

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Divide County Sheriff's Department)	Supreme Court No.: 20100047
by Lauren Throntveit,)	
)	
Petitioner/Appellee,)	District Court No. 12-07-RJ-055
)	
vs.)	
)	
M.W. a child, T.F., mother,)	
C.W. father,)	
)	
Respondents/Appellant.)	

APPEAL FROM THE DISTRICT COURT OF DIVIDE COUNTY
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NO. 12-07-RJ-055
THE HONORABLE GERALD RUSTAD

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Issues Presented	¶1
Statement of Case	¶4
Statement of Facts	¶6
Law and Argument	
I. The Juvenile Court Erred in Transferring Counts 4 and 5 of the Juvenile Petition to District Court	¶11
II. The Juvenile Court Lacked Jurisdiction When it Issued its Transfer Order	¶38
III. The State Intentionally Delayed the Prosecution to Avoid Juvenile Court Jurisdiction	¶50
Conclusion	¶59

TABLE OF AUTHORITIES

CASES:

<u>Dawson v. Guerrero</u> , 552 NW2d 317 (ND 96)	¶26
<u>In Re J.K.M.</u> , 557 NW2d 229 (ND 96)	¶23
<u>In Re M.W.</u> , 2009 ND 55, 764 NW2d 185	¶5, ¶8, ¶55
<u>Siefert v. A.D.L.</u> , 301 NW2d 380 (ND 81)	¶24
<u>State v. Grenz</u> , 243 NW2d 375 (ND 76)	¶45

STATUTES:

NDCC 27-20	¶46
NDCC 27-20-34	¶44, ¶46, ¶53, ¶57
NDCC 27-20-34(1)(b)	¶6, ¶12, ¶54
NDCC 27-20-34(1)(c)	¶7
NDCC 27-20-34(1)(c)(4)	¶12, ¶13, ¶26
NDCC 27-20-34(1)(c)(4)(b)	¶18, ¶27
NDCC 27-20-34(1)(c)(4)(d)	¶26, ¶27
NDCC 27-20-34(2)	¶25
NDCC 27-20-34(3)	¶29
NDCC 27-20-34(5)	¶39, ¶42, ¶43, ¶44, ¶47, ¶59
NDCC 27-20-34(8)	¶39, ¶47, ¶58
NDCC 27-20-36(6)	¶41, ¶44
NDCC 27-20-37(1)(b)	¶41, ¶44

OTHER:

State v. Scurlock, 286 Or.App. 277, 593 P.2d 1159 (79) ¶58

State of Oregon v. Thornton, 41 Or.App. 469, 599 P.2d 1160 (79) ¶48, ¶58

ISSUES PRESENTED

- ¶1 I. Did the Juvenile Court error in transferring counts 4 and 5 of the juvenile petition to District Court?
- ¶2 II. Did the Juvenile Court lack jurisdiction when it issued its transfer order?
- ¶3 III. Did the State intentionally delay the prosecution to avoid Juvenile Court jurisdiction?

STATEMENT OF THE CASE

¶4 This is a juvenile case venued in Divide County. A Summons and Petition were filed on December 20, 2007. The Petition alleged that the respondent, M.W., hereinafter referred to as “Child” or “M.W.”, committed the delinquent acts of gross sexual imposition (5 counts). (App.1-6) A Petition for Detention and Order for Evaluation was also granted. (App.7-8)

¶5 The petitioner submitted a Request for Transfer of Jurisdiction. (App.9) The Request for Transfer came on before the Honorable Gerald Rustad, Judge of the District Court in Williston on May 14, 2008 and continued to July 14, 2008. The Court granted the Request for Transfer to the Divide County District Court. (App.10) The respondents appealed that transfer order. (App.11) This Court reversed and remanded the matter to the Juvenile Court. See In Re M.W., 2009 ND 55, 764 NW2d 185. The Divide County Juvenile Court upon remand and after hearing transferred counts 4 and 5 of the petition to District Court and denied the petition to transfer counts 1, 2, and 3. (App. 20, 21-24) The respondent’s appeal the Juvenile Court’s transfer of counts 4 and 5. (App.25)

STATEMENT OF FACTS

¶6 This is the second appeal of this case. The Divide County District Court had previously transferred all counts in the petition to the District Court pursuant to NDCC 27-20-34(1)(b).

