors Resulted in a Clearly Erroneous Waiver Decision, such that the Waiver Order Should be Reversed.

POINT II

RESENTENCING IS REQUIRED BECAUSE THE SENTENCING JUDGE ERRONEOUSLY BELIEVED THAT [DEFENDANT] HAD PREVIOUSLY SERVED A CUSTODIAL SENTENCE AND IMPROPERLY USED [DEFENDANT]'S MENTAL HEALTH DIAGNOSES IN AGGRAVATION.

Our standard of review in juvenile waiver cases "is whether the correct legal standard has been applied, whether inappropriate factors have been considered, and whether the exercise of discretion constituted a 'clear error of judgment' in all of the circumstances." State in re J.F., 446 N.J. Super. 39, 51-52 (App. Div. 2016) (quoting State v. R.G.D., 108 N.J. 1, 15 (1987)). "[T]he standard of review of the prosecutor's waiver decision is deferential. The trial court should uphold the [prosecutor's] decision unless it is 'clearly convinced that the prosecutor abused his [or her] discretion in considering' the enumerated

statutory factors." State in re Z.S., 464 N.J. Super. 507, 519-20 (App. Div. 2020) (quoting N.J.S.A. 2A:4A-26.1(c)(3)).

Family Part judges may not substitute their judgment for that of the prosecutor. State in re V.A., 212 N.J. 1, 8 (2012). The juvenile court conducts a limited yet substantive review to ensure the prosecutor made an individualized decision about the juvenile that was neither arbitrary nor abused the prosecutor's considerable discretion. Ibid.

The prosecution must provide a written assessment at the time of the waiver motion, identifying the facts it relied on to assess the eleven statutory "factors 'together with an explanation as to how evaluation of those facts support waiver for each particular juvenile.'" Z.S., 464 N.J. Super. at 533 (quoting N.J.S.A. 2A:4A-26.1(a)). Importantly, the prosecutor's written statement of reasons should "not simply mirror the statutory language in a cursory fashion." Ibid. (quoting State in re N.H., 226 N.J. 242, 250 (2016)). The written statement of reasons "cannot be incomplete or superficial," cannot make "conclusory assertions that are devoid of analysis," and must "show the work." Id. at 534.

However, "because positive and negative factors will often exist, the prosecutor's ultimate conclusion balancing those offsetting factors may not be amenable to precise articulation." Id. at 535. The weighing process by the

prosecutor is qualitative and "not a mechanical quantitative process." Id. at 542. As we noted in Z.S., "the waiver analysis is not a counting exercise. Some factors can have more importance or probative strength than others." Ibid. Under the statute, the weight to be accorded to each waiver factor remains within the prosecutor's discretion.

Here, defendant contends the prosecutor abused his discretion because he relied on legally and factually erroneous assessments of factors (c), (d), (f), (h), and (i). We disagree.

As to factor (c), the degree of the juvenile's culpability, the prosecutor noted defendant was the sole individual charged in the stabbing incident and thus highly culpable. Additionally, the State noted the victim returned to the safety of the Passat during the fight and defendant escalated the situation by following the victim and stabbing him. Further, based on Dr. Gambone's testimony at the waiver hearing, the State asserted defendant knew right from wrong as part of its evaluation of defendant's culpability. The State also considered the various evaluations and reports submitted on defendant's behalf and determined the information in those documents did not diminish defendant's degree of culpability, which weighed heavily in favor of waiver.

As to factor (d), the age and maturity of the juvenile, the prosecutor stated defendant was fifteen years old at the time of these offenses, the youngest age allowable for the State to seek a waiver. The prosecutor further considered the learning evaluation report, Dr. Gambone's psychological evaluation, a prior psychological evaluation by a different doctor, the behavior intervention plan, and the IEP in determining that defendant "is of below average maturity." Thus, the prosecutor considered this factor "was probably minor in weight" and concluded it weighed against waiver.

As to factor (f), the juvenile's degree of criminal sophistication, the prosecutor noted defendant "armed himself with a knife, escalated a physical fight by utilizing said knife, then . . . stabb[ed the victim] in the jugular, . . . and then [defendant] fled the scene and left [the victim] there to die." The prosecutor explained defendant "waited for a time when the victim was in a more vulnerable position to attack him." The prosecutor also highlighted that defendant elevated the degree of criminal sophistication by using a weapon as opposed to punching the victim. Additionally, the prosecutor cited Dr. Gambone's testimony that defendant "has the ability to think things through" in support of this factor. However, because the attack on the victim was not premeditated, the prosecutor submitted this factor weighed minimally in favor of waiver.

As to factor (h), whether the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, the prosecutor, during the waiver hearing, stated he had no information relevant to this factor. Thus, the prosecutor argued at the hearing that this factor was neutral regarding waiver.²

However, in her decision, the judge relied on the prosecutor's written statement of reasons, indicating defendant "has not previously served a custodial disposition in a State juvenile facility." As such, the judge explained that the State submitted "factor (h) does not weigh in favor of waiver." The judge also noted defendant concurred with the State's conclusion regarding factor (h).

As to factor (i), the current or prior involvement of the juvenile with child welfare agencies, during the waiver hearing, the prosecutor explained he had not received any information in this regard and submitted this factor was neutral in assessing the waiver decision. However, in his written statement of reasons seeking waiver, the prosecutor took the position that the absence of such information did not weigh in favor of waiver.

² N.J.S.A. 2A:4A-26.1(c)(3)(h) provides that information relevant to this factor shall be considered "to the extent this information is provided to the prosecution by the Juvenile Justice Commission." During argument before this court, the State could not explain why it was unable to obtain information regarding any previously served custodial dispositions.

