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NO. 34744

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

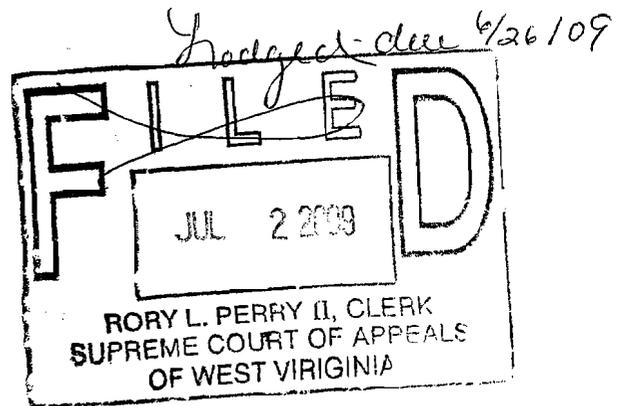
STATE OF WEST VIRGINIA,

*Appellee,*

v.

LARRY T.,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

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

Larry T. (hereafter “Appellant”) appeals the October 20, 2008, judgment of the Circuit Court of Kanawha County (Bloom, J.), which denied Appellant’s motion to dismiss and ordered that Appellant be transferred to the criminal jurisdiction of the court.

On appeal, Appellant contends that the circuit court wrongfully transferred the matter in violation of West Virginia Code § 49-5-10(b) [2001], failed to give adequate consideration to all of the factors required by the discretionary transfer statute, and erred in finding probable cause that Appellant committed First Degree Sexual Abuse.

II.

**STATEMENT OF FACTS  
AND PROCEDURAL HISTORY**

On July 24, 2008, Appellant, two days shy of his 18th birthday, admitted to sexually abusing J.C., his ten-year-old step-niece. Appellant was confronted by the victim’s mother, Jennifer Foster,

at which time he cried and admitted that he had put his hands down J.C.'s pants and "fingered around with her." (Tr. 10-11.)<sup>1</sup> For years there had been rumors circulating that Appellant was "supposedly touching [J.C.] in her private parts." (Tr. 22.) Appellant told Ms. Foster and his brother, Joseph Huff, that the rumors were true. (Tr. 11, 22.) Appellant also told his brother that he was "tired of hiding it," and stated that on or about July 24, 2008, he had put his hand on the "side of her panties." (Tr. 22.)

West Virginia State Trooper Tina Divita interviewed the victim on August 18, 2008. (Tr. 26.) During this interview, J.C. told Trooper Divita that Appellant had been coming into her bedroom at night and touching her, roughly every other weekend for the past three years. (Ex. 1.)<sup>2</sup> J.C. told Trooper Divita that Appellant put his finger on and inside her "kitty cat" (which is what she called her vagina). She also said that Appellant put his genitalia (which she called his "nuts") in her "kitty cat" on two occasions. (*Id.*) J.C. informed Trooper Divita that she woke up one night to find Appellant on top of her, with "his thing out." She stated that she felt his "thing" on her leg. J.C. cried and told Trooper Divita that she had wanted to tell her mother about the abuse, but was scared to because Appellant had told her not to tell anyone. (Ex. 1.) J.C. stated that ever since her mother learned about the abuse, Appellant has not been allowed to come to her home. When asked what else was going on, J.C. said she was "just having a good time" because she no longer had to worry about Appellant's abuse when she slept. (*Id.*)

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<sup>1</sup>"Tr." citations are to the transcript of Appellant's transfer hearing on October 7, 2008.

<sup>2</sup>"Ex. 1" citations are to State's Exhibit #1, the DVD of the video interview between J.C. and Trooper Divita.

On August 21, 2008, Detective Paris Workman interviewed Appellant at the Marmet Police Department. (Ex. 2.)<sup>3</sup> During this interview, Appellant initially denied all allegations of abuse. However, as Detective Workman was about to go off the record, Appellant said he had something to add. He admitted to touching J.C. three years ago. (*Id.*) Following this admission, Appellant began to change his story to admit to thinking about and starting to touch her, but not actually doing it. By the end of this interview, Appellant had given Detective Workman three different stories. (*Id.*) On September 2, 2008, a juvenile delinquency petition, 2008-JD-286, was filed against Appellant charging him with First Degree Sexual Abuse. (R. 1.) At the time, Appellant was already serving one year of probation after pleading guilty to public intoxication and obstructing. (Tr. 50.)

On September 8, 2008, the juvenile referee found probable cause at a preliminary hearing, and ordered Appellant placed in a secure juvenile detention facility. (R. 10-14.) On that day, the referee also ordered that a post-adjudication psychological evaluation and a sexual offender assessment be conducted to aid the court in disposition. (R. 7-8, 12.) On September 8, 2008, Appellant's counsel signed a form entitled "Waiver of West Virginia State Code 49-5-13(a)" in which she refused to waive the application of this statute. This refusal resulted in prohibiting any psychological examination "and other investigative and social reports" from "being made available to the court until after the adjudicatory hearing." (R. 9.)

On September 26, 2008, Appellant entered a plea of not guilty to the charge against him at an arraignment hearing, and a jury trial was set for October 15, 2008. (R. 17-18.) The State filed a motion to transfer the case to the criminal jurisdiction of the court on October 1, 2008, pursuant to

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<sup>3</sup>"Ex. 2" citations are to State's Exhibit #2, the tape recorded interview between Appellant and Detective Workman.