¶7 This Court reversed the Juvenile Court Order transferring jurisdiction and remanded the matter for the Juvenile Court to consider whether transfer to District Court was appropriate under NDCC 27-20-34(1)(c).

¶8 The applicable facts prior to remand are set forth in In Re: MW, 2009 ND 55, 764 NW2d 185.

¶9 An evidentiary hearing was held before the Honorable Gerald Rustad, Judge of Juvenile Court on August 10, 2009. Judge Rustad, as Juvenile Court Judge, issued his Orders dated January 6, 2010, transferring counts 4 and 5 to the District Court and declining to transfer counts 1, 2 and 3.

¶10 The appeal is taken from the Juvenile Court's Order of January 6, 2010 transferring counts 4 and 5 to the District Court.

LAW AND ARGUMENT

¶11 I. THE JUVENILE COURT ERRED IN TRANSFERRING COUNTS 4 AND 5 OF THE JUVENILE PETITION TO DISTRICT COURT.

¶12 The parties upon remand stipulated that probable cause as required by NDCC 27-20-34(1)(b) was established at the original transfer hearing. (App. 26) Therefore the issues to be addressed by the Juvenile Court in the transfer hearing were those set forth in NDCC 27-20-34(1)(c)(4). That statute provides:

¶13 “(4)The court finds that there are reasonable grounds to believe that:
(a)The child committed the delinquent act alleged;

(b)The child is not amenable to treatment or rehabilitation as a juvenile through available programs;

(c)The child is not treatable in an institution for the mentally retarded or mentally ill;

(d) The interests of the community require that the child be placed under legal restraint or discipline; and

(e) If the child is fourteen or fifteen years old, the child committed a delinquent act involving the infliction or threat of serious bodily harm.”

¶14 The petitioner called 3 witnesses, Cory Peterson, Lauren Throntveit and Barbara Andrist.

¶15 Peterson is the Deputy Director of the North Dakota Division of Juvenile Services. (App. 27) He testified that the typical length or average stay for a juvenile in a sex offender treatment program is 12 to 18 months (App. 28), that a child who has turned 18 is no longer eligible to be in a North Dakota program, based on a private

facility decision (App. 28, 29, 33) but that a youth would be eligible for placement by the State in other State programs as long as the child is in the facility prior to the 18th birthday and that there are a couple of facilities in Minnesota that will take a youth up to the age of 21. (App. 29-30) He said that the Minnesota program for persons up to the age of 21 is not available in that North Dakota jurisdiction ends at the age of 20 and the State chooses not to pay for it. (App. 30)

¶16 Peterson acknowledged that not all child sex offenders would receive the same treatment especially those who have committed a status, consensual or statutory offense as opposed to a forceful offense. (App. 31) He further acknowledges that such an offender (statutory) could be assessed as not requiring any treatment at all including residential treatment. (App. 32)

¶17 He further acknowledged that an evaluation conducted by a psychologist that included the ERASOR which concluded that the risk for future sexually predatory conduct does not support a conclusions that the child needed to be locked down would definitely be considered as a factor in the treatment of a child. (App. 34, 35)

¶18 Lauren Throntveit is the Sheriff of Divide County. His testimony and that of Barbara Andrist who is the Director of Nursing for the Upper Missouri District Health Unit addressed the provision of NDCC 27-20-34(1)(c)(4)(d). They testified to their opinion of the reaction of the Divide County Community to a sex offense, sex offenses involving children and sex offenders. Their testimony was directed toward their opinion of the community generally and hypothetically. In that respect, it would be hard to visualize any community that would welcome sex offenses and sex offenders.

¶19 Their testimony on cross examination was more specific. They both acknowledged that there were known sex offenders residing in the County, that the community was generally aware of the circumstances of this case, that it is known that M.W. has been residing openly in the community for the last year, and that there have not been any problems. (App. 36, 39-40)

¶20 Andrist defined legal restraint or discipline as used in the statute as meaning that the offender needs to have treatment. (App. 37, 38)

¶21 The respondent submitted the Court ordered psychological evaluation conducted by Dr. Lincoln Combs. (App.12-18) Dr. Combs concluded that M.W. presents with a low degree of risk of future sexual reoffending based upon the ERASOR. His future sexual predatory conduct is low and that the level or risk for future sexual predatory conduct as it stands now does not support a conclusion that M.W. needs to be locked down. (App. 35)

¶22 The respondent also called three witnesses, Stanley Kahl, Dan Hausauer, and Eddie Collins. All three are employees of the North Dakota Youth Correctional Center. They had extensive professional contact with M.W. when he was held in detention at that facility for about seven months. (App. 41) They all testified that M.W. complied with all the rules and regulations, that he did very well and that he earned all of the privileges that he could earn. They also testified that students who comply with the rules and regulations of the center have a greater likelihood of success in complying with the rules, regulations and laws of society upon release than those who do not comply with the center's rules.

¶23 A juvenile Court's decision to maintain jurisdiction or to deny a request for transfer is appealable as a final order. In Re J.K.M., 557 NW2d 229 (ND 96)

¶24 The burden of persuasion that the petitioner has in a transfer hearing is reasonable grounds to believe which is equated to a probable cause determination. Siefert v. A.D.L., 301 NW2d 380 (ND 81)

¶25 NDCC 27-20-34(2) which places the burden upon the child is not applicable in that the offenses charged are not one of those listed nor does the child in this case have any prior offenses.

¶26 The juvenile Court should make specific findings in all matters addressed in paragraph (1)(c)(4) but the court's failure to make a specific finding under subparagraph (1)(c)(4)(d) regarding the community is not fatal. Dawson v. Guerrero, 552 NW2d 317 (ND 96)

¶27 The disputed and litigated issues at the transfer hearing pertained to NDCC 27-20-34(1)(c)(4)(b) and (d); is the child amenable to treatment or rehabilitation as a juvenile through available programs and do the interest of the community require that the child be placed under legal restraint or discipline.

¶28 The petitioners evidence and position as to the child being amenable to treatment or rehabilitation as a juvenile was based solely upon the child's age at the time of the hearing coupled with the programs that the State has decided to make available and the interplay between those two factors. The petitioner did not present any evidence that M.W. required any treatment or rehabilitation.

¶29 The juvenile Court addressed the factors set forth in NDCC 27-20-34(3) in

making its determination as to the child's amenability to treatment. (App.21-24)

¶30 The statutory provision merely states that the Court should consider and make specific findings as to the stated factors. The statute does not give the Courts any guidance as to weight to be given to any.

¶31 The respondent takes issue with the Court's findings as to maturity, degree of criminal sophistication exhibited, the prospect for adequate protection of the public, the success or failure of previous attempts to rehabilitate and its ultimate conclusion.

¶32 The juvenile Court in addressing the maturity factor merely noted the absence of any evidence of immaturity. The Court failed to note that there was also an absence of any evidence of maturity.

¶33 M.W. does not disagree with the claimed facts that the Court set forth in its finding regarding the degree of criminal sophistication that was exhibited. He does disagree that those facts establish a greater than average degree of criminal sophistication.

