Youth Part Removals, Including AO's and JO's

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New York Official Reports

--- N.Y.S.3d ----, 2024 WL 186677 (N.Y.A.D. 3 Dept.), 2024 N.Y. Slip Op. 00212

***1** In the Matter of Lucas Y., Alleged to be a Juvenile Delinquent. Columbia County Attorney, Respondent; Lucas Y., Appellant.

OPINION

Supreme Court, Appellate Division, Third Department, New York
535227
Decided and Entered:January 18, 2024
Calendar Date:December 13, 2023

Before:Garry, P.J., Lynch, Reynolds Fitzgerald, McShan and Mackey, JJ.

APPEARANCES OF COUNSEL

Mitchell S. Kessler, Cohoes, for appellant.
William J. Better, PC, Kinderhook (Veronica S. Concra of counsel), for respondent.

Mackey, J.

Appeal from an order of the Family Court of Columbia County (Jonathan D. Nichols, J.), entered April 12, 2022, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Following a fact-finding hearing, at which the victim provided sworn testimony, Family Court determined that respondent had committed acts that, if committed by an adult, would have constituted the crimes of criminal sexual act in the third degree and sexual misconduct (Penal Law §§ 130.20 [2]; 130.40 [3]). The court adjudicated respondent a juvenile delinquent and placed him on probation for a period of 18 months, subject to various terms and conditions, and entered an order of protection in favor of the victim. This appeal by respondent ensued.

Initially, we reject respondent's claim that Family Court lacked jurisdiction to adjudicate him a juvenile delinquent. The charges set forth in the petition were offenses over which Family Court had original jurisdiction (*see* Family Ct Act §§ 301.2 [1] [a]; 302.1; *Matter of Trevon Y.*, 81 AD3d 841, 841 [2d Dept 2011]). Although a felony complaint accusing respondent of criminal sexual act in the third degree concerning the same incident had previously been filed in County Court, both the People and respondent had consented on the record to remove the case to Family Court, prior to the Family Court petition being filed, and County Court (Nichols, J.) directed such removal on the record. Although an order of removal was not signed until sometime thereafter, the prosecution in County Court was effectively terminated prior to the Family Court petition being filed (*see* Family Ct Act § 311.1 [7]; CPL 722.21 [1]; 725.00 *et seq.*). [1]

Contrary to respondent's further contention, the juvenile delinquency petition filed by petitioner was not jurisdictionally defective. Pursuant to Family Ct Act § 311.2, "to be facially sufficient, a juvenile delinquency petition must contain nonhearsay allegations establishing every element of each crime charged and the respondent's commission thereof" (*Matter of Tashawn MM.*, 218 AD3d 906, 907 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Michael DD.*, 33 AD3d 1185, 1186 [3d Dept 2006]) and comply with the requirements of Family Ct Act § 311.1. The Court of Appeals has held that a prosecuting agency may supplement the removal order and accompanying papers with a supporting deposition in order to satisfy the requirement of Family Ct Act § 311.2 (3) that a petition be supported by nonhearsay allegations establishing, if true, every element of each charged crime (*see Matter of Michael M.*, 3 NY3d 441, 448 [2004]). Here, the victim's supporting deposition satisfied the requirements of Family Ct Act § 311.2 (*see id.*).

We also find no merit in respondent's contention that his statutory right to a speedy fact-finding hearing was violated (*see* Family Ct Act § 340.1 [2]; ***2** *Matter of Zachary L.*, 218 AD3d 867, 869-870 [3d Dept 2023]). [2] The record shows that respondent expressly and unconditionally waived his right to challenge the adjournments of the fact-finding hearing past the statutory 60-day period. In light of that waiver, respondent "cannot now be heard to complain" (*Matter of Ryan LL.*, 119 AD3d 994, 995 [3d Dept 2014] [internal quotation marks and citation omitted], *lv denied* 25 NY3d 904 [2015]; *see Matter of Willie E.*, 88 NY2d 205, 209-210 [1996]; *Matter of Daniel B.*, 129 AD3d 1152, 1153 [3d Dept 2015], *lv denied* 25 NY3d 914 [2015]; *Matter of Joseph CC.*, 234 AD2d 852,

853-854 [3d Dept 1996]; *see also Matter of Michael DD.*, 33 AD3d at 1186).

Respondent also contends that Family Court's determination is against the weight of the evidence. "When presented with a weight of the evidence argument in a case, such as this one, where a different determination would not have been unreasonable, we view the evidence in a neutral light while according deference to the credibility determinations of Family Court" (*Matter of Alexander CC.*, 191 AD3d 1113, 1115 [3d Dept 2021] [internal quotation marks and citations omitted]). As relevant here, "[a] person is guilty of criminal sexual act in the third degree when . . . [h]e or she engages in . . . anal sexual conduct with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent" (Penal Law § 130.40 [3]). "A person is guilty of sexual misconduct when . . . [h]e or she engages in . . . anal sexual conduct with another person without such person's consent" (Penal Law § 130.20 [2]).

The victim testified that on the evening in question, she visited respondent at his home and agreed to engage in vaginal intercourse. While the victim and respondent were engaging in vaginal intercourse, respondent inserted his penis into the victim's anus. The victim testified that she told respondent to "please stop" because it hurt and that if it happened again, they were done having sex. According to the victim, respondent proceeded to insert his penis into her anus on two more occasions after she told him she did not want to participate in anal intercourse. She further testified that she was unable to stop him because he overpowered her, and he only stopped when he saw that there was feces and blood on his body and bedding. The victim testified that after she left respondent's home, she called her cousin and told her what had happened.[3] The victim also testified that she thereafter blocked respondent on all social media accounts except "iMessage" in order to retrieve a necklace she left at his house. During this communication to retrieve her necklace, respondent asked the victim to delete all messages from the evening of the incident, which she did. She testified that she eventually reported the incident to her school counselor and that she did not speak up sooner because she feared what people might think.

Although a different determination would not have ***3** been unreasonable in light of the fact that the allegations rested entirely on an assessment of the victim's credibility, having considered the evidence and giving deference to Family Court's credibility determinations, we are satisfied that the determination is supported by the weight of the evidence (*see Matter of Alexander CC.*, 191 AD3d at 1115-1116; *Matter of Devin Z.*, 91 AD3d 1035, 1036 [3d Dept 2012]; *Matter of Gordon B.*, 83 AD3d 1164, 1167 [3d Dept 2011], *lv denied* 17 NY3d 710 [2011]; *Matter of Jared WW.*, 56 AD3d 1009, 1010-1011 [3d Dept 2008]). The victim testified that respondent forcefully subjected her to anal intercourse without her consent, which supports both criminal sexual act in the third degree and sexual misconduct (*see* Penal Law §§ 130.20 [2]; 130.40 [3]). Although respondent is correct that there was no physical evidence supporting his commissions of the act, neither statute requires such evidence (*see* Penal Law §§ 130.20 [2]; 130.40 [3]). Simply stated, Family Court was in the best position to assess the victim's credibility, as it saw and heard her testimony firsthand (*see Matter of Paul QQ.*, 256 AD2d 751, 751 [3d Dept 1998]).

As a final matter, we reject respondent's contention that he received ineffective assistance of counsel. The record reflects that he certainly received meaningful representation throughout the proceeding. In that regard, any objection predicated upon improper procedure, violation of respondent's speedy-trial right or lack of adjustment services would have had little to no chance of success (*see Matter of Bernard K.*, 280 AD2d 728, 729 [3d Dept 2001]). Respondent's counsel was prepared at every conference, was aware of the speedy-trial time limitations and appropriately waived such rights and zealously defended respondent at the fact-finding hearing by cross-examining the victim, eliciting inconsistencies and objecting when necessary (*see Matter of Alexander CC.*, 191 AD3d at 1117). Viewed in the totality, respondent was provided with meaningful representation (*see id.* at 1116-1117; *Matter of Michael DD.*, 33 AD3d at 1186; *Matter of Gregory AA.*, 20 AD3d 726, 726-727 [3d Dept 2005]; *Matter of Bernard K.*, 280 AD2d at 729). Respondent's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Garry, P.J., Lynch, Reynolds Fitzgerald and McShan, JJ., concur.

ORDERED that the order is affirmed, without costs.

FOOTNOTES

Footnotes

1 Indeed, County Court stated on the record that "[t]his matter will be discontinued as a criminal matter, and it will now be handled as a juvenile delinquency matter in [F]amily [C]ourt."

2 At no time during the proceedings was respondent held in detention.

3 The cousin testified that the victim called her on the evening of the incident and relayed that she was penetrated anally against her consent.

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212 A.D.3d 615, 181 N.Y.S.3d 323, 2023 N.Y. Slip Op. 00085

****1** In the Matter of Omar G., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2022-01745, 2022-01746, D-1409-2020
January 11, 2023

CITE TITLE AS: Matter of Omar G.

HEADNOTES

Crimes
Evidence
Excited Utterances—911 Emergency Recording

Crimes
Evidence
Excited Utterances—Admission of Video Recording of Non-Spontaneous Statements Subsequent to 911 Call Made by Mother while Being Interviewed by Police Officers in Her Apartment Not Harmless Error

Austin I. Idehen, Jamaica, NY, for appellant.
Sylvia O. Hinds-Radix, Corporation Counsel, New York, NY (Jane L. Gordon and Deborah E. Wassel of counsel), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Omar G. appeals from (1) an order of fact-finding of the Family Court, Kings County (Alan Beckoff, J.), dated January 21, 2022, and (2) an order of disposition of the same court dated March 9, 2022. The order of fact-finding, after a hearing, found that the appellant committed acts which, ***616** if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree. The order of disposition, insofar as appealed from, upon the order of fact-finding and after a hearing, adjudicated the appellant a juvenile delinquent.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is modified, on the law, by deleting the provision thereof adjudicating the appellant a juvenile delinquent based upon the finding that he committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the second degree; as so modified, the order of disposition is affirmed insofar as appealed from, without costs or disbursements, the order of fact-finding is modified accordingly, and the matter is remitted to the Family Court, Kings County, for a new fact-finding hearing on the count of the petition charging criminal possession of a weapon in the second degree.

The appellant, an adolescent offender (*see* CPL 1.20 [44]), was charged in the Criminal Court with criminal possession of a weapon in the second degree, among other offenses, based on an incident during which he brandished a gun in the presence of his mother, his nine-year-old brother, and the appellant's infant daughter in the family's apartment. This juvenile delinquency proceeding was initiated by the removal of the criminal action from the Criminal Court to the Family Court pursuant to Criminal Procedure Law article 725 (*see* Family Ct Act § 311.1 [7]).

At a fact-finding hearing in the Family Court, a recording of the call placed by the mother to the 911 emergency number during the incident was admitted into evidence under the ****2** excited utterance exception to the hearsay rule. During this call, the mother told the 911 operator, in an anxious tone and without being prompted, that "I need police. . . . My son's got a gun and he's waving it. . . . I have kids in the house." She indicated that she needed to return to the apartment, which she had left in order to make the call.

The Family Court also admitted into evidence, again under the excited utterance exception, a video recording of a statement made by the mother during questioning by police officers ***617** in the apartment after the appellant had been arrested and taken to a police station, and permitted a police officer to testify as to the contents of the mother's statement. While being interviewed by police officers, the mother recounted to the police officers that the appellant, while displaying a gun, said to her "I will boom you," and also said that he would "boom" the mother's boyfriend.

After the fact-finding hearing and a dispositional hearing, the Family Court, inter alia, found that the appellant committed acts which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, and adjudicated him a juvenile delinquent. This appeal ensued.

The appellant has cited no authority that supports his contention that the petition must be dismissed in its entirety because the Family Court was divested of jurisdiction when the presentment agency filed a superseding petition that added a count alleging conduct that would constitute attempted criminal possession of a weapon in the second degree. To the extent that it was improper to add the new count since it charged conduct for which the appellant could be held criminally responsible and the Family Court therefore had no original jurisdiction over that count (*see Matter of Raymond G.*, 93 NY2d 531 [1999]), the appropriate remedy would be dismissal of the improperly added count (*see Matter of Elizabeth R.*, 243 AD2d 427, 427-428, 429 [1997], *affd* 93 NY2d 531 [1999]). Since no finding adverse to the appellant was made with respect to the count alleging conduct that would constitute attempted criminal possession of a weapon in the second degree, no remedial action is warranted.

Contrary to the appellant's contention, the recording of the mother's 911 call fell within the excited utterance exception to the rule against

hearsay. The mother made the call immediately after a startling and disturbing event, while she was still concerned for the safety of the two children in the apartment, and her demeanor indicated that the statements represented "impulsive and unreflecting responses" to the startling event (*People v Caviness*, 38 NY2d 227, 231 [1975]; *see People v Thomas*, 187 AD3d 949, 950 [2020]; *People v Jaber*, 172 AD3d 1227, 1230 [2019]).

The Family Court erred, however, in admitting as excited utterances the statements subsequently made by the mother while being interviewed by police officers in her apartment. ***618** Those statements, made after the appellant had been handcuffed and removed from the scene, were not spontaneous, but were made in narrative form and in response to prompting, after sufficient time had passed to render the mother capable of engaging in reasoned reflection (*see People v Johnson*, 1 NY3d 302, 306-307 [2003]; *People v Leach*, 137 AD3d 1300, 1300-1301 [2016]). Although the mother raised her voice and became agitated as she recalled the incident, she was no longer acting under the stress of the incident itself, and her tone "did not evidence an inability to reflect upon the events" (*People v Cantave*, 21 NY3d 374, 382 [2013]).

While the error in admitting the mother's out-of-court statements that the appellant threatened to "boom" her and her boyfriend had no apparent effect on the Family Court's findings as to the counts charging criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, those statements supplied proof of the appellant's intent to use the gun unlawfully against another (*see* Penal Law § 265.03 [1]). Thus, the error in admitting those statements was not harmless with respect to the charge of criminal possession of a weapon in the second degree, and the presentment agency does not argue otherwise.

The appellant's remaining contentions are without merit.

****3** Accordingly, the appellant is entitled to a new fact-finding hearing on the count of the petition charging criminal possession of a weapon in the second degree. Connolly, J.P., Wooten, Zayas and Wan, JJ., concur.

End of Document

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93 N.Y.2d 531, 715 N.E.2d 486, 693
N.Y.S.2d 482, 1999 N.Y. Slip Op. 05336

In the Matter of Raymond
G., a Person Alleged to be a
Juvenile Delinquent, Respondent.
Presentment Agency, Appellant.

Court of Appeals of New York
118
Argued May 6, 1999;
Decided June 10, 1999

CITE TITLE AS: Matter of Raymond G.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered October 30, 1997, which (1) reversed, on the law, an order of the Family Court, New York County (Judith B. Sheindlin, J.), adjudicating respondent a juvenile delinquent upon a finding that respondent committed acts which, if committed by an adult, would constitute the crime of assault in the second degree, and (2) dismissed the petition. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the [Family] Court, properly made?"

Matter of Raymond G., 243 AD2d 427, affirmed.

HEADNOTES

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution

(1) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 in response to a perceived epidemic of violent criminal conduct by juveniles, divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. The statutory scheme eliminated Family Court's original jurisdiction for persons under the age of 16 who, having been deprived of an infancy defense (*see,* Family Ct Act § 301.2 [1]; Penal Law § 30.00 [2]), can be held criminally responsible for their actions. Accordingly, in a juvenile delinquency proceeding arising out of respondent's alleged participation in an attack on three individuals at a subway station in which he was charged with multiple counts of assault in varying degrees, the highest being two counts of assault in the first degree, respondent had no infancy defense under section 30.00 (2) and thus, initially could be held criminally responsible. As a result, Family Court had no jurisdiction over him unless and until he were to become "the defendant in an action ordered removed from a criminal court to the family court" pursuant to section 301.2 (1) (b).

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution--Divestiture of Concurrent Jurisdiction

(2) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced ***532** in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. Although Penal Law § 30.00 (3) still makes infancy a defense in most criminal prosecutions, the legislative scheme did not preserve concurrent original jurisdiction over juvenile offenders in Family Court. While that subdivision states that "lack of criminal responsibility by reason of infancy, *as defined in this section,* is a defense" (emphasis supplied), subdivision (2) thereof eliminates the defense of infancy for certain enumerated offenses. Moreover, although the Legislature left intact the definition of "designated felony acts" in article 3 of the Family Court Act, it cannot be said that the Family Court has retained concurrent original jurisdiction over juveniles charged with first degree assault; while there is an overlap between juvenile offender crimes and designated felony acts, there are a number of designated felony acts which are not also juvenile offenses. Therefore, as to those offenses that are designated felony acts but do not give rise to juvenile offender status, Family Court's original jurisdiction had to be retained because the defense of infancy is still available to youths charged with those offenses, and in the event of removal, Family Court will have jurisdiction to consider all of the counts charged against the youth, including those over which it lacked original jurisdiction.

Courts
Family Court
Lack of Original Jurisdiction over Acts for Which Juvenile Subject to Criminal Prosecution--Prosecutorial Discretion

(3) Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court, since the Legislature, in 1978 in response to a perceived epidemic of violent criminal conduct by juveniles, divested the Family Court of original jurisdiction over several serious acts committed by 13, 14 and 15 year olds in favor of original jurisdiction in the adult criminal justice system. It cannot be said that Family Court retains concurrent original jurisdiction over juvenile offenders charged with serious acts since that would confer upon the prosecutor a discretion not authorized by the statutory scheme. So long as there is an extant charge pending against a defendant under the age of 16 for which that youth may be held criminally responsible, a transfer to Family Court may not be effected unless a criminal court reviews the case and

finds removal to be within the interests of justice. Thus, to permit, at the election of the District Attorney, a juvenile offender to be charged originally in Family Court would circumvent the legislative directive to have juvenile offenses criminally prosecuted except in those instances where a court finds removal appropriate.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 34, 36, 37, 39, 43.

Carmody-Wait 2d, Courts and Their Jurisdiction §§ 2:125-2:127; Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:144, 119A:151. ***533**

McKinney's, Family Ct Act § 301.2 (1); Penal Law § 30.00 (2), (3).

NY Jur 2d, Criminal Law, §§ 966-969; Domestic Relations, § 1331.

ANNOTATION REFERENCES

See ALR Index under Juvenile Courts and Delinquent Children.

POINTS OF COUNSEL

Michael D. Hess, Corporation Counsel of New York City (*Sharyn Rootenberg* and *Larry A. Sonnenshein* of counsel), for appellant.
Where a 13, 14, or 15-year-old juvenile has committed a statutorily targeted and enumerated offense, the Family and Criminal Court systems share concurrent original jurisdiction to preside over proceedings against that class of juveniles. (*Matter of Meleick H.*, 170 Misc 2d 230, 238 AD2d 339, 90 NY2d 805; *People v Murphy,* 128 AD2d 177; *Matter of Hassan v Magistrates' Ct. of City of N. Y.,* 20 Misc 2d 509, 10 AD2d 908, 8 NY2d 750, 364 US 844; *Ivey v State of New York,* 80 NY2d 474; *Matter of Elizabeth R.,* 169 Misc 2d 58, 243 AD2d 427, 92 NY2d 843; *Matter of Nick C.,* 172 Misc 2d 739; *Matter of Steven L.,* 101 Misc 2d 320; *Matter of Consolidated Edison Co. v Department of Envtl. Conservation,* 71 NY2d 186; *People v Newman,* 32 NY2d 379, 414 US 1163; *Alweis v Evans,* 69 NY2d 199.)
Lawrence Katz, New York City, for respondent.
The Family Court does not have jurisdiction over acts which must be charged as crimes. (*Matter of Vega v Bell,* 47 NY2d 543; *Matter of Meleick H.,* 170 Misc 2d 230; *Rodriguez v Myerson,* 69 AD2d 162.)

OPINION OF THE COURT

Levine, J.

In 1996, after allegedly participating in an attack against three individuals at a subway station, then 15-year-old respondent Raymond G. was charged with delinquency for multiple counts of assault in varying degrees, the highest being two counts of assault in the first degree (Penal Law § 120.10 [1], [2]), in a designated felony act petition filed in Family Court (*see,* Family Ct Act § 311.1 [5]). Respondent moved to dismiss the top counts on the ground that Family Court lacks original ***534** jurisdiction over acts for which a juvenile could be subject to criminal prosecution.

Family Court denied respondent's motion and asserted jurisdiction. During the fact-finding hearing, respondent admitted to acts which if committed by an adult would constitute assault in the second degree. He was adjudicated a juvenile delinquent and placed in a limited secure facility for up to 18 months. On respondent's appeal, the Appellate Division reversed Family Court's order of disposition and dismissed the petition, holding that, absent an order of removal from a criminal court pursuant to CPL article 725, Family Court lacked jurisdiction over offenses for which a juvenile could be held criminally responsible. The court also granted dismissal of the remaining counts of the petition on speedy hearing grounds (*see,* Family Ct Act § 340.1). The Appellate Division granted petitioner presentment agency leave to appeal upon the certified question of whether its order reversing the order of Family Court was properly made.

(1) We now affirm, concluding that Family Court's jurisdiction over acts for which a juvenile can be held criminally responsible is limited to transferrals where prosecution was commenced in a criminal court and thereafter was removed to Family Court. Thus, respondent was entitled to dismissal of the first degree assault counts of the petition. The presentment agency does not independently challenge the Appellate Division's consequent conclusion that, with the assault in the first degree counts dismissed, respondent was denied his right to a speedy hearing on the remaining counts under Family Court Act § 340.1 (1).

Now and since its inception, Family Court has possessed "exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent" (Family Ct Act § 302.1 [1]; *see,* Family Ct Act former § 713, added by L 1962, ch 686; *see also,* NY Const, art VI, § 13 [b]; Family Ct Act § 115 [a] [vi]). Until 1978, a juvenile delinquent was defined as a "person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime" (Family Ct Act § 712 [former (a)]; L 1978, ch 481, § 47). Thus, had this offense been committed prior to 1978, respondent, who was 15 years old at the time of commission, unquestionably would have been subject to the original and exclusive jurisdiction of Family Court.

