

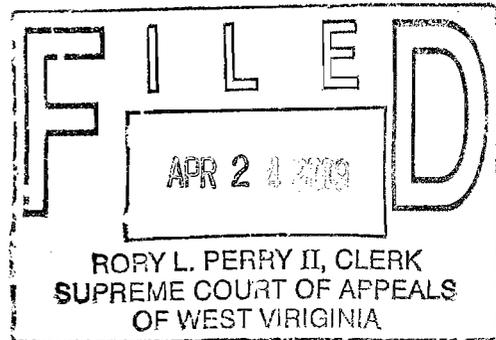
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE INTEREST OF:

Supreme Court No. 34744

Kanawha Co. Circuit Court No. 2008-JD-286

LARRY T.
A Child Under the Age of Eighteen Years



APPELLANT'S BRIEF

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**THE KIND OF PROCEEDING AND THE
NATURE OF THE RULING BELOW**

On September 26, 2008, the State lied to Larry T. The lie was a simple one, but one that would immeasurably impact Larry T's future. The State told Larry T., his family, defense counsel, and the trial court, that they had no intentions of transferring his case from the juvenile jurisdiction to the criminal jurisdiction and went on to say they believed his case was not a transferable case. Yet five days later, on October 1, 2008, the State filed a motion to transfer Larry T. on juvenile petition 2008-JD-286.

On August 21, 2008, juvenile petition 2008-JD-286 was filed, charging Larry T. with first degree sexual abuse. On September 12, 2008, a second petition was filed, 2008-JD-306, charging Larry T. with first degree sexual assault. The petitions were identical, except for the code language. Both petitions were based on the same set of facts and circumstances, both probable cause statements were the same, and allege a sexual offense was committed on or about July 24, 2008.

The arraignment for 2008-JD-286 was held before the Honorable Judge Bloom on September 26, 2008. At that time the trial court inquired as to whether the State intended to file a transfer motion on 2008-JD-286. The State said they could not and would not transfer 2008-JD-286, but intended to transfer 2008-JD-306. The State went on to say they filed 2008-JD-306 because they wanted to transfer that case.

On September 29, 2008, juvenile petition 2008-JD-306 was dismissed at the preliminary hearing for lack of probable cause. Then on October 1, 2008, the State filed a transfer motion on 2008-JD-286. This motion was filed only five days after the arraignment where the State placed on the record they had no intention of transferring

2008-JD-286 and believed it was not a transferable case. It was only after juvenile petition 2008-JD-306 was dismissed the State filed its motion to transfer on the original petition.

The transfer hearing was held on October 7, 2008. At the start of the hearing defense counsel made a motion to dismiss based on a violation of West Virginia Code § 49-5-10(b) (2001) (2004 Repl. Vol.), arguing since the juvenile respondent entered a denial of the allegation and made a request for a jury trial at the arraignment, the State is therefore precluded from proceeding with a transfer motion. The motion to dismiss was denied and the Court heard testimony from witnesses regarding the transfer to criminal jurisdiction. The transfer motion on 2008-JD-286 was a discretionary transfer which required the trial court to consider all of the following factors – the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors. However, before ordering Larry T.’s transfer to the criminal jurisdiction the Court made only a superficial inquiry into the factors that must be considered.

The State called only two witnesses, Ricky Smoot with juvenile probation, who met Larry T. on only four occasions, and Patsy T., the juvenile’s mother. There was no psychological evaluation, no substance abuse evaluation, no sexual offender evaluation, no probation report, no pre-disposition report, no social summaries, no school records, and no school testing submitted into evidence. Further, no expert witnesses testified such as a physician or psychologist and no teachers or counselors were called to testify. Also, no home visits were conducted of the juvenile’s residence or interviews with the juvenile’s family. The State offered no evidence that any prospects for rehabilitation

were explored, nor did the State offer evidence the juvenile respondent would not be amenable to rehabilitation.

On October 20, 2008, the Circuit Court entered an order transferring Larry to adult status, an order which does not even address two of the statutorily require factors – the juvenile’s school experience and home and family environment. In regards to the remaining factors, the Court found, considering the juvenile respondent’s age, that his mental and physical condition was that of an adult and that since he was furthering his education at the time of the alleged offense, he demonstrated the maturity of an adult. In addition, since the juvenile respondent cried when confronted by the victim’s family the Court concluded that his emotional attitude was that of an adult. Finally, the Court found the juvenile was not amenable to rehabilitation since the alleged offense occurred while he was on juvenile probation. The petitioner appeals this transfer order, pursuant to W.Va. Code § 49-5-10(j) (2001) (2004 Repl. Vol.), which provides for a direct appeal of a transfer order.