¶34 The Court's determination as to the likelihood that the child could be rehabilitated prior to the expiration of the juvenile Court jurisdiction is based solely upon the child's age by the time the case reached the most recent transfer hearing and an unsupported conclusion that M.W. requires treatment. The excessive delay was not the fault of the child, but rather the fault of the petitioner as will be argued later. The Court also failed to note or take into account the evidence that the child did not require any sex offender's treatment. That evidence was presented through cross examination of the petitioner's witnesses and the report of Dr. Combs that stated "M.W. presents

with a low degree of risk of future sexual reoffending...it was furthermore concluded that his risk of future sexual predatory conduct was low. And the level of risk for future sexually predatory conduct as it stands now does not support a conclusion that M.W. needs to be locked down.” (App.12-18)(Emphasis added) The Court erroneously concluded that the child required treatment without any evidence.

¶35 The Court noted that there had been no attempts to rehabilitate the respondent child and therefore could not determine the success or failure of previous attempts to rehabilitate. This again is not the fault of the child. The child was held in detention for seven months. There is no opportunity in that it was not available to him in detention. (App. 42)

¶36 The respondents also submitted a consent to the juvenile Court continuing jurisdiction over M.W. until January 3, 2012. The Court did not address this issue in considering whether there was sufficient time for treatment. Counsel was unable to find any authority as to whether that consent is valid but if authorized the juvenile Court to issue an order beyond M.W.’s 20th birthday. (App. 19)

¶37 The juvenile Court failed to weigh any of the competing factors set forth in the statute and at the very least appeared to give no weight to those factors that worked against transfer.

¶38 II. THE JUVENILE COURT LACKED JURISDICTION WHEN IT
ISSUED ITS TRANSFER ORDER

¶39 Interpretation, application and interplay between NDCC 27-20-34(5) and (8) and the issue raised appears to be one of first impression not only for this Court, but for

any Court. Counsel's research has failed to disclose any case law dealing directly with those subsections.

¶40 The Court Order transferring jurisdiction of counts 4 and 5 from the juvenile Court to District Court was executed on January 6, 2010, three days after M.W. turned 20.

¶41 The petitioner in his motion to dismiss the appeal contended that the appeal is moot and argued that the Court lacked jurisdiction to transfer counts 4 and 5 at the time. The petitioner's position is based upon his contention that all orders expire once the child turns 20 citing NDCC 27-20-36(6) and 27-20-37(1)(b).

¶42 If the petitioner is correct, then and in that event, the transfer is invalid and the District Court would be without jurisdiction. NDCC 27-20-34(5) provides that:

¶43 "No child subject to the jurisdiction of the juvenile court, either before or after reaching eighteen years of age, may be prosecuted for an offense previously committed unless the case has been transferred as provided in this section."

¶44 The Court's Order of January 6, 2010 transferred jurisdiction pursuant to that section, NDCC 27-20-34. If that Order is in fact invalid, based upon NDCC 27-20-36(6) and NDCC 27-20-37(1)(b) then the child can not be prosecuted for the offense because he has not been transferred as required and provided by NDCC 27-20-34(5).

¶45 A defect in a transfer hearing destroys the jurisdiction of the District Court, is not waivable, and can be raised even after entry of a guilty plea. State v. Grenz, 243 NW2d 375 (ND 76)

¶46 The Uniform Juvenile Court Act, NDCC 27-20 does not define the terms

adjudicate, adjudicated or adjudication. The petitioner will argue the terms should be defined as the juvenile equivalent of conviction in an adult Court, that they would mean adjudicated delinquent upon the facts. There is no support within the juvenile Court act for that argument. M.W. would submit that the term has a broader definition. In this case, the juvenile Court has previously adjudicated probable cause in both proceedings under NDCC 27-20-34.

¶47 NDCC 27-20-34(5) and (8) appear to be in conflict. The Rules of statutory construction requires the Court to first attempt to reconcile the two subdivisions to give meaning to both. The respondent would submit that subsection 5 applies to those cases when the petition is filed prior to the child reaching the age of 20 whereas subsection 8 applies to a person who committed an offense when he was a juvenile but a petition was not filed prior to the child reaching the age of 20.

