

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3922-21

STATE OF NEW JERSEY IN
THE INTEREST OF I.S.,
a juvenile.

Argued February 14, 2023 – Decided April 21, 2023

Before Judges Messano, Gilson and Rose.

On appeal from an interlocutory order of the Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FJ-18-0231-20.

Emily M. M. Pirro, Assistant Prosecutor, argued the cause for appellant (John P. McDonald, Somerset County Prosecutor, attorney; Paul H. Heinzl, Assistant Prosecutor, of counsel and on the briefs).

Mark A. Bailey and Jeff Thakker, attorneys for respondent (Jeff Thakker, of counsel; Mark A. Bailey, on the brief).

PER CURIAM

"[T]he waiver of a juvenile to adult court 'is the single most serious act that the juvenile court can perform.'" State in the Int. of N.H., 226 N.J. 242, 252 (2016) (quoting State v. R.G.D., 108 N.J. 1, 4-5 (1987) (quotation and

citation omitted)). The court's role, however, is limited and deferential. It must determine (1) if the juvenile was fifteen years of age or older at the time of the alleged act; (2) if there is probable cause to believe that the act, if committed by an adult, would constitute one of the statutorily-listed offenses; and (3) if the prosecutor clearly and convincingly abused her or his discretion in seeking a waiver. Id. at 251; see also State in the Int. of Z.S., 464 N.J. Super. 507, 519 (App. Div. 2020).

On leave granted, the State appeals from a Family Part order denying its motion to waive a charge against I.S., a juvenile, which, if committed by an adult, would constitute first-degree murder. Because the judge abused her discretion by focusing her evaluation on one of the eleven factors the prosecutor considered, we reverse and remand for a new hearing before a different judge.

I.

We discern the facts from the record, recognizing that the charges against I.S. are allegations and no trial has yet been conducted.

In the afternoon of December 31, 2019, S.F., who was then nineteen years old, was shot to death while sitting in a car with N.T., his girlfriend.¹ Police responded quickly to the reports of shots fired, and observed a black Nissan Altima, with multiple people in the car, speeding away from the scene. Some officers pursued the Nissan and a high-speed chase ensued. After speeding down several streets, the Nissan crashed and five individuals wearing dark clothes and ski masks fled on foot. Officers quickly apprehended three individuals near the crash: I.S., Jeffrey Grant, and Gavin Owens-Jones. The other two individuals, Luther Waters and T.H., were apprehended and arrested later.

Owens-Jones and T.H. gave statements to the police. They explained that all five passengers in the Nissan were armed with handguns, and they had gone looking for people they believed had been involved in shootings that took place the day before. While driving, they saw S.F. in another car and followed that car believing S.F. had been involved in the prior shootings. When the car in which S.F. was traveling as a passenger parked, I.S., Owens-Jones, T.H.,

¹ We use initials for the victim and certain witnesses to protect their privacy interests. We also use initials for juveniles to protect the confidentiality of juvenile delinquency proceedings. See R. 1:38-3(d)(5).

and Grant got out of the Nissan with their handguns and fired multiple shots at S.F.

Owens-Jones admitted he fired a .40 caliber semi-automatic handgun, and T.H. admitted that he fired a .45 caliber handgun. Police recovered spent casings at the scene of the shooting from .45 caliber, .40 caliber, and 9 mm bullets. They also recovered two projectiles from S.F.'s torso: a .40 caliber projectile and a .45 caliber projectile. A forensic ballistic expert opined that the .40 caliber projectile and casings matched the gun seized from Owens-Jones.

The police also obtained warrants to search cell phones found in the Nissan after it crashed. One of the phones was later determined to belong to I.S. From I.S.'s cell phone, police recovered a text message that he sent to his girlfriend two and a half hours before the shooting. That text message read:

If I get bagged or shoot !! , opps shoot two of my mans crib up yesterday 42 times at my first mans crib & 10+ times at my other mans crib and they shoot my mans grandpa in the leg ... I been sliden since early this morning so I'm just saying baby

I.S., who was born in January 2003, was sixteen years old at the time of the alleged murder. He was charged in a juvenile delinquency complaint with acts, which if committed by an adult, would constitute first-degree murder,

N.J.S.A. 2C:11-3(a), and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2).