STATEMENT OF FACTS

Larry T. was maturing into a responsible and dependable young man when the juvenile petition was filed. He was not only working at Long John Silvers in Marmet, West Virginia, but also studying for his GED at the Garnet Career Center. At seventeen, Larry had never really been in trouble before. His entire juvenile record consisted of one petition filed in May of 2008. Larry pled guilty to being a juvenile delinquent by committing the offenses of obstructing and public intoxication in June of 2008 and was placed on probation for a period of one year. That was the extent of his juvenile record.

Larry's life drastically changed on August 29, 2008. He was arrested after a juvenile petition, 2008-JD-286, was filed charging him with first degree sexual abuse in violation of West Virginia Code § 61-8B-7 (2006) (2005 Repl. Vol.), occurring on or about July 24, 2008. After a detention hearing, Larry was detained at the Tiger Morton Juvenile Detention Center in Dunbar, West Virginia.

On September 8, 2008, a preliminary hearing was held before the juvenile referee on the first degree sexual abuse charge, 2008-JD-286. At that time, the juvenile referee found probable cause and the case was bound over to the Circuit Court of Kanawha County.

On September 12, 2008, a second juvenile petition, 2008-JD-306, was filed charging Larry with first degree sexual assault in violation of West Virginia Code § 61-8B-3 (2006) (2005 Repl. Vol.). The petition was based upon the same facts as juvenile petition 2008-JD-286. In fact, the probable cause statement on the first petition was identical to the probable cause statement on the second petition, 2008-JD-286; only the statutory language was altered.

An arraignment hearing and violation of probation hearing was held before the Honorable Judge Bloom on September 26, 2008. Larry T. entered a not-guilty plea and a jury trial was scheduled for October 15, 2008. The Court also inquired as to whether the prosecutor intended to transfer this case, 2008-JD-286, to the criminal jurisdiction. The prosecutor stated they could not and would not transfer 2008-JD-286 to the criminal jurisdiction, but they were going to file a transfer motion on 2008-JD-306. There being no objection by defense counsel, the Court granted the State's motion to hold the violation of probation in abeyance.

A preliminary hearing was held on September 29, 2008, before the juvenile referee on juvenile petition 2008-JD-306, the first degree sexual assault charge. As indicated above, the State noted at the arraignment and probation violation hearing on September 26, 2008, this was the petition in which they intended to file a transfer motion, a transfer which would be mandatory once probable cause was found. However, the juvenile referee did not find probable cause and the charge was dismissed.

On October 1, 2008, a Motion to Transfer Larry T. to the criminal jurisdiction was filed by the State on 2008-JD-286, the first degree sexual abuse charge, and the charge on which the State previously said they would not be filing a transfer motion. A hearing was set for October 7, 2008. Defense counsel made a motion to dismiss based on a violation of West Virginia Code § 49-5-10(b) (2001) (2004 Repl. Vol.), arguing since Larry T. entered a denial of the allegation and made a request for a jury trial at the arraignment, the State is therefore precluded from proceeding with a transfer motion. The motion was denied and the Court heard testimony from witnesses regarding the transfer to criminal jurisdiction.

The State called Jennifer Foster as their first witness. Ms. Foster testified she questioned Larry T. about his contact with her daughter, J. C., a few days before his birthday, July 26, 2008. Ms. Foster testified that while in the presence of her husband Joey Huff, Larry T. stated he put his hand down J. C.'s pants and "fingering her" the day before his birthday (10/7/2008, Tr. 11).

The State then called Joey Huff, Larry T.'s brother and wife of Jennifer Foster. Mr. Huff testified he was present when Ms. Foster questioned Larry T. Mr. Huff's testimony contradicted Ms. Foster's in that he testified that Larry T. stated he put his hands "right there on the side of her panties." (10/7/2008, Tr. 22).

The State also called J. C. who testified that Larry T. touched her in the stomach area with his hand on or about July 24, 2008. (10/7/2008, Tr. 39). J.C. also testified Larry T. put his girlfriend L. B.'s hand on her stomach area. (10/7/2008, Tr. 39). At no time did J. C. testify that on or about July 24, 2008, Larry T. intentionally touched her sex organs or breasts.

The State called only two witnesses to testify to the discretionary factors, Ricky Smoot with juvenile probation, who had met Larry only on four occasions, and the juvenile's mother, Patsy T. Further, no psychological evaluation or evidence regarding Larry T. was submitted, nor did the State submit any evidence regarding his school experiences. Further, the state offered no evidence Larry T. would not be amenable to rehabilitation.