West Virginia Code § 49-5-10(g)(1), on the grounds that Appellant, a juvenile over the age of fourteen, had committed an offense of violence to a person which would be a felony if he were an adult. The State argued that Appellant should be transferred to adult jurisdiction because at age 17 he “allegedly committed a First Degree Sexual Abuse” against 10-year-old J.C., in violation of West Virginia Code 61-8B-7(a)(3). (R. 29-30.)

The circuit court held a transfer hearing on October 7, 2008, at which time Appellant moved to dismiss the transfer motion pursuant to West Virginia Code § 49-5-10(b), because Appellant had already been arraigned. (Tr. 5.)<sup>4</sup> The prosecuting attorney responded that the motion to transfer was filed before any adjudication, as required by law. The court asked counsel to brief the issue, and allowed the transfer hearing to proceed. (Tr. 6.)

During the transfer hearing, the court heard testimony from several individuals, including the victim, J.C. First, the State called Jennifer Foster, the victim’s mother and Appellant’s sister-in-law. (Tr. 7.) She testified that Appellant babysat J.C. in her home “about every other weekend” for three to four years. (Tr. 9.) She also advised the court that Appellant had lived with her family two years ago, and again “right before his probation officer made him go home.” (Tr. 12.) Ms. Foster stated that on July 24, 2008, upon confessing to sexually abusing her daughter, Appellant cried and said, “It needs to come out. . . I did it.” (Tr. 10.)

The State then presented testimony from Appellant’s brother, Joseph Huff. The victim is Mr. Huff’s step-daughter. He testified that Appellant admitted to putting his hands on the side of J.C.’s panties on or about July 24, 2008. (Tr. 22.) Mr. Huff also stated that Appellant confirmed rumors

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<sup>4</sup>West Virginia Code § 49-5-10(b) [2001] provides: “No inquiry relative to admission or denial of the allegations of the charge or the demand for 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.”

from years before, admitting that he had indeed been touching the victim's "private parts." He testified that Appellant asked him "to give him another chance." (*Id.*)

The court viewed State's Exhibit #1, the video interview between J.C. and Trooper Divita. (Tr. 30.) The victim also testified at the transfer hearing. J.C. testified that Appellant had touched her with his hand, and put his hands down her pants "a lot." (Tr. 35-36.) She indicated that the abuse had been going on for quite awhile. (*Id.*) The victim testified that on or about July 24, 2008, Appellant and Laci, his girlfriend, were in her bed watching movies. (Tr. 38.) J.C. told the court that on that night Appellant took Laci's hand and placed it "a little bit down" from where her shorts came up to her tummy, and subsequently did the same with his own hand. (Tr. 39.)

In order to ascertain the appropriateness of transfer to the criminal system, the court also heard testimony from Appellant's probation officer, Ricky Smoot, and Appellant's mother, Patricia T. Mr. Smoot testified that Appellant was attending GED classes at Garnet Career Center and was reportedly working at a Long John Silvers restaurant. (Tr. 50-51.) Mr. Smoot had a copy of a drug abuse assessment of Appellant conducted by a psychologist, Henry Busse, which was ordered by the Juvenile Referee following the preliminary hearing on the previous charges. (Tr. 51-52.) This report indicated that Appellant had "admitted to several instances where he had been intoxicated, and also that he had abused prescription medications," including Lortab, Xanax, Clonipine and Adderall. (Tr. 53.) In the report, Appellant also admitted to using cocaine on two occasions. (*Id.*) Out of three drug screens performed while he was on bond or probation, Appellant tested positive for drugs once, and subsequent screens were negative. (Tr. 51-52.)

Regarding Appellant's home life and psychological factors, Mr. Smoot testified that when first placed on probation, Appellant had not been living with his mother. However, after being

ordered to do so by a judge, he moved back into his mother's home. (Tr. 52.) Mr. Smoot testified to his belief that Appellant was "competent" and "self-aware of what's going on." (Tr. 58.) He stated that, according to Mr. Busse's report, Appellant had a history of suicidal thoughts, but no suicide attempts. (Tr. 58.) In the past, Appellant had received treatment at Highland Hospital and Shawnee Hills Mental Health Center. (Tr. 59.)

Appellant's mother, Patricia T., gave testimony regarding his home life. She informed the court that prior to being placed in a juvenile detention facility for these charges, Appellant had been working 14 hours a week at Long John Silvers for about five months. (Tr. 62-63.) Ms. T. informed the court that she was Appellant's adopted mother, but that he had a good relationship with his biological parents. (Tr. 66.) She further testified that Appellant had been "more mature" since being placed on probation. (Tr. 62.)

In Appellant's brief on the procedural issue, counsel argued that because Appellant had entered a denial of the allegation and a request for a jury trial at the arraignment, the State was therefore precluded from proceeding with a transfer motion. (R. 58.) Appellant further alleged that the State was "us[ing] the transfer process to retaliate against a juvenile who refuses to admit to an allegation," and to gain "a tactical advantage." (R. 59.)

The State's brief argued that the transfer motion was filed in compliance with Kanawha County Circuit Court procedure, which divides juvenile proceedings into separate arraignment, adjudication and disposition hearings. Because jeopardy does not attach until the adjudication, the State argued that West Virginia Code § 49-5-10(b) does not preclude the filing of a transfer motion after an arraignment. (R. 77.) The State also contended that it complied with West Virginia Code

§ 49-5-10(a) because it filed the motion to transfer more than the required eight days before the adjudicatory hearing, and the transfer hearing took place prior to the trial. (R.78.)

On October 20, 2008, after hearing this testimony and reviewing briefs and arguments of counsel, the circuit court denied Appellant's motion to dismiss and ordered that the matter be transferred to the criminal jurisdiction of the court. (R. 83.)