In reaction to a perceived epidemic of violent criminal conduct by juveniles, however, in 1978 the Legislature ***535** " 'criminalized' several serious acts committed by thirteen-, fourteen-, and fifteen-year-old youths" (Besharov and Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 301.2, at 25). Thus, the Legislature divested the Family Court of original jurisdiction over such acts in favor of original jurisdiction in the adult criminal justice system (*see,* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 10.00, at 24 [for certain crimes, 13, 14 and 15 year olds are subjected to "prosecution in a criminal court *rather than* to a proceeding in the Family Court" (emphasis supplied)]; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 180.75, at 167 [referring to the youths who, after the 1978 amendments "would be dealt with by the adult system *rather than* in Family Court" (emphasis supplied)]; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A

[1982 ed], CPL 180.75, at 165 [pertinent 1978 amendments to the CPL were added as "part of a detailed legislative scheme to *transfer* responsibility for the most violent juveniles from Family to Criminal Courts" (emphasis supplied)]).

The statutory means chosen by the Legislature to execute the task of "criminalizing" certain juvenile offenses through divestiture of Family Court original jurisdiction began with creating a class of "juvenile offenders" consisting of 15, 14, and in a few instances, 13 year olds who are accused of committing any of a number of specifically named serious violent felonies (*see,* Penal Law § 10.00 [18]; CPL 1.20 [42]). Next, the Legislature provided for the divestiture of Family Court's original jurisdiction over these juvenile offenders by recasting the Family Court Act definition of juvenile delinquent to exclude them, while at the same time making correlative revisions to the Penal Law to render juvenile offenders subject to criminal prosecution (L 1978, ch 481, §§ 28, 47).

As revised, "juvenile delinquent" is defined as "a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) *is not criminally responsible for such conduct by reason of infancy,* or (b) *is the defendant in an action ordered removed from a criminal court* to the family court pursuant to article seven hundred twenty-five of the criminal procedure law" (Family Ct Act § 301.2 [1] [emphasis supplied]). To complement the new definition of juvenile delinquent, Penal Law § 30.00, the infancy defense, was amended to expressly exclude the availability of the defense to juvenile offenders ***536** (*see,* Penal Law § 30.00 [2], as amended by L 1978, ch 481, § 28). Thus, Family Court's *original* jurisdiction was eliminated for persons under the age of 16 who, having been deprived of an infancy defense, can be held criminally responsible for their actions.

Here, respondent had no infancy defense under Penal Law § 30.00 (2) and thus, initially could be held criminally responsible for the alleged assault. As a result, Family Court has no jurisdiction over respondent unless and until he were to become "the defendant in an action ordered removed from a criminal court to the family court" (Family Ct Act § 301.2 [1] [b]).

This Court addressed the impact of the 1978 amendments to the Family Court Act in *Matter of Vega v Bell* (47 NY2d 543, 551):

"All youngsters over a certain age who are accused of certain criminal activities are now *automatically* prosecuted within the adult criminal justice system unless there exist certain special circumstances warranting more lenient treatment and *transfer* to the Family Court" (emphasis supplied).

We recognized in *Matter of Vega v Bell* that the 1978 Legislature had decided that subjecting certain juveniles to criminal prosecution was "necessary to control violent juvenile crime in the face of what was considered to be the failure of the traditional means of treating that problem" (*id.,* at 548). Thus, consistent with the legislative goal that juvenile offenders will, as a general rule, be prosecuted as adults, Family Court does not have jurisdiction over such youths except where the juvenile offender's

case has been removed from a criminal court to Family Court.

(2) The presentment agency nevertheless argues that the legislative scheme preserves concurrent original jurisdiction over juvenile offenders in Family Court and, thus, the District Attorney has the discretion to authorize initial prosecution in that court. Its argument is two-fold. First, it contends that respondent fits within the amended definition of "juvenile delinquent" because Penal Law § 30.00 (3) still makes infancy a defense in *any* criminal prosecution. That section provides "[i]n any prosecution for an offense, lack of criminal responsibility by reason of infancy, *as defined in this section,* is a defense" (Penal Law § 30.00 [3] [emphasis supplied]). The presentment agency's argument wholly ignores the above-emphasized words, in that subdivision (2) of section 30.00 expressly eliminates the defense of infancy for all juvenile offenders. ***537**

Second, the presentment agency relies heavily on the fact that the 1978 Legislature, when providing that certain juveniles would be subject to criminal prosecution, left intact the definition of "designated felony acts" in article 3 of the Family Court Act--a definition which includes first degree assault and the other acts that are now subject to criminal prosecution (Family Ct Act § 301.2 [8]). Designated felony acts are a subset of juvenile delinquency, created by the Legislature in 1976 (L 1976, ch 878). There were no new jurisdictional prerequisites added to the Family Court Act in relation to this amendment because the purpose of creating the designated felony acts category was primarily to authorize more stringent sanctions by way of a lengthier, more secure placement (*see, e.g.,* Family Ct Act §§ 353.5, 355.3; *see also,* Besharov and Sobie, *op. cit.,* at 27). Essentially, the presentment agency argues that because the Legislature did not eliminate those offenses which are now subject to criminal prosecution from the definition of designated felony acts, it necessarily left original jurisdiction over those offenses in Family Court.

The presentment agency's reliance on the designated felony act provisions of the Family Court Act is misplaced. The continued inclusion of those provisions of Family Court Act article 3 concerning designated felony acts does not support the conclusion that Family Court has retained concurrent *original* jurisdiction over juvenile offenders such as respondent. First, while there is an overlap between juvenile offender crimes and designated felony acts, there are a number of designated felony acts which are not also juvenile offenses (*compare,* Family Ct Act § 301.2 [8] [including, *inter alia,* second degree assault in some instances, and first degree kidnapping and first degree arson when committed by a 13 year old], *with* CPL 1.20 [42]; Penal Law § 10.00 [18]; § 30.00 [2] [not including second degree assault under any circumstances and limiting criminal prosecutions of 13 year olds to murder cases]). Obviously then, as to those offenses that are designated felony acts but do not give rise to juvenile offender status, Family Court's original jurisdiction had to be retained because the defense of infancy is still available to youths charged with those offenses.

Second, in the event a juvenile offender's case is removed to Family Court from a criminal court,

Family Court has jurisdiction to consider all of the counts charged against the youth, including those designated felony acts over which Family Court lacked original jurisdiction. Thus, the provisions in ***538** article 3 of the Family Court Act for disposition of designated felony acts had to remain intact in order to subject the transferee to the restrictive placements provided for therein.

(3) In addition to being contrary to the clear language of the statutes and the evident legislative intent to divest Family Court of original jurisdiction over juvenile offenders, the presentment agency's theory of concurrent jurisdiction would confer upon the prosecutor a discretion not authorized by the statutory scheme. So long as there is an extant charge pending against a defendant under the age of 16 for which that youth may be held criminally responsible, a transfer to Family Court may not be effected unless a criminal court reviews the case and finds removal to be within "the interests of justice" (*see,* CPL 180.75 [4]; 210.43 [1]; 220.10 [5] [g] [iii]; 330.25 [3]; *cf.,* CPL 190.71 [removal authorized where Grand Jury fails to indict the juvenile on any offense for which criminal liability may be imposed]; CPL 310.85 [3] [removal necessary where verdict of guilty is returned only on a charge for which the juvenile defendant is not criminally responsible]). Thus, the presentment agency's position that, at the election of the District Attorney, a juvenile offender can be charged originally in Family Court, would circumvent the legislative directive to have juvenile offenses criminally prosecuted except in those instances where a court finds removal appropriate.

Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question not answered as unnecessary given the fact that the Appellate Division order dismissing the petition was final.

Chief Judge Kaye and Judges Bellacosa, Smith, Ciparick, Wesley and Rosenblatt concur.
Order affirmed, without costs. Certified question not answered upon the ground that it is unnecessary. ***539**

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 2266307
(Table), 2024 N.Y. Slip Op. 50582(U)

***1** The People of the State of New York,

v.

A.M., Defendant.

County Court, Putnam County
Docket No. FYC-70048-24
Decided on May 14, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Transfer from Youth Part to Family Court--People's motion to prevent removal of second-degree assault prosecution to Family Court was denied upon failure to establish extraordinary circumstances after weighing aggravating and mitigating factors

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OPINION OF THE COURT

Anthony R. Molé, J.

The following papers were read and considered on the motion made by the People of the State of New York, pursuant to CPL 722.23 (1), for an order preventing removal of this action to the Family Court, Putnam County:

Motion Papers:

Affirmation in Support of ADA Breanne M. Smith (dated March 26, 2024); Unmarked Exhibit Attachments

Reply to Motion by Defense Counsel Christopher York, Esq. (dated March 29, 2024)

Upon review of the foregoing papers and the court file, the Court finds and determines the following:

In 2017, the New York State Legislature enacted the "Raise the Age Law," which defines a 16-or 17-year-old who was charged with a felony committed on or after October 1, 2018, or October 1, 2019, respectively, as an "adolescent offender" (CPL 1.20 [44]; *see* Penal Law § 30.00 [1], [3] [a]). The Raise the Age Law created a youth part of Superior or Supreme Court to decide on the proper forum for such prosecutions (*see* CPL 722.10 [1]) -- thus bringing this case before the undersigned as the presiding judge of the Youth Part.

I. *Procedural History and Background*

Defendant, an adolescent offender ("AO"), is currently 17 years old (born 2006). He is charged by felony complaint with assault in the second degree in violation of Penal Law § 120.05 (2), a class D felony (a violent felony). The AO was arraigned in the Youth Part on February 27, 2024, [1] when he entered a plea of not guilty and was released on his own recognizance. Subsequently, the AO waived the six-day felony hearing.

Although the AO is charged with a violent felony, the facts as delineated do not meet any of the three prongs as enumerated in CPL 722.23 (2). Because none of the aggravating factors enumerated in CPL 722.23 (2) exist here, the People indicated that they would make a written motion to prevent removal based on the existence of "extraordinary circumstances" sufficient to override the preference for removal to family court (CPL 722.23 [1]). [2]

The People timely filed such motion on March 26, 2024, [3] being within 30 days after the AO's arraignment on the felony complaint (*see id.* [1] [a]). The AO filed opposition papers on April 2, 2024. No reply papers were filed by the People.

In their moving papers, the People requested a hearing under CPL 722.23 (1) (c), which the Court conducted on May 6, 2024. Based on the evidence adduced at the hearing and the parties' written submissions, the Court makes the following findings of fact and conclusions of law.

***2** II. *Legal Standard*

CPL 722.23 (1) (a) states that the court "shall order the removal of the action to the family court," unless the District Attorney's Office files a written motion to block the removal predicated on extraordinary circumstances. But pursuant to CPL 722.23 (1) (d), the Court "shall deny" the People's motion to prevent removal "unless the Court makes a determination . . . that *extraordinary circumstances* exist that should prevent the transfer of the action to family court" (emphasis added).

The Legislature did not define the term "extraordinary circumstances" as it is used in the Raise the Age Law. So, this Court must follow the state's rules of statutory interpretation.

"We begin with our governing rule of statutory construction, namely that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used. When statutory terms are not defined, dictionary definitions serve as useful guideposts in determining the word's ordinary and commonly understood meaning" (*People v Williams*, 37 NY3d 314, 317-318 [2021] [internal quotation marks and citations omitted]). While usually "the text itself is generally the best evidence of legislative intent" (*People v Ballman*, 15 NY3d 68, 72 [2010]), the absence of the term's definition compels the Court to "resort to other means of interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 92, Comment).

Determining the meaning of statutory language sometimes calls for reference to dictionary definitions (*see People v Andujar*, 30 NY3d 160, 163 [2017]). The term "extraordinary" is defined as "[b]eyond what is usual, customary, regular, or common" (Black's Law Dictionary [11th ed 2019], extraordinary). It is similarly defined elsewhere as "going beyond what is usual, regular, or customary" (Merriam-Webster Online Dictionary, extraordinary [https://www.merriam-webster.com/dictionary/extraordinary [last accessed May 14, 2024]). Trial courts have referred to the common dictionary definition of the term "extraordinary," and interpreted the "plain meaning" of the phrase "extraordinary circumstances" as a set of facts that are "exceptional" and "highly unusual" (*see e.g. People v R.U.*, 70 Misc 3d 540, 547 [Co Ct, Nassau County 2020]; *People v J.P.*, 63 Misc 3d 635, 649-650 [Sup Ct, Bronx County 2019] [where the term was interpreted to be inclusive of "far from common, very outstanding, very remarkable"]).

Trial courts have also reviewed the legislative history of the Raise the Age Law to ascertain legislative intent in aspiring to construe the term's meaning. Legislators expressed that in assessing extraordinary circumstances, the presiding judge should consider the youth's situation holistically, including both aggravating factors and mitigating circumstances (*People v T.P.*, 73 Misc 3d 1215[A], *3 [Co Ct, Nassau County 2021] [quotation marks omitted]). Citing to the legislative record, trial courts have recognized that State Assembly members debating the Raise the Age Law expressed that the threshold of extraordinary circumstances is intended to be a very high standard for the District Attorney to satisfy; hence, preventing removals of adolescent offenders to the family court should be extremely rare (*see People v O.C.*, 80 Misc 3d 1204[A], *2 [Fam Ct, Erie County 2023]). "The Legislature . . . specifically contemplated that ***3** the courts would shape and determine the meaning of extraordinary circumstances in evaluating the factors of each individual case" (*see People v B.H.*, 63 Misc 3d 244, 248-250 [Sup Ct, Nassau County 2019] [internal quotation marks omitted]). Notwithstanding all of the foregoing, "one could question what set of facts would need to be presented to constitute extraordinary circumstances" (*Clark v Boyle*, 210 AD3d 463, 469 [1st Dept 2022], *lv denied* 39 NY3d 974 [2023] [internal quotation marks omitted]).

The legislative intent is indeed reliably manifest. The statute, as strictly construed, renders the matter presumptively subject to family court removal. With the foregoing legal standard and principles in mind, the Court now turns to the merits of the People's motion. [4]

III. *Factual Findings*

Here, the AO is charged by way of a felony complaint with one count of assault in the second degree in violation of Penal Law § 120.05 (2). That offense is a violent felony as defined in Penal Law 70.02 (1) (c). The charge stems

from February 15, 2024, when the AO allegedly struck the victim, G.B., multiple times with a metal baseball bat, causing swelling and bruising to the victim's hands, arms, and legs. G.B. is a minor (born 2008). [5]

Relevant here, a person commits intentional assault in the second degree when, "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.05 [2]). Physical injury "means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]).

Case law confirms that a baseball bat can be deemed a dangerous instrument. Depending on how it is used, a baseball bat can be readily capable of causing serious physical injury and thus satisfy the definition of a "dangerous instrument" (*see* Penal Law § 10.00[10], [13]; *People v Torres*, 211 AD2d 509, 509 [1st Dept 1995] [conviction affirmed where a child's toy baseball bat was found to constitute a dangerous instrument]). Hence, attacking another person with a baseball bat can support a conviction of assault in the second degree (*see e.g. People v Gurgov*, 129 AD3d 989, 990 [2d Dept 2015]; *People v Smoke*, 43 AD3d 1332, 1333 [4th Dept 2007], *lv denied* 9 NY3d 1039 [2008]; *People v Coffin*, 263 AD2d 780, 781 [3d Dept 1999]).

According to the victim and three witnesses, the victim encountered the AO at an Acme supermarket in the Town of Southeast and attempted to avoid him, so that a verbal or physical confrontation would not arise. When leaving the supermarket with his girlfriend, and as he was walking to enter a vehicle, the victim avers that the AO rushed at him with a dark-colored ***4** baseball bat, chased him around the vehicle, and struck him on his hands, arms, and legs with the bat until the AO fled the scene in his girlfriend's vehicle. The victim's girlfriend called the police to report the incident. The victim claims that as a result of the attack, he suffered pain and bruising to his arms and left thigh.

Pursuant to a search warrant, police later seized the metal baseball bat from the vehicle of the AO's girlfriend. On February 20, 2024, an investigator from the Putnam County Sherriff's Office contacted the AO's father in order to speak to the AO, advising him that the AO was facing an assault charge and he should promptly turn himself in to police. A few days later, the AO's father contacted the investigator and told him that the AO assaulted the complainant because he had threatened to rape the AO's younger sister. [6] The AO, accompanied by his father and his attorney, appeared at the Sherriff's Office on February 27, 2024 to surrender based on the criminal charge. He was arraigned that same day.

A. The People's Arguments

The People argue that compelling facts are present here to warrant retention of this case in the Youth Part. In so doing, they are of the view that the Legislature envisioned this exact sort of scenario for a court to find the existence of extraordinary circumstances in order to block removal to family court and keep the case for adjudication in the Youth Part.

The People's position in making this motion appears to be premised on the ground that removal to family court would merely amount to allowing the AO's criminal behavior to go without consequences. The People claim that the AO had malicious intent by carrying out a carefully planned violent attack on the victim, which was premeditated, and is corroborated by video camera footage capturing the incident. The People argue that the AO's calculated and brutal attack lacked impulsivity since he stalked, taunted, and intimidated the victim, was armed with a weapon, and caused him bodily harm by striking him with a metal baseball bat. The People insist that the AO's conduct is cruel and heinous -- thereby, rising to the level of extraordinary circumstances.

The People also rely on the certified disciplinary records from the AO's high school as an aggravating factor, which they believe demonstrate he has violent tendencies, despite school intervention, assistance, and suspensions. The People urge that the AO has several instances dating back to 2019 where he previously instigated confrontations with other students, and his prior school history reflects that he harassed, threatened, and assaulted other students. The People maintain that the AO's documented behavior has been troublesome for several years given his issues throughout high school and the disciplinary measures imposed upon him. Since prior services offered to him through school have been to no avail, the People believe that the AO would not be amenable to the services offered in family court, nor would the heightened services there steer him in the right direction since he is "heading down a path of violence and destruction."

In addition, the People posit that the AO comes from a unified family, lives in a stable ***5** household, and has the benefit

of parental guidance. They represent that based on the AO's appearance and demeanor in court, he is not facing economic or educational difficulties. The Court, however, finds this contention to be merely an assumption made by the People as will be delineated below.

B. The AO's Contentions

The AO does not dispute the factual aversions set forth in the People's moving papers. He counters that removal to family court is warranted here since extraordinary circumstances are not present. The AO explains that the reason prompting the incident is that the complainant threatened he would rape the AO's younger sister which, in turn, infuriated him and led him to confront the complainant in the first instance. He concedes that his conduct was not legally justified, but it should be "morally understandable" because he was trying to protect his sister. The AO represents that he carried out the assault as a warning to the victim to stay away from her. The AO also points to his upbringing, personal difficulties, and the cultural differences as an Albanian in how he poorly handled the situation.

The AO claims that he did not intend to cause the victim grave injury inasmuch as he had no intention to strike him in the head with a metal baseball bat, that he deliberately avoided contact with the victim's head, and the victim suffered minor, not serious, injuries as a result of the attack. According to the AO, he exercised restraint in how and where he struck the victim with the bat.

C. Testimony of the AO's Sister

The AO's sister, 16 years old, testified at the hearing on behalf of the AO in order to corroborate his reason for attacking the victim. Overall, the Court finds the AO's sister to be credible.

The AO's sister testified that well before the underlying incident, the complainant asked her several times to be his girlfriend, but she declined since it is against her Islamic religion, yet he continued to pressure her about a potential relationship and attempted to keep it a secret. According to the AO's sister, the complainant became frustrated and at some point, the complainant followed her around, gave her "dirty" looks that scared her, and the complainant also sent her text messages that he was "going to get" her. The AO's sister also testified that a few days before the incident (around the beginning of February 2024), the complainant sent her text messages saying that he would rape her; thus, she perceived his conduct as threatening and uncomfortable, so she asked her friends to accompany her to classes due to safety concerns. The AO's sister stated that after the assault, she reported the complainant's behavior to the school principal, who represented to her that he would speak with the complainant to address the matter.

The AO's sister conceded that she did not tell the AO about the text messages, nor did she show them to the police or the school principal. However, she testified that at some point, their mother took her cellphone and showed the AO the texts that were sent by the complainant to her. The AO's sister explained that she is no longer in possession of those text messages from the complainant because her mother took her cellphone, implying that she may have deleted ***6** them from her cellphone. Notably, the AO's sister testified that she told the AO about the complainant's conduct towards her. The AO's sister further testified that she learned about the assault after it occurred, and she knew the AO would protect her as her older brother.

IV. *Conclusions of Law*

CPL 722.23 (1) (b) states that every motion to prevent removal of an action to family court must "contain allegations of sworn fact based upon personal knowledge of the affiant." The undersigned has considered the felony complaint and the sworn written statements made to police by three eyewitnesses whose content fall within the mandate of CPL 722.23 (1) (b). The People rely upon the supporting depositions, which were subscribed and verified under penalty of perjury; thus, the content therein also falls within the requirement of CPL 722.23 (1) (b).

The Court has additionally reviewed the prosecutor's supporting affirmation and the exhibits annexed thereto, inclusive of photographs depicting the victim's injuries, screenshots of social media postings made by the AO messaging the victim, and the AO's school disciplinary records. The Court has also considered counsel's arguments on the motion.

All things considered, this case presents a close call. Extraordinary circumstances must be determined on a case-by-case basis. Ordinary cannons of construction warrant a full and liberal effectiveness to the legislative purpose of the Raise the Age Law. The Court underscores that the Legislature

contemplated that most youth part cases should be removed to family court.