At the conclusion of the hearing, the Court requested the parties to brief the procedural issue of whether the transfer motion was properly filed under the West

Virginia Code. The Court ordered proposed findings of facts and conclusions of law to be submitted by October 14, 2008.

On October 20, 2008, the Court signed an Order denying Larry T.'s motion to dismiss and transferring him to the criminal jurisdiction. The Order held subsection (b) of the W.Va. Code §49-5-10 (2001) presupposes that the State has already filed a motion to transfer under subsection (a) of W.Va. Code §49-5-10 which is not what occurred here as Larry T. had already entered a plea of not guilty. Therefore the Court held after a motion to transfer has been filed, the Court cannot inquire as to an admission or denial of the allegations against the juvenile until the Court has determined whether the proceeding should be transferred. Further, the Court found, having weighed the relevant factors and considered the testimony, Larry T. shall be transferred to the criminal jurisdiction. On October 24, 2008, Larry T. timely appealed this order.

ASSIGNMENTS OF ERROR

- I. The Circuit Court of Kanawha County erred in allowing the State to proceed on a transfer motion filed after the arraignment was held in violation of West Virginia Code § 49-5-10(b) (2001).
- II. The Circuit Court of Kanawha County abused its discretion by failing to consider all of the statutorily required factors and transferring Larry T. to adult status.
- III. The Circuit Court of Kanawha County erred in finding probable cause Larry T. committed the offense of first degree sexual abuse.

DISCUSSION OF LAW – ARGUMENT

I. THE CIRCUIT COURT OF KANAWHA COUNTY ERRED IN ALLOWING THE STATE TO PROCEED ON A TRANSFER MOTION FILED AFTER THE ARRAIGNMENT WAS HELD IN VIOLATION OF WEST VIRGINIA CODE § 49-5-10(B) (2001).

A. Standard of Review.

This Court has held, “where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E. 2d 415 (1995).

B. W.Va. Code §49-5-10(b) Prohibits A Transfer Proceeding Once the Juvenile Respondent Has Entered a Denial of the Allegation.

West Virginia Code § 49-5-10(b) (2001) (2004 Repl. Vol.) defines the procedures for a juvenile transfer. Specifically, W. Va. Code § 49-5-10(b) states:

(b) No inquiry relative to the admission or denial of the allegation of the charge or the demand for a jury trial may be made by or before the court until the court has determined whether the proceeding is to be transferred to criminal jurisdiction.

This section of the statute is procedural in nature with numerous implications on a juvenile’s constitutional rights. For example, at the arraignment the juvenile respondent has a choice to plead guilty or not guilty. If he pleads guilty he would be adjudicated a delinquent child and subject himself to the penalties under West Virginia Code § 49-5-13 (2005) (2004 Repl. Vol.). If he pleads not guilty he invokes his statutory right to a jury trial. See W.Va. Code §49-5-6 (2006) (2004 Repl. Vol.).

When faced with that choice, Larry T. pled not guilty and requested a jury trial. Larry T. was arraigned on September 26, 2008. At that time the Court accepted his not guilty plea and a trial by jury was set for October 15, 2008. At the arraignment hearing, the Court also inquired as to whether the State was going to transfer this case to adult status.

The Court: Is the State going to be moving to elevate this to adult status?

Ms. Smith (Prosecutor): Your Honor, he was also charged with First Degree Sexual Assault, based on the same incident. We have the prelim on Monday, and I am going to transfer that.

The Court: Run that by me again?

Ms. Smith (Prosecutor): There is a First Degree Sexual Assault set for Monday, based on the same incident that happened. This is one count, that is the other count. And we are going to transfer that. A First Degree Sexual Abuse we cannot transfer with his history, but I want to make sure I transfer this case. So I have the other prelim set down.

(9/26/2006 Tr. Page 5).

At the onset of the transfer hearing, defense counsel made a motion to dismiss the transfer motion based on the procedural problem stated above. As defense counsel was making the motion, the Court interrupted and the following was stated:

The Court: If you'll remember, I asked that question at the time of the arraignment

Ms. Mullins (Defense Counsel): I do, your Honor.

The Court: And I was told that the allegation relative to that Petition was not going to be transferred, but some other allegation was going to be transferred. Is that correct?