In its order transferring the case to criminal jurisdiction, the circuit court concluded that West Virginia Code § 49-5-10(b) "*presupposes* that the State has already filed a motion to transfer" and therefore does not apply until after a motion to transfer has been filed. (R. 88; emphasis in original.)

The circuit court also held that "[b]ased on the testimony of Jennifer Foster, the victim's mother, and the victim, [J.C.], the Court concludes that there is probable cause to believe that on or about July 24, 2008, the juvenile respondent committed First Degree Sexual Abuse" against J.C. (R. 89.) "Specifically, there is probable cause to believe that the juvenile respondent put his hands down [J.C.]'s pants and intentionally touched her sex organs." (*Id.*) Furthermore, the court held: "Considering that the victim was only ten years old at the time of the alleged incident, and incapable of consent, the Court concludes that the juvenile respondent used physical force to commit the alleged offense," thereby making the offense one of violence. (R. 90.) After weighing the relevant factors under the discretionary transfer statute and considering the testimony presented, the circuit court concluded that "the juvenile respondent shall be transferred to the criminal jurisdiction of the Court." (R. 91.)

It is from this order that the Appellant now appeals.

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's response.

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).

#### State's Response:

West Virginia Code § 49-5-10(b), when read in context, prohibits the court from asking a juvenile to admit or deny the allegations set forth in the juvenile petition after a motion to transfer has been filed, and before the final transfer determination has been made. However, this provision does not apply when an arraignment takes place prior to the motion to transfer even being filed.

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.

#### State's Response:

The circuit court considered all of the statutorily required factors prior to its decision to transfer Appellant to criminal jurisdiction. Furthermore, as a result of Appellant's refusal to waive West Virginia Code § 49-5-13(a), the court would have been prohibited from considering the psychological evaluation and sexual offender assessment that were ordered by the juvenile referee, even if they had been available at the time of the transfer hearing.

The Circuit Court of Kanawha County erred in finding probable cause Larry T. committed the offense of first degree sexual abuse.

#### State's Response:

The circuit court had probable cause to believe that Appellant committed the offense of first degree sexual abuse, a crime of violence that would be a felony if committed by an adult.

#### IV.

#### ARGUMENT

A. WEST VIRGINIA CODE § 49-5-10(b), WHEN READ IN CONTEXT, PROHIBITS A COURT FROM ASKING A JUVENILE TO ADMIT OR DENY THE ALLEGATIONS OF THE CHARGE AFTER A MOTION TO TRANSFER HAS BEEN FILED, AND BEFORE THE FINAL TRANSFER DETERMINATION HAS BEEN MADE. HOWEVER, THIS PROVISION DOES NOT APPLY WHEN AN ARRAIGNMENT TAKES PLACE PRIOR TO THE MOTION TO TRANSFER BEING FILED.

1. The Standard of Review.

“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).

Syl. Pt. 2, *In the Matter of Steven William T.*, 201 W. Va. 654, 499 S.E.2d 876 (1997).

2. West Virginia Code § 49-5-10(b) Does Not Apply When a Motion to Transfer Has Not Yet Been Filed.

West Virginia Code § 49-5-10 [2001] provides in relevant part:

(a) Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing . . . the court shall conduct a hearing to determine if juvenile jurisdiction should or must be waived and the proceeding transferred to the criminal jurisdiction of the court. . . . Any hearing held under the provisions of this section is to be held within seven days of the filing of the motion for transfer unless it is continued for good cause.

(b) No inquiry relative to the admission or denial of the allegations 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.

Appellant contends that subsection (b) of this statute prohibits the State from filing a transfer motion once the juvenile has denied the allegations of the juvenile petition.

Regarding the application of West Virginia Code § 49-5-10(b), the circuit court held:

The juvenile respondent argues that subsection (b) of W. Va. Code § 49-5-10 prohibited the State from filing a motion to transfer after the arraignment hearing wherein the juvenile denied the allegations of the charge.

Although the juvenile respondent points to subsection (b) to support his assertion, “a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.” *See* also Syl. pt. 3, *In re Estate of Lewis*, 217 W. Va. 48, 614 S.E.2d 695 (2005); *Id.* at Syl. pt. 2 (“A cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context.”)

The statute at issue, W. Va. Code § 49-5-10, is titled “Waiver and transfer of jurisdiction.” It begins by stating, in subsection (a), that, “Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing . . . the court shall conduct a hearing to determine if juvenile jurisdiction should or must be waived and the proceeding transferred to the criminal jurisdiction of the court[.] Any hearing held under the provisions of this section is to be held within seven days of the filing of the motion to transfer.”

Next, subsection (b) states, “No inquiry relative to admission or denial of the allegations of the charge or the demand for 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.” W. Va. Code § 49-5-10.

Reading subsection (b) of W. Va. Code § 49-5-10 in context, the Court concludes that subsection (b) *presupposes* that the State has already filed a motion to transfer under subsection (a) of W. Va. Code § 49-5-10. Therefore, 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 determine[d] whether the proceeding should be transferred.

In the matter at hand, the arraignment and the juvenile respondent’s denial of guilt occurred prior to the time the State had even filed its Motion to Transfer.

Accordingly, the Court finds no merit in the juvenile respondent’s assertion and his motion to dismiss is denied.

(R. 87-88; emphasis in original.)