T.H., Owens-Jones, Grant, and Waters were also charged with the murder of S.F. T.H. was also sixteen years old at the time of the alleged murder. T.H. consented to being charged as an adult and thereafter pled guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). As a condition of his plea agreement, T.H. agreed to provide truthful testimony against his codefendants, including I.S.

In April 2020, the State moved to waive jurisdiction from the juvenile court to the criminal court so I.S. could be prosecuted as an adult. In support of its position, the State submitted a written statement of reasons detailing its evaluation of all eleven factors identified in the statute authorizing waivers to adult court. See N.J.S.A. 2A:4A-26.1(c)(3). The State concluded that factors one, two, three, and eleven weighed heavily in favor of waiver, factors six and seven favored waiver, factors four and eight weighed against waiver, and factors five, nine, and ten were inapplicable.

In response to the State's waiver motion, counsel for I.S. produced and submitted two psychological evaluations of I.S. One of those evaluations was prepared by Dr. Kris Stankiewicz, Psy.D., ABPP, who evaluated I.S. in April

2020. Dr. Stankiewicz diagnosed I.S. with "Persistent Complex Bereavement Disorder," "Cannabis Use Disorder," and "Major Depression Disorder," on a rule-out basis. The second report was submitted by Dr. Nicole Rafanello, Ph.D., a clinical psychologist, who evaluated I.S. in August and September of 2020. Dr. Rafanello diagnosed I.S. with "Major Depressive Disorder, Single Episode, Moderate" and "Cannabis Use Disorder, Mild."

The State retained psychiatrist Dr. Howard Gilman, M.D., who performed an evaluation of I.S. in February 2021. Dr. Gilman diagnosed I.S. with criteria of "Other Specified Disruptive, Impulse Control and Conduct Disorder," and listed "Cannabis Use Disorder" on a rule-out basis. On September 21, 2021, the State submitted an amended statement of reasons, which addressed the three psychological reports and discussed the eleven statutory factors in greater detail. The State reached the same conclusions it had in its earlier statement of reasons, except the State reasoned that factors four and ten now weighed in favor of waiver in light of information contained in the psychological reports.

Thereafter, the juvenile court conducted a multi-day waiver hearing between October 2021 and January 2022. At that hearing, the State presented testimony from Dr. Gilman, a Somerset County detective, and the mother of

S.F. Counsel for I.S. presented testimony from Dr. Rafanello, a police officer, a witness to the shooting, and N.T., S.F.'s girlfriend. The State and I.S. also submitted various documents into evidence, including the reports of Drs. Rafanello, Gilman, and Stankiewicz. Although Dr. Stankiewicz did not testify at the hearing, her report was reviewed and discussed by both Drs. Rafanello and Gilman.

Following the close of all evidence, the court allowed the parties to submit written summations. Thereafter, the court heard argument on May 12, 2022. On June 24, 2022, the family judge issued an order and written decision denying the State's waiver motion.

The judge found that I.S. was sixteen years and eleven months old at the time of the alleged murder, satisfying the statutory age for waiver. See N.J.S.A. 2A:4A-26.1(c)(1). The judge also found probable cause that I.S. committed an act, which if committed by an adult, would constitute murder, a crime listed in N.J.S.A. 2A:4A-26.1(c)(2).

In analyzing the State's evaluation of the eleven factors set forth in N.J.S.A. 2A:4A-26.1(c)(3), the judge focused on the tenth factor (subsection j): "Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the

prosecution by the juvenile or by the court." The judge acknowledged that the State had addressed the psychological evidence submitted on behalf of I.S., including the reports of Dr. Stankiewicz and Dr. Rafanello. The court found, however, that the State's consideration was "insufficient" to diminish the importance and weight of the mitigating psychological evidence. The court took issue with the State's analysis of factor ten and the State's reliance on Dr. Gilman's opinion that I.S. "had no history of significant trauma." The court pointed to several "significant life events" I.S. endured in a span of two years as evidence that the State "fail[ed] to weigh and acknowledge the trauma in I.S.'s life." According to the court, the State did not adequately explain why it disagreed with the conclusions of Dr. Rafanello or Dr. Stankiewicz, and that this failure amounted to an abuse of discretion.