Ms. Smith (Prosecutor): That did not reach – did not make it through probable cause. So I decided to transfer this motion. A transfer just has to be filed before the adjudication, and it's the State's position that an adjudication is trial. Now, had he pled guilty at the arraignment, that would have been an adjudication. But since he pled not guilty, the trial was set down for October 15th

The State filed its Motion to Transfer on October 1st, 2008, and that's the required eight days before the adjudication –

The Court: I'll let you all brief it.

(10/7/2008 Tr. 5-6).

The issue of whether a transfer motion can be filed after the juvenile has denied the allegation is a case of first impression for this court. No the other juvenile transfer cases with written opinions have this issue or even a similar issue. In those cases, the transfer motion was filed prior to the arraignment as required by W. Va. Code §49-5-10(b) (2001) (2004 Repl. Vol.).

The West Virginia Code is clear and unambiguous and protects the juvenile from situations like this one. W. Va. Code §49-5-10(b) states that the transfer motion and decision must be made before the juvenile is subjected to the choice whether to plead guilty or not guilty. If not, the juvenile is in a situation of choosing to plea guilty to avoid a transfer or facing a transfer motion in retaliation to his not guilty plea.

The State should not use the transfer process to retaliate against a juvenile who refuses to admit to an allegation, nor should the State use the transfer statute to “get another bite at the apple.” The juvenile could have pled guilty on September 26th, 2008, and would have remained in the juvenile jurisdiction and have been sentenced in the juvenile jurisdiction. To file a transfer motion after such an inquiry or in response to a not guilty plea is punishing the juvenile for pleading not guilty and exercising his right to a jury trial. A trial court may not punish a defendant for exercising his right to a jury trial. United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485 (1982). “To punish a person because he has done what the law plainly allows him to do is a due process

violation ‘of the most basic sort.’” Id. 457 U.S. at 372, 102 S.Ct. at 2488 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663 (1978)).

Further, the State should be prohibited from “getting another bite of the apple” so to speak. In this case, the State had no intention of transferring juvenile petition 2008-JD-286, and stated it was not a transferable case (10/7/2008, Tr. 5). Yet, after juvenile petition 2008-JD-306 was dismissed the State filed its motion to transfer on the original petition, 2008-JD-286. In the clearest of language, the State lied to Larry T.

There is a need for an early decision in the transfer process to protect the juvenile’s interest and prohibit the State from using the transfer process as a tactical maneuver, which is the purpose behind West Virginia Code § 49-5-10(b). To allow the State to wait until a denial of the allegation and then to file a transfer motion is prejudicial to the juvenile respondent and gives the State an unfair tactical advantage. Further, to allow the State to file a motion to transfer after stating they would not and after Larry T. denied the allegation and made a request for a jury trial is clearly prohibited by statute. Had Larry T. made an admission to the allegation, the State could not have filed the motion. Yet, when the juvenile denied the allegation, the State filed a motion they claimed not two weeks prior they would not and could not file. The State should make a decision based on the facts and merits of the case and not be permitted to use the transfer process as a tactical device to transfer the case of a juvenile respondent who chooses to enter a plea of not guilty and exercise his right to a jury trial.

II. THE CIRCUIT COURT OF KANAWHA COUNTY ABUSED ITS DISCRETION BY FAILING TO CONSIDER ALL OF THE STATUTORILY REQUIRED FACTORS AND TRANSFERRING THE JUVENILE CASE TO ADULT STATUS.

A. Standard of Review.

In reviewing orders in a juvenile transfer proceeding, the Court applies the deferential, clearly erroneous standard of review to factual findings by the circuit court. In the Matter of Steven William T., 201 W.Va. 654, 499 S.E. 2d 876 (1997). “Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed.” W.Va. Code 49-5-10(3) (2001) (2004 Repl. Vol.); Syl. Pt. 1, State v. Bannister, 162 W.Va. 447, 250 S.E. 2d 53 (1978).

B. The State Failed to Address All of the Factors the Circuit Court is Required to Consider at a Transfer Hearing, Pursuant to W.Va. Code § 49-5-10(g) (2001), the Discretionary Transfer Provision.

In this case, the juvenile respondent, Larry T., was seventeen (17) years old at the time of the alleged incident. The State filed a motion to transfer Larry’s case from the juvenile jurisdiction to the adult jurisdiction on October 1, 2008. The State’s motion is based upon the statutory provision W. Va. Code § 49-5-10(g) (2001) (2004 Repl. Vol.). This provision does not require transfer, but instead leaves the decision to transfer within the discretion of the Court. In a discretionary transfer case the Court must consider *all* of the following factors:

“The juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors.” W.Va. Code § 49-5-10(g), in part.