This interpretation is also consistent with case law. West Virginia Code § 49-5-10(b) “merely stays further proceedings, such as arraignment, until the court has made its decision whether to transfer the child to adult jurisdiction.” *Arbogast v. R.B.C.*, 171 W. Va. 737, 741, 301 S.E.2d 827, 831 (1983) (per curiam), *rev’d in part on other grounds, E.B., Jr. v. Canterbury*, 183 W. Va. 197, 201, 394 S.E.2d 892, 896 (1990). This language supports the circuit court’s conclusions because it is impossible to “stay” a proceeding that has not yet begun. Therefore, once a motion to transfer has been filed, the proceedings are stayed until the court makes its transfer determination. However, if the motion to transfer has not been filed, there are no proceedings to stay, and the court can ask the juvenile to answer to the juvenile charges. Upon denial of the juvenile allegations, the State may file a motion to transfer the case to criminal jurisdiction.

For example, in *Comer v. Tom A.M.*, 184 W. Va. 634, 403 S.E.2d 182 (1991) (per curiam), a juvenile was charged with the sexual assault of his sister on January 16, 1990. He was arraigned that same evening before a magistrate. The juvenile petition was filed January 19, 1990, and the State timely moved to transfer the juvenile to the court’s criminal jurisdiction. A transfer hearing was held on January 29, 1990, and the circuit court granted the motion to transfer on February 1, 1990. The procedure of arraigning the juvenile prior to the transfer decision was not even questioned. *See* 184 W. Va. at 636, 403 S.E.2d at 184.

3. **Appellant Was Not Prejudiced by the State’s Filing the Motion to Transfer Following the Juvenile’s Denial of the Allegations at the Arraignment.**

Appellant alleges that the State is using the motion to transfer “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.” (Appellant’s Brief at 12.) However, Appellant does not state what tactical advantage

the State would gain by doing so. In his brief, Appellant repeatedly asserts that “the State lied” to him when the prosecutor said she did not intend to transfer this case. However, by the time the prosecutor made this statement, Appellant had already entered his plea of “Not guilty.” (9/26/09 Arraignment Tr. 4-5.) Obviously, this had absolutely no bearing on Appellant’s plea.

Nor has Appellant demonstrated any vindictive or retaliatory motive in the State’s decision to file the motion to transfer this case to criminal jurisdiction. During the arraignment hearing, the prosecutor advised the court that there was a preliminary hearing scheduled on another juvenile petition charging Appellant with First Degree Sexual Assault based on this same incident, and that she intended to transfer that case. (9/26/09 Arraignment Tr. 5.) However, when the juvenile referee failed to find probable cause on that charge, the prosecutor decided to file a transfer motion in this case. (Tr. 5-6.) This was an entirely reasonable decision given the serious nature of this offense, and does not support any inference of retaliation.

In *E.B., Jr., v. Canterbury*, 183 W. Va. 197, 199 n.1, 394 S.E.2d 892, 894 n.1 (1990), the State offered to let E.B., Jr. plead guilty to a juvenile petition in exchange for the State not seeking to transfer him to adult status. Had the juvenile refused the offer, the State’s subsequent decision to file a transfer petition could be considered retaliatory. No similar circumstances are presented here, and Appellant has not been “punished” for pleading not guilty and exercising his right to a jury trial.

While the Kanawha County Circuit Court’s practice of holding separate arraignments in juvenile cases is admittedly inconsistent with the procedures set forth in the West Virginia Code, in the present case Appellant denied the allegations against him, and therefore will not and cannot be prejudiced. If Appellant had admitted the allegations, he would have been adjudicated as a juvenile,

and the State would have been precluded from transferring the case for reasons of double jeopardy. *See* W. Va. Code § 49-5-11(c); *State ex. rel. Smith v. Scott*, 160 W. Va. 730, 735, 238 S.E.2d 223, 226 (1977). However, Appellant’s denial of the juvenile allegations will have no effect on a possible criminal trial.

As long as a transfer hearing is held prior to the adjudicatory hearing, there are no double jeopardy problems because a transfer hearing “is not intended to establish guilt.” *Id.* Because the transfer hearing was held prior to the scheduled adjudication, Appellant has not been subjected to double jeopardy.

Furthermore, Appellant was not prejudiced because if the transfer is upheld he will receive a trial by jury under the court’s criminal jurisdiction. In *Scott*, this Court said that judges who preside over transfer hearings and are exposed to evidence and facts regarding the alleged crime are “not ordinarily precluded from holding a subsequent adjudicatory or criminal proceeding.” *Scott*, 160 W. Va. at 735 n.3, 238 S.E.2d at 227 n.3. This is because “the integrity of the fact-finding process is preserved by the right to have a jury trial.” *Id.*

The circuit court did not err in refusing to dismiss the transfer petition on these grounds.

**B. THE CIRCUIT COURT CONSIDERED ALL OF THE STATUTORILY REQUIRED FACTORS PRIOR TO ITS DECISION TO TRANSFER APPELLANT TO CRIMINAL JURISDICTION. FURTHERMORE, AS A RESULT OF APPELLANT’S REFUSAL TO WAIVE WEST VIRGINIA CODE § 49-5-13(a), THE COURT WAS PROHIBITED FROM CONSIDERING THE PSYCHOLOGICAL EVALUATION AND SEXUAL OFFENDER ASSESSMENT THAT WERE ORDERED.**

**1. The Standard of Review.**

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.

Syl. Pt. 1, in part, *State v. Bannister*, 162 W. Va. 447, 250 S.E.2d 53 (1978).

