

ORIGINAL

990084

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 990084
District Court No. J-99-33

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 27 1999

STATE OF NORTH DAKOTA

In The Interest of L.G., a Child.

Tracy J. Mollick,

Petitioner/Appellee,

v.

D.G., J.G., and L.G.,

Respondents/Appellants.

Appeal from the Order on Request for Review in the Cass
County District Court, East Central Judicial District,
Honorable Norman J. Backes, Presiding.

BRIEF OF APPELLANT

Brian W. Nelson
ND Bar No. 02638
Mark T. Blumer
ND Bar No. 04669
NELSON LAW OFFICE
111 9th Street South
Fargo, ND 58103
Ph. (701) 237-4433
Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Issues Presented.....	iii
Statement of the Case.....	1
Statement of the Facts.....	3
Argument	
I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO REVIEW A TRANSCRIPT OF THE JUVENILE HEARING.....	6
II. WHETHER THE DISTRICT COURT ERRONEOUSLY DETERMINED THE JUVENILE REFEREE ERRED IN REFUSING TO ADMIT ADMISSIONS MADE BY THE JUVENILE.....	8
III. WHETHER THE DISTRICT COURT ERRONEOUSLY DETERMINED THE JUVENILE REFEREE ERRED IN FINDING NO PROBABLE CAUSE EXISTED TO SUPPORT THE FELONY CHARGE.....	12
Conclusion.....	14

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION:

Fifth Amendment.....10

STATE CASES:

Huff v. K.P.,
302 N.W.2d 779 (N.D. 1993).....10

In Interest of B.S.,
491 N.W.2d 31 (N.D. 1993).....9

In Interest of D.S.,
263 N.W.2d 114 (N.D. 1978).....9

In Interest of J.A.G.,
552 N.W.2d 317 (N.D. 1996).....14

In Interest of J.K.M.,
557 N.W.2d 229 (N.D. 1996).....13, 14

In Interest of T.M.,
512 N.W.2d 441 (N.D. 1994).....14

STATUTES:

North Dakota Century Code:

19-03.1-05.....6

19-03.1-23.....6

27-20-26.....9

27-20-34.....6, 12

NORTH DAKOTA COURT RULES:

Supreme Court Administrative Rules:

Rule 13.....6, 7

ISSUES PRESENTED

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO REVIEW A TRANSCRIPT OF THE JUVENILE HEARING.
- II. WHETHER THE DISTRICT COURT ERRONEOUSLY DETERMINED THE JUVENILE REFEREE ERRED IN REFUSING TO ADMIT ADMISSIONS MADE BY THE JUVENILE.
- III. WHETHER THE DISTRICT COURT ERRONEOUSLY DETERMINED THE JUVENILE REFEREE ERRED IN FINDING NO PROBABLE CAUSE EXISTED TO SUPPORT THE FELONY CHARGE.

STATEMENT OF THE CASE

On January 27, 1999, a Petition was filed in the Juvenile Court of Cass County, North Dakota, naming D.G., J.G., and L.G., a child, as Respondents. A: 3-5. A Motion for Transfer to Adult Court was also filed on that date. A: 6-7.

On February 10, 1999, Juvenile Court Referee Janice Benson Johnson conducted a hearing on the Motion for Transfer to Adult Court. T: 1-53. At the conclusion of the hearing, the Referee recommended that transfer be denied. T: 49-50. On February 11, 1999, the Referee entered a written order. A: 8-9.

On February 12, 1999, the Petitioner filed a Request for Review with the District Court. A: 10.

On March 8, 1999, the Honorable Norman J. Backes granted the Request for Review, reversing the recommendations of the Referee. A: 11-13.

On March 18, 1999, Respondent's Notice of Appeal was filed with the District Court. A: 14.

STATEMENT OF THE FACTS

L.G., a child, appeals from the Order on Request for Review entered by Cass County District Judge Norman J. Backes which reversed the recommendation of a Juvenile Referee Janice Benson Johnson that a Motion for Transfer to Adult Court should be denied. A: 11-13. The motion was based on the allegations contained in Count I of a Petition filed in Juvenile Court alleging L.G. committed the unlawful act of possession of a controlled substance with intent to deliver, in violation of Sections 19-03.1-05 and 19-03.1-23 of the North Dakota Century Code. A: 3-4.