We granted the State's motion for leave to appeal the order denying the juvenile waiver.

II.

Waiver of a juvenile to be tried as an adult is governed by statute, N.J.S.A. 2A:4A-26.1, and guided by caselaw, see N.H., 226 N.J. at 251-52. To be subject to waiver, the juvenile must be (1) fifteen years old or older at the time of the alleged act; and (2) charged with at least one of the serious

offenses listed in the statute, which includes criminal homicide. N.J.S.A. 2A:4A-26.1(c)(1) and (2).

A. The Prosecutor's Discretion.

The decision of whether to seek waiver is committed to the discretion of the prosecutor. N.H., 226 N.J. at 249 (citing N.J.S.A. 2A:4A-26.1(c)(3)). The prosecutor has sixty days after receipt of the juvenile complaint to file a motion for waiver. N.J.S.A. 2A:4A-26.1(a). The motion must be accompanied by a statement of reasons that sets forth the facts used to assess the factors listed in the statute, together with an explanation of how those factors support waiver. Ibid. See also N.H., 226 N.J. at 250. Specifically, the prosecutor must consider eleven factors listed in the waiver statute:

- (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) Degree of the juvenile's culpability;
- (d) Age and maturity of the juvenile;
- (e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court;

(f) Degree of criminal sophistication exhibited by the juvenile;

(g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications;

(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;

(i) Current or prior involvement of the juvenile with child welfare agencies;

(j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and

(k) If there is an identifiable victim, the input of the victim or victim's family.

[N.J.S.A. 2A:4A-26.1(c)(3).]

The statute has a presumption in favor of waiver for juveniles who commit serious acts, and the juvenile must overcome a "heavy burden" to defeat a waiver motion. Z.S., 464 N.J. Super. at 519 (citing R.G.D., 108 N.J. at 12).

The standard of review of the prosecutor's waiver decision is deferential. Ibid. The Family Part must "uphold the decision unless it is 'clearly convinced that the prosecutor abused [her or] his discretion in considering' the

enumerated statutory factors." Ibid. Moreover, the family court may not substitute its judgment for that of the prosecutor. State in the Int. of V.A., 212 N.J. 1, 8 (2012). Instead, the court conducts a limited, yet substantive, review to ensure that the prosecutor has made an individualized decision about the juvenile that was neither arbitrary nor abused the prosecutor's considerable discretion. Ibid.; see also N.H., 226 N.J. at 255 (explaining that "the prosecutor's decision to seek waiver is subject to review—at the hearing—for abuse of discretion").

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'" under all the circumstances. State in the Int. of J.F., 446 N.J. Super. 39, 51-52 (App. Div. 2016) (quoting R.G.D., 108 N.J. at 15).

In Z.S., we emphasized that the prosecutor's written statement of reasons must be detailed and cannot "simply mirror the statutory language in a cursory fashion." 464 N.J. Super. at 533 (quoting N.H., 226 N.J. at 250). We explained that the prosecutor's statement of reasons "cannot be incomplete or superficial" or make "conclusory assertions that are devoid of analysis." Id. at 534. Moreover, "[t]he prosecutor must 'show the work.'" Ibid. We also

recognize, however, that the prosecutor's waiver statement "need not elaborate about minutia" and the ultimate balancing of the eleven factors "may not be amendable to precise articulation." Id. at 535. Finally, we clarified that "[n]o one factor . . . may be treated as dispositive" and the decision as to how much weight to accord each statutory factor remains vested in the discretion of the prosecutor. Ibid.

B. The Decision by the Family Judge.

There is no dispute that I.S. was sixteen years old at the time of the alleged murder. The family judge also found that there was probable cause that I.S. committed an act that would constitute murder if committed by an adult. Accordingly, under the waiver statute, the charges against him were presumptively subject to waiver to the adult criminal court. The issue before the family judge, and us on this appeal, is whether the prosecutor abused his discretion in seeking waiver.

The supplemented statement of reasons submitted by the prosecutor was thorough and complete. He laid out some of the evidence against I.S. and the circumstances of the shooting and murder of S.F. The statement then went through each of the eleven statutory factors and analyzed them in detail.