Properly framed, the issue is whether the People have proven that the circumstances in the AO's case are so exceptional and beyond what is "usual," so as to overcome the presumption that this matter is "one in 1,000 cases" that would be kept by the criminal court and it should not be removed to family court (*People v T.P.*, 73 Misc 3d 1215[A] at *3). The Court finds that the People did not meet that heavy burden here.

The People contend that a determination of extraordinary circumstances must include consideration of the totality of circumstances, including the AO's prior transgressions and his conduct surrounding this offense. The Court disagrees. This case is *not* one of the rare or uncommon cases that falls within such criteria *(see People v J.G.*, 81 Misc 3d 1239[A], *3 [Fam Ct, Erie County 2024]; *People v J.R.*, 65 Misc 3d 1223[A], *5-6 [Co Ct, Nassau County 2019]). The Court finds that the cannons of construction, the legislative history, and the circumstances surrounding passage of the Raise the Age Law are contrary to the People's position that extraordinary circumstances are present here to warrant preclusion of removal to family court. In reaching this conclusion, the Court notes, again, that there is a strong presumption of removing an adolescent offender's case to the family court (*see People v W.H.*, 69 Misc 3d 278, 279 [Sup Ct, Kings County 2020]).

In support of their argument that extraordinary circumstances exist to prevent removal, the People author a descriptive story leading up to the timeline of the AO's arrest. The prosecutor's supporting affirmation, weaving a story of suspense and violence, attempts at times to fill in gaps and provide some testimonial evidence. It is rife with alleged statements made between the AO and an investigator from the Putnam County Sheriff's Office, as are set forth in the People's CPL 710.30 notice. Some of the factual allegations relied upon by the People are ***7** based upon conversations with a police officer. The prosecutor's supporting affirmation also contains other hearsay statements that are unsupported by an affidavit from the investigator, who has personal knowledge of the facts (*see* CPL 722.23 [1] [b]; *People v J.B.*, 63 Misc 3d 424, 428-429 [Co Ct, Westchester County 2019]). Reference by the People is also made to "video surveillance obtained by law enforcement" of the Acme parking lot area and the interior of the supermarket, which were not included as part of their motion.

The People maintain that the AO offered no proof of the alleged threat by the complainant to the AO's sister, noting that his opposition papers lack any such claimed evidence. The People fault the AO and his counsel for the AO's refusal to turn over his cellphone so that the prosecution can extract forensic data therefrom to retrieve deleted text messages in an effort to corroborate the AO's allegation that the complainant threatened to rape the AO's teenage sister. Also, the People aver that the AO initially denied involvement in the attack by telling police he had been home the entire day on the date of the incident.

The AO highlights in opposition that the People have a very high burden to prevent removal. Despite testimony provided at the hearing by the AO's sister, the People assert that the AO has failed to adduce proof that the complainant threatened at any time to rape her. At the same time, the burden here is on the People. It cannot be shifted to the AO. There is no indication that the AO's sister fabricated her version of the story. During her testimony, she appeared to the undersigned as candid, forthright, and sincere based on her demeanor. She credibly testified at the hearing by providing responsive answers based on what she could remember.

In assessing "extraordinary circumstances," the undersigned must consider the AO's predicament in its totality, including both aggravating factors and mitigating circumstances. Aggravating factors make it more likely that the matter should remain in the Youth Part. Conversely, mitigating circumstances make it more likely that the matter should be removed to family court. With that said, the Court must carefully look at this case having "its own intricacies and nuances" in deciding the People's motion to prevent removal (*People v S.J.*, 72 Misc 3d 196, 201 [Fam Ct, Erie County 2021]).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days; (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes. On the other hand, mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers (*see People v S.J.*, 72 Misc 3d at 199).

In the present scenario, the allegations in this case are very serious. The AO's actions should in no way be minimized. The AO's actions show calculation and malice. At the same time, if the AO's claim that the complainant made threatening remarks that he would rape his sister is also accepted as true, his conduct, while highly concerning and unjustified, is not exceptional to a very marked extent.

True, the AO exhibited aggressive and vicious conduct in purposefully confronting and ***8** attacking the victim. He engaged in dangerous behavior. The AO, in essence, implicitly concedes as much by not rebutting the account of the events as outlined in the People's motion papers. As to aggravating factors, the AO allegedly committed a crime on a single day. He did not commit a separate series of crimes over multiple days. The AO's premeditation and planning in the commission of the offense is an aggravating factor. While his conduct in assaulting the complainant with a metal baseball bat was arguably heinous and cruel, the AO did not lead, threaten, or coerce other reluctant youth in assaulting the victim, despite the fact that the AO was with his teenage girlfriend at the time. The AO's girlfriend was not charged or deemed an accomplice.

Although the AO's actions in physically attacking the complainant with a baseball bat are reprehensible, the Court holds that the surrounding facts of this incident are not overly exceptional to prevent removal. In drawing this conclusion, it has been held that a physical attack, in and of itself, does not compel a finding of extraordinary circumstances (*see e.g. People v A.M.*, 77 Misc 3d 1227[A], *3 [Sup Ct, Erie County 2023]).

Cases where extraordinary circumstances were found and kept in the youth part include armed robbery with other youth (*see People v B.T.*, 73 Misc 3d 1238 [A], *7-8 [Co Ct, Nassau County 2021]); repeatedly stabbing someone with a kitchen knife (*see People v V.M.*, 73 Misc 3d 1224[A], *3-4 [Co Ct, Nassau County 2021]); firing a handgun where the codefendants, acting in concert, were facing firearm-related offenses and attempted murder in the second degree (*see People v R.U.*, 70 Misc 3d 540, 541-548 [Co Ct , Nassau County 2020]; *People v D.S.*, 69 Misc 3d 1214[A], *1 [Co Ct, Nassau County 2020]); a brutally violent attack where codefendants repeatedly punched, stomped, and kicked a person who was unconscious and helpless, without signs to discontinue the assault until the codefendants were eventually restrained (*see People v C.S.*, 68 Misc 3d 1208[A], *4 [Fam Ct, Onondaga County 2020]); armed robbery using a collapsible type of knife with a 3½ inch blade, where the victim was cut on both hands and suffered deep lacerations, exposing the victim's bones and arteries in both hands, which required approximately 30 stitches and caused the victim severe bleeding and substantial pain (*see People v K.F.*, 67 Misc 3d 1215[A], *2-5 [Co Ct, Nassau County 2020]); and where codefendants, both charged with attempt to commit the crime of gang assault in the first degree, first provoked a homeless man suffering from mental health issues, and then proceeded to taunt, punch, and kick him repeatedly in his head, causing the man to suffer a broken nose with significant swelling to his head requiring hospitalization, all while an uncharged individual recorded the incident on video and livestreamed it on "Facebook Live" (*see People v Y.L.*, 64 Misc 3d 664, 665 [Co Ct, Monroe County 2019]).

As the AO correctly points out, the cases cited by the People in their moving papers are *not* on point, given that those courts did not find the existence of "extraordinary circumstances"; and therefore, denied the People's respective motions to prevent removal in those cases (*see People v J.P.*, 63 Misc 3d at 651-652; *People v B.H.*, 63 Misc 3d at 248-250).

At the hearing, the People cited a case from this Court: *People v S.B.* (Docket No. FYC-70002-20 [Co Ct, Putnam County 2020, Rooney, J.]), which they rely on in support of their application. In *People v S.B.*, Judge Rooney granted the People's motion to prevent removal to family court based upon a finding of extraordinary circumstances (*see. id.* at 5-8). The facts of that case however can be easily distinguished with this one. There, the youth defendant ***9** confronted another student regarding a dispute over money at a high school basketball game, provoked a fight in a school parking lot, preceded by a threat, before the youth defendant stabbed the student in the back with a fixed 3½ inch blade knife, causing puncture wounds that required sutures and medical treatment at a hospital (*see id.* at 2, 7; *see also People v C. S.*, 68 Misc 3d 1208[A] at *4). In stark contrast here, the AO's confrontation with the victim was prompted by the remarks and conduct at the AO's sister, not about a monetary matter, the weapon used by the AO was a metal baseball bat, and the victim suffered minor injuries. Hence, the People's reliance on *People v S.B.* is misguided.

The Court further notes that there are several analogous cases where, similarly as here, an adolescent offender was charged with assault in the second degree, but fellow jurists did *not* find the presence of extraordinary circumstances, and thus,

ultimately denied the People's motions to prevent removal (*see e.g. People v J.L.*, 78 Misc 3d 1231[A], *2-3 [Fam Ct, Erie County 2023]; *People v M.R.*, 68 Misc 3d 1004, 1010-1012 [Sup Ct, Kings County 2020]; *People v J.S.*, 66 Misc 3d 1213[A], *1-6 [Co Ct, Nassau County 2020]; *People v J.R.*, 65 Misc 3d 1223[A] at *1-6; *People v L.L.*, 2019 NY Slip Op 32330[U], *1-4 [Sup Ct, Queens County 2019]; *cf. People v J.G.*, 81 Misc 3d 1239[A] at *1-3; *Matter of Isaiah D.*, 72 Misc 3d 1120, 1122 [Fam Ct, New York County 2021]).

As the People would have it, the AO's past misconduct and transgressions in school should be an aggravating factor. "[T]he People may not, in any way, use the AO's juvenile delinquency history, including any past admissions or adjudications," in a motion to prevent removal (*People v J.J.*, 74 Misc 3d 1223[A], *3 [Co Ct, Ulster County 2022]; *see* Family Ct Act § 381.2 [1]).

Equally unavailing is the People's contention that the mitigating factors offered by the AO are not present or should be cast aside. The AO specifically asserts, among other things, that his father is disabled, suffering from several medical conditions, and that his father's health has been deteriorating over the last few years. According to the AO, he felt the need to take on the patriarchal role of protecting his sister's honor and defending her as her older brother. Additionally, the AO explains that as an Albanian, he has been called religious epithets and obscenities as a Muslim by students who are bullying him at high school. According to the AO, he has been repeatedly harassed by fellow students, including multiple threats of being assaulted. It may, for example, provide some context as to why the AO retaliated in such a manner.

Moreover, the AO avers that his family was oppressed in Albania, and they are struggling financially here due to his father's disability and severe health complications that prevent him from working, including his father's recent admission to the intensive care unit (ICU). This is somewhat corroborated with the AO's representation that his counsel fees are being paid by a "family friend trying to help him." Furthermore, the AO is currently pursuing a GED. He has intentions of joining the military after turning 18. The AO turns the age of majority in a matter of months. Relevant to this consideration is that if the AO's case remains in the Youth Part, it will be adjudicated under the criminal law where the AO faces the prospect of incarceration. [7]

Further, the AO's behavior here demonstrates the kind of poor judgment and impetuous conduct that militates in favor of removal to the family court in order to redirect his errant path. In fact, this is his first time facing criminal proceedings.

Next, the People rely heavily on the AO's school disciplinary records dating back to 2019 -- which were admitted into evidence at the hearing without objection -- for keeping this case in the Youth Part until disposition. In examining the potential mitigating circumstances, the Court notes that although the People state that the AO's school disciplinary records evince that he has a troubled history leading to suspensions, the Court finds that his disorderly behavior, use of racial slurs, insubordination, and acts of intimidation, harassment, and bullying are some of the exact mitigating factors expressed by the Legislature in the consideration of extraordinary circumstances (*see People v B.H.*, 63 Misc 3d at 250). While the People paint a picture of the AO's school disciplinary records to show that he is a troubled youth, the AO's school disciplinary records are not in any way connected to the underlying offense he is charged with. The Court has balanced the aggravating and mitigating factors in concluding to remove this matter to family court.

The Court further rejects the People's supposition that the AO is not amenable to, nor he would not in any way benefit from, the heightened services available in family court. The AO has faced challenges growing up that have significantly impacted his insight and judgment. Considering the totality of the circumstances, the Court finds that the AO is probably in greater need of the heightened services available in family court to aid him in addressing his behaviors and help him develop the skills necessary for rehabilitation. The People thus failed to overcome the burden of demonstrating that the AO is not amenable to or would not benefit from the heightened services provided in family court (*see People v K.K.*, 82 Misc 3d 1218[A], *3 [Fam Ct, Erie County 2024]).

The Court adds that in enacting the Raise the Age Law, the Legislature concluded that adolescent offenders should be treated differently than adult criminal defendants within the criminal justice system given the unique circumstances and needs of the young population. The aspirational goal of that scheme is that "children who are alleged to have committed crimes be rehabilitated rather than incarcerated and punished" (*People v J.L.*, 78 Misc 3d 1231[A] at *3). Removal to family court furthers the Legislature's articulated policy goals.

While mindful that the assault charge the AO is facing is serious, the violent nature of the crime, and the AO's conduct being very dangerous, the Court nonetheless must be guided by the statutory scheme. The decision here, though not an easy one, comports with the spirit of the Raise the Age Law. Transferring to family court is supported in the plain language of the relevant provisions and the legislative history.

"Reform is about changing the dynamics. The intent of the [Raise the Age Law] is to give adolescent and juvenile offenders an opportunity to rehabilitate. The goal is avoidance of criminal records and incarceration when possible and in appropriate circumstances" (*People v D.P.*, 62 Misc 3d 1226[A], *3 [Fam Ct, Erie County 2019]).

Removal to family court does not mean that the AO is getting a free pass. There are consequences in transferring this case to family court -- which will result in a juvenile delinquency proceeding under Family Court Act article 3.

The undersigned is aware that even upon removal, the Family Court Act provides for the possible placement upon adjudication at a facility developed for treatment while protecting the public. This Court is cognizant that various beneficial services and programs are readily available for a juvenile who is placed. This matter can be effectively adjudicated in family court where either rehabilitation or detention can be imposed. Having considered the totality of the record, this matter does not present to be so extraordinary as a basis for retaining the case in the Youth Part.

V. *Conclusion*

In sum, the Court holds that extraordinary circumstances do not exist here to prevent the removal/transfer of this case to the family court. The Court further concludes that the People did not meet their very high burden to prevent removal. Based on the totality of the circumstances, and after balancing the aggravating factors and mitigating factors in this case, the Court finds that the aggravating factors do not outweigh the mitigating circumstances. The People have failed to establish the existence of "extraordinary circumstances" warranting the retention of the AO's case in the Youth Part (*see People v B.H.*, 63 Misc 3d at 248-250). This case shall therefore be removed to the Family Court, Putnam County.

The People's remaining contentions, to the extent not specifically addressed herein, have been evaluated and determined to be without merit. Accordingly, it is hereby:

Ordered that the People's motion, made pursuant to CPL 722.23, to prevent removal to the Family Court is *DENIED*; and it is further

Ordered that this case shall be transferred to the Family Court, Putnam County; and it is further

Ordered that the Youth Part file shall be sealed, as is required by CPL 725.15; and it is further

Ordered that the AO and a member of the Putnam County Probation Department shall appear in Family Court on July 1, 2024, at 2 p.m. before the Hon. Joseph J. Spofford, Jr., J.F.C. for further proceedings thereon. [8]

A separate Order of transfer/removal shall issue herewith by the Clerk of the Court. [9]

This constitutes the opinion, decision, and order of the Court.

Dated: May 14, 2024

Carmel, New York

E N T E R:

Hon. Anthony R. Molé

Judge of the County Court

FOOTNOTES

Footnotes

1 The Hon. Joseph J. Spofford, Jr., J.C.C., conducted the arraignment in the undersigned's absence.

2 By waiving the statutory six-day hearing, the parties have, in effect, agreed that the Court base its determination to remove the case to family court solely on the People's underlying motion to block removal.

3 The District Attorney's Office did not file a notice of motion (*see* CPL 722.23 [1] [a]; CPLR 2214 [a]; *see also* *People v A.M.*, 77 Misc 3d 1227[A], *1 [Sup Ct, Erie County 2023]; *People v J.A.D.*, 70 Misc 3d 1222[A], *1 [Co Ct, Nassau County 2021]). In any event, the Court will disregard such error in order to consider the merits of the motion since the AO is not prejudiced, and a briefing schedule was previously established on the record with respect to the People's anticipated application (*see generally* CPLR 2001).

4 At the close of the hearing, the parties consented to waive the statutory timeframe for the Court's written decision on the People's motion (*see* CPL 722.23 [1] [e]; *People v M.R.*, 72 Misc 3d 791, 792 n 1 [Co Ct, Nassau County 2021]).

5 The Court will interchangeably refer to G.B. as the victim and the complainant in this Decision.

6 The Court will refer to her as the AO's sister throughout this decision since she is a minor and for purposes of maintaining her privacy.

7 Other sentencing options may be available if the AO is adjudicated a youthful offender under CPL Article 720.

8 The AO has prior family court history before Judge Spofford under Family File No. 14112.

9 The statute uses the terms “removal” and “transfer” interchangeably regarding the transfer of youth part adolescent offender proceedings to the Family Court. Neither term is defined in the Raise the Age Law. CPL 722.23 (1) (g) states that cases “transferred pursuant to this section . . . shall not be considered removals subject to [Family Court Act § 308.1 (13)]” (*see generally* Family Ct Act § 308.1 [3]; *People v D.L.*, 62 Misc 3d 900, 901 n 1 [Fam Ct, Monroe County 2018]).

New York Official Reports

Unreported Disposition
81 Misc.3d 1235(A), 202 N.Y.S.3d 725 (Table), 2024 WL 297027 (N.Y.Fam.Ct.), 2024 N.Y. Slip Op. 50079(U)

***1** The People of the State of New York

v.

D.M.-J., AO.

Youth Part, Erie County
Docket No. FYC-73909-23/001
Decided on January 16, 2024

CITE TITLE AS: People v D.M.-J.

ABSTRACT

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden to prevent removal to Family Court where, although handgun was recovered from scene of crime, there was no proof it was used in furtherance of any crime.

People v D.M.-J., 2024 NY Slip Op 50079(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden to prevent removal to Family Court where, although handgun was recovered from scene of crime, there was no proof it was used in furtherance of any crime. (Youth Part, Erie County, Jan. 16, 2024, Freedman, J.)

APPEARANCES OF COUNSEL

Denise A. Herman, Esq., (Assistant District Attorney)
Giovanni Genovese, Esq., (for the Principal)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise A. Herman, Esq. (Assistant District Attorney), dated January 4, 2024; responsive papers dated January 10, 2024 by Giovanni Genovese, Esq., on behalf of AO D.M.-J.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO D.M.-J. is charged under FYC-73909-23 with one count of Criminal Possession of a Weapon in the Second Degree, a class C felony, contrary to Penal Law Section 265.03(3) and Obstructing Governmental Administration in the Second Degree, a class A misdemeanor, contrary to Penal Law Section 195.05.

Accessible Magistrate Samuel P. Davis, Sr. arraigned AO A.G. on December 8, 2023 and released him on his own recognizance to the custody of his mother.

On December 8, 2023, AO D.M.-J. appeared for an arraignment in Youth Part, entering a plea of not guilty. The People conceded the six-day reading, and this Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO D.M.-J. was released, having voluntarily accepted probation services.

The decision date of the extraordinary circumstances motion was scheduled for January 18, 2024.

Findings of Fact

It is alleged that on December 7, 2023, at approximately 9:44 PM, a call came out for Threats in Progress. While responding to the call, the police officer received another radio call stating that a group of young males were threatening an individual. Upon arrival at the scene, the officer spoke with an older man ("Complainant 1"), who advised that approximately six to eight young males had harassed and threatened Complainant 1 while he was walking his dog. While the officer and Complainant 1 were talking, a second individual

("Complainant 2") approached the officer. Complainant 2 said he had been kicked in the back by a person who the officer believed was part of the group of kids that had harassed and threatened Complainant 1. Complainant 2 described the suspect that kicked him as a young black male wearing a hoodie with yellow on it. One of the complainants stated that the suspects were right around the corner. The officer headed in that direction and approached a group of young men, one of whom was wearing a hoodie with yellow on it. The individual with the hoodie with yellow on it fled down the street and was detained shortly thereafter. That youth was positively identified as the person who kicked Complainant 2 in the back.

Two other officers reported to the Threats in Progress call. One of those officers also spoke with Complainant 1. Complainant 1 told him that one person in the group of young males was wearing a black mask. Complainant 2 told the officers that the group of males was down the street. The officers saw the group and asked the individuals to stop. The young men ignored their instructions to stop and fled from the officers. One of the officers followed the suspect with a black mask and detained him. That suspect was identified as AO D.M.-J. The officer brought the AO. to his patrol vehicle, where AO D.M.-J. stated to the officer that "he had some weed on (his person)." Additionally, upon the Officer searching the AO, he discovered a gun in his waistband, which AO D.M.-J. stated he "found in the bushes." The gun was test fired and found to be operable. Further investigation revealed that the gun was reported stolen.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". ***2** NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

It is alleged that AO D.M.-J. was out at 10:00 PM in a group of six to eight young males. The group of males threatened and harassed an older man walking his dog, and one of the males kicked another individual in the back. All of the young males fled from police officers when they were directed to stop. AO D.M.-J. was apprehended and placed in a patrol car. AO D.M.-J. admitted to having marijuana in his possession, and police recovered a loaded firearm from his waistband. AO D.M.-J. said he found the gun in the bushes. An investigation revealed that the gun was reported stolen. AO D.M.-J. was the only individual in the group caught with a gun. The People argue in part that this makes AO D.M.-J. a principal leader in that group, as he would be the person who could defend the group using said weapon if necessary. AO D.M.-J. was associated in a group that committed two incidents of criminal behavior within one hour. Additionally, the People argue that the behavior of the group of young men -- kicking a complainant in the back and harassing and threatening an older man walking his dog -- demonstrates a lack of respect for others and empathy, illustrating that AO D.M.-J. would not be amenable to Family Court services.

Counsel for AO D.M.-J. raises mitigating factors in his responsive paperwork, stating that his client has been entirely compliant with his conditions of probation, illustrating that AO ***3** D.M.-J. is capable of benefitting from the heightened services of Family Court. Defense counsel states that the handgun recovered was not used in furtherance of a crime and there were no injuries as a result of these events. Additionally, defense counsel states that there is no evidence that AO D.M.-J. was the leader of this criminal activity, or that he coerced other youth into committing the crimes alleged. Further, counsel reiterates that this was one incident, and not a series of crimes over a series of days.

While this Court might agree with many of the People's arguments, it still finds that the People have not satisfied the "extraordinary circumstances " standard. Highly unusual and heinous facts have not been proven. This youth did not use a gun in furtherance of any crimes or display the gun. Although he was seen with the youth who kicked the older man in the back, AO D.M.-J. himself did not kick that person. Despite the People's argument to the contrary, the presence of the gun on AO D.M.-J.'s person, does not prove that this youth led, threatened, or coerced other reluctant youth into committing the crimes before the court.

This Court concludes that this is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER

_____

HON. BRENDA M. FREEDMAN

[*1]

People v J.B.
2024 NY Slip Op 50529(U)
Decided on May 3, 2024
Youth Part, Erie County
Freedman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 3, 2024

Youth Part, Erie County

The People of the State of New York

against

J.B., AO.

Docket No. FYC-70887-24/001

James Harrington, Esq., (Assistant District Attorney)

Daniel Schaus, Esq., (for the Principal AO J.B.)

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of James Harrington, Esq. (Assistant District Attorney), dated April 15, 2024; responsive papers on behalf of AO J.B. by Daniel Schaus, Esq. having been received on April 26, 2024; oral argument and a hearing on the motion

having been waived; and due deliberation having been had, the Court finds the following:

Procedural History

AO J.B. is charged under FYC-70887-24 with one count of Criminal Possession of Stolen Property in the Third Degree, in violation of Penal Law § 165.50, one count of Criminal Mischief in the third degree, in violation of Penal Law § 145.05(2), one count of Criminal Mischief in the Second Degree, in violation of Penal Law § 145.10, and one count of Unauthorized Use of a Vehicle, Third Degree, in violation of Penal Law § 165.05(1). Additionally, AO J.B. is charged under FYC-70921-24 with multiple Vehicle and Traffic Law infractions.

On March 21, 2024, this Court arraigned AO J.B. and released him on his own recognizance.

The six-day reading was held on March 27, 2024. The People conceded the reading. This [*2]Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL § 722.23(1) requesting that this matter not be removed to Family Court. An extraordinary circumstances decision on motion was scheduled for May 3, 2024.

Findings of Fact

It is alleged that on March 12, 2024, at around 11:00 AM, Complainant reported that her 2021 Blue Kia Sportage was taken from her driveway overnight.

At approximately 3:30 that afternoon, a police officer was parked in a parking lot of a pharmacy and dental office. He saw a blue Kia Sportage pull into the parking lot. The vehicle was occupied by at least four unknown people. He saw the vehicle travel west towards the far end of the parking lot, make a loop around the parking lot, travel east along the building, then park between a black Chevy Trailblazer and a white Hyundai Tucson.

The Officer saw an unknown juvenile male attempting to gain entry to the Chevy Trailblazer. Another unknown male attempted to gain entry to the Hyundai Tucson, causing damage to the door handle and lock. The Officer drove over and parked behind the Sportage to prevent it from fleeing. He exited his vehicle to initiate a traffic stop, began to identify himself as a Police detective and gave verbal commands to the operator and occupants of the Sportage. The driver of the Sportage then placed the vehicle in reverse and began backing up. The Officer continued to give verbal commands

to the driver to stop the vehicle and identified as a police officer. The Sportage continued backing up and struck the passenger side of the Officer's vehicle, causing damage to the front passenger side door and the rear passenger side door. The driver of the Sportage then put the vehicle in drive and started driving forward. At this time, the driver and three other passengers exited the Sportage, while it was in motion. The Sportage struck the Tucson, causing damage to the front driver's door, estimated to exceed $2,000.00 on one estimate and approximately $1,773.00 pursuant to another estimate. The Sportage came to rest due to striking a sign and hill located in front of the vehicle. The Officer observed significant damage to the steering column of the Sportage.

Additional officers responded and helped apprehend the four individuals who fled the scene. In total, five juveniles were taken into custody relative to this incident. AO J.B. admitted to being the operator of the Sportage.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that [*3]the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard

where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40. This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People state that AO J.B.'s actions were cruel and heinous in that he was the driver of the stolen vehicle and caused an estimated $2,000.00 of damages to an unoccupied vehicle. The People also allege that AO J.B. was the leader of criminal activity who coerced other reluctant youth into committing crimes when he drove them to a parking lot for the purpose of unlawfully taking and possessing stolen vehicles for their enjoyment. Further, the People contend that AO J.B. will not be amenable to Family Court services.

Defense counsel alleges that the People have failed to meet their burden and this matter should be removed to Family Court. He argues that this Court should not assume that AO J.B. was the leader of criminal activity just because he was driving the vehicle. Additionally, AO J.B. and the passengers in the vehicle are of similar ages. Defense counsel further states, and this Court agrees, that stolen vehicles are a common occurrence in Erie County. This incident was not especially

heinous. No one was injured, and no weapons were recovered. The People do not allege that AO J.B. has a history in Youth Part. There were significant damages to other vehicles during this incident. With the removal of this case, Family Court will have the ability to award up to $1,500.00 in restitution.

Based on the foregoing, this Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court.

Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. [*4]This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.
ENTER,
HON. BRENDA M. FREEDMAN

Return to Decision List

[*1]

People v J.W.-C.
2024 NY Slip Op 50251(U)
Decided on February 29, 2024
Youth Part, Erie County
Freedman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on February 29, 2024

Youth Part, Erie County

The People of the State of New York

against

J.W.-C., AO.

Docket No. FYC-70111-24/001

James Harrington, Esq., (Assistant District Attorney)

Michael Cimasi, Esq., (for the Principal AO J.W.-C.)

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of James L. Harrington, Esq. (Assistant District Attorney), dated February 15, 2024; responsive papers dated February 22, 2024 by

Michael C. Cimasi, Esq., on behalf of AO J.W.-C.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

Procedural History

AO J.W.-C. is charged under FYC-70111-24 with one count of Criminal Possession of a Weapon in the Second Degree: Possession of a Loaded Firearm, in violation of PL § 265.03(3) and Criminal Possession of a Weapon in the Fourth Degree, in violation of PL § 265.01(9).

On January 16, 2024, AO J.W.-C. appeared for an arraignment in Youth Part and entered a plea of not guilty. The People conceded that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part and indicated that they would make a motion under CPL Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO J.W.-C. was released on RUS, and additionally, the Youth Part Resource Coordinator was appointed.

The decision date of the extraordinary circumstances motion was scheduled for February 29, 2024.

Findings of Fact

It is alleged that on January 15, 2024, at or around 12:03 AM, Buffalo Police Officers were responding to a report of a robbery when they were flagged down by a victim. The Victim said that he was an Uber driver. He had just dropped off a customer and was on his way home when he saw a man walking in the middle of the road. He slowed down and the man came to his window. The man said something that the Victim did not understand, and the Victim said "what". The man then pulled out a gray handgun and said, "get out of the car." The Victim got out of his car. The man said, "keys" and pressed the gun to the Victim's neck. The man ordered: "wallet and phone". Then the man got into Victim's vehicle and drove away.

Buffalo Police Officers were able to track the location of the Victim's stolen phone to a gas station. Patrol officers went to the gas station and surrounded it. They detained three individuals and arrested two of them: AO J.W.-C. and his co-defendant (AO J.W.-C.'s cousin).

Video surveillance of the gas station showed these three individuals exiting the stolen vehicle and entering a convenience store at the gas station. AO J.W.-C. is recorded putting a Polymer80 9mm Ghost Gun, loaded with one round in the chamber and 10 rounds in the magazine, into his waistband and then placing the firearm among bags of chips on a store shelf. The loaded firearm was

later recovered by an officer and submitted to the CPS lab.

AO J.W.-C. is charged with one count of Criminal Possession of a Weapon in the Second Degree: Possession of a Loaded Firearm, in violation of PL § 265.03(3) and Criminal Possession of a weapon in the Fourth Degree, in violation of PL § 265.01(9). AO J.W.-C.'s co-defendant (his cousin) was arrested and charged with Criminal Possession of Stolen Property and Unauthorized Use of a Vehicle.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge [*2]should

consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People allege that video surveillance of the gas station shows AO J.W.-C. exiting a vehicle that was reported stolen by gunpoint minutes earlier and removing a firearm from his waistband and placing it on a shelf inside the store. The People cite this as an exceptional circumstance, stating any patron of the store could have accessed this loaded weapon, putting everyone in danger. Additionally, the People allege that this AO will not be amenable to the heightened services of Family Court due to his alleged involvement in a robbery and shooting in September, 2023, illustrating that he is not open to modifying his behavior. Finally, the People indicate that AO J.W.-C. does not have any familial support at home, which adds an obstacle for this AO to be compliant with the heightened services of Family Court.

In support of mitigating factors, Defense counsel argues that AO J.W.-C. voluntarily accepted probation services and has remained compliant with the rules and regulations associated therewith, illustrating his willingness and ability to benefit from the heightened services offered by Family Court.

It is not alleged that AO J.W.-C. caused physical injury to anyone. The People have not made any allegations that AO J.W.-C. led or coerced other youths to participate in any crimes.

However, highly unusual and heinous facts have been proven. It is alleged that this AO had a loaded and operable Ghost Gun which had been involved in a robbery at gunpoint, and that he stashed it in that loaded and operable condition in a public place, amongst snacks, easily accessible to children and adults alike. While it is fortunate no one got hurt, that is likely because the police recovered the weapon shortly after it was abandoned. Additionally, the AO does not have support at home sufficient to ensure he adheres to the recommendations of Family Court services. Further, there is evidence to suggest this AO has been involved in another incident involving a loaded weapon. Although that matter remains under investigation, AO J.W.-C.'s [*3]DNA appears to be on that gun as well.

Extraordinary circumstances exist to prevent the transfer of this action to Family Court. The aggravating fsactors outweigh the mitigating circumstances. The People have met its burden to prevent removal of this action to Family Court. This matter shall remain in the Youth Part.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.
ENTER,
HON. BRENDA M. FREEDMAN

Return to Decision List

New York Official Reports

Unreported Disposition
81 Misc.3d 1235(A), 202 N.Y.S.3d 728 (Table), 2024 WL 297148 (N.Y.Fam.Ct.), 2024 N.Y. Slip Op. 50080(U)

***1** The People of the State of New York

v.

J.G., AO.

Youth Part, Erie County
Docket No. FYC-73909-20/001
Decided on January 25, 2024

CITE TITLE AS: People v J.G.

ABSTRACT

Infants
Adolescent Offenders
Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden preventing removal to Family Court where AO was involved in single car accident that struck electric pole, causing destruction to vehicle and pole.

People v J.G., 2024 NY Slip Op 50080(U). Infants—Adolescent Offenders—Transfer from Youth Part to Family Court—Extraordinary Circumstances—People did not meet burden preventing removal to Family Court where AO was involved in single car accident that struck electric pole, causing destruction to vehicle and pole. (Youth Part, Erie County, Jan. 25, 2024, Freedman, J.)

APPEARANCES OF COUNSEL

Denise A. Herman, Esq., (Assistant District Attorney)
Sunil Bakshi, Esq., (for the Principal)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise A. Herman, Esq. (Assistant District Attorney), dated January 12, 2024; responsive papers dated January 19, 2024 by Sunil Bakshi, Esq., on behalf of AO J.G.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO J.G. is charged under FYC-73909-23 with one count of Criminal Possession of Stolen Property in the Third Degree, PL § 165.50, a class D felony; one count of Obstructing Governmental Administration in the Second Degree, PL § 195.05, a class A misdemeanor; one count of Unlawfully Fleeing a Police Officer, PL § 270.25, a class A misdemeanor; one count of Reckless Driving, VTL § 1212, a misdemeanor; and nine other traffic infractions.

On December 15, 2023, AO J.G. appeared for an arraignment in Youth Part and entered a plea of not guilty. The People conceded the six-day reading, and this Court found that the charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. AO J.G. was released, having voluntarily accepted probation services.

The decision date of the extraordinary circumstances motion was scheduled for January 26, 2024.

Findings of Fact

It is alleged that on December 10, 2023 at approximately 2:08 AM, in the Town of Amherst, a police officer responded to a report of two stolen vehicles (one Black SUV and one Red SUV) from a KIA dealership. Shortly thereafter, the Lieutenant saw a Black SUV speed past then do multiple donuts in an intersection. The Lieutenant saw a driver in the vehicle and no other passengers.

The Lieutenant saw the vehicle turn right and continue speeding, driving approximately 80 m.p.h. in a 45 m.p.h. zone. During pursuit of the vehicle, the Lieutenant observed

the vehicle driving on the wrong side of the road with no headlights on. The Lieutenant, as well as an Amherst Police Investigator, continued the high-speed pursuit of the Black SUV and observed as the vehicle erratically changed lanes, turned over a curb, and drove over a second curb in a Tops parking lot. The Black SUV was paced by the Investigator as going approximately 120 m.p.h. in a 45 m.p.h. zone. The Black SUV then went airborne and struck a support wire to an electrical pole in the Tops parking lot. The driver of the SUV fled the vehicle immediately after the crash. The Lieutenant began looking for the driver on foot. He heard a noise come from a dumpster near the accident and later saw someone, later identified as AO J.G., crawl out of the dumpster, which was located approximately 200 yards from the scene of the accident.

The Lieutenant went back to investigate the accident scene after AO J.G. was placed in custody. The Black SUV had crashed into an electric pole, and the damage to the electric pole created a live wire, which was an extreme hazard and could have caused serious physical injury or death to anyone who went into that area. The Black SUV was observed with front end damage, and there were car parts found at the scene consistent with the Black SUV.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term “extraordinary circumstances”.

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted “extraordinary circumstances” to mean that “the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court.”

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a “high standard” for the District Attorney to meet, and denials of transfers to Family Court “should be extremely rare”. NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). “[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing ”extraordinary circumstances“, the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

”The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute.“ People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also,

People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

It is alleged that AO J.G. was driving a stolen vehicle in the middle of the night. He was speeding, doing donuts in the middle of an intersection, and ultimately went airborne and struck an electrical pole. He risked the lives of anyone in his path, including the officers following him, and his own life. However, it is not alleged that he caused physical injury to anyone. He did not commit a separate series of crimes over multiple days. He is not alleged to have led, threatened, or coerced other reluctant youth into committing the crimes before the court. It is unclear whether the driver of the Red SUV has been apprehended, and the People have not made any allegations that AO J.G. led or coerced this driver to participate in any crimes. It is not alleged that this AO was in possession of a weapon.

This Court finds that highly unusual and heinous facts have not been proven. In support of mitigating factors, Defense counsel argues that AO J.G. does not have a criminal record, and the charges here may be consistent with adolescent type behavior. This Court feels as if AO J.G. may benefit from the heightened services of Family Court, having voluntarily accepted probation services.

This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The aggravating factors do not outweigh the mitigating circumstances. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

_____

HON. BRENDA M. FREEDMAN

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 1396228
(Table), 2024 N.Y. Slip Op. 50336(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** The People of the State of New York
v.
J.M., AO.

Youth Part, Erie County
Docket No. FYC-70014-24/001
Decided on March 14, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Extraordinary circumstances did not exist to prevent transfer from Youth Part to Family Court where offender did not flee scene, and it was not alleged that they used any weapons in furtherance of crime or participated in stealing vehicle

APPEARANCES OF COUNSEL

Denise Herman, Esq., (Assistant District Attorney)
Connor Dougherty, Esq., (for the Principal AO J.M.)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise Herman, Esq. (Assistant District Attorney), dated February 29, 2024; responsive papers having been filed on March 8, 2024 by Connor C. Dougherty, Esq., on behalf of AO J.M.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO J.M. is charged under FYC-70014-24 with one count of Criminal Possession of Stolen Property in the Fourth Degree, in violation of Penal Law § 165.45, a class E felony.

On January 29, 2024, AO J.M. appeared for an arraignment in the Youth Part, entering a plea of not guilty. The People conceded the six-day reading. This Court found that these charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting this matter not be removed to Family Court. The attorneys consented to various time waivers on the record, and the decision date of the extraordinary circumstances motion was scheduled for March 15, 2024. AO J.M. was released on her own recognizance, having voluntarily accepted probation services.

Findings of Fact

It is alleged that on January 2, 2024, there was a 911 call for an alleged robbery at 650 Tonawanda Street, Buffalo. Upon investigation, there were multiple suspects involved in said robbery; one group of suspects was driving a Red 2014 Ford Escape that was reported stolen in ***2** January, 2024. After the alleged robbery occurred, AO J.M. got into the Red Ford Escape with the perpetrators of said robbery. Officers observed the Red Escape driving erratically at a high speed. Upon attempting to pull the vehicle over, the Officers observed the Red Ford Escape driving at approximately sixty (60) miles per hour, going through stop signs, and driving through red lights. The Red Ford Escape subsequently crashed into a tree, and some of the occupants of the car ran from the vehicle and away from Police. AO J.M. exited the vehicle and was immediately taken into custody.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court.

CPL § 722.23 does not define the term "extraordinary circumstances".

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted "extraordinary circumstances" to mean that "the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court."

New York State Assembly members debating the Raise the Age legislation indicated that the extraordinary circumstances requirement was intended to be a "high standard" for the District Attorney to meet, and denials of transfers to Family Court "should be extremely rare". NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). "[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing "extraordinary circumstances", the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

"The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute." People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court "contain allegations of sworn fact based upon personal knowledge of the affiant." This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

The People argue that the actions of AO J.M. were especially cruel and heinous, in that she was associating with people who held a man up at gunpoint at a gas station, evaded police, and had a weapon accessible. Defense counsel for AO J.M. raises mitigating factors, stating that his client was not present for the robbery, was not the driver of the vehicle, and was not aware that the vehicle she was a passenger in was stolen. Defense counsel alleges that she is merely associated with the perpetrators here and had no part in these alleged crimes.

Even if AO J.M. was aware of the gun, it is not alleged that she used the firearm in furtherance of a crime. The People do not allege that AO J.M. led, threatened, or coerced other reluctant youth into committing the crime before the court. It is not alleged that she participated in the theft of the vehicle. It seems that, based on the facts as they are presented, AO J.M. got into a vehicle with the suspects who had allegedly robbed a driver at a gas station. AO J.M. was a passenger in the vehicle, there are no allegations that she drove the vehicle away from police, thereby evading arrest. Additionally, it is stated that AO J.M. was arrested upon exiting the vehicle; she did not flee the scene.

This Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court. This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the

Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. The People did not meet its burden to prevent removal of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

HON. BRENDA M. FREEDMAN

New York Official Reports

Unreported Disposition
Slip Copy, 2024 WL 1361149
(Table), 2024 N.Y. Slip Op. 50333(U)

***1** The People of the State of New York
v.
K.K., AO.

Youth Part, Erie County
Docket No. FYC-70421-24/001
Decided on March 21, 2024

Digest-Index Classification:Infants--Adolescent Offenders--Transfer from Youth Part to Family Court--Extraordinary Circumstances Did Not Exist to Prevent Transfer Where Offender Did Not Fire Gun or Use it in Furtherance of Crime

APPEARANCES OF COUNSEL

Denise Herman, Esq., (Assistant District Attorney)
Connor Dougherty, Esq., (for the Principal AO K.K.)

OPINION OF THE COURT

Brenda M. Freedman, J.

The People having moved pursuant to Criminal Procedure Law, Article 722, § 722.23(1), et seq. for an order preventing removal of this action to the juvenile delinquency part of Erie County Family Court, and upon reading the Notice of Motion and Supporting Affidavit of Denise Herman, Esq. (Assistant District Attorney), dated March 11, 2024; responsive papers having been filed on March 18, 2024 by Connor C. Dougherty, Esq., on behalf of AO K.K.; oral argument and a hearing on the motion having been waived; and due deliberation having been had, the Court finds the following:

PROCEDURAL HISTORY

AO K.K. is charged under FYC-70421-24 with one count of Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law § 265.03(3), a class C felony and one count of Obstructing Governmental Administration in the Second Degree, in violation of Penal Law § 195.05, a misdemeanor.

On February 12, 2024, Accessible Magistrate Carney arraigned AO K.K. and released him to his Mother's custody.

On February 13, 2024, AO K.K. appeared for an arraignment in Youth Part, entering a plea of not guilty. The People conceded the six-day reading. This Court found that these charges did not meet the requirements of CPL § 722.23(2)(c) to remain in Youth Part. The People indicated that they would make a motion under CPL, Art. 722, § 722.23(1) requesting that this matter not be removed to Family Court. The decision date of the extraordinary circumstances motion was scheduled for March 25, 2024. AO K.K. was released under probation supervision, with a curfew, an ankle monitor at Probation's discretion, and various other conditions.

Findings of Fact

It is alleged that on February 11, 2024 at approximately 9:00PM, Police officers responded to two gun calls--one a shots fired call and the other a fight with guns call--in two adjacent areas. One Officer observed AO K.K. walk in front of his patrol vehicle, reach into his pocket, and grab an object. The Officer and his partner called out to the AO and asked him about shots being fired, and AO K.K. took off running. The Officer saw a dark colored object in AO K.K.'s hand that looked like a handgun as he was running; he then observed AO K.K. run into a house.

The Officer went to the house, announced his presence as a police officer, and asked the occupants to open the door. AO K.K. came outside wearing some of the same clothes he had been wearing earlier and was out of breath and sweating. The owner of the home (AO K.K.'s mother) signed a consent to search. While inside the home, it was ascertained that the firearm the Officer saw while he was running was stashed under AO K.K.'s mother's mattress. The Officer recovered one Reck P8 Kai firearm, which was loaded with nine live rounds. Additionally, the Officer observed approximately two eight balls of crack/cocaine in plain view in an open dresser drawer in the bedroom where the gun was found. The Officer recovered the drugs for destruction purposes because there was a child in the home. The police did not charge anyone with criminal possession of a controlled substance.

Another Officer heard a call that a male with a gun was with a female running into the home discussed above. Upon arrival, the Officer saw a live round near the living room doorway. Upon speaking with the residents of the home, they agreed to allow the Officers to search the living room. The Officer then returned to his patrol vehicle to retrieve a consent to search. While walking back to his vehicle, he saw AO K.K. in the back of a patrol vehicle. The Officer knew AO K.K. from a previous job. AO K.K. asked the Officer if his mom was going to jail for this. He responded that he did not know what he was talking about. AO K.K. asked the Officer if he could prevent his mom from going to jail if he told the Officer where the gun was located. The Officer responded that it was not his call. AO K.K. then said that the gun was under his mother's bed. The Officer told the other officers who were inside the home, and the gun was recovered. After the gun was recovered, AO K.K. screamed to his mother that he only had the gun because he had previously been shot.

Conclusions of Law

Pursuant to CPL § 722.23(1)(a), the Court shall order removal of the action to Family Court unless, within 30 days of arraignment, the District Attorney makes a written motion to prevent removal of the action.

Pursuant to CPL § 722.23(1)(d), the Court shall deny the district attorney's motion to prevent removal unless the Court determines that extraordinary circumstances exist that should prevent the transfer of the action to Family Court. CPL § 722.23 does not define the term “extraordinary circumstances”.

In People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021), the Court referenced the common dictionary and the legislative history of the Raise the Age legislation and interpreted “extraordinary circumstances” to mean that “the People's Motion Opposing Removal must be denied unless they establish the existence of an 'exceptional' set of facts which 'go beyond' that which is 'usual, regular or customary' and which warrant retaining the case in the Youth Part instead of removing it to the Family Court.”

New York State Assembly members debating the Raise the Age legislation indicated that ***2** the extraordinary circumstances requirement was intended to be a “high standard” for the District Attorney to meet, and denials of transfers to Family Court “should be extremely rare”. NY Assembly Debate on Assembly Bill A03009C, Part WWW, at 39, April 8, 2017; see also, People v S.J., 72 Misc 3d 196 (Fam Ct 2021). “[T]he People would satisfy the 'extraordinary circumstances' standard where 'highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court'. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021) citing *Assembly Record*, p. 39.

The legislators indicated that in assessing ”extraordinary circumstances“, the Judge should consider the youth's circumstances, including both aggravating factors and mitigating circumstances. People v T.P., 73 Misc 3d 1215(A) (NY Co Ct 2021); *Assembly Record*, pp. 39 to 40. Aggravating factors make it more likely that the matter should remain in Youth Part, and mitigating circumstances make it more likely that the matter should be removed to Family Court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021).

Aggravating factors include whether the AO: (1) committed a series of crimes over multiple days, (2) acted in an especially cruel and heinous manner, and (3) led, threatened, or coerced other reluctant youth into committing the crimes before the court. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record*, p. 40.

Mitigating circumstances are meant to include a wide range of individual factors, including economic difficulties, substandard housing, poverty, difficulties learning, educational challenges, lack of insight and susceptibility to peer pressure due to immaturity, absence of positive role models, behavior models, abuse of alcohol or controlled substances by the AO, or by family or peers. People v S.J., 72 Misc 3d 196 (Fam Ct 2021); *Assembly Record* at 40.

”The People may not, in any way, use the [AO's] juvenile delinquency history, including any past admissions or adjudications, in any application for removal under the statute.“ People v J.J., 74 Misc 3d 1223(A) [NY Co Ct 2022]; citing Family Court Act § 381.2(1); see also, People v. M.M., 64 Misc 3d at 269, supra, citing Green v. Montgomery, 95 NY2d 693, 697 (2001).

CPL § 722.23(1)(b) mandates that every motion to prevent removal of an action to Family Court ”contain allegations of sworn fact based upon personal knowledge of the affiant.“

This Court considered only those exhibits and documents whose content fall within the mandate of CPL § 722.23(1)(b) in making this decision.

Extraordinary circumstances that should prevent the transfer of the action to Family Court do not exist here. These facts here are not exceptional. The People allege that, while responding to a "shots fired" call, police officers saw AO K.K. running with a gun in his hand. Officers later searched AO K.K.'s mother's room; they recovered the gun from under her mattress, and they saw two eight balls of crack/cocaine in her open dresser. Defense counsel alleges that AO K.K. had gone to a neighbor's home to watch the Super Bowl. As he was walking home, two officers pulled up to AO K.K. on the wrong side of the street and ordered him to stop. Defense counsel argues that the Officers ordered AO K.K. to stop with very little, if any, reason to do so. It is not clear that the officers continued to the scene where the shots were fired.

The People do not allege that AO K.K. fired the gun or otherwise used the gun in furtherance of any crimes. There are no aggravating factors here. AO K.K. did not commit a series of crimes over multiple days, act in an especially cruel and heinous manner, or lead, threaten, or coerce other reluctant youth into committing the crimes before the court. However, ***3** there are mitigating circumstances. The fact that police recovered crack cocaine from an open drawer in AO K.K.'s mother's bedroom suggests that AO K.K. lacks positive behavior models and support at home.

This Court finds that the People failed to meet their burden of proving that this young person is not amenable to or would not benefit in any way from the heightened services in Family Court. Defense counsel states that AO K.K. has attended every scheduled appointment with Probation, but for one appointment when he did not have transportation. Even though he was unable to physically attend the meeting, he called his Probation Officer to explain the situation. He has fully abided by his curfew since it was set. He is participating in community-based programs and is registered for a GED program this Fall.

This is not the rare, "one out of 1,000 cases" that the Legislature envisioned would remain in the Youth Part and not be removed to Family Court. (Assembly, Record of Proceedings, April 8, 2017, pp. 37-38); see People v J.M., 64 Misc 3d 259, 268 [NY Co Ct 2019]. Extraordinary circumstances do not exist to prevent the transfer of this action to Family Court. This matter shall be removed.

This constitutes the opinion, decision, and order of this Court.

SO ORDERED.

ENTER,

HON. BRENDA M. FREEDMAN

93 N.Y.2d 949, 716 N.E.2d 173, 694 N.Y.S.2d 338, 1999 N.Y. Slip Op. 05334

In the Matter of Desmond J., a Person Alleged to be a Juvenile Delinquent, Appellant.

Court of Appeals of New York
116
Argued May 6, 1999;
Decided June 10, 1999

CITE TITLE AS: Matter of Desmond J.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 14, 1998, which affirmed an order of the Family Court, Queens County (Nora Freeman, J.), adjudicating appellant a juvenile delinquent upon a finding that appellant committed acts which, if committed by an adult, would constitute the crimes of rape in the first degree, burglary in the second degree, and sexual abuse in the first degree.

Matter of Desmond J., 246 AD2d 111, affirmed.

HEADNOTE

Infants

Juvenile Delinquents

Sufficiency of Delinquency Petition upon Removal from Criminal Court

In a juvenile delinquency proceeding in which respondent, then 14 years old, was originally charged in criminal court with first degree rape and related crimes, the juvenile delinquency petition was not jurisdictionally defective where the felony complaint, which was based on hearsay allegations from a detective, and supporting papers from the criminal proceeding were transferred to Family Court in the interests of justice and "deemed to be" a juvenile delinquency petition, and where the complainant, on the day after the transfer, signed a supporting deposition affirming the truthfulness and accuracy of the allegations of the felony complaint, since Family Court Act § 311.1 (7) excuses removal petitions from strict compliance with the otherwise applicable provisions of section 311.1. The allegations in the felony complaint were acceptable for commencing a criminal action; thus, if the felony complaint and other documents from the criminal proceeding are deemed a petition, it defies common sense and the clearly expressed intent of the Legislature that such papers should be deemed to be an incurable jurisdictionally deficient petition. The timing of the filing of the deposition did not constitute an improper amendment of the petition to cure the legal insufficiency of the factual allegations since the presentment agency immediately filed the supporting deposition on the date of respondent's initial appearance in Family Court, and in a removal context, that was the earliest stage at which the deposition could have been filed.

APPEARANCES OF COUNSEL

Jonathan M. Kratter, New York City, and *Monica Drinane* for appellant.
Richard A. Brown, District Attorney of Queens County, Kew Gardens (*John M. Castellano* and *Alyson J. Gill* of counsel), for respondent. ***950**
Michael D. Hess, Corporation Counsel of New York City (*Pamela Seider Dolgow* and *Fay Ng* of counsel), *amicus curiae.*

OPINION OF THE COURT

Memorandum.

The order of the Appellate Division should be affirmed, without costs.

In this juvenile delinquency proceeding, respondent, then 14 years old, was originally charged in a felony complaint with rape in the first degree and other related crimes. The felony complaint was based on hearsay allegations from a detective. Following arraignment in criminal court, the case was transferred to Family Court "in the interests of justice" pursuant to CPL 180.75. The order contains an uncontested finding by the criminal court of reasonable cause to believe that respondent committed the crimes charged in the felony complaint (*see,* CPL 725.05 [3]).

The felony complaint and supporting papers from the criminal proceeding were transferred to Family Court, where they were "deemed to be" a juvenile delinquency petition (Family Ct Act § 311.1 [7]). On the day after the transfer, the complainant signed a supporting deposition affirming the truthfulness and accuracy of the allegations of the felony complaint. One day later, respondent made his first appearance in Family Court. The presentment agency immediately handed up the supporting deposition and requested that it be filed with the papers transferred from criminal court. Respondent objected, arguing that only the felony complaint and the other papers transferred from criminal court could properly be deemed the petition. Respondent also moved to dismiss the petition as jurisdictionally defective, as it did not contain non-hearsay allegations satisfying all of the elements of the crimes charged.

Family Court denied the motion, and the Appellate Division affirmed, holding that Family Court Act § 311.1 (7) "excuses removal petitions from strict compliance with the otherwise applicable provisions of section 311.1" (246 AD2d 111, 115). The court noted that the allegations in the felony complaint were acceptable for commencing a criminal action. Thus, if the felony complaint and other documents from the criminal proceeding are "deem[ed]" a petition under Family Court Act § 311.1, it "defies common sense and the clearly expressed intent of the Legislature that such papers should be deemed to be an incurable jurisdictionally deficient petition" (*id.,* at 117). We agree.

Pursuant to Family Court Act § 311.1 (7), the felony complaint and additional papers transferred from criminal court ***951** are deemed to satisfy the requirements of Family Court Act § 311.1 (3). However, section 311.1 (7) does not expressly reference the requirement contained in Family Court Act §

311.2 (3) that "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the [juvenile's] commission thereof." A felony complaint, by its very nature, need not satisfy this specific Family Court jurisdictional threshold (*see,* CPL 100.15 [3]). However, the felony complaint is legally "deemed" the petition. As section 311.2 states, and as this Court made clear in *Matter of Jahron S.* (79 NY2d 632, 638):

"Family Court Act § 311.2 clearly contemplates that ... supporting depositions may be filed in addition to petitions and that the sufficiency of the petition is to be measured by the factual allegations contained not only in the petition itself but also in any supporting deposition that may be attached to it."

Here, the complainant's supporting deposition filed with the papers transferred from criminal court satisfied the requirements of Family Court Act § 311.2. Respondent does not argue that the allegations in the deposition were insufficient, but instead contends that the timing of the filing of the deposition constituted an amendment of the petition to cure the "legal insufficiency of the factual allegations" in violation of Family Court Act § 311.5 (2) (b) and this Court's decision in *Matter of Rodney J.* (83 NY2d 503, 508). We reject respondent's argument.

The presentment agency immediately filed the supporting deposition on the date of respondent's (and the agency's) initial appearance in Family Court. In a removal context, this was the earliest stage at which the deposition could have been filed. While respondent contends that a deposition should have been filed in criminal court prior to the transfer, this would have been a superfluous, if not irregular, action. It would not be good and sound practice to require the filing of a document in criminal court that has no legal relevance to the criminal proceeding, solely to anticipate a distinctive jurisdictional requirement of Family Court. Nor need the case be delayed in criminal court pending a felony hearing or Grand Jury proceedings which would then become part of the petition pursuant to Family Court Act § 311.1 (7). This might directly contravene the legislative purpose to provide for a removal avenue "as quickly as possible" (*Matter of Vega v Bell,* 47 NY2d 543, 550). ***952** Under the facts of this case, the deposition was timely filed with the petition (Family Ct Act § 311.2) and thus was not an improper amendment of the petition within the meaning of Family Court Act § 311.5. We deem it unnecessary in this context to decide any broader question.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick, Wesley and Rosenblatt concur.

Order affirmed, without costs, in a memorandum.

New York Official Reports

3 N.Y.3d 441, 821 N.E.2d 537, 788 N.Y.S.2d 299, 2004 N.Y. Slip Op. 08596

**1 In the Matter of Michael M., a Person Alleged to be a Juvenile Delinquent, Appellant

Court of Appeals of New York
1, 157
Argued October 20, 2004
Decided November 23, 2004

CITE TITLE AS: Matter of Michael M.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered October 21, 2003. The Appellate Division affirmed an order of the Family Court, Bronx County (Alma Cordova, J.), which had adjudicated appellant a juvenile delinquent, upon a fact-finding determination that appellant had committed acts which, if committed by an adult, would have constituted the crimes of attempted robbery in the first degree, attempted robbery in the second degree, assault in the second degree (two counts), attempted grand larceny in the fourth degree, and attempted criminal possession of stolen property in the fifth degree.

Matter of Michael M., 309 AD2d 631, reversed.

HEADNOTES

Infants
Juvenile Delinquents
Sufficiency of Removal Order

(1) In a juvenile delinquency proceeding that originated with the filing in Criminal Court of a felony complaint signed by a police officer and based on his interview of the victim, the order of removal to Family Court and the accompanying pleadings and proceedings containing only hearsay allegations were insufficient to satisfy the jurisdictional requirements for filing in Family Court. A removal order must be supported by nonhearsay factual allegations sufficient to establish every element of the crimes charged and the juvenile's commission of the crimes. Although a removal order and all associated pleadings and proceedings are deemed by Family Court Act § 311.1 (7) to be a petition to originate a juvenile delinquency proceeding in Family Court, the removal order and all associated pleadings and proceedings are not deemed to constitute a facially sufficient petition by virtue of section 311.1 (7)'s express terms. Section 311.1 (7) exempts a removal order from compliance with the requirement that a juvenile delinquency petition contain certain allegations required by section 311.1, but it does not excuse compliance with the requirement in section 311.2 (3) that petitions and/or supporting depositions must contain nonhearsay allegations.

Infants
Juvenile Delinquents

Sufficiency of Removal Order--Jurisdictional Defect is Nonwaivable

(2) In a juvenile delinquency proceeding that originated with the filing in Criminal Court of a felony complaint signed by a police officer and based on his interview of the victim, the order of removal to Family Court and the accompanying pleadings and proceedings containing only hearsay allegations were insufficient to satisfy the jurisdictional requirements for filing in FamilyCourt. ***442** The jurisdictional defect was nonwaivable and thus reviewable for the first time on appeal.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Appellate Review §§ 615, 691; Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 36, 37, 118, 119.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:256, 119A:258–119A:260; Carmody-Wait 2d, Criminal Procedure § 172:4495.

6 Law and the Family New York (2d ed) §§ 11:22, 11:26, 11:32.

McKinney's, Family Ct Act § 311.1 (7); § 311.2 (3).

NY Jur 2d, Appellate Review §§ 72, 562, 600–603, 619; NY Jur 2d, Domestic Relations §§ 1368–1370, 1391, 1434.

ANNOTATION REFERENCE

Validity, construction, and application of child hearsay statutes. 71 ALR5th 637.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: delinquency /s family /2 court /s removal /2 order & non-hearsay

POINTS OF COUNSEL

Legal Aid Society, Juvenile Rights Division, New York City (*Susan Clement* and *Monica Drinane* of counsel), for appellant.
The Family Court Act's unique jurisdictional requirements were not satisfied where the removal petition failed to contain nonhearsay allegations establishing every element of the crimes charged and no nonhearsay supporting deposition was filed with the petition at the initial appearance in Family Court or at any future point in the delinquency proceeding. (*Matter of Jahron S.,* 79 NY2d 632; *Matter of Rodney J.,* 83 NY2d 503; *People v Finnegan,* 85 NY2d 53, 516 US 919; *Matter of Robert J.,* 2 NY3d 339; *Matter of David T.,* 75 NY2d 927; *People v Alejandro,* 70 NY2d 133; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Angel A.,* 92 NY2d 430; *People v Swamp,* 84 NY2d 725; *Matter of Neftali D.,* 85 NY2d 631.)
Michael A. Cardozo, Corporation Counsel, New York City (*Sharyn Rootenberg* and *Larry A. Sonnenshein* of counsel), forrespondent. ***443**
Pursuant to the express terms of Family Court Act § 311.1 (7), when a juvenile offender proceeding is commenced in Criminal Court

and removed to Family Court, the order of removal, which consists of the Criminal Court pleadings and proceedings, is legally sufficient to constitute a valid petition notwithstanding that it does not contain nonhearsay allegations establishing each element of the crimes charged. Therefore, the failure to supplement the removal petition with a supporting deposition containing nonhearsay allegations is nonetheless jurisdictionally sound and, in any event, may not be challenged for the first time on appeal.

(*Matter of Detrece H.,* 78 NY2d 107; *Matter of Desmond J.,* 246 AD2d 111, 93 NY2d 949; *Matter of David M.,* 229 AD2d 345; *Matter of Edward B.,* 80 NY2d 458; *Matter of Neftali D.,* 85 NY2d 631; *Matter of City School Dist. v New York State Pub. Empl. Relations Bd.,* 144 AD2d 35; *Matter of Allstate Ins. Co. v Libow,* 106 AD2d 110, 65 NY2d 807; *American Lodge Assn. v East N.Y. Sav. Bank,* 100 AD2d 281; *Sanders v Winship,* 57 NY2d 391; *Matter of Vega v Bell,* 47 NY2d 543.)

OPINION OF THE COURT

Read, J.

This appeal calls upon us to decide whether the jurisdictional requirements for filing in Family Court are met when an order of removal and the accompanying pleadings and ****2** proceedings contain only hearsay allegations; and, if they are not met, whether this deficiency is waivable. For the reasons that follow, we conclude that such a removal is jurisdictionally defective. Further, the defect is nonwaivable and thus is reviewable for the first time upon appeal.

I.

This case originated with the filing of a felony complaint on April 3, 2002 in Criminal Court, Bronx County. The complaint charged appellant Michael M., who was 14 years old at the time, with participating in a group assault on a 13-year-old boy to steal his bicycle. In the resulting melee, the 13 year old suffered a broken leg. The felony complaint was signed by a police officer and was based on his interview of the victim. In other words, the complaint contained only hearsay.

After Michael M. was arraigned, he was interviewed by the New York City Criminal Justice Agency, which recommended juvenile offender treatment. Accordingly, at a calendar call on May 15, 2002, the prosecutor asked Criminal Court to removethe ***444** case to Family Court "pursuant to CPL 180.75 [and] 210.43," [1] and handed up a form removal order for the judge to sign. [2] The prosecutor cited three factors to support her oral application: that Michael ****3** M. was not the "sole participant" in the attack; that removal would assure that the victim, who was of "tender age," would not be "subjected to needless trauma"; and that removal would not negatively affect the criminal justice system (*see* CPL 180.75 [6] [b]). The judge asked if there were "[a]ny objections," and Michael M.'s attorney replied "No." The judge did not place on the record the reasons causing him to exercise his discretion to order removal (*cf.* CPL 180.75 [6] [a], [c]; *see also Matter of Raymond G.*, 93 NY2d 531, 538 [1999]). He immediately signed the order, which directed Michael M. to appear in Family Court a week later, on May 22, 2002.

At his initial Family Court appearance, Michael M. was served with the felony complaint, the removal order and the transcript of the Criminal Court proceeding. On November 14, 2002, Family Court found that Michael M. had committed acts which, if committed by an adult, would constitute the felonies of attempted robbery in the first degree, attempted robbery in the second degree, assault in the second degree (two counts), attempted grand larceny in the fourth degree and attempted criminal possession of stolen property in the fifth degree. By orderof ***445** disposition dated November 22, 2002, Family Court placed him on probation for 24 months.

Michael M. challenged Family Court's jurisdiction in this matter for the first time on appeal, arguing that the removal order and its accompanying papers were facially insufficient because they contained only hearsay allegations. Citing to *Matter of Desmond J.* (93 NY2d 949 [1999]), the Appellate Division rejected Michael M.'s claim, stating that "[o]n this record, jurisdiction was sufficiently established" (309 AD2d 631 [1st Dept 2003]). We now reverse.

II.

A juvenile delinquency proceeding "is originated [in Family Court] by the filing of a petition" (Family Ct Act § 310.1 [1]). Family Court Act § 311.1 specifies the delinquency petition's contents. As relevant on this appeal, Family Court Act § 311.1 (7) provides that a removal order from a criminal court to Family Court and all associated "pleadings and proceedings" (other than those not yet transcribed) "shall be deemed to be a petition filed pursuant to subdivision one of section 310.1 containing all of the allegations *required by this* ****4** *section* [i.e., Family Ct Act § 311.1] notwithstanding that such allegations may not be set forth in the manner therein prescribed" (emphasis added). Here, the presentment agency takes the position that by virtue of section 311.1 (7)'s express terms, the removal order and whatever other pleadings and proceedings may accompany it in an individual case are deemed to constitute a facially sufficient petition. We disagree.

(1) The need for nonhearsay allegations stems not from Family Court Act § 311.1 ("this section"), but instead from subdivision (3) of a different section--Family Court Act § 311.2. The latter provision mandates that the factual allegations of a petition and/or any supporting depositions must contain "non-hearsay allegations [to] establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]; *see also* Family Ct Act § 315.1 [1] [a]; [2]). Section 311.1 (7) exempts a removal order from compliance with the requirements of section 311.1; it does not excuse compliance with section 311.2 and its nonhearsay requirements. Accordingly, we conclude that removals must be supported by nonhearsay factual allegations to establish every element of the crimes charged and the juvenile's commission of these crimes.

Other provisions in the Family Court Act support our reading of Family Court Act § 311.1 (7). In 1978, the Legislatureamended ***446** former Family Court Act § 731 to add the removal provision as subdivision (3) (*see* L 1978, ch 481, § 48), which provided in relevant part as follows:

> "When an order of removal . . . is filed with [Family Court] such order and the pleadings and proceedings transferred with it shall be and shall be deemed to be a petition filed pursuant to *subdivision one of this section* containing all of the allegations therein required notwithstanding that such allegations may not be set forth in the manner therein prescribed" (former Family Ct Act § 731 [3] [emphasis added]).

Subdivision (1) of former Family Court Act § 731, in turn, required the filing of a petition to originate a juvenile delinquency proceeding (comparable to Family Ct Act § 310.1 [1]). In addition, subdivision (1) required the petition to allege that the juvenile had committed an act that, if done by an adult, would constitute a crime and to specify the act as well as the time and place of its commission (former Family Ct Act § 731 [1] [a], restated in Family Ct Act § 311.1 [2], [3] [d], [e], [f], [g]); that the juvenile was under 16 years old at the time of the alleged act's commission (former Family Ct Act § 731 [1] [b], restated in Family Ct Act § 311.1 [3] [c]); and that the juvenile required supervision, treatment or confinement (former Family Ct Act § 731 [1] [c], restated in Family Ct Act § 311.1 [3] [j]).

Thus, the removal provision enacted by the Legislature in 1978 as former Family ****5** Court Act § 731 (3) did not, by its express terms, exempt a removal from compliance with any of the former Act's requirements except those in section 731 (1), which are broadly comparable to Family Court Act § 311.1's requirements from which a removal pursuant to section 311.1 (7) is exempt. Underscoring this point, the Legislature expressly stated that other provisions of the former Family Court Act were inapplicable to a removal order. For example, the Legislature amended former Family Court Act § 733, which provided for various individuals to originate a juvenile delinquency proceeding, to specify that its provisions did "not apply to a proceeding originated by the filing of an order of removal" (L 1978, ch 481, § 49; *see also* ch 481, § 50 [providing that former Family Ct Act § 734, relating to procedures for initiation of juvenile delinquency proceedings by individuals, did not apply in the removal context; ch 481, § 51 [providing that former FamilyCt ***447** Act § 734-a, relating to various approvals for the filing of a petition, did not apply in the removal context]). [3]

Similarly, former Family Court Act § 739, which governed release or detention after the filing of a petition and prior to an order of disposition, was amended by adding language as subdivision (c) to require that "[w]here the petition consists of [a removal order], the petition shall be deemed to be based upon a determination that probable cause exists to believe the respondent is a juvenile delinquent and the respondent shall not be entitled to any further inquiry on the subject of whether probable cause exists" (L 1978, ch 481, § 52). This language was carried over into Family Court Act § 325.1 (5) when the Legislature recodified the Family Court Act's juvenile delinquency provisions in 1982 (L 1982, ch 920, § 1). Interestingly, however, the Legislature provided an exception from section 325.1 (5) for a removal pursuant to CPL 725.05 (3)/CPL 180.75 (4)--the bases for Michael M.'s removal--provided that the juvenile was not afforded a probable-cause hearing for a reason other than waiver. [4] The Legislature also

enacted Family Court Act § 311.2 in 1982, but did not similarly provide any express exception from its nonhearsay requirements for a removal pursuant **6 to CPL 725.05 (3)/CPL 180.75 (4).

Nor does our decision in *Matter of Desmond J.*, which also involved a felony complaint based solely on hearsay allegations, contradict our reading of Family Court Act § 311.1 (7). At the initial appearance in Family Court in *Matter of Desmond J.*, the presentment agency filed a supporting deposition containing nonhearsay allegations to comply with Family Court Act § 311.2 (3). The juvenile "objected, arguing that only the felony complaint and the other papers transferred from criminal court could properly be deemed the petition[, and] moved to dismiss the petition as jurisdictionally defective, as it did not contain non-hearsay allegations" (93 NY2d at 950). Both Family Court and the Appellate Division (246 AD2d 111 [2d Dept 1998]) rejected the juvenile's claim. *448

The Appellate Division adopted the position pressed by the presentment agency here; i.e., that a removal order and whatever other pleadings and proceedings may accompany it are deemed by Family Court Act § 311.1 (7) to constitute a facially sufficient petition. The Appellate Division recognized that we had "consistently stated that a juvenile delinquency petition must contain nonhearsay factual allegations which support every element of the crimes charged to meet the legal sufficiency requirements of Family Court Act § 311.2" (246 AD2d at 113, citing *Matter of Neftali D.*, 85 NY2d 631 [1995]; *Matter of Rodney J.*, 83 NY2d 503 [1994]; *Matter of Edward B.*, 80 NY2d 458 [1992]; *Matter of Jahron S.*, 79 NY2d 632 [1992]; *Matter of Detrece H.*, 78 NY2d 107 [1991]; and *Matter of David T.*, 75 NY2d 927 [1990]). "All of these cases were decided upon the theory that because a juvenile delinquency petition may be used to deprive a juvenile of his liberty, the accuracy of the allegations contained therein must be reliable" (246 AD2d at 113-114). The Court concluded, however, that these considerations were not relevant in the removal context because "there will generally have been proceedings held [i.e., a felony hearing or grand jury proceeding] to test the case against the accused juvenile offender"; and, further, the Criminal Court "is required, depending upon the extent of action previously taken in Criminal Court, to make findings as to reasonable cause or evidentiary sufficiency" (*id.* at 115).

We affirmed the Appellate Division, but on different grounds entirely. As previously noted, the presentment agency had filed a supporting deposition satisfying the requirements of Family Court Act § 311.2 (3) at the initial appearance in Family Court. Because "[i]n a removal context, this was the earliest stage at which the deposition could have been filed," we concluded that the petition was not improperly amended within the meaning of Family Court Act § 311.5 (93 NY2d at 951), and was therefore facially sufficient. Accordingly, in *Matter of Desmond J.* we did not need to reach the "broader question" that we now resolve. (*Id.* at 952.) In short, because the papers transferred from the Criminal Court, as supplemented at the earliest possible **7 moment by the supporting deposition, in fact satisfied the requirements of section 311.2 (3),

we did not need to decide in *Matter of Desmond J.* whether they were required to do so.

(2) We have, moreover, consistently viewed petitions failing to satisfy Family Court Act § 311.2 (3) as exhibiting a nonwaivable jurisdictional defect (*see* ***449** *Matter of Neftali D.*, 85 NY2d at 636-637; *Matter of Rodney J.*, 83 NY2d at 507; *Matter of Jahron S.*, 79 NY2d at 637; *Matter of Detrece H.*, 78 NY2d at 109-110; *Matter of David T.*, 75 NY2d at 929).[5] In *People v Casey* (95 NY2d 354 [2000]), we recently considered whether a hearsay pleading violation of CPL 100.40 (1), from which Family Court Act § 311.2 is derived, is jurisdictional and nonwaivable. We concluded that it was not. In doing so, however, we noted "the importance of the curability of a particular procedural defect as a factor weighing in favor of requiring preservation" (*id.* at 367). Because a legally insufficient juvenile delinquency petition under Family Court Act § 311.2 (3) cannot be cured by amendment, "we have held that hearsay pleading defects in delinquency petitions need not be preserved" (*id.*).

Finally, there may indeed be cases where the reliability of the charges in a felony complaint will have been tested at a hearing or in the grand jury or otherwise during the course of juvenile offender proceedings taking place in a criminal court prior to removal. In such cases, the juvenile may receive protections equivalent to a nonhearsay supporting deposition. In this case, however, no such equivalent protections were afforded Michael M.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the petition dismissed.

R.S. Smith, J. (dissenting). We dissent, and would hold that Michael M. waived his right to have a nonhearsay deposition filed in support of the juvenile delinquency petition when he failed to raise ****8** this issue at any time before taking an appeal.

I

On April 2, 2002, a 13-year-old boy with a bicycle was set upon by a gang of other boys near Yankee Stadium. The assailants, trying to steal the bicycle, punched the victim in the face, knocked him down and kicked him while he lay on the ground. Michael, 14, was arrested near the scene and identified by thevictim ***450** and other witnesses as one of the participants in the assault.

Michael was arraigned on a felony complaint in Criminal Court. As is permissible (CPL 100.15 [3]), the Criminal Court complaint was based on hearsay; the arresting officer related what the victim had told him. Later, the prosecutor decided that a felony prosecution would not be necessary, and that a juvenile delinquency proceeding in Family Court would be preferable. On motion of the prosecution, and without objection, Michael's case was removed to Family Court.

Family Court complaints, unlike felony complaints in Criminal Court, must contain, or be supported by depositions that contain, "non-hearsay allegations" (Family Ct Act § 311.2 [3]). Thus, after the case was removed, the

City of New York, which was presenting the delinquency petition, should have submitted to the Family Court a deposition from the victim supporting the officer's hearsay complaint (*Matter of Desmond J.*, 93 NY2d 949 [1999]). The City omitted to do this. Michael did not complain of, or call the Family Court's attention to, the omission.

The case proceeded to a hearing, and Family Court found that Michael had committed acts which, if committed by an adult, would have constituted attempted robbery in the first degree, assault in the second degree, and several other crimes. Michael was adjudged a juvenile delinquent and placed on probation for 24 months. The Family Court's order of disposition required that he receive counseling and obey curfews. Michael appealed from this order and on appeal argued, for the first time, that the proceedings against him were flawed because no deposition containing "non-hearsay allegations" had been filed.

II

It is an unquestioned rule, applicable in almost all cases, that a litigant may not complain on appeal of errors that he did not bring to the attention of the lower court. There are a few exceptions, for errors so fundamental that justice requires their correction, but there is no reason in principle why a violation of the "non-hearsay" requirement of Family Court Act § 311.2 (3) should be placed in that category. Michael's argument here, which the majority accepts, is based not on principle but on some peculiarities in our Court's case law.

One of the errors considered so fundamental that it may be raised for the first time ****9** on appeal is the failure of an accusatoryinstrument ***451** to allege facts that constitute the charged crime. Where the acts the defendant allegedly committed do not violate the criminal statute on which the prosecution is based, we have permitted defendants to raise the issue on appeal even though they did not raise it below. We have grounded this result on the theory that an accusatory instrument that fails to allege essential facts is insufficient to confer jurisdiction on the trial court (*People v Case*, 42 NY2d 98 [1977]).

In *Case*, we stated the rule broadly: "A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*id.* at 99; citation omitted). Language like this is open to the mistaken interpretation that not just a failure to allege facts constituting the charged crime, but every technical defect in the instrument, is a "nonwaivable jurisdictional" error. We made such a mistake, in dictum, in *People v Alejandro* (70 NY2d 133 [1987]). All we held in *Alejandro* was that a misdemeanor information charging defendant with resisting arrest was jurisdictionally deficient when the facts alleged failed to support an element of the charged crime--that the arrest in question was "authorized." In stating the rule, however, we tracked the language of the statute governing misdemeanor informations, Criminal Procedure Law § 100.40 (1) (c)--which, like the Family Court Act section at issue in this case, contains a "non-hearsay" requirement. Thus, we said in *Alejandro* that an information which "lacked the necessary nonhearsay allegations which would establish,

'if true, every element of the offense charged and the defendant's commission thereof' " contained a "jurisdictional defect which was not waived by defendant's failure to raise the issue until after completion of the trial" (*id.* at 134-135).

In *People v Casey* (95 NY2d 354, 362 [2000]) we found it necessary to "revisit" *Alejandro* and we retracted "*Alejandro*'s suggestion that the . . . non-hearsay requirement of CPL 100.40 (1) (c) was 'jurisdictional' and, thus, non-waivable and reviewable on appeal without preservation." Our holding in *Casey* rests in part on an analysis of the background and purpose of CPL 100.40 (1) (c), but also in part on what we called "the general principles governing the narrow instances where this Court has departed from the requirement that errors in criminal proceedings have to be preserved at the trial court in order to be reviewable as an issue of law." (*Id.* at 363.) We said in *Casey*:

> "[T]he failure to preserve has been excused for onlythe ***452** most fundamental procedural irregularities . . . [I]t is only 'where "the error complained of goes to the *essential validity* of the proceedings conducted below" such that "the entire trial is *irreparably tainted*," [that] it need not be preserved to present a question of law reviewable by this Court' (*People v Agramonte*, 87 NY2d 765, 770 [quoting *People v Patterson*, 39 NY2d 288, 295-296] [emphasis supplied]). ****10** Pleading errors involving omission of elements of the charged crime are fundamental. They impair a defendant's basic rights to fair notice sufficient to enable preparation of a defense and to prevent double jeopardy. *Hearsay pleading defects do not implicate any of those basic rights of an accused*." (*Id.* at 366 [emphasis added in part]; *accord People v Keizer*, 100 NY2d 114, 121 [2003] ["a purported hearsay defect in an accusatory instrument is nonjurisdictional"].)

The reasoning of *Casey* is convincing, and logically it should control our decision here. A problem arises, however, because, in a two-sentence dictum near the end of the *Casey* opinion, we distinguished juvenile delinquency proceedings from proceedings on Criminal Court misdemeanor informations, thus seeming to imply that the *Casey* rule would not apply in delinquency cases. We said:

> "Contrastingly, a legally insufficient juvenile delinquency petition under Family Court Act § 311.2 (3), the counterpart to CPL 100.40 (1) (c), cannot be cured by amendment (*see*, Family Ct Act § 311.5 [2] [b]). Thus, we have held that hearsay pleading defects in delinquency petitions need not be preserved (*see*, *Matter of Rodney J.*, 83 NY2d 503 [ ]; *Matter of Detrece H.*, 78 NY2d 107)." (95 NY2d at 367.)

This dictum, unlike the rest of the *Casey* opinion, will not withstand analysis. The first sentence of the dictum distinguishes juvenile delinquency from misdemeanor cases because a flaw in a delinquency petition, unlike a flaw in a misdemeanor information, "cannot be cured by amendment." As we noted in *Casey*, the curability of a procedural defect is an important factor weighing in favor of requiring preservation. However, although a defect in a delinquency petition cannot be cured *by amendment*, it can be cured. Here, for example, if Michael hadmade ***453** a timely motion to

dismiss the petition, his motion presumably would have been successful, but the City could simply have brought another petition. Here, as in *Casey*, curability furnishes an important reason why preservation should be required.

The second sentence of the *Casey* dictum says "we have held" that hearsay defects in delinquency petitions are nonwaivable--but the two cases cited for that proposition do not support it. Neither *Matter of Rodney J.* (83 NY2d 503 [1994]) nor *Matter of Detrece H.* (78 NY2d 107 [1991]) involved any issue of waiver. In both cases, the alleged delinquent had preserved the defect in the petition by moving to dismiss in Family Court. The same is true of two other cases cited by the majority here, *Matter of Jahron S.* (79 NY2d 632 [1992]) and ****11** *Matter of Neftali D.* (85 NY2d 631 [1995]). There appears to be only one case, *Matter of David T.* (75 NY2d 927 [1990]) in which we held that a hearsay defect in a delinquency petition was nonwaivable--and *David T.* is a brief memorandum decision in which we relied exclusively on *Alejandro*. There is no reason why the *David T.* holding should have survived our decision in *Casey*, 10 years later, to revisit *Alejandro*.

We thus conclude that the majority errs in following the *Casey* dictum. We would instead follow the *Casey* holding and the powerful reasoning that supports it, and would conclude that a hearsay defect in a delinquency petition, like a hearsay defect in a criminal court misdemeanor information, is nonjurisdictional and may be waived.

III

The result in this case is unfortunate. It is always unfortunate--though, of course, it is sometimes inevitable--when a meritorious case fails because of a lawyer's omission to file the right piece of paper, but it is especially so in juvenile delinquency cases. Such cases serve not only to protect the community from troubled young people like Michael, but to give these young people themselves, to the extent that an imperfect system can manage it, the help they need. The rule the Court adopts today, by magnifying the consequences of a procedural error, correspondingly reduces the chances of doing practical good. When a boy or girl is adjudicated delinquent, and a court orders the services that it thinks most appropriate, the services may or may not help--but they will certainly not help if they are terminated in midstream because a lawyer has belatedlydiscovered ***454** a procedural glitch. Nor is it helpful to send the message to Michael, and to future Michaels, that violent and antisocial conduct will have no consequences if a lawyer can discover a long-neglected flaw in paperwork.

IV

Accordingly, we would affirm the decision of the Appellate Division.

Chief Judge Kaye and Judges G.B. Smith, Ciparick and Rosenblatt concur with Judge Read; Judge R.S. Smith dissents and votes to affirm in a separate opinion in which Judge Graffeo concurs.

Order reversed, etc.

FOOTNOTES

Footnotes

1 CPL 180.75 (4) provides that when a juvenile offender is arraigned before a local criminal court upon a felony complaint, the court shall order removal to Family Court at the District Attorney's request if, upon consideration of criteria specified in CPL 210.43 (2), removal is determined to be "in the interests of justice." These criteria, which the court must consider "to the extent applicable," include the seriousness and circumstances of the offense, the extent of harm caused and the evidence of guilt, whether admissible or inadmissible at trial (CPL 210.43 [2]). Additional showings are required where the felony complaint charges murder in the second degree, rape in the first degree and other specified serious crimes (*see* CPL 180.75 [4]). Further, where a court directs removal to Family Court, the provisions of CPL 725.05 govern the order. For a removal order made pursuant to CPL 180.75 (4), the court must specify the act or acts it found "reasonable cause to allege" (CPL 725.05 [3]).

2 The form order purports to be an order for Supreme Court to remove a criminal proceeding to Family Court upon the People's motion, acting pursuant to paragraph (a) of CPL 180.75 (4). This provision, which took effect on September 1, 1978 (*see* L 1978, ch 481, §§ 33, 67), was repealed when section 180.75 (4) was substantially amended, effective August 4, 1979 (*see* L 1979, ch 411, §§ 5, 26; Governor's Approval Mem, 1979 McKinney's Session Laws of NY, at 1800). Thus, the order is not only boilerplate, but outdated boilerplate.

3 When the Legislature recodified the Family Court Act's juvenile delinquency provisions in 1982, it restricted origination of juvenile delinquency proceedings to presentment agencies (*see* Family Ct Act § 310.1 [2]; *see also* L 1982, ch 920, §§ 1, 28).

4 As a result, Michael M. would have been entitled to a probable-cause hearing in Family Court because he was not afforded a hearing to test the evidence in Criminal Court, and he did not waive his right to a hearing on the felony complaint.

5 The dissent suggests that this disserves young people charged with juvenile delinquency. We do not doubt that among the purposes of a delinquency adjudication is the provision of necessary services to the delinquent. But we recognize as well that a system of justice must always ensure that procedural safeguards are met and legal requirements are fulfilled. Under our law, presentment

agencies may only prosecute based on a facially sufficient petition. Because their failure to do so has consequences, we are confident that they will be vigilant about complying with their statutory mandate in the future.

New York Official Reports

87 N.Y.2d 9, 660 N.E.2d
1108, 637 N.Y.S.2d 329

In the Matter of Robert O.,
a Person Alleged to be a
Juvenile Delinquent, Appellant.

Court of Appeals of New York
266
Argued October 24, 1995;
Decided December 5, 1995

CITE TITLE AS: Matter of Robert O.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 12, 1994, which affirmed an order of disposition of the Family Court, Dutchess County (Damian J. Amodeo, J.), entered upon a fact-finding order of that court finding, upon respondent's admission, that he had committed an act constituting unlawful possession of a weapon by a person under 16 years of age, adjudicating respondent to be a juvenile delinquent and placing him on probation for a term of 12 months.

Matter of Robert O., 207 AD2d 783, affirmed.

HEADNOTES

Infants
Juvenile Delinquents

Failure to Hold Timely Initial Appearance Not Ground for Dismissal with Prejudice

(1) In a juvenile delinquency proceeding, the failure to hold the "initial appearance" within 10 days of the filing of the delinquency petition as required by Family Court Act § 320.2 is not alone a reason to foreclose a timely prosecution of the underlying charges. While the Legislature has seen fit to give protected status to the 60-day limit for commencing the fact-finding phase by enacting the speedy fact-finding right and by providing an express ground for dismissal for its violation, the time period for holding the initial appearance has not been granted similar protected status. Nowhere in the Family Court Act is a dismissal for a violation of the 10-day limit for holding the initial appearance elevated to the status of a ground for dismissal with prejudice, and such a provision will not be read into the statute. Moreover, the requirement of Family Court Act § 320.2 that "good cause" for the delay be shown before departing from the 10-day initial appearance time limit is not eviscerated by permitting refiling of the petition, in view of the significant consequences that may result from the presentment agency's failure to show good cause for the delay.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 71, 73.

Family Ct Act § 320.2.

NY Jur 2d, Domestic Relations, § 1381. ***10**

ANNOTATION REFERENCES

See ALR Index under Children; Juvenile Courts and Delinquent Children.

POINTS OF COUNSEL

Schisler & Sall, Poughkeepsie *(Richard C. Schisler* and *David B. Sall* of counsel), for appellant.

The refiling of the juvenile delinquency petition herein, after its dismissal on speedy hearing grounds pursuant to Family Court Act §§ 310.2 and 320.2 (1), where appellant did nothing to cause the delay, was totally improper and without authority and the refiled petition should have been dismissed. *(Matter of Robert S.,* 192 AD2d 612; *Matter of Frank C.,* 70 NY2d 408; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312.)

Ian G. MacDonald, County Attorney, Poughkeepsie *(Victor A. Civitillo* and *Christian R. Cullen* of counsel), for presentment agency, respondent.

I. The court below properly found that the presentment agency may file a second petition identical to one which was dismissed for failure to conduct the first appearance within 10 days because there is no right to a speedy first appearance comparable to the right to a speedy fact finding. *(Matter of Frank C.,* 70 NY2d 408; *Matter of Randy K.,* 77 NY2d 398; *Matter of Christopher WW.,* 189 AD2d 411; *Matter of Robert S.,* 192 AD2d 612; *Matter of Jose R.,* 83 NY2d 388; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Satori R.,* 202 AD2d 432.)

II. The court below properly found that the presentment agency may file a second petition identical to the first one which was dismissed for failure to conduct the first appearance within 10 days because appellant's right to a speedy fact-finding hearing was not violated. *(Matter of Gabriel R.,* 208 AD2d 984; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Jessie C.,* 154 Misc 2d 103; *Matter of J. V.,* 127 Misc 2d 780; *Matter of Rodney J.,* 83 NY2d 503; *Matter of Jahron S.,* 79 NY2d 632; *Matter of Detrece H.,* 78 NY2d 107; *Matter of David T.,* 75 NY2d 927.)

Jane M. Spinak, New York City, and *Robyn B. Millman* for the Juvenile Rights Division of The Legal Aid Society, *amicus curiae.*

The presentment agency in a juvenile delinquency proceeding should not be allowed to refile an identical petition to one which was previously dismissed due to a violation of Family Court Act § 320.2 (1). *(Matter of Jose R.,* 83 NY2d 388; ***11** *Matter of Randy K.,* 77 NY2d 398; *Matter of Frank C.,* 70 NY2d 408; *Matter of Satori R.,* 202 AD2d 432; *Matter of Robert S.,* 192 AD2d 612; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Detrece H.,* 78 NY2d 107; *Matter of Shannon FF.,* 189 AD2d 420.)

Paul A. Crotty, Corporation Counsel of New York City *(Kristin M. Helmers* and *Deborah R. Douglas* of counsel), for New York City, *amicus curiae.*

The Court below properly concluded that a dismissal based upon the failure to hold an initial appearance within 10 days after the filing of the petition did not preclude the filing of a second petition on "speedy trial" grounds, where, as here, the fact-finding proceeding commenced within 60 days of the juvenile's initial appearance on the original petition. *(Matter of Detrece H.,* 78 NY2d 107; *People v Lomax,* 50 NY2d 351; *Matter of Gabriel R.,*

208 AD2d 984; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Aaron J.,* 80 NY2d 402; *Matter of Atthis D.,* 205 AD2d 263, 85 NY2d 924; *Matter of Kevin G.,* 159 Misc 2d 288; *Royal Zenith Corp. v Continental Ins. Co.,* 63 NY2d 975; *Matter of Jose R.,* 83 NY2d 388.)

OPINION OF THE COURT

Titone, J.

In this juvenile delinquency proceeding we are called upon to determine the consequences of a failure to hold the "initial appearance" within 10 days of the filing of the delinquency petition as required by Family Court Act § 320.2. We conclude that this flaw is not alone a reason to foreclose a timely prosecution of the underlying charges.

On March 2, 1993, the presentment agency filed a petition alleging that respondent committed acts, which if committed by an adult, would constitute the crimes of burglary in the first degree, burglary in the second degree and petit larceny. The charges stem from respondent's alleged breaking and entering into a residence while armed and his theft of property therefrom. Respondent's initial appearance on the petition was not held until March 29, 1993.

Respondent then moved to dismiss the petition on the ground that the initial appearance was not held within 10 days of the date the petition was filed as required by Family Court Act § 320.2 (1) and no good cause was shown for the delay. The presentment agency conceded that dismissal of that petition was proper since no good cause had been shown, but argued that ***12** dismissal should be without prejudice to refile the petition. Family Court granted the motion and dismissed the petition on April 26, 1993.[1] On May 3, 1993, the presentment agency filed an identical petition against respondent. Respondent's appearance on the second petition was held on May 11, 1993.

Respondent then moved to dismiss the second petition pursuant to Family Court Act §§ 310.2, 320.2 and 332.1 (8) on the ground that his right to a speedy fact-finding hearing was violated. Family Court denied the motion, holding that the right to speedy fact finding guaranteed by the Family Court Act "is not compromised by allowing the refiling of a petition" where, as here, the fact-finding hearing commenced within 60 days of the initial appearance on the first petition. Respondent preserved his right to appeal after admitting that he committed acts constituting unlawful possession of a weapon by a person under 16 in satisfaction of all charges in the petition.[2] Respondent was adjudicated a juvenile delinquent and placed on probation for a term of 12 months.

The Appellate Division affirmed, with one Justice dissenting. The majority concluded that the presentment agency was not precluded from refiling a delinquency petition after the first was dismissed for failure to hold the initial appearance within 10 days of such filing where the juvenile's separate right to a "speedy hearing" was observed. The dissent opined that the presentment agency's failure to show "good cause" for the belated initial appearance required dismissal of the petition with prejudice in order to give effect to the statutory "good cause" language. We granted

respondent permission to take this appeal, and now affirm.

The Family Court Act prescribes the procedures and time frames for conducting the juvenile's "initial appearance," which is "the proceeding on the date the respondent first appears before the court after a [delinquency] petition has been filed and any adjournments thereof" (Family Ct Act § 320.1).[3] At the initial appearance, the juvenile is appointed a Law ***13** Guardian if independent counsel has not been retained, informed of the charges contained in the petition, and furnished with a copy of the petition (Family Ct Act § 320.2 [2]; § 320.4 [1]). At that time, the court must determine whether detention of the juvenile is warranted, whether the case should be referred to the probation service for adjustment services, the date of the probable-cause hearing for a detained child, the date of the fact-finding hearing, and other issues properly before it (*id.*, § 320.4 [2] [a]-[e]). Family Court Act § 320.2 (1) provides that "[i]f the respondent is not detained, the initial appearance shall be held as soon as practicable and, absent good cause shown, within ten days after a petition is filed."

Where the juvenile is not detained, an adjudication on the merits of the petition's charges, known as the "fact-finding" phase of the process, "shall commence not more than sixty days after the conclusion of the initial appearance" (Family Ct Act § 340.1 [2]), subject to adjournments for good cause and special circumstances (*see, id.*, § 340.1 [3]-[5]). The Legislature has given the time frame for commencing the fact-finding phase special status by providing that "[a]fter a petition has been filed ... the respondent is entitled to a speedy fact-finding hearing" (*id.*, § 310.2). No counterpart to this section exists for the initial appearance. To protect a juvenile's right to a "swift and certain adjudication" within the designated 60-day time period (*see, Matter of Frank C.*, 70 NY2d 408, 413), Family Court Act § 332.1 (8) expressly authorizes the filing of a pretrial motion to "dismiss[ ] a petition, or any count thereof, on the ground that the respondent has been denied a speedy fact-finding hearing contrary to section 310.2" (*id.*, § 332.1 [8]). Thus, under the legislative scheme, so long as the adjudication is completed within 60 days, unless good-cause or special-circumstances adjournments are in order, a respondent's right to a speedy fact finding has been preserved.

We reject respondent's contention that a violation of the 10-day period for holding the initial appearance alone warrants dismissal of the petition with prejudice, regardless of the date fact finding has commenced. While the Legislature has seen fit to give protected status to the 60-day limit for commencing the fact-finding phase by enacting the speedy fact-finding right and by providing an express ground for dismissal for its violation, the time period for holding the initial appearance has not been granted similar protected status (*cf., Matter of Jose R.*, 83 NY2d 388 [dismissal of petition for failing to timely complete dispositional phase not warranted where Family Court Act ***14** lacks provisions establishing right to a speedy disposition and authorizing dismissal of petition for such violation]).

The Family Court does not have inherent power to dismiss a juvenile delinquency petition.

Rather, that authority is governed by statute, and is available only in carefully delineated circumstances (*see,* Family Ct Act §§ 315.1, 332.1). Specifically, in addition to a dismissal for a denial of the right to a speedy fact finding, the grounds for dismissal are expressly limited to the existence of factual, legal or jurisdictional defects in a petition (*see, id.,* § 315.1), a violation of the Statute of Limitations of Family Court Act § 302.2 (*id.,* § 332.1 [9]) and a violation of the prohibition against double jeopardy as provided by Family Court Act § 303.2 (*id.,* § 332.1 [10]). Where a petition is dismissed as jurisdictionally defective, dismissal is generally without prejudice, and the presentment agency's proper recourse is to refile the petition (*see, Matter of Detrece H.,* 78 NY2d 107, 111). While the parties here agree that dismissal of the first petition was in order, they dispute whether that dismissal was with prejudice. Nowhere in the Family Court Act is a dismissal for a violation of the 10-day limit for holding the initial appearance elevated to the status of a ground for dismissal with prejudice, and we decline to read such a provision into this statute.

Respondent and supporting *amicus curiae* conclude that although the right to a speedy initial appearance is not explicitly found in the statute, it is encompassed in the right to a speedy fact finding. In other words, they argue that because the date of the fact-finding phase is derived from the date of the initial appearance, a delay of the initial appearance without good cause necessarily constitutes a violation of the speedy trial right and is thus similarly subject to the remedy of dismissal under Family Court Act § 332.1.

While theoretically a late initial appearance may directly delay adjudication of the merits in contravention of the statutory speedy fact-finding mandate, here that consideration is insignificant because no violation of the speedy fact-finding right occurred. From start to finish, respondent's adjudication was completed within 60 days of his appearance on the original petition.[4] Respondent does not claim that an adjudication on the merits had to be postponed due to the petition's refiling. ***15**

Indeed, were we to accept respondent's argument that the right to a speedy fact finding attaches to all individual proceedings taking place after the petition is filed, and is thus violated by holding a late initial appearance, we would be constrained to reach the same conclusion for an untimely probable cause hearing, which by definition occurs after the initial appearance, but prior to fact finding (*see,* Family Ct Act § 325.2 [1], [2]). Nonetheless, Family Court Act § 325.3 (4) belies that contention, providing that "[i]f the court or the presentment agency cannot hold a probable cause hearing within the limits of subdivision two of section 325.1, *the court may dismiss the petition without prejudice* or for good cause shown adjourn the hearing and release the respondent pursuant to section 320.5" (emphasis added). Given that this provision contemplates that dismissal without prejudice may be an appropriate remedy for failure to meet pre-fact-finding phase statutory deadlines in lieu of a showing of good cause for an adjournment, we conclude that similar relief is appropriate to redress a belated initial hearing, where no separate speedy fact-finding violation has occurred. Indeed, it would be illogical to permit dismissal without prejudice

for a probable cause hearing violation and not for an initial appearance violation, where the former is further along in the process and involves resolution of the substantive question whether reasonable cause to believe that respondent committed a crime exists.

Contrary to the views expressed by the Appellate Division dissent below, the requirement of Family Court Act § 320.2 that "good cause" for the delay be shown before departing from the 10-day initial appearance time limit is far from eviscerated by permitting refiling of the petition. The initial appearance, like the arraignment of an adult charged with a crime,[5] is the process by which the court obtains jurisdiction over the minor, determines if detention is warranted, and sets the dates for further proceedings (Family Ct Act §§ 320.2, 320.4; ***16** *see also, Matter of Atthis D.,* 205 AD2d 263, 267). The presentment agency's failure to show good cause for the arraignment delay resulted in significant consequences--the original petition was dismissed, jurisdiction over the juvenile was thereby lost, and the entire proceeding was stalled. As a result, the presentment agency was then required to refile the petition to regain jurisdiction and begin the process anew (*see, Matter of Detrece H.,* 78 NY2d 107, *supra*).

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur. Order affirmed, without costs. ***17**

Footnotes

1 The order of dismissal does not indicate whether dismissal was with or without prejudice to refile.

2 The presentment agency does not contest respondent's right to appeal in this case.

3 The clerk of the court "shall notify the presentment agency and any appointed law guardian of the initial appearance date" (*id.,* § 320.2 [4]) to "insure [ ] that that agency will be apprised of the appearance and afforded an opportunity to participate" in the proceedings (Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 320.2, at 364).

4 Notably, we do not address whether the 60-day period should be measured for speedy fact-finding purposes from the date of the initial appearance on the first petition or on the refiled petition because here the fact-finding hearing was held within 60 days of the earlier appearance (*compare, Matter of Gabriel R.,* 208 AD2d

984, *and* *Matter of Tommy C.,* 182 AD2d 312 [measure 60 days from appearance on original petition], *with* *Matter of Marcus A.,* 155 Misc 2d 482 [speedy trial "clock" does not begin to run until initial hearing on new petition]; *cf.,* *People v Osgood,* 52 NY2d 37 [speedy trial clock in criminal action commences when first accusatory instrument is filed]).

5 Family Court Act § 320.4, which sets forth the procedures to be followed at the initial appearance, is derived from CPL 210.15, which governs arraignments in the criminal justice system (*see,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 320.4, at 371; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 210.15).

New York Official Reports

182 A.D.2d 312, 588 N.Y.S.2d 916

In the Matter of Tommy C., a Person Alleged to be a Juvenile Delinquent, Respondent. Westchester County Attorney, Appellant.

Supreme Court, Appellate Division, Second Department, New York
91-02293
October 26, 1992

CITE TITLE AS: Matter of Tommy C.

SUMMARY

Appeal from an order of the Family Court, Westchester County (Bruce E. Tolbert, J.), entered January 25, 1991, which dismissed the petition in a juvenile delinquency proceeding.

HEADNOTES

Infants
Juvenile Delinquents
Timeliness of Fact-Finding Hearing

(1) Family Court Act § 340.1 requires that, if the respondent in a juvenile delinquency proceeding is not in detention, a fact-finding hearing shall commence within 60 days after the conclusion of the juvenile's "initial appearance", and when a juvenile delinquency petition is dismissed for facial insufficiency, and a second petition is filed, the 60-day deadline runs from the time of the juvenile's initial appearance on the first petition. Judicial interpretations of appropriate provisions of the Criminal Procedure Law may be considered in interpreting similar provisions of the Family Court Act (Family Ct Act § 303.1 [2]), and CPL 1.20 (17), which provides that a criminal action is commenced by the filing of an accusatory instrument and if more than one accusatory instrument is filed it commences when the first such instrument is filed, has been interpreted to require that where the original accusatory instrument is dismissed and another one is later filed the prosecution must be ready for trial within six months after the first instrument is filed (CPL 30.30). The Legislature intended that the time period in issue begins to run from the date of the initial appearance on the first petition, and a fact-finding hearing must be held within 60 days thereafter, subject to adjournments granted for cause, relief not sought in the instant case. In juvenile delinquency proceedings the date of the respondent's appearance on the original petition fixes the time from which the period of limitations for holding the respondent's fact-finding hearing is to be calculated, and accordingly, because the presentment agency failed to commence a fact-finding hearing within 60 days after the date of the respondent's initial appearance on the original petition, the respondent's right to a timely fact-finding hearing was violated and the petition was properly dismissed.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 44, 46.

CPL 1.20 (17); 30.30; Family Ct Act § 303.1 (2); § 340.1.

NY Jur 2d, Domestic Relations, §1690. ***313**

ANNOTATION REFERENCES

See Index to Annotations under Juvenile Courts and Delinquent Children.

APPEARANCES OF COUNSEL

Marilyn J. Slaatten, County Attorney of Westchester County, White Plains *(Carol L. Van Scoyoc* and *Vincent M. Cascio* of counsel), appellant *pro se.*
John F. Clennan, Ronkonkoma, for respondent.

OPINION OF THE COURT

Rosenblatt, J. P.

The case before us involves interpretation of the statutory deadlines for fact-finding hearings in juvenile delinquency proceedings. Family Court Act § 310.2 is a general provision, entitling the juvenile to a speedy fact-finding hearing. Family Court Act § 340.1 (2) is specific, and requires that, if the respondent is not in detention, a fact-finding hearing shall commence within 60 days after the conclusion of the juvenile's "initial appearance" *(see,* Family Ct Act § 320.1).

When a juvenile delinquency petition is dismissed for facial insufficiency, and a second petition is filed, does the 60-day statutory deadline run from the time of the juvenile's initial appearance on the first or second petition? This question, now before us, is one of first impression in the appellate courts of New York State. We conclude that the deadline runs from the initial appearance on the first petition.

By designated felony petition dated June 18, 1990, in the Family Court, Westchester County, the respondent was charged with committing acts which, if committed by an adult, would constitute the crimes of sodomy in the first degree (two counts) and sexual abuse in the first degree (two counts). On June 27, 1990, the respondent made his first appearance in the Family Court on the petition.

Thereafter, the respondent moved to dismiss the petition, asserting that it was defective because it failed to set forth any nonhearsay factual allegations. The Family Court (Tolbert, J.) agreed with the respondent and, accordingly, dismissed the petition by order dated August 10, 1990.

On October 29, 1990, 124 days after the respondent's initial appearance on the first petition, the presentment agency ***314** brought a second designated felony petition, charging the respondent with the same acts as in the first petition. The respondent moved to dismiss the second petition, asserting that his right to a timely fact-finding hearing had been violated because no fact-finding hearing had commenced within 60 days after his appearance on the initial petition. The Family Court agreed, relying upon judicial interpretations of analogous speedy trial provisions of the CPL, and dismissed the second petition.

The appellant does not claim that the lapse of time was occasioned by "good cause" (Family Ct Act § 340.1 [4] [b]), or "special

circumstances" (Family Ct Act § 340.1 [6]). Indeed, it never requested any adjournment, nor was one ever ordered. Instead, it argues that the time limitation for holding the fact-finding hearing began anew upon the respondent's appearance on the second petition.

Family Court Act § 303.1 (2) provides: "A court may ... consider judicial interpretations of appropriate provisions of the criminal procedure law to the extent that such interpretations may assist the court in interpreting similar provisions of this article [on juvenile delinquency]".

We find it proper to look to judicial interpretations of CPL 1.20 (17) to help answer the question before us. CPL 30.30 sets forth the time periods within which the prosecution must be ready for trial following the commencement of a criminal action. CPL 1.20 (17) provides: "A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court, and, if more than an accusatory instrument is filed in the course of the action, it commences when the first of such instruments is filed."

In *People v Lomax* (50 NY2d 351, 356), the Court of Appeals interpreted CPL 1.20 (17) to mean that: "there can be only one criminal action for each set of criminal charges brought against a particular defendant, notwithstanding that the original accusatory instrument may be replaced or superseded during the course of the action. This is so even in cases such as this, where the original accusatory instrument was dismissed outright and the defendant was subsequently haled into court under an entirely new indictment". Thus, the court held that where the original accusatory instrument is dismissed, and another one is later filed, the prosecution must be ready for trial within six months after the first instrument is filed *(see also, People v Osgood,* 52 NY2d 37; *People v Cortes,* 80 NY2d 201, 207, n 3). ***315**

Although the Family Court Act does not contain a provision similar to CPL 1.20 (17), the principles expressed in *Lomax (supra)* and *Osgood (supra)* as to when a criminal action is commenced parallel the legislative intent underlying the speedy fact-finding hearing provisions of the Family Court Act.

The appellant asserts that in dismissing the second petition, the Family Court erroneously relied upon judicial interpretations of the CPL. We disagree, and we hold that the Legislature intended that the time period in issue begins to run from the date of the initial appearance on the first petition, and that a fact-finding hearing must be held within 60 days thereafter, subject to adjournments granted for cause, relief not sought in the case before us.

We find unpersuasive the appellant's assertions that because the Court of Appeals, in *Matter of Frank C.* (70 NY2d 408), held that the speedy trial provisions of the CPL and the Family Court Act are not "analogous", judicial interpretations of the speedy trial provisions of the CPL are uninstructive here. Although in *Matter of Frank C.,* the Court of Appeals found no genuine analogy between the speedy trial provisions of the CPL and the Family Court Act, the court's analysis in interpreting Family Court Act § 340.1 centered on the over-arching legislative concern that juveniles be brought to trial promptly. The court noted,

by way of contrast, that the CPL is "aimed principally at prosecutorial delays rather than at the larger problem of bringing criminal defendants swiftly to trial" *(Matter of Frank C., supra,* at 412-413). The court pointed out that Family Court Act § 340.1 is not a prosecutorial readiness rule *(see also, Matter of Randy K.,* 77 NY2d 398, 404), but "a true 'speedy trial' provision, in that both its language and its underlying purpose are directed toward bringing the accused juvenile to trial" within the mandated time periods *(Matter of Frank C., supra,* at 413). Thus, while the court acknowledged that under the CPL, delays in bringing an accused to trial are excused if the delays are beyond the prosecution's control, the court refused to afford those allowances to presentment agencies in the context of juvenile delinquency fact-finding hearings *(see also,* Family Ct Act 340.1 [6]).

In *Matter of Randy K.* (77 NY2d 398, 402, *supra),* the Court of Appeals held that the strict time requirements of Family Court Act § 340.1 may not be waived, even by a respondent's ***316** willful failure to appear at a fact-finding hearing, and that even if the juvenile has absconded, the presentment agency must, nonetheless, comply with Family Court Act § 340.1 (4), (5) and (6), by moving to adjourn the fact-finding hearing. Thus, in *Matter of Randy K.,* the agency did not prevail even though the juvenile himself was entirely responsible for thwarting the fact-finding hearing. The case before us is stronger yet in compelling dismissal, considering that the delay was occasioned by the presentment agency, with no fault on the part of the juvenile *(cf., Matter of Faruq F.,* --- AD2d --- [decided herewith]).