The evidence adduced at the hearing in this matter revealed that on January 16, 1999, L.G.'s mother, J.G., contacted Officer Mark Hanson of the Fargo Police Department and requested that he visit her to discuss concerns she had about her son. T: 4, 36-37. Officer Hanson arrived at J.G.'s home and examined a locked container she indicated was found in L.G.'s bedroom closet. T: 5. Officer Hanson did not open the box, but instead advised J.G. that she could have a locksmith open it, suggesting Curt's Lock and Key. T: 5-6, 38-39. He also told her the box contained

"something ripe." T: 38. Officer Hanson did not see L.G. present, nor did he view his bedroom. T: 7.

Officer Hanson and J.G. proceeded to Curt's Lock and Key. T: 6, 39. After obtaining a key for the locked box, they returned to J.G.'s home. T: 6, 39-40. Once at the home, J.G. asked Officer Esposito, also at the scene, to open the box, at which time approximately twelve pounds of suspected marijuana was found inside of it. T: 7. Prior to these events, neither officer advised J.G. that L.G. could face an adult prosecution if more than one pound of marijuana was found in the box. T: 40.

After discovering the suspected marijuana, narcotics detective Tami Link was called to the scene. T: 13. Upon her arrival, Detective Link observed what appeared to be marijuana inside of a box in J.G.'s living room. T: 14-16. She took custody of the substance and later transported to an evidence room at the police station. Id. L.G. was arrested and taken to the juvenile detention center, though he was not informed of the charges. T: 25, 31.

While the police officers were at the home, L.G. arrived, along with a friend. T: 18. Officers

searched the person of each boy. Id. A small amount of suspected marijuana, paraphanilia, and one hundred sixteen dollars in cash was found on L.G. Id. Detective Link did not observe L.G. possess the larger quantity of suspected marijuana and took J.G.'s word that it came from L.G.'s bedroom. T: 25.

J.G. indicated at the transfer hearing that she would not have consented to a search of the locked box if she had been informed by officers that her son could be prosecuted as an adult. T: 40. Though she believed she was helping her son at the time, she also conceded that other people in the home had access to the area where the suspected marijuana was found. T: 36, 40. She believes her son would be amenable to treatment and should stay in the juvenile system, as he had no prior treatment of any kind. T: 42-43.

After hearing all of the testimony, the Referee recommended that the motion for transfer on Count I be denied. T: 49-50. The Referee opined that no evidence was offered to show direct possession and that scant evidence was offered to demonstrate constructive possession, since other parties had access to the area in which it was said to have been found. T: 50. The

Referee entered a finding of no probable cause and ordered L.G.'s release from custody, with Counts II and III to remain in juvenile court. T: 50-53.

On February 12, 1999, the State filed a Request for Review with the District Court, along with a supporting brief. A: 10. The State requested an evidentiary hearing. Id.

On March 8, 1999, District Court Judge Norman J. Backes granted the State's Request for Review. A:11-13.

This appeal follows.

ARGUMENT

I. WHETHER THE DISTRICT COURT ABUSED
 ITS DISCRETION BY FAILING TO REVIEW
 A TRANSCRIPT OF THE JUVENILE HEARING.

This is an appeal from the decision of East Central District Judge Norman J. Backes granting a Motion for Transfer to Adult Court filed against L.G., a juvenile. Judge Backes' decision reversed the recommendation of Juvenile Referee Janice Benson Johnson that such transfer be denied. A: 8-9, 11-13.

L.G. was charged by way of a juvenile delinquency petition with three offenses. A: 3-4. Count I was the only felony count, alleging possession of a controlled substance with intent to deliver, in violation of Sections 19-03.1-05 and 19-03.1-23 of the North Dakota Century Code. Id. The State filed a Motion for Transfer to Adult Court, pursuant to Section 27-20-34 of the North Dakota Century Code. A: 6-7.

On February 10, 1999, the Juvenile Referee conducted a transfer hearing, under the authority granted by Supreme Court Administrative Rule 13. The Referee recommended that the motion be denied. A: 8-9, T: 49-50.