“[T]he legislative intent behind the enactment of the juvenile statute was that juveniles should, in the ordinary case, be subject to juvenile court jurisdiction. Transfer therefore should be the exception and not the rule.” State v. Michael S., 188 W.Va. 229, 231-232, 423 S.E.2d 632, 635 (1992); State ex rel. Smith v. Scott, 160 W.Va. 730, 735, 238 S.E. 2d 223, 226 (1977). “Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors.” Syl. Pt.2, State v. Sonja B., 183 W.Va. 380, 395 S.E. 2d 803 (1990).

Despite this statutory mandate, the State presented only two witnesses to support the motion to transfer – Ricky Smoot, Kanawha County Juvenile Probation Officer who only met with Larry T. four times, and Larry T.’s mother, Patsy T. As will be explained below, neither of these witnesses could testify to more than a superficial inquiry into the statutorily required facts.

Also, there was no psychological evaluation, no substance abuse evaluation, no sexual offender evaluation, no probation report, no pre-disposition report, no social summaries, no school records, and no school testing submitted into evidence. Further, no expert witnesses testified such as a physician or psychologist and no teachers or counselors were called to testify. No home visits were conducted of the juvenile’s residence or interviews with the juvenile’s family. The State offered no evidence that any prospects for rehabilitation were explored, nor did the State offer evidence the

juvenile respondent would not be amenable to rehabilitation. By the plain language of the statute alone, the State's evidence at the juvenile petitioner's transfer hearing was insufficient.

Not only was the State's evidence at the juvenile petitioner's transfer hearing insufficient under the plain language of West Virginia Code § 49-5-10(g), the evidence presented was wholly inadequate under the Supreme Court case law which requires the trial court to consider *all* of the factors listed in West Virginia Code § 49-5-10(g). This Court has provided a great deal of guidance as to the trial court's duties in a discretionary transfer case and has overturned trial court determinations which considered less than all of these factors.

This statute is all inclusive and does not allow for any of the listed factors to be disregarded. A holistic appraisal of the child and his environment is consistent with the broad rehabilitative purposes of juvenile law, and reflects a legislative recognition that unlawful behavior is not simply a product of the evils of human nature; that criminal, anti-social behavior may have its genesis in a broken or violent home, in educational difficulties, or in poverty. The causes of a child's behavior, therefore, must be analyzed if the rehabilitative, child-saving purpose of our child welfare law is to be fulfilled.

State v. D.D., 172 W.Va. 791, 795, 310 S.E. 2d 858, 862 (1983), quoted in State v. Sonja B., 183 W.Va. 380, 384, 395 S.E. 2d 803, 807 (1990).

i. The State failed to present evidence of the juvenile's mental and physical condition.

The most glaring omission from the record in this case is the lack of any objective psychological evaluation or evidence regarding Larry T. A long and consistent line of cases from this Court establishes the importance of this information in juvenile transfer cases.

In State v. Michael S., 188 W.Va. 229, 231, 429 S.E. 2d 632, 634 (1992), the evidence at the transfer hearing included a psychological report from a school psychologist. However, the Court did not find that an adequate record had been made or that the Court had made the detailed careful analysis required by law. Further, inadequate evidence was found for transfer in State v. Sonja B., 183 W.Va. 380, 395 S.E. 2d 803 (1990). The opinion commented, “It would also seem that in view of the length of time the juvenile system had dealt with Sonja and the number of placements she had been through, there surely must have been probation reports, psychological evaluations, or even social summaries that could have been examined.” Id. at 384, 395 S.E.2d at 807. In C.J.S., 164 W.Va. 473, 475, 263 S.E. 2d 899, 903, (1980), the Court found significance in the fact that no expert witnesses, no physicians or psychologists testified, and no school records were assessed.

The type of evidence which is necessary on the issue of mental and physical condition is shown in In the Matter of Joseph M., 193 W.Va. 443, 457 S.E. 2d 120 (1995). In that case, the State presented the expert testimony of a child psychiatrist who had examined the juvenile and provided testimony regarding his potential for rehabilitation. In State v. Gary F., 189 W.Va. 523, 532, 432 S.E. 2d 793, 801 (1993), it was found that the Circuit Court had considered sufficient and appropriate evidence regarding the statutory factors. In that case, the State also presented testimony by a psychiatrist.

This Court has provided a great deal of guidance as to what evidence needs to be considered, and as a result, it is surprising that no psychiatric, psychological, or anger management services have ever been offered to Larry T. by the West Virginia

Department of Health and Human Resources, or any other related agency. Larry T.'s probation officer, Ricky Smoot, testified he underwent a substance abuse assessment on an unrelated charged in May of 2008 (10/7/2008, Tr. 52); however, the State did not enter the report into evidence at the transfer hearing (10/7/2008, Tr. 55). Further, a psychological and sexual offender assessment was ordered by the Juvenile Referee on September 8, 2008. Nevertheless, at the time of the transfer hearing the status of those reports was unknown.

In addition, the Kanawha County Juvenile Probation Department regularly conducts background investigations and prepares reports for the Court on matters of disposition and placement. These comprehensive reports are routinely requested in minor juvenile matters. No report was requested by the State or ordered by the Court in this matter for Larry T.'s previous charge of obstructing and public intoxication or his current charge.

While Mr. Smoot was called to testify, he had no knowledge regarding Larry T.'s mental condition (10/7/2008, Tr. 58). Further, due to the fact no testing has ever been performed, it is questionable whether the State and the trial court had any true knowledge of the "juvenile's mental and physical condition, maturity, [and] emotional attitude," which are factors the Court is statutorily required to consider in a transfer hearing pursuant to West Virginia Code § 49-5-10(g).

The trial court nonetheless found there was sufficient evidence of Larry T.'s mental and physical condition. The court Order states, "Considering the juvenile respondent's age, the Court finds that his mental and physical condition was that of an adult when he engaged in the alleged offense. Although age is not the determinative

factor, the juvenile respondent was only two days away from his eighteenth birthday when the alleged incident occurred; therefore he has sufficient mental and physical abilities to understand his body and his actions.” (Transfer Order, Page 8).

The West Virginia Supreme Court has also addressed the consideration of age in regards to a transfer from the juvenile jurisdiction. Age of the juvenile is of some significance as it bears upon the opportunity of the Court to exercise its jurisdiction and to select appropriate procedures for rehabilitation; “however age alone should never be the determinative factor.” State v. Scott, 160 W.Va. 730, 734, 238 S.E. 2d 223, 226 (1977). Yet the trial court specifically stated, “considering the juvenile respondent’s age, the Court finds that his mental and physical condition was that of an adult.” (Transfer Order Page 8). The Court relied only upon the age of the juvenile in assessing the juvenile’s mental and physical condition and the Supreme Court in Scott was emphatically clear that age alone should never be the determinative factor.

Also, it is important to note that at the conclusion of the transfer hearing, when the Court inquired if there was anything else to take up today, the State responded:

Ms. Smith (Prosecutor): Just that, your Honor, it may help with the personal factors if we had the benefit of the sexual abuse assessment and the psychological, which are still pending. I wonder if the Court wouldn’t hold that in abeyance –

The Court: The opportunity to present evidence is today, not some time later.

Ms. Smith: Okay, thank you your honor.

(10/7/2008, Tr. 76-77).

Therefore, even the State had grave doubts as to whether they met their burden on the discretionary transfer.

ii. The State failed to present evidence of the juvenile's home or family environment.

Another factor the Court is statutorily required to consider in a transfer hearing pursuant to West Virginia Code § 49-5-10(g) is the juvenile petitioner's "home or family environment." In State v. Michael S., 188 W.Va. 229, 423 S.E.2d 632 (1992), a juvenile probation report was submitted prior to the juvenile transfer hearing, and the Supreme Court found that the probation officer's investigation and report were insufficient because the probation officer, in her investigations, had only interviewed the juvenile respondent for forty-five minutes, and had never spoken to any of the juvenile respondent's relatives, other than the juvenile respondent's mother. In this case, the Court did not even have as much information as was found inadequate in Michael S.

In the present matter, the State called Ricky Smoot who testified he conducted no home visits while supervising Larry T. (10/7/2008, Tr. 59) and only met with him for four office meetings (10/7/2008, Tr. 50). Further, no probation report was ever ordered nor an investigation conducted.

The little bit of evidence the trial court received regarding Larry T.'s home or family environment came from his mother and was positive and would mitigate against transfer. Larry T.'s mother, Patsy T., testified he cooperated fully while on probation, maintaining employment and working towards his GED at Garnet (10/7/2008, Tr. 63-64). Further, Ms. T. testified Larry T. had been on probation since June 2008, and had followed all of the rules of probation (10/7/2008, Tr. Page 68).

The Court, however, did not even address the juvenile's home or family environment in the Transfer Order.

iii. The State failed to present evidence of the juvenile's maturity and emotional attitude.

Regarding Larry T.'s emotional attitude and maturity, the Court's order states, "the fact that the juvenile was working while also furthering his education shows that his maturity was that of an adult when the offense allegedly occurred." (Transfer Order, Page 8). Further, since Larry T. baby-sat for the victim, the juvenile was "mature enough to know that he was in a position of responsibility to care for Jessica [C.]" (Transfer Order, Page 8).

The inclusion of this simplistic, conclusory remark in the transfer order illustrates the chasm of misunderstanding separating the Circuit Court's ruling from the requirements of the transfer statute and guidance of this Court's precedent. If that were sound reasoning, courts would be able to transfer every fourteen-year-old neighborhood babysitter because she demonstrates the maturity of an adult by going to school and working. Mr. Smoot and Larry T.'s mother testified Larry T. was maintaining employment, working towards his GED and following the rules of probation. If anything, judging by the evidence presented through testimony, Larry possesses the maturity and emotional attitude to benefit from the dispositional options available in the juvenile system.

iv. The State failed to present evidence of the juvenile's school experience.

Although required by statute, the trial court did not even address Larry T.'s school experience in the transfer order. Further, neither teachers nor counselors were called as witnesses and no school records or standardized test scores were submitted into evidence. Larry T.'s overall school record with Kanawha County Schools, which would have been easily accessible by the juvenile probation department, was not placed into evidence. Mr. Smoot did not gather Larry T.'s Kanawha County school records while supervising him or for the purposes of the transfer hearing (10/7/2008, Tr. 59). The only school factor Mr. Smoot could testify to was that Larry T. was attending Garnet at the time of the allegation (10/7/2008, Tr. 59). Mr. Smoot had no knowledge of how Larry T. was doing in school prior to attending Garnet GED (10/7/2008, Tr. Page 60).

v. The State failed to present evidence of the juvenile's reasonable prospects for rehabilitation and similar personal factors.

Further, in considering whether to transfer a juvenile to criminal jurisdiction, an evaluation of the prospects for rehabilitation must be undertaken. In the Matter of Joseph M., 193 W.Va. 443, 457 S.E. 2d 120 (1995). The State is also required to produce clear and convincing proof there are no reasonable prospects for rehabilitating the juvenile through resources available to this Court. To meet this burden, the State must show that consideration has been given to all alternatives, and if all alternatives have been rejected, the reasons for their rejection must be shown. State v. M.M. 163 W.Va. 235, 256 S.E. 2d 549 (1979).

The State offered no evidence that any prospects for rehabilitation were explored, nor did the State offer evidence Larry T. would not be amenable to rehabilitation. The State offered no evidence that it even considered the rehabilitative alternatives available through the juvenile jurisdiction.

Larry T. still has rehabilitative options in the juvenile jurisdiction. If adjudicated a delinquent child Larry T. could be sentenced to the West Virginia Industrial Home for the Youth until age twenty-one (21). The West Virginia Industrial Home for the Youth is a secure detention facility with an on-grounds school, individual and group therapy, and vocational training. Further, while serving a sentence at the West Virginia Industrial Home for the Youth, Larry T. could be placed in the sexual offender unit which offers individual therapy for juvenile sexual offenders.

If transferred to the criminal jurisdiction and convicted, he faces a one to five year sentence in an adult prison. If convicted as an adult, he would be eligible for parole in one year and would likely discharge before his twenty-first birthday. In addition, in the adult facility he would not have age-appropriate rehabilitative resources offered at the West Virginia Industrial Home for the Youth.

Mr. Smoot testified Larry T. has not undergone any treatment through the juvenile justice system. He has never been placed in a group home or other residential treatment facility for therapy and treatment while in the juvenile justice system. He has never undergone therapy, either outpatient or inpatient for depression or substance abuse in the juvenile justice system. (10/7/2008, Tr. 56-58). Ms. T. also confirmed Larry T. has had no treatment through the juvenile system, no therapy either inpatient or outpatient, and no substance abuse counseling. (10/7/2008, Tr. 68).

The Court stated, “finally with regard to rehabilitation, the Court concludes that the juvenile respondent does not have significant rehabilitative potential as he was already on probation when he committed the alleged sexual abuse.” (Transfer Order, Page 9).

While it is true Larry T. was on probation, he has only been on probation since June 2008 and had responded remarkably well to the structure. He was abstaining from drug and alcohol use, complying with the rules of probation, maintaining employment and working towards his GED.

Although the Code permits a transfer motion based on a single felony petition, the structure of the transfer statute makes it clear that the lack of previous felony convictions is a factor that weighs against transfer. More importantly, it is very difficult to conclude that a juvenile like Larry T. would not be amenable to rehabilitation with such limited experiences in the juvenile justice system and with the resources to provide secure treatment until age twenty one (21).