2. **The Court Considered All of the Statutorily Required Factors Prior to its Decision to Transfer Appellant to Criminal Jurisdiction.**

The State filed a motion to transfer Appellant to the criminal jurisdiction of the court pursuant to West Virginia Code § 49-5-10(g)(1).<sup>5</sup> Therefore, “[b]efore 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.” Syllabus, in part, *In the Matter of Joseph M.*, 193 W. Va. 443, 457 S.E.2d 120 (1995) (per curiam).

What exactly constitutes a “careful, detailed analysis” is not precisely defined. The cases cited by Appellant demonstrate that there is no “magic formula” used by this Court to determine whether or not the lower court gave sufficient consideration to the statutory factors.

Moreover, these statutory factors alone are not determinative of whether transfer is appropriate in a particular case. “The juvenile law of this state has developed both statutorily and judicially.” *State v. Robert McL.*, 201 W. Va. 317, 320, 496 S.E.2d 887, 890 (1997) (citing *State v.*

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<sup>5</sup>West Virginia Code § 49-5-10(g)(1) [2001] states:

The court may, upon consideration of the juvenile’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that:

(1) 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[.]

*Sonja B.*, 183 W. Va. 380, 384, 395 S.E.2d 803, 807 (1990)). “We have said that in making such a transfer determination, a court is not limited to considering the specific personal factors about a juvenile which may be enumerated by a transfer statute, and may consider other factors which are promulgated by this Court. *State ex rel. Cook, supra*. See also Syllabus Point 1, *State ex rel. Smith v. Scott*, 160 W. Va. 730, 238 S.E.2d 223 (1977).” *Id.*

In the present case the circuit court heard testimony from Appellant’s probation officer and mother regarding his school attendance, employment, and problems with depression and substance abuse. The court also heard testimony at the transfer hearing from Appellant’s sister-in-law, brother, and step-niece. As a result of this testimony, the court had for its consideration evidence of a tearful confession, which the court considered sufficient to ascertain Appellant’s emotional attitude.

Regarding these factors, the circuit court made the following findings of fact:

The juvenile respondent was on probation when he was charged with First Degree Sexual Abuse. Specifically, he was sentenced to one year of probation on July 18, 2008, based on his plea of guilty to Public Intoxication and Obstructing an Officer.

Ricky Smoot, the juvenile respondent’s probation officer, testified at the transfer hearing that the juvenile respondent had not caused any problems while on probation.

Mr. Smoot further testified that he has documentation supporting that the juvenile respondent has been attending GED classes at Garnet Career Center, while also working at Long John Silver’s.

Finally, Mr. Smoot stated that the juvenile respondent has admitted to having abused illegal substances in the past and did, in fact, test positive for marijuana following his preliminary hearing.

The juvenile respondent’s adopted mother, Patricia [T.], testified that he has been more mature since going on probation in July 2008.

She testified that he has a history of depression, but he has not received any therapy since he was younger.

(R. 86-87.)

These findings of fact are supported by the record, and are not clearly erroneous. Regarding the statutory factors, the circuit court made the following conclusions of law:

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 2 days away from his eighteenth birthday when the alleged incident occurred; therefore, he had sufficient mental and physical abilities to understand his body and his actions.

The fact that the juvenile respondent was working while also furthering his education shows that his maturity was that of an adult when the offense allegedly occurred. Additionally, considering that he often baby-sat for the victim, the juvenile respondent was mature enough to know that he was in a position of responsibility to care for [J.C.].

As the juvenile respondent admitted to committing the alleged acts and cried when he discussed the incident with the victim's parents, the Court concludes that his emotional attitude was that of an adult at the time of the alleged incident.

Finally, with regard to rehabilitation, the Court concludes that the juvenile respondent does not have significant rehabilitation potential as he was already on probation when he committed the alleged sexual abuse.

Having weighed the relevant factors and considering the testimony presented, the Court concludes that the juvenile respondent shall be transferred to the criminal jurisdiction of the Court.

(R. 90-91.) These conclusions are also supported by the record, and are not clearly erroneous.

Appellant contends that the evidence introduced by the State during the transfer hearing was insufficient, and that the court failed to make specific findings on all of the statutory factors required by the transfer statute. While the evidence submitted at the transfer hearing was admittedly not comprehensive, it nevertheless supports the circuit court's decision to transfer the case.

**a. The court considered evidence regarding Appellant's mental and physical condition.**

The circuit court's findings and conclusions followed a transfer hearing during which the court heard testimony from Appellant's probation officer, Ricky Smoot, and his mother, Patricia T. Mr. Smoot had been acquainted with Appellant since July 18, 2008, when Appellant was placed on probation after pleading to public intoxication and obstructing. (Tr. 49-50.) Mr. Smoot's testimony included information from a drug abuse assessment conducted by psychologist Henry Busse as a result of that charge.<sup>6</sup> According to this assessment report, Appellant "admitted to a history of suicidal thoughts when angry, but denied any suicide attempts, and that he had been hospitalized at Highland Hospital at approximately 6 years old. And, he had received therapy at Shawnee Hills Mental Health Center." (Tr. 58-59.) The assessment also indicated that Appellant had a history of substance abuse, including cocaine and prescription medications. (Tr. 53.) Mr. Smoot testified to his belief that Appellant was "competent" and "self-aware." (Tr. 58.)

Appellant's mother also testified regarding his mental and physical condition. She testified that he had dropped out of high school as a result of his "bad nerves." (Tr. 63.) Ms. T. confirmed that Appellant had been treated for depression as a child with therapy at Shawnee Hills, but has had no treatment as a teenager. (Tr. 65, 67.) She also told the juvenile referee that she was concerned about Appellant's drug abuse. (Tr. 67.)

