IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. SANDERS

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,
V.
DEANDRE D. SANDERS, APPELLANT.

Filed May 11, 2010. No. A-09-1047.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, Nathan A. Liss, and Carrie A. Christensen, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Deandre D. Sanders appeals from his conviction and sentence for two counts of second degree assault and one count of use of a weapon to commit a felony, following his entry of guilty pleas. Because we find that the district court did not abuse its discretion in denying Sanders' motion to transfer the case to juvenile court or in the sentence imposed, we affirm.

BACKGROUND

On November 25, 2008, an information was filed in district court charging Sanders with two counts of attempted second degree murder, Class II felonies; two counts of use of a firearm to commit a felony, Class II felonies; and two counts of second degree assault, Class IIIA felonies. Sanders filed a motion for transfer to juvenile court and a hearing was held thereon on February 12, 2009. At the hearing, the parties stipulated that Sanders was born in August 1991. The State adduced evidence which consisted of the following exhibits: La Vista, Nebraska, police department reports and witness statements; Douglas County, Nebraska, sheriff reports;

Carter Lake, Iowa, police department reports; Sanders' criminal history; and juvenile court pleadings in docket No. JV08-368. In addition, testimony was given by Jim Anderson, supervisor of juvenile parole officers with the Department of Health and Human Services, Office of Juvenile Services.

The record from the evidentiary hearing shows that on September 19, 2008, Sanders was involved in a verbal altercation with Randall Carter at a basketball court. The two decided to take the fight to a different location, and Carter began to walk away. Sanders thereafter went to his girlfriend's vehicle, took a handgun out of the trunk, and began to fire shots toward Carter. One of the shots struck a nearby house, and the other two shots hit female bystanders in their legs. Sanders later told the police that he fired the shots in self-defense. Following Sanders' arrest, he was placed in the custody of a Douglas County juvenile detention facility. On November 16, Sanders' girlfriend helped him escape from the facility.

Sanders' criminal history includes a prior conviction in Douglas County for assault and battery in 2007, for which he received intensive supervision probation. A juvenile petition was filed in Sarpy County in May 2008, which alleged one count of third degree assault and two counts of criminal mischief arising out of an incident in March of that year. The juvenile petition was dismissed on October 30, after the court found that Sanders was "non-amenable" due to the present charges. In addition to the present offenses, Sanders has two pending charges in Douglas County of second degree assault and escape when under arrest on a felony charge.

Anderson testified that when a matter is handled in juvenile court, the amount of time between adjudication and disposition varies anywhere between 1 to 60 days. Anderson discussed the various possible dispositions through juvenile court, including commitment to the Youth Rehabilitation and Treatment Center in Kearney, Nebraska, which is the strictest juvenile facility. This facility can hold a juvenile only until age 19, and the average stay is 172 days. Anderson testified to treatment that is available at the Kearney facility. Anderson testified that once a juvenile is placed at the Kearney facility, the court's jurisdiction ends and the duration of the commitment is determined by the facility.

On February 17, 2009, the district court entered its written order denying Sanders' motion to transfer. After examining the relevant factors, and "upon balancing public protection and societal security against the rehabilitation of [Sanders]," the district court found that the State had met its burden of proof and provided a sound basis to maintain the case in district court.

On July 20, 2009, pursuant to a plea agreement, Sanders pled guilty to an amended information which charged him with two counts of second degree assault and one count of use of a weapon to commit a felony. The guilty plea was accepted, and a presentence investigation was ordered. On October 2, a sentencing hearing occurred, and Sanders was sentenced to 5 years' imprisonment on each of the assault convictions and 10 years' imprisonment on the weapons conviction, all to be served consecutively.

Sanders filed this timely appeal.

ASSIGNMENTS OF ERROR

Sanders assigns as error the district court's failure to transfer the matter to juvenile court, failure to find Sanders to be a candidate for probation, and imposition of excessive sentences.

STANDARD OF REVIEW

A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). The term "judicial abuse of discretion" means that the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*.

ANALYSIS

Denial of Motion to Transfer to Juvenile Court.

Neb. Rev. Stat. § 29-1816 (Reissue 2008) provides that, after considering evidence presented pursuant to Neb. Rev. Stat. § 43-276 (Reissue 2008), a case shall be transferred to juvenile court unless a sound basis exists for retaining the case. The burden of proving a sound basis for retention lies with the State. *State v. Goodwin, supra*.