The State thereafter exercised its right to file a Request for Review with the District Court, pursuant to Section 11(a) of Administrative Rule 13. Although no provision exists within that section for the filing of a brief, the State also included a brief with its Request for Review.

Without any further order or hearing, the District Court granted the Request for Review on March 8, 1999. A: 11-13. The Court did not conduct a hearing or invite L.G. to file a responsive brief. More troubling is the fact that it does not appear that the Court reviewed a transcript of the Juvenile Court proceedings and instead simply based its ruling on the contents of the State's brief.

The pertinent part of Administrative Rule 13 provides:

Section 11. Procedure for Review.

. . . .

(b) The review by a district court judge shall be a *review of the record*, unless the court orders a hearing of the proceedings.

Adm. Rule 13, Section 11(b) (emphasis added).

In the instant case, there is no indication on the

docket sheet that a transcript was ever prepared prior to this appeal being taken. Therefore, it appears the District Court never reviewed the record as required by the administrative rule.

Fundamental fairness dictates that a Request for Review, particularly that involving the transfer of a juvenile to adult court, should be carefully reviewed. The District Court's apparent failure to review the entire record, coupled with the fact that the L.G.'s counsel was not permitted to file a brief or argue legal issues at a hearing, denied L.G. due process and mandates reversal.

**II. WHETHER THE DISTRICT COURT ERRONEOUSLY
DETERMINED THE JUVENILE REFEREE ERRED
IN REFUSING TO ADMIT ADMISSIONS MADE
BY THE JUVENILE.**

During the transfer hearing, the State attempted to elicit admissions L.G. may have made to Detective Link. T: 19. An objection was made, which the Referee sustained. T: 19-20. In reversing the Referee's ruling on this issue, the District Court found that the Rules of Evidence do not apply in a hearing on whether to transfer a juvenile to adult court for prosecution.

A: 12.

L.G. submits that any admissions he may have made were inadmissible, as his statutory and constitutional rights were clearly violated. Therefore, the District Court erred in reversing the Referee.

The relevant part of Section 27-20-26 of the North Dakota Century Code provides:

"Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him . . . Counsel must be provided for a child not represented by his parent, guardian, or custodian . . ."

If a minor is represented by a parent during the interrogation, the right to counsel can be waived if the waiver is knowingly, intelligently and voluntarily made. In Interest of B.S., 496 N.W.2d 31, 33 (N.D. 1993); In Interest of D.S., 263 N.W.2d 114, 120 (N.D. 1978).

The record in this case demonstrates that L.G.

waived his right to counsel and consented to an interviewed with Detective Link. T: 26. In addition, L.G.'s mother, J.G., appears to have given approval for the interview. Id. Hence, the question becomes whether the waiver of counsel was knowingly, intelligently and voluntarily made. In deciding whether there was a voluntary waiver of the right to counsel, this Court looks to the totality of the circumstances. Huff v. K.P., 302 N.W.2d 779 (N.D. 1981)

There are two significant reasons why the waiver of counsel in this case was defective:

First, J.G. contacted police and asked them for assistance in determining the contents of a box she suspected contained something illegal. T: 4, 37. At this point, J.G. became a police informant against her son and developed an incurable conflict of interest between his prosecution and defense. While acting as an agent of the police, J.G. also counseled L.G. to waive his right to counsel and submit to an interrogation. Under the unique circumstances, this deprived L.G. of his Fifth Amendment rights under the United States Constitution.

Secondly, J.G.'s decision to counsel her son in favor of submitting to an interrogation was tainted by the fact that police officers allowed her to make such a decision under the mistaken impression that any prosecution would take place in Juvenile Court. At no time was J.G. informed that her son would be facing potential prosecution in adult court. T: 40. J.G. testified at the transfer hearing that she would not have consented to the interrogation if she would have known of prospect for adult prosecution. Id. Accordingly, it cannot be said that J.G.'s waiver of L.G.'s right to counsel was knowingly, intelligently and voluntarily made. The totality of circumstances demonstrates that any admissions from L.G. were extracted under unconstitutional circumstances and were properly excluded from the transfer hearing.