Appellant argues that "the most glaring omission from the record in this case is the lack of any objective psychological evaluation or evidence" regarding Appellant. (Appellant's Brief at 15.) He cites several decisions of this Court in juvenile transfer cases where psychological or psychiatric

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<sup>6</sup>Although a copy of this report is not in the record, the circuit court heard substantial testimony from Mr. Smoot regarding its contents.

reports or testimony were introduced, but none of these cases hold that such evidence is absolutely required before a transfer motion may be granted. In the present case, the circuit court did have the benefit of a substance abuse assessment by a psychologist, who also explored Appellant's mental and emotional factors. Although this report was not introduced into evidence, the court heard substantial testimony from Mr. Smoot regarding its contents.

Appellant also contends that the court based its determination of his mental and physical condition solely on his age. However, the record does not support this assertion. Moreover, this Court has held that "[t]he 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." *Scott*, 160 W. Va. at 734, 238 S.E.2d at 226. Consequently, the circuit court did not err in taking Appellant's age into consideration when making its decision.

**b. The court considered evidence regarding Appellant's home or family environment.**

Although it did not make specific findings in its transfer order, the circuit court did consider testimony regarding Appellant's home or family environment. Further, the court is not required to "mention in detail the testimony of each of the witnesses who offered pertinent social testimony" in its findings. *State v. Gary F.*, 189 W. Va. 523, 532, 432 S.E.2d 793, 802 (1993).

Appellant's mother testified that she was in fact his adopted mother. She informed the court that she adopted Appellant when he was two weeks old, and that Appellant has a good relationship with his biological parents. (Tr. 66.) She testified that, since Appellant was placed on probation, he has now been coming home when he should. (Tr. 62.) In addition, although presented in the "probable cause" portion of the transfer hearing, the court heard testimony from Appellant's sister-

in-law, step-niece, and brother indicating that Appellant had an unstable home environment. Jennifer Foster, Appellant's sister-in-law, testified that Appellant had lived with her roughly two years prior to the time that the abuse was reported, and again immediately preceding his probation. (Tr. 12.) Appellant moved back in with his mother only after the authorities ordered him to do so when he was placed on probation. (Tr. 52.) His step-niece testified that Appellant had put his hand down her pants "a lot." (Tr. 36.) This testimony is certainly indicative of Appellant's home or family environment.

**c. The court considered evidence regarding Appellant's maturity and emotional attitude.**

The court's conclusions in this regard were based in part on testimony from Appellant's probation officer. Mr. Smoot testified that Appellant told him he was working at a Long John Silvers restaurant. (Tr. 50-51.) However, Appellant's mother stated that he was only working 14 hours a week. (Tr. 62.) While Mr. Smoot stated that Appellant was pursuing his GED, he only had a record of Appellant attending classes at Garnet Career Center from June 2, 2008 to June 18, 2008. (Tr. 59.) Although Appellant's mother testified that he was doing better at home, she merely stated that since Appellant was placed on probation, he had been "coming home when he's supposed to" and acting "more mature." (Tr. 62.)

The court also considered testimony of Appellant's sister-in-law, Ms. Foster, that he had been babysitting J.C. regularly for several years. Ms. Foster also testified that, upon confessing to her that he had been sexually abusing her daughter, Appellant cried. (Tr. 11.) This was confirmed by Appellant's brother, Mr. Huff, who testified that Appellant begged him for another chance. (Tr. 22.) This showing of remorse gave the court an indication of Appellant's emotional attitude.

**d. The court considered evidence regarding Appellant's school experience.**

Mr. Smoot and Ms. T. also testified regarding Appellant's school experience. Mr. Smoot testified that Appellant attended Garnet Career Center from June 2, 2008, to June 18, 2008, in attempts to earn his GED. (Tr. 59-60.) However, there is no indication that Appellant ever obtained his GED following this brief attempt. Ms. T. testified that Appellant quit school "because he had bad nerves" and "kids were bothering him and making fun of his clothes, and everything." (Tr. 63.) She didn't remember exactly when that had occurred, but according to Mr. Busse's report Appellant dropped out of school in the 10th grade. (Tr. 54.)

**e. The court considered evidence regarding Appellant's prospects for rehabilitation and similar personal factors.**

Appellant argues that the court did not give sufficient consideration to his rehabilitation potential because "[t]he State offered no evidence that any prospects for rehabilitation were explored, nor did the State offer evidence [Appellant] would not be amenable to rehabilitation." (Appellant's Brief at 22.) He maintains that the burden of proof on the issue of rehabilitation is on the State, citing this Court's decision in *State v. M.M.*, 163 W. Va. 235, 256 S.E.2d 549 (1979). However, the holding of *M.M.* was based upon the 1977 version of West Virginia Code § 49-5-10(a), which was subsequently amended to relieve the State of this burden. "[T]he state is no longer expressly required to prove by clear and convincing evidence that there are 'no reasonable prospects for rehabilitating the child through resources available to the court[.]'" *State v. D.D.*, 172 W. Va. 791, 795, 310 S.E.2d 858, 861 (1983) (quoting *State ex rel. Cook v. Helms*, 170 W. Va. 200, 292 S.E.2d 610, 612 (1981)).