Regarding factor (i), defense counsel stated at the waiver hearing that "the child protection records reflected that . . . [defendant] had enough dysfunction in the home so that he was running away," and the records demonstrated defendant was "a dependent on the street with no supervision." The judge also obtained records reflecting defendant's interactions with child welfare agencies and provided those records to counsel on the first day of the waiver hearing. Based on those records, the judge noted, "although there have been no child protection petitions filed in the courts, [defendant] and his family have a prior history of multiple interactions with the Division of Child Protection and Permanency (DCP&P). The interactions with DCP&P involved allegations of problems with parental supervision and of [defendant] running away from home." Nonetheless, the judge agreed that factor (i) did not weigh in favor of waiver.

In responding to the State's position as to factors (c), (d), (f), (h), and (i), defendant focused on the weight accorded by the prosecutor. Defendant offered evidence and testimony to counter the weight given to those statutory factors but did not challenge the legal reasoning proffered by the State.

Having reviewed the record, we are satisfied the prosecutor did not abuse his discretion in seeking a waiver of defendant to the Law Division, Criminal

Part. The prosecutor submitted a comprehensive written statement of reasons and amplified those written reasons during the waiver hearing. The prosecutor provided responsive information for each statutory factor, explaining why the factor weighed in favor of or against waiver. The prosecutor did not merely parrot the statutory factors and his statement of reasons reflected an individualized decision that did not constitute an abuse of the State's considerable discretion. Nor did the prosecutor's decision to seek waiver amount to a clear error in judgment. While defendant disagreed with the weight accorded to certain statutory factors, the record contains sufficient reasons supporting waiver of defendant to the Law Division, Criminal Part.

Moreover, based on our careful review of the record, including defendant's documents regarding his psychological evaluations, IEP, behavior intervention plan, and learning evaluation report, the prosecutor's written statement of reasons in support of the waiver motion, defendant's written objections to the waiver motion, Dr. Gambone's testimony during the waiver hearing, and the arguments of counsel at the conclusion of the hearing, we are satisfied that the record supports the Family Part judge's factual findings and legal conclusions regarding the prosecutor's motion to transfer jurisdiction of defendant's criminal matter to the Law Division, Criminal Part.

However, for future guidance, Family Part judges reviewing juvenile waiver applications must provide a comprehensive analysis of the facts related to each of the statutory factors governing waiver of a juvenile to the Law Division, Criminal Part. The judge should explain why the information provided by the prosecutor as to each statutory factor weighs either in favor of or against waiver, and avoid merely repeating the State's reasons in support of waiver. Without a more fulsome analysis by the Family Part judge, it falls to the reviewing court to undertake that examination to ensure the prosecutor's decision reflects an individualized determination, is not an abuse of the prosecutor's considerable discretion, and does not amount to a clear error in judgment. The lack of a thorough and complete analysis of each statutory waiver factor based on the record before the Family Part judge is unfair to the juvenile, to counsel, and to this court.

We next consider defendant's argument that the judge erred in imposing a seven-year prison sentence, requiring a remand for resentencing. We disagree.

We review a sentence for abuse of discretion. State v. Miller, 237 N.J. 15, 28 (2019). An appellate court "must not substitute its judgment for that of the sentencing court" and should defer to the trial court's sentencing determinations. State v. Fuentes, 217 N.J. 57, 70 (2014). Moreover, a sentence

imposed pursuant to a plea agreement is presumed to be reasonable because a defendant voluntarily "waive[d] . . . his right to a trial in return for the reduction or dismissal of certain charges, recommendations as to sentence and the like." State v. Davis, 175 N.J. Super. 130, 140 (App. Div. 1980).

In his decision, the sentencing judge mistakenly stated that defendant "served a term of youth detention in the past." Defendant argues this factual error improperly influenced the judge's finding that "[o]nly a substantial commitment to state prison will serve as an adequate deterrent at this juncture." According to defendant, based on the judge's mistaken belief that defendant served time in a juvenile detention facility, the judge erroneously applied aggravating factor six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which [the defendant] has been convicted." N.J.S.A. 2C:44-1(a)(6).

Despite the judge's misstatement, his finding of aggravating factor six was grounded in other credible evidence in the record. The judge cited "the extent of defendant[']s prior juvenile record and the seriousness of the offense of which he has now been convicted" and noted "[d]efendant's criminal conduct as a juvenile has now escalated and reached a point of dangerous violence." The judge accurately summarized defendant's criminal record, revealing sixteen

arrests resulting in eleven prior adjudications and violations of probation, including aggravated assault against an officer. Thus, the sentencing judge properly found aggravating factor six based on competent and credible evidence in the record.

Next, defendant argues the sentencing judge improperly relied on defendant's mental health diagnoses in finding aggravating factor three, "[t]he risk that the defendant will commit another offense." N.J.S.A. 2C:44-1(a)(3). The judge found defendant's escalating conduct and Dr. Gambone's psychological evaluations indicated "there's a real risk that he'll commit another offense without appropriate intervention." Defendant argues his mental health diagnoses should have been considered as a mitigating factor, and the judge overlooked Dr. Gambone's opinion that defendant's symptoms could improve with treatment.

However, defendant misstates the judge's reasoning in finding aggravating factor three. The judge cited Dr. Gambone's opinion that "significant psychological dysfunction . . . has hindered the [d]efendant's capacity to control his behavior." Defendant's conduct, including anger issues and adolescent antisocial behaviors, supported the judge's finding that defendant was at risk of committing another offense.

We discern no error in the sentencing judge's determination because there was competent and credible evidence in the record supporting the sentence imposed.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION