ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

990084

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

Tracy J. Molick,

Petitioner-Appellee,

v.

Case No. 990084

Dist. Ct. No. J99-33

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

Respondents-Appellants.

BRIEF OF PETITIONER-APPELLEE

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

---

Tracy J. Molick, NDID #05432
Assistant State's Attorney
P.O. Box 2806
Fargo, ND 58108
(701) 241-5850
Attorney for Petitioner/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. The district court did not abuse its discretion by not reviewing the transcript of the juvenile hearing.

II. The juvenile referee erred in refusing to admit into evidence admissions made by the juvenile.

III. There was sufficient evidence to support a finding of probable cause on the charge of possessing a controlled substance with intent to deliver.

STATEMENT OF THE CASE

This case involves a juvenile, L.G., who has been charged with possession of a controlled substance with intent to deliver in violation of N.D.C.C. Section 19-03.1-05 and 19-03.1-23. This would be a class B felony if committed by an adult.

On January 16, 1999, L.G.'s mother found a large Rubbermaid tote container containing eleven gallon size Ziploc bags filled with marijuana in her son's bedroom. T. at 16. The tote contained approximately twelve pounds of marijuana. T. at 29. Upon discovering the tote, L.G.'s mother contacted the Fargo Police Department. T. at 4.

There were two padlocks on the tote. T. at 6. L.G.'s mother took it to Curt's Lock and Key and had the padlocks opened. T. at 6. She brought the tote back to her residence where Officer Greg Esposito of the Fargo Police Department opened it at her request. T. at 7. The tote was filled with marijuana. T. at 7. Fargo narcotics officers arrived on the scene and confirmed the substance in the tote was, in fact, marijuana. T. at 15. Fargo Narcotics Officer, Tammy Lynk, transported the tote to the police station where it was logged as evidence. T. at 16. L.G.

was not home up to this point. T. at 17.

Later that same afternoon, L.G.'s mother contacted Officer Lynk indicating L.G. had returned home. T. at 17. The narcotics officers returned to L.G.'s residence to talk to him about the marijuana. T. at 17.

When the officers arrived, L.G. was downstairs with a friend. T. at 17. The officers went downstairs, identified themselves, and requested to search L.G. and his friend. T. at 18. They both consented to be searched. T. at 18. Officer Lynk searched L.G. and found a small silver pipe with burnt marijuana residue on it. T. at 18. Officer Lynk also found a baggie containing a small amount of marijuana in L.G.'s right front watch pocket and $116.00 in cash. T. at 18-9. Officer Lynk searched L.G.'s coat and found another plastic pipe that smelled of burnt marijuana as well as a packet of Zig Zag rolling papers and another small baggie containing marijuana. T. at 20.

After finding these items in L.G.'s possession, Officer Lynk advised L.G. of his Miranda rights and questioned him about the marijuana in the tote container. T. at 19. L.G. admitted he knew the marijuana was in his closet. T. at 19. He indicated he brought it home and claimed he was holding it for another person. T. at 19. L.G. was then transported

to the Juvenile Detention Center. T. at 19.

Officer Lynk also interviewed some acquaintances of L.G. T. at 22. One of those acquaintances indicated he had purchased between seven and eight ounces of marijuana from L.G. over the previous couple of months. T. at 23.

L.G. was charged in juvenile court with possession of a controlled substance with intent to deliver, a class B felony; possession of a controlled substance, a class B misdemeanor, and possession of drug paraphernalia, a class A misdemeanor. Appellant's App. at 3. The Petitioner moved to transfer all three counts to adult court. Appellant's App. at 6, Appellee's App. at 1. After a hearing on the Motion to Transfer, the referee recommended the motions be denied. Appellant's App. at 8.

The Petitioner filed a request for review with the district court requesting review of the motion concerning the B felony possession with intent to deliver charge. Appellant's App. at 10. The Petitioner also filed a Brief in Support of its request for review. Appellee's App. at 3. The district court reversed the findings and recommendations of the juvenile referee and transferred the B felony charge to the district court. Appellant's App. at 11. The misdemeanor charges were disposed of in the juvenile court.

The Appellant appeals from the district court's order reversing the juvenile referee's findings and recommendations.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY NOT REVIEWING THE TRANSCRIPT OF THE JUVENILE HEARING.

The Appellant first argues the district court's failure to review a transcript of the transfer hearing requires reversal. We disagree.

