

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

S.J.R.,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

No. J-2004-149

JUN 23 2004

**MICHAEL S. RICHIE
CLERK**

ACCELERATED DOCKET ORDER

Appellant, a juvenile, was charged by delinquency petition in the Juvenile Division of the Bryan County District Court, Case No. JDL-2003-65, with Count I, Possession of Controlled Dangerous Substance (Methamphetamine), and Count II, Possession of Paraphernalia. Appellant was approximately seventeen-and-a-half years old at the time of the alleged delinquent acts.

The State filed a motion to certify Appellant as an adult. The motion was heard by the Honorable Rocky L. Powers, Associate District Judge, who found prosecutive merit existed upon both counts, and who received evidence as to certification. Judge Powers found Appellant should be certified to stand trial as an adult upon both counts. From this February 12, 2004, order of certification, Appellant has perfected this appeal.

The appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004). Oral argument was held on June 3, 2004. Within this appeal, Appellant raises the following propositions of error:

Proposition I

The Juvenile Court abused its discretion when it denied Appellant's Motion to Suppress the Evidence.

Proposition II

The Juvenile Court abused its discretion in finding S.J.R. not amenable to rehabilitation and that the public could not be adequately protected if S.J.R. remained in the juvenile system.

Proposition III

Appellant received ineffective assistance of counsel by counsel's failure to request a continuance of the certification hearing or by failing to provide any evidence on Appellant's behalf.

After hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, by a vote of four (4) to zero (0), the court affirms the juvenile court's order certifying Appellant as an adult upon Count I but vacates that portion of the order that certifies Appellant to stand trial as an adult upon Count II. The applicable certification statute in Appellant's matter is found at 10 O.S.2001, § 7303-4.3. Subsection (B) of that provision only permits adult certification of a child in those cases where "a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult." 10 O.S.2001, § 7303-4.3(B). *See Mason v. State*, 1994 OK CR 2, ¶ 17, 868 P.2d 724, 728 ("a juvenile can only be certified to stand trial as an adult for an offense which would have constituted a felony if committed by an adult.") The Count II charge of Possession of Paraphernalia as alleged within the juvenile petition would not be a felony offense if committed by an adult. 63 O.S.2001, § 2-405(E). Therefore, the District Court was without authority to certify Appellant as an adult upon Count II.

Appellant's Proposition I claims that evidence seized from Appellant's person should have been suppressed at the prosecutive merit hearing because the evidence was discovered in a manner that violated the prohibition against unreasonable searches and seizures. The Court has reviewed the appeal record and finds it contains evidence sufficient for the trial judge to have deter-

mined that Officer Hyde possessed adequate grounds to conduct a self-protective pat down of Appellant's person. The trial court's decision must therefore be upheld. *Wilson v. State*, 1987 OK CR 86, ¶ 5, 737 P.2d 1197, 1201 ("Whether evidence should be suppressed is within the trial court's sound discretion, and this Court will not reverse the trial court upon a question of fact where there is a conflict of evidence and there is competent evidence reasonably tending to support the judge's findings.").

Moreover, prior to the pat down of Appellant, Officer Hyde observed behavior by Appellant that arguably provided him probable cause to arrest Appellant for driving while under the influence. If having probable cause, Officer Hyde had authority to conduct a search incident to arrest. That such a search occurred prior to the officer formally placing Appellant under arrest does not invalidate the search. See *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed. 2d 633 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); *State v. Overby*, 590 N.W.2d 703, 707 (N.D.1999) (officer's search of defendant's person prior to arrest was "a valid search incident to arrest because he had probable cause to arrest prior to conducting the search, and the arrest and search were sufficiently contemporaneous"); *State v. O'Neill*, 43 P.3d 522, 524 (Wash. Ct. App. 2002) ("so long as there was probable cause and the authority to arrest, a search incident to arrest is justified, even if preceding the ultimate decision to book").

In Proposition II Appellant urges that this Court find that Judge Powers' abused his discretion in determining that Appellant should not be retained within the juvenile system. The certification evidence revealed that Appellant (1) was not in school, (2) had several prior juvenile referrals, (3) had a previous

nine-month inpatient placement but had relapsed, (4) had one or more prior delinquent adjudications, (5) had received another referral for drugs while being out on bond in his current case, (6) needs placement within an in-patient treatment facility to have any reasonable likelihood of rehabilitation, and (7) being one month away from his eighteenth birthday at the time of the certification hearing, had little or no likelihood of being able to access an appropriate in-patient facility. This evidence provided sufficient support for the trial judge's decision granting the State's motion to certify as an adult. See *K.V.F. v. State*, 1991 OK CR 11, ¶ 11, 805 P.2d 106, 109 (holding that the "finding that a juvenile is unfit for rehabilitation is a discretionary decision to be made by the judge" and that evidence that previous treatment interventions for sixteen-year-old juvenile had failed, that there was inadequate time and resources within the juvenile justice system for further treatment, and that juvenile was allegedly involved in negative activity only three to four weeks after being released, was adequate factual support for judge's decision to certify as adult).

Lastly, the Court finds Appellant's Proposition III claim of ineffective assistance of trial counsel is without merit. In this proposition, Appellant asserts that his trial counsel provided ineffective assistance by (1) not requesting a continuance of the certification portion of the proceedings, and (2) by not presenting evidence on Appellant's behalf at certification. This proposition must fail as it is entirely speculative as to what, if any, prejudice resulted from those acts of counsel about which Appellant complains. In order for an accused individual to prevail upon a claim of ineffective assistance, he must first "show that counsel's performance was deficient; and second, he must show the deficient performance prejudiced the defense." *Childress v. State*, OK CR 10, ¶ 47, 1 P.3d 1006, 1016-17. Appellant's claim does not make these requisite showings.

Appellant states no reason why a continuance was either necessary or advisable at the conclusion of the prosecutive merit portion of the hearing. In fact, a continuance could arguably have resulted in prejudice to Appellant due to nearing of his eighteenth birthday. As concerns Appellant's claim of trial counsel's failure to produce evidence, it is observed that Appellant neither cites to nor provides any records, affidavits, or other evidence of any kind that would show that favorable evidence did indeed exist that could have been presented by counsel at the certification hearing upon Appellant's behalf, but that was not presented due solely to counsel's neglect.

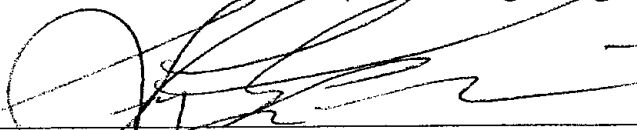
IT IS THEREFORE THE ORDER OF THIS COURT that the February 12, 2004, order of the Juvenile Division of the Bryan County District Court, Case No. JDL-2003-65, that sustains the State's motion to certify Appellant as an adult upon Count I is **AFFIRMED**, but that the portion thereof certifying Appellant as an adult upon Count II is hereby **VACATED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 23rd day of June, 2004.

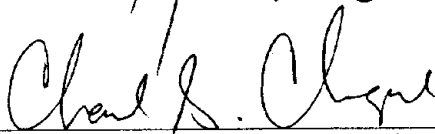


CHARLES A. JOHNSON, Presiding Judge

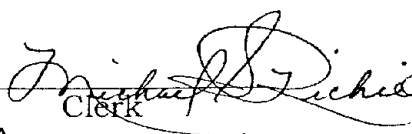


GARY L. LUMPKIN, Judge

ATTEST:



CHARLES S. CHAPEL, Judge



Clerk
RA



RETA-M. STRUBHAR, Judge