Assuming the District Court properly determined that the admissions of L.G. should have been allowed at the transfer hearing, the correct remedy would be to remand the matter for an additional evidentiary hearing rather than an outright reversal of the Referee's recommendation. The Referee found no probable cause existed to support the felony charge, and therefore,

transfer was not appropriate. The result may not have been different even if the admissions had been allowed. At this point, there is nothing in the record to indicate what the supposed admissions were, and it is improper to assume that they would support a finding of probable cause. The District Court erred in reversing on this issue.

**III. WHETHER THE DISTRICT COURT ERRONEOUSLY
DETERMINED THE JUVENILE REFEREE ERRED
IN FINDING NO PROBABLE CAUSE EXISTED
TO SUPPORT THE FELONY CHARGE.**

As noted earlier, L.G. was charged in Count I with the felony offense of possessing a controlled substance with intent to deliver. Section 27-20-34(1)(b) of the North Dakota Century Code includes language which provides transfer to adult court is appropriate if the Court finds there are reasonable grounds to believe that the child is over the age of fourteen and possessed with intent to deliver more than one pound of marijuana. Transfer cannot be granted if probable cause is lacking.

The Referee in this case specifically found that probable cause was lacking to find that L.G. committed

the act of possessing a controlled substance with intent to deliver. A: 8-9, T: 50. This finding was based the fact that the State offered only the type of packaging the substance was in and the presence of \$118.00 on the child's person as evidence of intent. A: 8-9. The Referee further found that no direct possession was linked to L.G. and that other parties may have been involved. A: 8. This evidence was not persuasive for a finding of probable cause of intent. Id.

Because the Referee did not find probable cause that L.G. committed the delinquent act alleged, transfer to adult court would not be authorized under the statute. The District Court, in reversing this determination, indicated the Referee "appears to have weighed the evidence presented by the State concerning probable cause . . ." A: 12. The Court did not, however, indicate why it felt probable cause existed. It merely found probable cause without pointing to any facts in the record to support an opposite conclusion as that reached by the Referee.

The term "reasonable grounds" is the equivalent to "probable cause." In Interest of J.K.M., 557 N.W.2d

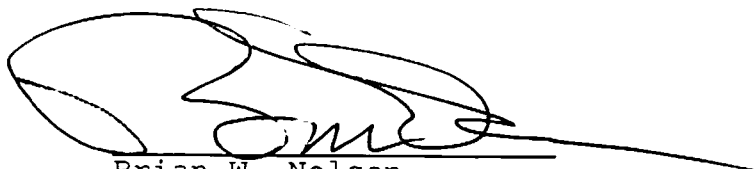
229, 231 (N.D. 1996), citing In Interest of T.M., 512 N.W.2d 441, 443 (N.D. 1994). Both require only a minimal burden of proof, which is met if there is a definite probability based on substantial evidence. In Interest of J.K.M., 557 N.W.2d at 231; In Interest of J.A.G., 552 N.W.2d 317, 320 (N.D. 1996).

In the present case, the Referee made thorough findings as to why probable cause was lacking for the felony offense alleged in Count I. The scant evidence presented by the State at the transfer hearing failed to satisfy the minimal threshold required to afford transfer into adult court. The District Court's decision to overturn this finding is not supported by any facts whatsoever and should be reversed.

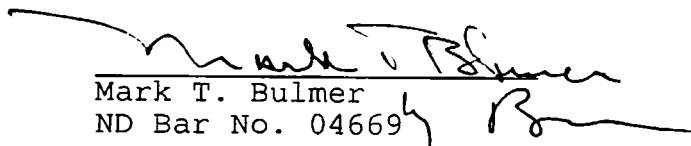
CONCLUSION

For the foregoing reasons, the decision of the District Court granting the Request for Review in this matter should be reversed.

Dated this 26 day of July, 1999.



Brian W. Nelson
ND Bar No. 02638



Mark T. Bulmer
ND Bar No. 04669

NELSON LAW OFFICE
111 9th Street South
Fargo, ND 58103
Ph. (701) 237-4433
Attorneys for Appellant