The Petitioner filed a Request for a Review of the Juvenile Court's Findings and Recommendation under North Dakota Administrative Rule 13(11) which states: "(b) The review by a district court judge shall be a review of the record, unless the court orders a hearing of the proceeding." It is undisputed the district court judge did not order a hearing of the proceedings nor did he request a transcript from the proceedings. The rule simply requires any evidence considered by the district court be part of the record. See N.D. Admin. R. 13 § 11. The district court stated it reviewed the "file and its contents and the Findings of Fact and Conclusions of Law of the Referee." Appellant's App. at 11-2.

Based on this evidence, the district court was able to make a decision concerning the request for a review. If the district court thought it needed to review the transcript of the proceedings in order to make a decision, it would have done so. The district court made its decision based on

information contained in the record. Therefore, the district court did not err in not ordering and reviewing a transcript of these proceedings.

Even if this Court finds the district court erred in not ordering a transcript, the error would be of no consequence at this point because the standard of review in this Court is "de novo."

"This [C]ourt's review of a juvenile court order is similar to a trial de novo." In Interest of A.E., 1997 ND 9, ¶3, 559 N.W.2d 215. Under N.D.C.C. § 27-20-56, an appeal from the juvenile court is based upon "the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court." *See also* In Interest of A.E., 1997 ND at ¶3, In Interest of J.K.M., 557 N.W.2d 229, 230(N.D. 1996). This is the case even when the district court reverses the Findings and Recommendations of the juvenile referee. See, e.g., In Interest of K.S., 500 N.W.2d 603(N.D. 1993).

Because the standard of review is de novo, a review of a juvenile matter does not take into consideration any conclusions of the district court upon a request for review. Therefore, any error by the district court in reviewing the record in reaching its conclusions would be of no

consequence. We believe a "de novo" review of the record would reach the same conclusion as that of the district court.

The Appellant also contends it should have been given an opportunity to file a responsive brief. Although North Dakota Administrative Rule 13(11) does not require the parties submit briefs when requesting a review by the district court, the parties are certainly not prohibited from filing briefs. The Appellant could have filed a responsive brief and chose not to.

II. THE JUVENILE REFEREE ERRED IN REFUSING TO ADMIT INTO EVIDENCE ADMISSIONS MADE BY THE JUVENILE.

Second, the Appellant argues the juvenile court was correct in not allowing admissions by L.G. into evidence. We disagree.

At the hearing, Officer Tammy Lynk testified she had advised L.G. of his Miranda rights and, in the presence of his mother, he agreed to talk to Officer Lynk about the tote container found in his closet. T. at 19. When L.G. was asked how the marijuana ended up in his closet, he told Detective Lynk "he knew the marijuana was there, he had brought it in the home, [and] he claimed he was holding it

for another individual who he wished not to identify." T. at 19. When the Petitioner asked Detective Lynk if L.G. gave a description of how the tote got in his closet, L.G.'s attorney objected, stating "I don't think that there has been a knowing waiver of [an attorney]...[L.G.] could not waive the right to an attorney nor should he have waived a right to an attorney." T. at 19. The court sustained the objection.

When the Petitioner specifically asked whether the referee would allow Officer Lynk to testify as to admissions made by L.G., the referee said she could not. T. at 20. The referee would not allow testimony on admissions by the juvenile because "[t]his is going to be the subject of subsequent motions I am sure. I don't want it tainted here, so I don't think it's necessary." T. at 20.

"A juvenile court transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence." In Interest of C.R.M., 552 N.W.2d 324 (N.D. 1996). At a preliminary examination, "[t]he magistrate may receive evidence that would be inadmissible at trial." North Dakota Rules of Criminal Procedure 5.1(a). Therefore, the fact that L.G.'s admissions may be the focus of a suppression motion at some

time in the future, should not have had any impact on its admissibility at the transfer hearing. If the Appellant intends to challenge the admissibility of L.G.'s admissions, the issue would be handled in a hearing on a motion to suppress which L.G. would be entitled to in adult court.

The only question at a hearing on a motion to transfer is whether the juvenile will be transferred to adult court. Once probable cause is established, the juvenile is transferred to adult court, and the entire prosecution starts over. See generally, Healy v. Healy, 297 N.W.2d 71 (N.D. 1986)(a finding of probable cause has only temporary or short-term consequences). The use of evidence at a preliminary hearing does not preclude that evidence from being the subject of a subsequent suppression motion. Therefore, the voluntariness of L.G.'s admissions is not an issue to be decided at a transfer hearing and the referee should have allowed the Appellee to present the evidence.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF PROBABLE CAUSE ON THE CHARGE OF POSSESSING A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

Finally, the Appellant argues there was not sufficient evidence presented at the hearing on the motion to transfer to support a finding of probable cause L.G. committed the

offense of possessing a controlled substance with intent to deliver. We disagree.