In her review, the family judge also thoroughly discussed and analyzed the eleven statutory factors and the prosecutor's analysis of those factors. The family judge did not take issue with the sufficiency of the prosecutor's analysis nor did the judge find that the analysis by the prosecutor was incomplete or superficial. Our review of the prosecutor's analysis convinces us that his statement of reasons was thorough, complete, and reflected an individualized, detailed analysis.

The family judge faulted the prosecutor, and ultimately determined that the prosecutor abused his discretion, based on the prosecutor's analysis of one factor: factor (j) (also referred to as factor ten). That factor considers evidence of mental health concerns, substance abuse, or emotional instability of the juvenile.

At the waiver hearing, two experts testified concerning factor (j). Dr. Rafanello testified on behalf of I.S. and Dr. Gilman testified on behalf of the State. Both doctors were qualified as experts. Both doctors had met with and evaluated I.S. Both doctors also had reviewed and referenced an evaluation conducted by Dr. Stankiewicz.

In the prosecutor's supplemental statement, he referenced and discussed the reports prepared by Drs. Gilman, Stankiewicz, and Rafanello. The

prosecutor ultimately found Dr. Gilman's analysis more persuasive and relied on Dr. Gilman's conclusion that I.S. did not suffer from any mental or emotional condition that would preclude him from being prosecuted as an adult. The prosecutor explained that he found Dr. Rafanello's conclusions less persuasive because her report failed to demonstrate I.S.'s conditions and symptoms were present during specific times.

The family judge came to a different conclusion. She found the testimony of Dr. Rafanello more compelling, particularly because Dr. Rafanello had analyzed I.S. within his cultural context. She acknowledged that Dr. Gilman had testified that he was aware of I.S.'s cultural context but had not felt it was a controlling factor in this situation. The family judge faulted that analysis and, in turn, faulted the prosecutor for accepting Dr. Gilman's analysis and recommendations without appreciating the impact of the cultural context.

Having reviewed the testimony by both doctors, the prosecutor's analysis of their testimony, and the family judge's analysis, we are convinced that the family judge simply substituted her judgment for the judgment of the prosecutor. The record does not support a finding that the prosecutor abused his discretion. The prosecutor evaluated all the expert reports that were

provided and explained the reasons why he accepted Dr. Gilman's report over Dr. Rafanello's analysis. Neither Dr. Gilman nor the prosecutor ignored I.S.'s cultural context. Instead, they both considered it, but did not give it the weight that Dr. Rafanello argued it should be accorded. Moreover, there was no evidence establishing that consideration of cultural context is the controlling factor in evaluating a juvenile's mental or emotional condition. Even Dr. Rafanello testified that I.S.'s cultural context was one of several considerations that helped inform her opinion.

After considering the competing testimony of the experts, the prosecutor found Dr. Gilman's analysis more persuasive. That consideration was not an abuse of discretion; rather, the prosecutor's consideration was an illustration of an appropriate exercise of discretion. Indeed, juries and judges, when acting as fact finder, routinely choose to rely on the testimony of one expert over another. See N.J. Div. of Youth & Fam. Servs., 414 N.J. Super. 56, 74 (App. Div. 2010); State v. M.J.K., 369 N.J. Super. 532, 549–52 (App. Div. 2004); Model Jury Charge (Criminal), "Expert Testimony" (rev. Nov. 10, 2003).

Just as importantly, the family judge did not explain how the prosecutor had abused his discretion in considering all eleven factors. Factor (j) was just

one of those factors. The family judge did not analyze how, even if factor (j) were weighed in favor of I.S., it overcame the other factors.

In summary, the record establishes that the family judge abused her discretion by substituting her judgment for the judgment of the prosecutor. We, therefore, reverse the order denying the prosecutor's motion for a waiver and remand this matter for a new waiver hearing. On remand, the new hearing should be conducted by a different family judge. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005) (explain that sometimes, "[i]n an abundance of caution, we direct that [a] matter be remanded to a different judge for the [new] hearing to avoid the appearance of bias or prejudice based upon the judge's prior involvement with the matter").

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION