

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-202

MAY TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
Luis A. Colon	}	
	}	DOCKET NO. 1687-12-04 Rdcr
	}	
	}	Trial Judge: M. Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

Defendant appeals an order of the district court denying his request to be transferred to juvenile court. We affirm.

By way of background, the issue of transfer from criminal to juvenile court is addressed by statute. Because defendant was between the ages of sixteen and eighteen at the time he allegedly committed the offense, and also because one of the charged offenses—kidnapping—is enumerated under 33 V.S.A. § 5506(a), transfer to juvenile court is not mandatory, but discretionary. Compare 33 V.S.A. § 5505(a) (providing that a court “shall forthwith transfer the case to juvenile court” where defendant was under age sixteen at the time of the offense) with *id.* § 5505(b) (providing that a court “may forthwith transfer the proceeding to the juvenile court” (emphasis added) where defendant is between sixteen and eighteen or where alleged offense is one of the enumerated offenses). While the statute does not contain standards governing the decision to transfer, we held in *State v. Willis*, 145 Vt. 459, 468-71 (1985), that courts may consider the factors set forth by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541, 566-67 (1966).

Here, in ruling on defendant’s request, the district court considered the following evidence presented at the transfer hearing. Defendant was one of five co-defendants charged with kidnapping, carrying a dangerous or deadly weapon in commission of a felony, and felony unlawful mischief. Defendant was fifteen years old at the time of the crime. In addition to his young age, defendant is developmentally delayed with an IQ of 64, and was found to have a “prominent anxiety disorder.” He has performed poorly in school and has an extensive school disciplinary record. Further, defendant’s family members were involved in buying and selling drugs, and would make use of defendant in connection with these activities. Some of these family members were involved in the underlying offense here. Finally, defendant had four outstanding arrest warrants from Massachusetts, including one for assault with a dangerous weapon.

Following interviews with and testing of defendant, an expert qualified in the field of psychology gave the opinion that “defendant is not a hardened sixteen year old but an unsophisticated young adolescent who is emotionally fragile and intellectually limited.” The expert further testified that “defendant is likely a ‘follower’ and will try to please whomever he is with.” The expert was not aware of defendant’s outstanding arrest warrants from Massachusetts.

The court also considered the testimony of a caseworker from the Department for Children and Families (DCF). The caseworker had been in contact with defendant’s Massachusetts probation officer. Because of his outstanding warrants, the caseworker was of the opinion that defendant was not an appropriate candidate for juvenile court.

In reaching its decision, the court applied the factors outlined in Kent. Specifically, the court reasoned as follows. (1) Because “defendant is charged with five felonies which have a statutory maximum penalty of life imprisonment,” the seriousness of the alleged offense weighed against transfer to juvenile court. (2) “Kidnapping is a violent offense”; thus, the question of whether the offense were committed in an aggressive, violent, premeditated and/or wilful manner weighed against transfer. (3) Six of the seven counts were against persons as opposed to property, and therefore weighed against transfer. (4) Because defendant’s co-defendants were all adults charged with the same offenses, trial and disposition of the entire offense was desirable in a single court, and therefore this factor weighed against transfer. (5) The court found that “[t]he credible evidence is compelling that defendant is disadvantaged economically, socially and educationally. He is marginally competent. He is extremely anxious, immature and developmentally delayed with an overall IQ of 64.” Consideration of defendant’s sophistication and maturity weighed in favor of transfer. The court went on, however, to consider the fact that defendant was at times untruthful and that his testimony to the effect that he was unaware of his outstanding arrest warrants was not credible. Thus, the court ultimately concluded that “[b]ased on all the other evidence adduced at hearing and through documentary evidence . . . this Kent factor weighs against transfer to juvenile court.” (6) The court emphasized defendant’s numerous outstanding warrants, DCF’s position that it did not consider him appropriate for juvenile court, and that the two years available for probation in juvenile court would not adequately address the need for deterrence, rehabilitation and punishment commensurate with the serious of the charges, as further weighing against transfer.

On appeal, defendant argues that, even accepting the district court’s application of the Kent factors, the evidence did not support the conclusion that transfer was not warranted. Specifically, defendant asserts that, while the offenses he is charged with are serious, his role was not carried out in an aggressive, violent and willful manner. Defendant emphasizes that he was not an alleged participant in the physical assaults associated with the offense. Defendant also maintains that the court inappropriately discounted the extent of his mental, social and intellectual immaturity. In sum, contends defendant, the psychological evidence supported the conclusion that he was not a danger to society and would benefit greatly from services of the type that would be available through the juvenile system.

“The decision to transfer a criminal proceeding to juvenile court lies within the sound discretion of the trial court.” State v. Barrette, 153 Vt. 476, 477 (1990). In the context of a transfer decision, “findings supported by credible evidence must stand”—“[e]ven when there is substantial

contrary evidence.” State v. Buelow, 155 Vt. 537, 543 (1990). While defendant characterizes the evidence differently or would give it a different weight, he has not shown that the evidence did not support the trial court’s decision or that it was otherwise an abuse of discretion.

Defendant argues in the alternative that the decision whether to transfer a defendant to juvenile court must be guided by express standards, rather than the Kent factors, which the courts are permitted—but not required—to consider. See Buelow, 155 Vt. at 547 (Dooley J., concurring) (advocating adoption of express standards for deciding whether defendant should be transferred to juvenile court). Defendant urges the adoption of the so-called “modified Kent factors,”¹ which focus more on the emotional, psychological and intellectual development of the defendant. These factors, according to defendant, are appropriate in light of public policy concerns with the different levels of culpability that may be assigned to adolescents. This determination, however, is ultimately one for the Legislature. In any event, the factors and conclusion specifically proposed by defendant in his post-hearing filings in support of transfer—immaturity and marginal competence, prior record, rehabilitation and public protection—were all addressed by the court’s findings and order.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

¹ The “modified Kent factors” are codified in 33 V.S.A. § 5506(d), which governs transfers from juvenile court to criminal court. Even under that provision, consideration of the factors is still not mandatory. 33 V.S.A. § 5506(d) (providing that “the court may consider” the enumerated factors).