At the time the district court considered Sanders' motion to transfer, the statutory criteria included the following factors: (1) the type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority, and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; (10) whether there is a juvenile pretrial diversion program established pursuant to Neb. Rev. Stat. §§ 43-260.02 to 43-260.07 (Reissue 2008); (11) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (12) whether a juvenile court order has been issued for the juvenile pursuant to Neb. Rev. Stat. § 43-2,106.03 (Reissue 2008); and (13) such other matters as the county attorney deems relevant to his or her decision. § 43-276.

In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007). It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id*.

The district court's written order analyzed each of the factors set forth in § 43-276. At the time of the transfer hearing, Sanders was 17 years old and would turn 19, the age of majority, in approximately 18 months. Although the district court noted that no evidence was presented regarding the specific treatment that Sanders requires, it concluded that the offenses charged would necessitate either long-term treatment while on probation or incarceration beyond Sanders' age of majority. The court found that the police reports indicated that Sanders committed the crime in an aggressive and violent nature by shooting a firearm at various persons and that his actions in retrieving the firearm from his vehicle suggested that his actions were premeditated. The court found that the evidence did not support Sanders' contention of self-defense and that therefore, the motivation for the offense "appears to be aggression by [Sanders]." The court noted that Sanders has had several contacts with law enforcement and has been under the jurisdiction of the juvenile court for an assault charge, which court found Sanders not amenable to services of the juvenile court. In addition, the court noted that Sanders has another pending assault matter in Douglas County. The court rejected Sanders' argument that his conduct displayed immaturity, in view of the aggressive nature of his actions. The court found that there were juvenile facilities available for Sanders but that these services would terminate at age 19. The court determined, after balancing the needs of Sanders and society, that correctional services or treatment for Sanders would be required past age 19.

In this appeal, Sanders argues that the evidence presented at the time of the transfer hearing was "rather sparse." Sanders points to the lack of evidence concerning what treatment is necessary for him. Sanders challenges the conclusions reached by the district court concerning whether the offense was committed in an aggressive and premeditated manner, the motivation for the offense, and the maturity of Sanders. Sanders argues that the State failed "to prove enough of the factors in this case to tip the scales at all in favor of retention in the [d]istrict court." Brief for appellant at 15.

Keeping in mind the balancing test required for consideration in transfer proceedings, we find that there was more than sufficient evidence to support the district court's findings concerning the statutory factors and the court's decision to deny Sanders' motion to transfer. Clearly, these crimes were violent in nature. Sanders has a history of assaultive behavior and the juvenile court has determined that Sanders was not amenable to treatment in another assault case. While there are services and treatment available at the Kearney youth facility, Sanders would only benefit from these services for approximately 1 year to 18 months between the time of placement and reaching the age of majority. Given the nature of these crimes and Sanders' past and continuing criminal activity, we cannot say that the district court erred in concluding that this was insufficient time for corrective services or treatment.

In sum, we conclude that the district court did not abuse its discretion in denying Sanders' motion to transfer.

Failure to Place on Probation/Imposition of Excessive Sentences.

Sanders asserts that the district court erred in failing to place him on probation and that the sentences imposed were excessive.

Sanders was convicted of two counts of second degree assault, Class IIIA felonies, and one count of use of a weapon to commit a felony, a Class III felony. A Class IIIA felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. A Class III felony is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both. The sentence imposed on Sanders was within the statutory limits.

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. In considering a sentence of probation in lieu of incarceration, the court should not withhold incarceration if a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law. *Id*.

In sentencing Sanders, the district court noted that this was a difficult case due to Sanders' age and background. The court noted Sanders' expression of remorse and acceptance of responsibility. Nevertheless, the court found that the nature of the offense, the danger that Sanders presents to society, and Sanders' past record weighed in favor of incarceration over probation. It is clear that the district court properly considered all of the appropriate factors in sentencing Sanders. On this record, it cannot be said that the district court abused its discretion in sentencing Sanders.

CONCLUSION

We conclude that the district court did not abuse its discretion in denying Sanders' motion to transfer the matter to juvenile court nor in sentencing Sanders. We therefore affirm Sanders' convictions and sentences.

AFFIRMED.