Moreover, this Court has expressly held that “it is not enough for the child ‘to show that the State has not sufficiently examined his rehabilitation potential and options within the juvenile system. The [child] should affirmatively show that he has rehabilitation potential and options within the juvenile system.’” *Joseph M.*, 193 W. Va. at 445, 457 S.E.2d at 122 (quoting *State v. Michael S.*, 188 W. Va. 229, 232 n.5, 423 S.E.2d 632, 635 n.5 (1992)). However, Appellant’s counsel introduced no evidence that Appellant had significant rehabilitation potential. In fact, no witnesses were called by the defense regarding any of Appellant’s personal factors, including his potential for rehabilitation.

This Court has held that “previous acts of delinquency, their frequency, seriousness and relationship to the present charge are all relevant considerations in determining the rehabilitative prospects of the juvenile.” *Scott*, 160 W. Va. at 734, 238 S.E.2d at 226; *see also In re E.H.*, 166 W. Va. 615, 625, 276 S.E.2d 557, 564 (1981) (“the juvenile’s prior record [is] one of the relevant factors that a court could consider at a transfer hearing”). In this case, the sexual abuse charged in the petition was committed by Appellant on or about July 24, 2008 – a mere six days after being placed on probation for previous offenses. Thus, the circuit court quite reasonably concluded that “the juvenile respondent does not have significant rehabilitation potential as he was already on probation when he committed the alleged sexual abuse.” (R. 91.) This finding came after the court had heard and considered the testimony of Mr. Smoot explaining the Appellant’s juvenile rehabilitative options with the West Virginia Home for Youth at Salem’s sexual offender program. (See Tr. 57.)

It is also important to note that even if Appellant is convicted under the criminal jurisdiction, he can still be sentenced as a juvenile. West Virginia Code § 49-5-13(e) [2005] provides:

Notwithstanding any other provision of this code to the contrary, if a juvenile charged with delinquency under this chapter is transferred to adult jurisdiction and there tried and convicted, the court may make its disposition in accordance with this section in lieu of sentencing such person as an adult.

Consequently, Appellant's rehabilitation options at the West Virginia Industrial Home for Youth may still be available, if the circuit court chooses this disposition option.

3. **As a Result of Appellant's Refusal to Waive West Virginia Code § 49-5-13(a), the Circuit Court Would Have Been Prohibited From Considering the Psychological Evaluation and Sexual Offender Assessment That Were Ordered.**

Appellant argues that the circuit court's consideration of the personal factors was insufficient, in large part because "there was no psychological evaluation, no substance abuse evaluation, no sexual offender evaluation" submitted into evidence. (Appellant's Brief at 14.) He further states that "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." (*Id.* at 17).

However, even if they had been available, the State would not have been able to submit these evaluations into evidence at the transfer hearing due to Appellant's refusal to waive the provisions of West Virginia Code § 49-5-13(a).<sup>7</sup> On September 8, 2008, counsel for Appellant signed a form entitled "Waiver of West Virginia State Code 49-5-13(a)," in which she checked the box stating, "Counsel for the Child does not waive the provision of West Virginia Code 49-5-13(a) prohibiting such reports from being made available to the court until after the adjudicatory hearing." (R. 9.)

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<sup>7</sup>West Virginia Code § 49-5-13(a) [2005] states: "The Court, upon its own motion, or upon request of counsel, may order a psychological examination of the juvenile. The report of such examination and other investigative and social reports shall not be made available to the court until *after the adjudicatory hearing.*" (Emphasis added.)

Because a transfer hearing is “not intended to establish guilt,” *Scott*, 160 W. Va. at 735, 238 S.E.2d at 226, it cannot be considered an adjudicatory hearing under this statute. Accordingly, the psychological evaluation and sexual offender assessment ordered by the juvenile referee to aid the court in disposition could not have been made available to the court during the transfer hearing.

The State was also under severe time constraints in presenting its evidence. West Virginia Code § 49-5-10(a) [2001] requires that a written motion to transfer be filed “at least eight days prior to the adjudicatory hearing” and further states that “[a]ny hearing held under the provisions of this section is to be held within seven days of the filing of the motion for transfer unless it is continued for good cause.” Therefore, even if Appellant’s counsel had waived the prohibition in West Virginia Code § 49-5-13(a), the transfer hearing had to be held within seven days of filing the motion regardless of the status of these reports, unless the hearing was “continued for good cause.” Counsel for Appellant did not even attempt to get a continuance for this purpose. Nor did Appellant introduce any evidence of his own regarding his psychological or emotional condition.

The circuit court’s findings on the statutory factors were supported by the evidence before it and were not clearly erroneous. This Court should therefore affirm its decision to transfer Appellant’s case to adult jurisdiction on these grounds.

**C. THE CIRCUIT COURT HAD PROBABLE CAUSE TO BELIEVE THAT APPELLANT COMMITTED THE OFFENSE OF FIRST DEGREE SEXUAL ABUSE.**

**1. The Standard of Review.**

“Generally, findings of fact are reviewed [by this Court] for clear error and conclusions of law are reviewed de novo.” Syl. Pt. 1, in part, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996).

In reviewing orders in juvenile-to-adult-jurisdiction transfer proceedings, we apply 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.

*In re James L.P.*, 205 W. Va. 1, 3, 516 S.E.2d 15, 17 (1999) (per curiam).

2. **The Circuit Court of Kanawha County Correctly Found Probable Cause to Believe that Appellant Committed First Degree Sexual Abuse.**

Before a juvenile may be transferred to adult jurisdiction, the court must find that there is “probable cause to believe that the juvenile has committed the offense alleged in the juvenile petition.” *Comer v. Tom A.M.*, 184 W. Va. 634, 640, 403 S.E.2d 182, 188 (1991) (per curiam).