Under N.D.C.C. Section 27-20-34, a juvenile must be transferred for prosecution as an adult if:

> "[t]he child was fourteen years of age or more at the time of the alleged conduct and the court determines that there is probable cause to believe the child committed the alleged delinquent act and the delinquent act involves the offense of...the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of Subdivision A or B of subsection one of Section 19-03.1-23."

Under N.D.C.C. Section 19-03.1-23, a person may not "willfully, as defined in Section 12.1-02-02, manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." If the controlled substance is classified in Schedule I, II, or III, and the controlled substance is not a narcotic drug or methamphetamine, the offense is a class B felony. N.D.C.C. § 19-03.1-23(1)(b).

In order to transfer this case to adult court, the State had the burden of showing probable cause L.G. had possession of the marijuana with intent to deliver.

"'Probable cause" is a minimal burden of proof.'" In Interest of A.E., 1997 ND 9, ¶5, 559 N.W.2d 215 (quoting In Interest of M.D.N., 493 N.W.2d 680, 684 (N.D. 1992)). "If [i]t appears to be so or there is definite probability based

on substantial evidence, the standard of probable cause has been met." Id.

In this case, there was probable cause to believe L.G. was in possession of the marijuana. L.G.'s mother found the tote containing the marijuana in L.G.'s bedroom closet. T. at 41. L.G.'s mother and her roommate have bedrooms upstairs. T. at 36. The roommate occasionally went into L.G.'s room to work on the computer, however, she usually went into his room with L.G.'s mother. T. at 36. Therefore, access to his room by others who lived in the house was minimal.

Also, when L.G. arrived home that day, he had a small silver pipe with burnt marijuana residue on it, two small Baggies containing small amounts of marijuana in them, a plastic pipe that smelled of burnt marijuana, and a pack of Zig Zag rolling papers. T. at 18-9.

"A 'willful' possession of a controlled substance may be actual or constructive, exclusive or joint, and may be shown entirely by circumstantial evidence." State v. McKinney, 518 N.W.2d 696 (N.D. 1994). "Constructive possession may be established by showing the [juvenile] had the power and ability to exercise the dominion and control over the controlled substance." Id.(citations omitted).

Because the tote was found in L.G.'s room and he had other indicia of drug use on his person, there was certainly probable cause to believe L.G. was in constructive possession of the marijuana.

There was also probable cause to believe L.G. intended to deliver the marijuana. The tote in L.G.'s closet contained twelve pounds of marijuana. T. at 29. Officer Lynk testified a person couldn't possibly use twelve pounds of marijuana before the marijuana would rot. See State v. Rodriguez, 454 N.W.2d 726 (N.D. 1990)(noting a large quantity of a controlled substance which appears to be more than for personal use, can be evidence of an intent to deliver). Also, an acquaintance of L.G.'s indicated he had purchased between seven and eight ounces of marijuana from L.G. in the previous couple of months. T. at 23. L.G. also had $116.00 cash on him and he was not employed. T. at 20-1. These facts establish probable cause to believe L.G. intended to deliver the marijuana.

Finally, there was probable cause to believe the substance in the tote was marijuana. Officer Glen Hanson of the Fargo Police Department indicated it "smelled and appeared to be marijuana." T. at 7. Officer Lynk testified she field tested the substance and it did test positive for

marijuana. T. at 15.

CONCLUSION

The district court did not abuse its discretion in not reviewing a transcript of the transfer hearing because the court may review whatever portion of the record it deems necessary to render a decision. Even if this Court finds it was error, the error wouldn't matter on appeal because the standard of review in this case is de novo. Second, the juvenile referee erred in refusing to allow L.G.'s admissions because, in a motion to transfer, such evidence is admissible for the limited purpose of established probable cause. Finally, there was sufficient evidence presented at the motion hearing to support a finding of probable cause. Therefore, the Appellee respectfully requests the Court affirm the order of the district court.

Tracy J. Molick, NDID #05432
Assistant State's Attorney
P.O. Box 2806
Fargo, ND 58108
(701) 241-5850
Attorney for Petitioner/Appellee

J:\SATINFO\GENERAL\tjm\Briefs\Glaser.wpd