Beyond the legislative intent and the instructive decisional law, there are implausible consequences that would follow if we do not measure the deadline from the respondent's first appearance on the initial petition. The short of it is that the time limitations could be circumvented and postponed repeatedly by filing successive petitions, each starting the clock anew, to the evisceration of the speedy fact-finding hearing concept itself.

We hold here that in juvenile delinquency proceedings the date of the respondent's appearance on the original petition fixes the time from which the period of limitations for holding the respondent's fact-finding hearing is to be calculated *(see, Matter of J. V.,* 127 Misc 2d 780; *Matter of Jessie C.,* --- Misc 2d --- [Fam Ct, Kings County, Apr. 1, 1992]). Because the Presentment Agency failed to commence a fact-finding hearing within 60 days after the date of the respondent's initial appearance on the original petition, the respondent's right to a timely fact-finding hearing was violated and the petition was properly dismissed. Accordingly, the order appealed from is affirmed, without costs or disbursements.

Miller, Ritter and Pizzuto, JJ., concur.
Ordered that the order is affirmed, without costs or disbursements. ***317**

588 N.Y.S.2d 916

End of Document

New York Official Reports

216 A.D.2d 225, 629 N.Y.S.2d 28

In the Matter of Warren W.,
a Person Alleged to be a
Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division,
First Department, New York
53399
(June 29, 1995)

CITE TITLE AS: Matter of Warren W.

HEADNOTE

INFANTS
JUVENILE DELINQUENTS

(1) Order which adjudicated appellant juvenile delinquent modified --- Appellant, then 15 years old, was indicted for second degree robbery; after trial in Supreme Court, appellant was found guilty, but of act that did not render him criminally responsible as juvenile offender; Supreme Court vacated guilty verdict, replaced it with juvenile delinquency fact-finding determination, and ordered case removed to Family Court; Family Court placed appellant with Division for Youth for 5 years (with first 18 months in secure facility) upon determining that he had committed designated felony act and applying disposition set out in Family Court Act § 353.5 (6); court denied appellant credit for time served in detention from time of his arrest until date of disposition; these determinations were in error --- Petition was not prominently marked as containing allegation that juvenile committed designated felony act, nor did presentment agency attach to petition certified copies of prior delinquency findings it was relying upon to convert ordinary felony act into designated felony act (see, Family Ct Act § 311.1 [5], [7]); accordingly, designated felony finding must be stricken and period of placement reduced to 18 months in accordance with Family Court Act § 353.3 (5) ---While presentment agency maintains that motion to strike designated felony marking was untimely, its reliance on Family Court Act § 332.2 (1), which states that 'all pretrial motions shall be filed within thirty days after conclusion of initial appearance and before commencement of fact-finding hearing', is misplaced; trial that led to fact-finding determination took place in Supreme Court, and appellant objected to designated felony charge at first hearing date in Family Court; finally, valid and sufficient accusatory instrument is nonwaivable jurisdictional prerequisite in delinquency proceeding --- While certified copies of prior delinquency findings were not included with petition, appellant's record was contained within papers and pleadings referred from Supreme Court, all of which were deemed petition; since record reflected appellant's prior criminal history, petition was not jurisdictionally defective --- 173-Day period served by appellant was in connection with criminal case, where defendants receive credit for all time spent in custody prior to sentencing; appellant is entitled to 173 days of credit for time served.

Order, Family Court, New York County (Judith Sheindlin, J.), entered on or about October 19,

1993, which adjudicated appellant a juvenile delinquent and placed him with the Division for Youth for a period of 5 years, the first 18 months of which were to be served in a secure facility and with no credit for the time spent in detention prior to disposition, unanimously modified, on the law, to strike the designated felony act marking and to reduce the period of placement to 18 months with a credit of 173 days for time served, and otherwise affirmed, without costs.

Appellant, then 15 years old, was indicted for second degree robbery. After jury trial in the Supreme Court, appellant was found guilty, but of an act that did not render him criminally responsible as a juvenile offender. Accordingly, the Supreme Court, pursuant to CPL 310.85, vacated the guilty verdict, replaced it with a juvenile delinquency fact-finding determination, and ordered the case removed to the Family Court for further proceedings pursuant to CPL 725.05.

The Family Court placed appellant with the Division for Youth for a period of 5 years (with the first 18 months in a secure facility), upon determining that he had committed a designated felony act as defined in Family Court Act § 301.2 (8) (vi), and then applying the disposition set out in Family Court Act § 353.5 (6). The court also denied appellant credit for time served in detention from the time of his arrest until the date of disposition. Both of these determinations were in error, however, and we modify the order of disposition accordingly.

Family Court Act § 311.1 (5) reads, in pertinent part: "If the petition alleges that the respondent committed a designated felony act, it shall so state, and the term 'designated felony act petition' shall be prominently marked thereon. Certified copies of prior delinquency findings shall constitute sufficient proof of such findings for the purpose of filing a designated felony petition."

In cases which are removed from the Supreme Court, Family Court Act § 311.1 (7) provides, in pertinent part: "When an order of removal pursuant to article seven hundred twenty-five of the criminal procedure law is filed with the clerk of the court, such order and those pleadings and proceedings, other than the minutes of any hearing inquiry or trial, grand jury proceeding, or of any plea accepted or entered, held in this action that has not yet been transcribed shall be transferred with it and shall be deemed to be a petition filed pursuant to subdivision one of section 310.1 containing all of the allegations ***226** required by this section notwithstanding that such allegations may not be set forth in the manner therein prescribed. *Where the order or the grand jury request annexed to the order specifies an act that is a designated felony act, the clerk shall annex to the order a sufficient statement and marking to make it a designated felony act petition."* (Emphasis added.)

It can be seen from the language above that both sections require that the petition be prominently marked as containing an allegation that the juvenile committed a designated felony act. The petition in this case was not so marked. Nor did the presentment agency attach to the petition certified copies of the prior delinquency findings it was relying upon to convert the ordinary felony act into a designated felony act. The failure to mark

the petition "designated felony act petition" precludes a finding that appellant committed an act which, if committed by an adult, would have constituted a designated felony offense (*Matter of Andrew D.,* 99 AD2d 510; *see also, Matter of Vladimir M.,* 206 AD2d 482, 483). Accordingly, the designated felony finding in this case must be stricken and the period of placement reduced to 18 months in accordance with Family Court Act § 353.3 (5).

While the presentment agency maintains that the motion to strike the designated felony marking was untimely, its reliance on Family Court Act § 332.2 (1), which states that "all pretrial motions shall be filed within thirty days after the conclusion of the initial appearance and before commencement of the fact-finding hearing", is misplaced. The trial that led to the fact-finding determination took place in the Supreme Court before the matter was transferred to the Family Court. Moreover, appellant objected to the designated felony charge at the first hearing date in the Family Court. Finally, a valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite in a delinquency proceeding (*Matter of David T.,* 75 NY2d 927, 929).

While the certified copies of prior delinquency findings were also not included with the petition, appellant's record was contained within the papers and pleadings referred from the Supreme Court, all of which were deemed a petition. Since this record reflected appellant's prior criminal history, the petition was not jurisdictionally defective in this regard (*cf., Matter of Jahron S.,* 79 NY2d 632).

In addition, appellant served 173 days prior to removal of the case to the Family Court and 84 days after the case was transferred. He was denied credit for the time previously ***227** served. While the Family Court may, in its discretion, deny a juvenile credit for time served (Family Ct Act § 353.5 [4] [a] [i]), the 173-day period served by appellant was in connection with the criminal case, where defendants receive credit for all time spent in custody prior to sentencing (Penal Law § 70.30 [3]). In Family Court, the juvenile is either detained or released; bail is not a consideration (Family Ct Act § 320.5). Had appellant, however, been able to post the bail, he would not have been incarcerated for the 173 days awaiting trial in Supreme Court. Accordingly, appellant is entitled to 173 days of credit for time served, under the circumstances.

The other issues raised by appellant are unnecessary to our determination and need not be addressed.

Concur--Ellerin, J. P., Kupferman, Rubin and Nardelli, JJ.

New York Official Reports

88 N.Y.2d 205, 666 N.E.2d
1043, 644 N.Y.S.2d 130

In the Matter of Willie E., a Person Alleged to be a Juvenile Delinquent, Appellant. George Dentes, as Tompkins County District Attorney, Respondent.

Court of Appeals of New York
88
Argued March 20, 1996;
Decided May 7, 1996

CITE TITLE AS: Matter of Willie E.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 8, 1995, which affirmed an order of disposition of the Family Court, Tompkins County (M. John Sherman, J.), adjudicating appellant to be a juvenile delinquent and placing him with the New York State Division for Youth for a period of 18 months, entered upon a fact-finding order of that court finding, after a hearing, that appellant committed acts which, if committed by an adult, would constitute the crimes of sexual misconduct and sexual abuse in the first degree.

Matter of Willie E., 216 AD2d 645, affirmed.

HEADNOTES

Infants
Juvenile Delinquents
Fact-Finding Hearing--Commencement of 60-Day Statutory Period Where Petition Refiled

(1) The 60-day period for commencing a fact-finding hearing in the Family Court begins with the initial appearance on the first petition when the petition is refiled due to the dismissal of the first petition. If the 60-day period does not commence until the initial appearance upon the filing of a second petition or a nondefective petition, the legislative policy of speedy determinations is subject to abuse.

Infants
Juvenile Delinquents
Fact-Finding Hearing--Adjournment for Good Cause

(2) In a juvenile delinquency proceeding, the facts constitute good cause for an adjournment of the fact-finding hearing beyond the 60-day statutory period for commencement of the fact-finding hearing (Family Ct Act § 340.1 [2]) where the court granted the juvenile's request for time in which to conduct discovery and file motions, thereby making compliance with the 60-day speedy trial requirement impossible, and the issue of good cause was explicitly raised prior to the adjournment by the presentment agency. When counsel seeks time for motions, which would delay the fact-finding hearing beyond the statutory speedy trial period, counsel arguably waives a speedy

trial, or, equivalently, the court may adjourn the proceedings for good cause. When good cause is granted under these circumstances, the court should consider any motions which are made on an expedited basis in order to ensure that the fact-finding hearing occurs in a timely manner. In this case, the hearing occurred within 30 days of the adjournment and 78 days from the first initial appearance. ***206**

Infants
Juvenile Delinquents
Presence of Parent at Hearing

(3) In a juvenile delinquency proceeding, in the absence of any request from the juvenile's attorney or the juvenile's parents, the absence of the parents from the hearing, despite being in the hall outside of the courtroom, is not a basis for reversal pursuant to Family Court Act § 341.2 (3) which requires the presence of a parent or other responsible person at any hearing.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 82, 87.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:241, 119A:242, 119A:245.

Family Ct Act § 340.1 (2); § 341.2 (3).

NY Jur 2d, Domestic Relations, §§ 1426, 1427, 1430.

ANNOTATION REFERENCES

See ALR Index under Juvenile Courts and Delinquent Children; Speedy Trial.

POINTS OF COUNSEL

Paul J. Connolly, Albany, for appellant.
I. The 60-day period for commencing the initial appearance on the second petition commenced upon the initial appearance on the first petition, which was dismissed for failure to afford appellant a prompt initial appearance and for jurisdictional insufficiency. *(Matter of Robert O.,* 87 NY2d 9; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Marcus A.,* 155 Misc 2d 482; *Matter of Shannon FF.,* 189 AD2d 420; *Matter of Gabriel R.,* 208 AD2d 984; *People v Lomax,* 50 NY2d 351; *Matter of Randy K.,* 77 NY2d 398; *People v Osgood,* 52 NY2d 37; *People v Hamilton,* 46 NY2d 932.)
II. The Court below erred in rejecting appellant's contention that his parents' absence from the fact-finding hearing requires that he be afforded a new hearing. *(Matter of Dennis NN.,* 107 AD2d 914; *Matter of Roman,* 144 AD2d 315; *Matter of John L.,* 125 AD2d 472; *Matter of John D.,* 104 AD2d 885; *People v Antommarchi,* 80 NY2d 247; *People v Dokes,* 79 NY2d 656; *People v Parker,* 57 NY2d 136; *People v Epps,* 37 NY2d 343; *People v Smith,* 68 NY2d 725.)
George M. Dentes, District Attorney of Tompkins County, Ithaca *(Stephen B. Flash* of counsel), for respondent *pro se.*

I. The 60 days within which a fact-finding hearing is to be held ***207** recommences upon the completion of a second initial appearance where the first petition is dismissed. *(Matter of Rodney J.,* 83 NY2d 503; *Matter of Atthis D.,* 205 AD2d 263; *Matter of Robert O.,* 87 NY2d 9; *Matter of Tommy C.,* 182 AD2d 312; *Matter of Frank C.,* 70 NY2d 408.)

. The Court below correctly found dismissal of the first petition to be without prejudice to filing a second and correctly found no merit to appellant's argument that there was no good cause shown on the record for adjournment of the fact-finding hearing to 78 days from the first initial appearance. *(Matter of Robert O.,* 87 NY2d 9; *Matter of Robert S.,* 192 AD2d 612; *Matter of Randy K.,* 77 NY2d 398; *Matter of Gabriel R.,* 208 AD2d 984.)

I. The Court below correctly found no merit in appellant's argument that, though the parents were outside the courtroom with the Law Guardian's consent, the absence of appellant's parents in the courtroom during the hearing requires dismissal. *(Matter of Latrice R.,* 93 AD2d 838; *Matter of John L.,* 125 AD2d 472; *Matter of Roman,* 144 AD2d 315; *Matter of John D.,* 104 AD2d 885; *Matter of Atthis D.,* 205 AD2d 263.)

OPINION OF THE COURT

Smith, J.

(1, 2) The primary issues here are (1) whether the 60-day period for commencing a fact-finding hearing in the Family Court begins after the initial appearance on the first petition when the petition is refiled due to the dismissal of the first petition, and (2) whether the facts here constitute good cause for an adjournment despite the court's failure to so state on the record. We conclude that the initial appearance on the first petition commences the 60-day period and that good cause for the adjournment of the fact-finding hearing appears on the record.

The first petition, filed in this case on November 9, 1993, was an order of removal from the Tompkins County Court to the Family Court pursuant to CPL article 725. A Grand Jury hearing the case had made a request for removal pursuant to CPL 190.71. Pursuant to Family Court Act § 311.1 (7), the order of removal was deemed to be a petition in the Family Court. The document charged that on or about September 23, 1993, appellant committed (1) sexual abuse in the first degree by subjecting a person to sexual contact by forcible compulsion (Penal Law § 130.65 [1]), and (2) sexual misconduct by engaging in sexual intercourse with a female without her consent (Penal Law § 130.20 [1]).

An initial appearance on the petition originally scheduled for November 22, 1993 was rescheduled for November 24, 1993. ***208** Appellant moved to dismiss the petition on the grounds that the initial appearance was not scheduled within 10 days after the filing of the petition as required (Family Ct Act § 320.2 [1]; § 340.1 [3]) and that the petition was jurisdictionally defective because the Grand Jury minutes had not been filed within 30 days after the order of removal was filed (Family Ct Act § 311.1 [7]). The motion was granted on January 10, 1994 on both grounds.

A new petition with the same charges was made on January 11, 1994. The initial appearance of appellant on the new petition occurred

on January 12, 1994. The appellant did not respond affirmatively to the court's inquiry as to whether he intended to proceed with the fact-finding hearing scheduled, on the original petition, for January 14, 1994. The Law Guardian orally moved for a dismissal of the second petition on the grounds that the first petition had been dismissed for failure to grant a speedy trial in that the initial appearance had not occurred within 10 days of the filing of the petition, and the petition had, therefore, been dismissed with prejudice. The court denied the motion, stating that the dismissal was based on the sufficiency of the petition.

The Law Guardian then asked for the statutorily required 15 days for discovery (Family Ct Act § 331.7 [2]) and 30 days to make motions (Family Ct Act § 332.2 [1]). The Assistant District Attorney commented that any adjournment would have to be based upon a finding of good cause stated on the record. The court adjourned the matter to February 10, 1994, without stating on the record that it was for good cause.

By order to show cause dated February 2, 1994, appellant moved to dismiss the second petition on the ground the court lacked jurisdiction to adjudicate a refiled petition previously dismissed on speedy trial grounds. The court denied the motion, stating that the circumstances of the adjournment on January 10, 1994, including appellant's request for time to make motions, "were deemed good cause" by the court even though not explicitly stated on the record. The court reiterated that the dismissal of the first petition was "upon the grounds of jurisdictional deficiency," that a delay in the initial appearance beyond 10 days was not intended to be a speedy trial ground for dismissal, and that a hearing within 60 days of the initial appearance on the petition was still possible at the time of the dismissal.

Appellant's first argument is that the 60-day time period in which the fact-finding hearing must commence when a juvenile ***209** is not detained (Family Ct Act § 340.1 [2]) begins after the initial appearance on the first petition. Respondent contends that because a petition dismissed for a jurisdictional defect is a nullity, the 60-day period commences only upon the initial appearance on the second petition.

(1) In *Matter of Robert O.* (87 NY2d 9), this Court did not reach the issue of whether the 60-day period commences with the initial appearance on the first petition or with a subsequent petition.[1] We hold that under the facts here the 60-day period commences with the initial appearance on the first petition. This conclusion is consistent with the legislative mandate that there be a swift determination of the charges brought against juveniles. (*See, Matter of Frank C.,* 70 NY2d 408 [dismissal of petition upheld where adjournments beyond the 60-day period had not been based on good cause or special circumstances]; *Matter of Randy K.,* 77 NY2d 398 [failure of a juvenile to appear would not stop the 60-day period from running absent an adjournment for good cause].) If the 60-day period does not commence until an initial appearance on a second petition or a nondefective petition, the policy of speedy determinations is subject to abuse.

A fact-finding hearing may be adjourned pursuant to Family Court Act § 340.1 (4) on good cause. However, appellant argues that the

15 days for discovery and 30 days for motions permitted by statute rendered a speedy trial impossible and that good cause for adjourning the fact-finding hearing did not exist.

(2) Although many fact-finding hearings in juvenile delinquency proceedings are governed by the 60-day speedy trial requirement, some hearings must be held in as little as 14, and even 3 days after the initial appearance (*see,* Family Ct Act § 340.1 [1]).[2] The expedited nature of these hearings makes it impossible to provide the statutory periods for motions; nevertheless, the Family Court Act does not exempt these hearings from section 332.2 (1). Consequently, when counsel seeks time for motions, which would delay the fact-finding hearing beyond the statutory speedy trial period, counsel arguably waives a ***210** speedy trial (*see,* Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29-A, Family Ct Act § 332.2, at 430-431), or, equivalently, the court may adjourn the proceedings for good cause.

Here, appellant's request for time in which to conduct discovery and file motions made compliance with the 60-day speedy trial requirement impossible. Consequently, at the time of the adjournment on January 12, 1994, the issue of good cause was explicitly raised by the respondent and when the court granted appellant's request for additional time, the case was adjourned for good cause. When good cause is granted under these circumstances, the court should consider any motions which are made on an expedited basis in order to ensure that the fact-finding hearing occurs in timely manner. In this case, the hearing occurred on February 10, 1994, within 30 days of the January 12 adjournment and 78 days from the first initial appearance.[3]

(3) Finally, in the absence of any request from the appellant's attorney or his parents that appellant's parents attend the hearing, the parents' absence from the hearing, despite their presence in the hall outside of the courtroom, is not a basis for reversal pursuant to Family Ct Act § 341.2 (3) which requires the presence of a parent or other responsible person at any hearing.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Levine and Ciparick concur.
Order affirmed, without costs. ***211**

Footnotes

1 The Court held that the failure of the Family Court to hold an initial appearance within 10 days of the filing of the petition did not preclude a dismissal of and a refiling of the petition since the juvenile's right to a speedy fact-finding hearing was not violated.

2 Where the juvenile is detained on a petition charging an A, B or C felony, the hearing must be held within 14 days. Where the juvenile is detained and the highest charge in the petition is less than a C felony, the hearing must be held within three days (Family Ct Act § 340.1 [1]).

3 Of course, where a fact-finding hearing cannot be held within the statutory time period because the presentment agency has engaged in truly dilatory conduct, Family Court retains the discretion to find that no good cause for adjourning the hearing exists.

REMOVALS FROM THE YOUTH PART TO FAMILY COURT CASE CITATIONS

Matter of Lucas Y., 2024 N.Y. Slip Op. 00212 (3d Dept. 2024)

Matter of Omar G., 212 A.D.3d 615 (2d Dept. 2023)

Matter of Raymond G., 93 N.Y.2d 531 (1999)

People v A.M., 2024 N.Y. Slip Op. 50582(U) (County Ct., Putnam Co.)

People v D.M.-J., 81 Misc.3d 1235(A) (2024) (Youth Pt., Erie Co.)

People v J.B.,2024 N.Y. Slip Op. 50529(U) (Youth Pt., Erie Co.)

People v J.W.-C., 2024 N.Y. Slip Op. 50251(U) (Youth Pt., Erie Co.)

People v J.G., 81 Misc.3d 1235(A) (Youth Pt., Erie Co.)

People v J.M., 2024 N.Y. Slip Op. 50366(U) (Youth Pt., Erie Co.)

People v K.K., 2024 N.Y. Slip Op. 50333(U) (Youth Pt., Erie Co.)

Matter of Desmond J., 93 N.Y.2d 949 (1999)

Matter of Michael M., 3 N.Y.3d 441 (2004)

Matter of Robert O., 87 N.Y.2d 9 (1995)

Matter of Tommy C., 182 A.D.2d 312 (2d Dept. 1992)

Matter of Warren W., 216 A.D.2d 225 (1st Dept. 1995)

Matter of Willie E., 88 N.Y.2d 205 (1996)