This Court set forth the standard for determining probable cause in the context of a transfer hearing in Syllabus Point 1 of *In Interest of Moss*, 170 W. Va. 543, 295 S.E.2d 33 (1982):

Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it.

In the present case, Appellant was accused in a juvenile petition of committing First Degree Sexual Abuse, in violation of West Virginia Code § 61-8B-7(a)(3) [2006], which states: “A person is guilty of sexual abuse in the first degree when . . . [s]uch person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old.” “Sexual contact” is defined as “any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, 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 desire of either party.” W. Va. Code § 61-8B-1(6) [2007].

At the time of the alleged incident, it is undisputed that Appellant was 17 years old and the victim was 10 years old. The circuit court in its transfer order found that:

Based on the testimony of Jennifer Foster, the victim’s mother, and the victim, [J.C.], the Court concludes that there is probable cause to believe that on or about July 24, 2008, the juvenile responded committed First Degree Sexual Abuse against [J.C.] at her residence in Marmet, West Virginia. Specifically, there is probable cause to believe that the juvenile respondent put his hands down [J.C.’s] pants and intentionally touched her sex organs.

Further, an “offense of violence” under W. Va. Code §49-5-10(h) means “an offense which involves the use or threatened use of physical force against a person.”

Considering that the victim was only ten years old at the time of the alleged incident, and incapable of consent, the Court concludes that the juvenile respondent used physical force to commit the alleged offense.

(R. 89-90.)

Jennifer Foster testified at the transfer hearing that she left her house in Marmet between 8:00 and 9:00 p.m. on July 23, 2008, and returned home around 3:00 a.m. on July 24, 2008. (Tr. 15-16.) Appellant’s mother was babysitting J.C. and Foster’s two other children, and Appellant and his girlfriend were also there when she got back. (Tr. 15, 17.) Later that day, Ms. Foster asked Appellant what had happened while she was gone, and Appellant confessed to her that “he put his hands down her pants and fingered around with” J.C. (Tr. 10-11, 18.) J.C. testified that Appellant had put his hands down her pants “[a] lot”, the last time being at her house in Marmet. (Tr. 36.)

The circuit court also viewed State’s Exhibit #1, an interview between J.C. and Trooper Divita held on August 18, 2008. During this interview, J.C. told Trooper Divita that Appellant had been touching her approximately every other weekend for the past three years. (Ex. 1.) She also

informed Trooper Divita that the last time he touched her was this year, and that Appellant's girlfriend was present. Appellant's girlfriend was present on July 24, 2008. (Tr. 37-38.) J.C. said that on the night in question, Appellant and his girlfriend were lying on her bed with her when Appellant put the girlfriend's hand down inside the waistband of her pajamas and put his hand there too. (Ex. 1.) During the interview, J.C. was asked questions about who lived in her house at the time. This indicates that she was being questioned about the time alleged in the petition. (*Id.*)

Appellant argues that because his brother testified that Appellant admitted only to putting his hands "on the side of" J.C.'s panties, and because at the transfer hearing J.C. testified that Appellant had only touched her "in the stomach area" with his hand on or about July 24, 2008, there was no evidence that Appellant had "sexual contact" with J.C. on the date alleged in the petition. (Appellant's Brief at 25-26.) He also contends that Jennifer Foster's testimony was contradicted by that of her husband, who testified he was present when Ms. Foster questioned Appellant. However, Ms. Foster testified that her husband was not present when Appellant confessed to her that he had "fingered around with" J.C. (Tr. 11). Because Appellant made this statement after Ms. Foster asked him what had happened while she was gone, the clear implication is that it had occurred some time during the night of July 23, 2008, or the early morning hours of July 24, 2008. In addition, J.C. told Trooper Divita that Appellant put his hand down her pajama pants on that night. (Ex. 1.)

On the issue of probable cause, the circuit court made the following findings of fact:

The day after the alleged offense, the juvenile respondent admitted to the victim's mother, Jennifer Foster, that he had put his hands down [J.C.]'s pants and "fingered around with her." The juvenile respondent also started to cry and stated, "It needs to come out; I did it."

Joe Huff is the brother of the juvenile respondent and is married to the victim's mother, Jennifer Foster. The juvenile respondent stated to Mr. Huff and his wife, Ms. Foster, that "he was tired of hiding it; it was all true."

Trooper Tina Divita of the West Virginia State Police took a statement from the victim, Jessica Lynn Carpenter, on August 18, 2008, that was recorded. In this statement, the victim stated that the juvenile respondent had put his hands down her pants on or about July 24, 2008.

(R. 86.)

These findings of fact are supported by the record, and are not clearly erroneous. The State's burden in establishing probable cause is "more than mere suspicion and less than clear and convincing proof." Syl. Pt. 1, in part, *In Interest of Moss, supra*. The evidence in this case is sufficient that a "prudent person" would be warranted "in the belief that an offense has been committed and that the accused committed it." *Id.* For purposes of a juvenile transfer, the evidence need not establish by clear and convincing proof that Appellant had sexual contact with J.C. on or about July 24, 2008. Instead, the evidence need only be such that a reasonable person could conclude that Appellant committed First Degree Sexual Abuse on or about the date in question. That standard has been met here.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

*Respectfully submitted,*

STATE OF WEST VIRGINIA,  
*Appellee,*

by counsel,

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<sup>8</sup>Sarah A. Leonard, a second-year law student at the West Virginia University College of Law, provided substantial and invaluable assistance in the preparation of this Brief.

**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 2nd day of July, 2009, addressed as follows:

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