III. THE CIRCUIT COURT OF KANAWHA COUNTY ERRED IN FINDING PROBABLE CAUSE LARRY T. COMMITTED THE OFFENSE OF FIRST DEGREE SEXUAL ABUSE.

A. Standard of Review.

In reviewing orders the Court applies “the deferential, ‘clearly erroneous’ standard of review to factual findings by the circuit court; we review the circuit court’s legal conclusions under the non-deferential, ‘de novo’ standard.” State v. Rush., 219 W.Va. 717, 725, 639 S.E.2d 809, 817 (2006).

B. There was Insufficient Evidence to Find Probable Cause of a First Degree Sexual Abuse on or about July 24, 2008.

Before a juvenile can be transferred to criminal jurisdiction, the Court must find there is probable cause to believe the juvenile committed an offense contained in the juvenile petition. State v. Largent, 172 W.Va. 281, 304 S.E. 2d 868 (1983). Probable cause for the purpose of transfer of a juvenile to criminal jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause for purposes of a transfer of a juvenile to the criminal jurisdiction exists when the facts and circumstances are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it. In re Moss, 170 W.Va. 543, 295 S.E. 2d 33 (1982).

W.Va. Code § 49-5-10(g)(1) (2001) (2004 Repl. Vol.), states a juvenile may be transferred to the criminal jurisdiction if there is probable cause to believe that: “The juvenile, who is at least fourteen years of age, has committed an offense of violence to a person which would be a felony if the juvenile was an adult.”

In this case, Larry T. was charged with being a juvenile delinquent within the meaning of West Virginia Code § 49-1-4(9) (1998) (2004 Repl. Vol.), in that the juvenile respondent on or about July 24, 2008, committed the offense of sexual abuse in the first degree. W.Va. Code § 61-8B-7 (2006) (2005 Repl. Vol.). The Code states “(a) a person is guilty of sexual abuse in the first degree when: (3) such person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less.” W.Va. Code § 61-8B-7, in part.

The West Virginia Code defines sexual contact as “any intentional touching, either directly or through clothing, of the anus, or any part of the sex organs of another person, or the breast of a female or intentional touching of any part of another person’s body by the actor’s sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desires of either party.” W.Va. Code § 61-8B-1(6) (2007).

The State called Jennifer Foster as their first witness. Ms. Foster testified she questioned Larry T. about his contact with her daughter, J. C., a few days before his birthday, July 26, 2008. Ms. Foster testified that while in the presence of her husband Joey Huff, Larry T. stated he put his hand down J. C.’s pants and “fingered her” the day before his birthday, July 23 2008 (10/7/2008, Tr. 11).

The State then called Joey Huff, Larry T.’s brother and wife of Jennifer Foster. Mr. Huff testified he was present when Ms. Foster questioned Larry T. Mr. Huff’s testimony contradicted Ms. Fosters’ in that he testified that Larry T. stated he put his hands “right there on the side of her panties.” (10/7/2008, Tr. 22).

The State also called J. C. who testified that Larry T. touched her in the stomach area with his hand on or about July 24, 2008. (10/7/2008, Tr. 39). J.C. also testified Larry T. put his girlfriend L. B.'s hand on her stomach area. (10/7/2008, Tr. 39). At no time did J. C. testify that on or about July 24, 2008, Larry T. intentionally touched her sex organs or breasts.

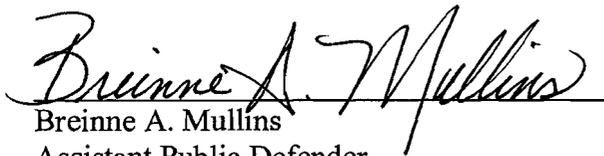
Thus, according to the alleged victim, J.C., there was no evidence that the juvenile respondent made sexual contact with her on or about July 24, 2008.

REQUEST FOR RELIEF

Wherefore, the Petitioner Larry T. respectfully requests that this Honorable Court reverse his transfer to the criminal jurisdiction of the Kanawha County Circuit Court and remand this case to the juvenile court.

Respectfully submitted,

LARRY T.
By Counsel



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CERTIFICATE OF SERVICE

I, Breinne Mullins, hereby certify at on the 24th day of April, 2009, I mailed a copy of the foregoing Appellant's Brief to Counsel for the Appellee, Dawn E. Warfield, Deputy Attorney General, 1900 Kanawha Boulevard East, Room E-26, Charleston, West Virginia 25305.


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