¶48 State of Oregon v. Thornton, 41 Or.App. 469, 599 P.2d 1160 (79) appears to have some application. The Juvenile Court denied two similar requests by the State to remand (transfer) the child to the adult Court. The juvenile had turned 18 at the time the Court denied the second request. The State then initiated an original charge on the same basis against the same child in adult Court. The trial Court granted the defendant's motion to dismiss the adult Court charge on the grounds that the State could not prosecute the defendant as an adult after remand (transfer) had been denied by the juvenile Court.

¶49 The appellate Court affirmed the trial Court. The Court held that the State could not circumvent juvenile Court jurisdiction by charging the child in adult Court after its

motions to transfer had twice been denied. The appellate Court essentially held that the State could not charge the child in adult Court without having received the grant of a motion to transfer from the juvenile Court. It further held that the juvenile Court has exclusive jurisdiction in determining a transfer and that that transfer does not evaporate merely because the juvenile turned 18 after the proceedings against him had been initiated.

¶50 III. THE STATE INTENTIONALLY DELAYED THE PROSECUTION
TO AVOID JUVENILE COURT JURISDICTION.

¶51 It is not apparent to counsel if this issue is subject to review on this appeal based upon the record presently before the Court or if it needs to be raised in the District Court where counts 4 and 5 are presently pending. Nevertheless, the respondent does not wish to be placed in the position of inadvertently waiving the issue and will therefore address it in this appeal.

¶52 The record clearly establishes that the State from the beginning wished to avoid juvenile court jurisdiction. The Request for Transfer of Jurisdiction, Petition for Detention and Order for Evaluation were all issued on the same day, December 20, 2007. It is therefore obvious that the State intended to avoid juvenile court jurisdiction from the beginning.

¶53 The language of the first Request for Transfer tracks the provision of the discretionary transfer statute NDCC 27-20-34(c) verbatim. (App.9) The language of the request clearly establishes that it was the State's belief that that was the applicable statutory provision.

¶54 The Juvenile Court at the beginning of the first transfer hearing announced that it was the Court's belief that the provisions of NDCC 27-20-34(1)(b) was applicable.

¶55 The State then had one of two choices; either advise the Court that it was its position that the correct provisions were those contained in the discretionary transfer statute and proceed accordingly or merely acquiesce in the Court's stated position. The State chose the second course. It was that course that lead to reversible error as found by this Court in In Re M.W., 2009 ND 55, 764 NW2d 185 and substantially delayed this proceeding.

¶56 Petitioner can not contend that the State did not delay the prosecution. The only issue is whether the prosecution "intentionally" delayed the prosecution.

¶57 NDCC 27-20-34 prohibits the prosecution of a child as an adult if the State "intentionally" delayed the juvenile court prosecution. The choice the State made was intentional and it was obvious by part of the State's tactic and strategy to have the case transferred and thereby avoid juvenile Court jurisdiction.

¶58 The Oregon Supreme Court has dealt with the exception to NDCC 27-20-34(8) pertaining to the State intentionally delaying the prosecution to avoid juvenile Court jurisdiction. See State v. Scurlock, 286 Or.App. 277, 593 P.2d 1159 (79) The Oregon Court of Appeal interpreted the conduct of the prosecution in Thornton supra as similar to the intentional delay disapproved in Scurlock. The conduct of the State in this case is also similar to the conduct condemned in the two Oregon cases.

CONCLUSION

¶59 The Order of the juvenile Court transferring counts 4 and 5 must be reversed

and the matter remanded to the juvenile Court with instructions to dismiss all proceedings before that Court in that the Court did not transfer the petition and the allegations contained therein pursuant to the provisions of NDCC 27-20-34(5) thereby resulting in all prosecution be barred or in the alternative remand it to juvenile Court for further proceedings.

Respectfully Submitted this 22nd day of April, 2010.

_____/s/_____
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Brief and Appendix was, on the 22nd day of April, 2010 emailed mailed to:

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