Should the viability of a Determinate Sentence disposition be a factor in a Motion for Discretionary Transfer to adult court?[In the Matter of E.H.](17-4-2)

On August 17, 2017, in a concurring opinion, the Houston (1st. Dist.) Court of Appeals stated that in a Certification and Transfer hearing, if the State chooses not to pursue a Determinate Sentence, it should be put to the burden—at a minimum—of establishing why such a choice is not appropriate in the case.

¶ 17-4-2. **In the Matter of E.H.**, MEMORNADUM, No. 01-16-00802-CV, 2017 WL 3526717 [Tex.App.—Houston (1st Dist.), 8/17/2017].

**Facts:** The charges against E.H. stem from his young niece’s allegations that he exposed himself to her and sexually abused her when she was 7 years’ old and he was almost 17 years’ old. The Brazoria County District Attorney’s Office filed a Petition for Discretionary Transfer to Criminal Court seeking to have proceedings against E.H. for indecency with a child and sexual assault of a child transferred from juvenile court to district court.

**Held:** Affirmed

**Memorandum Opinion:** In light of our analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, we must next review the trial court’s ultimate waiver decision under an abuse-of-discretion standard, i.e., we must determine whether the juvenile court acted without reference to guiding rules or principles. In re K.J., 493 S.W.3d 140, 154 (Tex. App.–Houston [1st Dist.] 2016, no pet.) (citing Moon, 451 S.W.3d at 47). “In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?” Id.

Applying this standard, we conclude that the juvenile court did not abuse its discretion in waiving jurisdiction and transferring appellant’s case to criminal district court. Section 54.02(d) of the Texas Family Code mandates the court “order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.” The court must hold a hearing, § 54.02(c), during which the court may consider “written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses.” § 54.02(e). Finally, the court must state specifically in any transfer order the reasons for waiver.

Here, the court compiled and comprehensively reviewed all the materials required under section 54.02(d) & (e) and conducted the hearing as required under section 54.02(c). It was presented with evidence of sexual crimes, committed more than once, against a 7–year–old victim, when E.H. was almost 17 years’ old. Dr. Fuller testified that E.H. has the sophistication and maturity to participate in an adult trial, and E.H.’s juvenile probation officer testified that she did not believe the juvenile court system could rehabilitate E.H.

**Conclusion:** Based on our review of the entire record, summarized in the background section of this opinion, we conclude that E.H. has not established that the court “acted without reference to guiding rules or principles,” or that its transfer was “arbitrary, given the evidence on which it was based,” Moon, 451 S.W.3d at 47. Accordingly, we hold that the juvenile court’s waiver of jurisdiction and transfer to criminal district court was within the court’s discretion. We overrule E.H.’s sole point of error.

**Concurring Opinion:** This case involves a juvenile charged with sexually molesting his 7–year–old niece. In its petition to transfer the proceedings to criminal court, the State alleged that “the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the Juvenile Court” were “in serious doubt.”

The evidence at the hearing established that E.H. was 16 years old at the time of the alleged offenses. There was evidence of a history of sexual abuse in his immediate family, as E.H.’s sister testified that their father was in prison for molesting her. E.H. does not have a criminal record. He has a history of some marijuana use and acting out while confined in juvenile detention for the underlying offenses. He has exhibited an uncooperative attitude toward officials. He operates at a low average intellectual range and, possibly because of ADHD, he has had problems with school. He laughs when he is nervous, even in situations in which that reaction is inappropriate, demonstrating immaturity.

There was testimony at his transfer hearing that the juvenile probation department believes that participation in available rehabilitative programs for a minimum of two years is necessary for a “person to get what they need for a sexual charge.” Significantly, E.H.’s probation officer testified that general juvenile sex-offender probation conditions, coupled with participating in a drug-treatment program, would be appropriate for E.H.

But the juvenile probation office can only confine or supervise E.H. until he turns 18. Accordingly, by the time of the adult-certification hearing, there were only five months left until E.H.’s 18th birthday. Thus, E.H.’s probation office further testified that E.H. should be certified as an adult, as the period for which the juvenile probation office would continue to have jurisdiction over E.H. was far short of the minimum two years needed to provide rehabilitative services.

The juvenile court’s order waiving its jurisdiction recites that E.H. “is of sufficient sophistication and maturity to be tried as an adult,” and that “because of the records and previous history of the child and because of the extreme and severe nature of the alleged offense(s), the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by use of the procedure, services and facilitates which are currently available to the Juvenile Court are in doubt.” But a review of the record actually reflects that the primary evidence supporting the juvenile court’s decision is the probation officer’s testimony that E.H. does not have time to complete appropriate juvenile rehabilitation services before his 18th birthday.

There are provisions in the Family Code, however, that can extend the jurisdiction of the juvenile court beyond the age 18. Specifically, a habitual juvenile offender, or a juvenile accused of a laundry list of offenses (including sexual assault and aggravated sexual assault, the offenses for which E.H. was charged), may be referred by the prosecuting attorney to the grand jury for a determinate sentence. TEX. FAM. CODE § 53.045. Determinate sentences allow the juvenile courts to maintain jurisdiction beyond a juvenile’s 18th birthday, resulting in several possible outcomes, including release before completion of the juvenile’s sentence, supervised release at the age of 19, transfer to the Texas Department of Criminal Justice (TDCJ) to serve the remainder of a sentence, or transfer to TDCJ jurisdiction to serve a remaining sentence on parole. See, e.g., In re J.H., 150 S.W.3d 477, 480 n.1 (Tex. App.–Austin 2004, pet. denied) (“A determinate sentence places a juvenile under the custody and control of the Texas Youth Commission with several possible outcomes.”). “In enacting the determinate sentencing statutes, the legislature has furthered a compelling state interest by striking a balance between the state’s interest in providing for the care, protection and development of its children and its interest in providing protection and security for its general citizenry.” In re S.B.C., 805 S.W.2d 1, 4 (Tex. App.–Tyler 1991, writ denied) (citation omitted).

Unlike in many adult certification cases, the State’s own witnesses agreed in this case that the juvenile system has programs available that could appropriately address E.H.’s alleged sexual misconduct and his admitted substance abuse. E.H. thus argues that the juvenile court abused its discretion by waiving jurisdiction because determinate sentencing could extend the juvenile court’s jurisdiction so he could avail himself of those services and because the time constraints were the only circumstance supporting adult certification. In response, the State does not argue that determinate sentencing would be insufficient to meet the needs of E.H. and the community. Rather, the State contends that the prosecutor had the discretion to pursue a determinate sentence and simply chose not to do so. Thus, the State argues that the availability of a determinate sentence to rehabilitate E.H. and to protect the community is irrelevant to this Court’s analysis of whether the juvenile court abused its discretion is waiving jurisdiction.

This argument is troubling because it is the State’s burden to prove that the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the juvenile court are in serious doubt. Moon, 451 S.W.3d at 40. Perhaps there is a reason that a determinate sentence would not be appropriate here, but the record does not reflect one. The testimony that E.H. would turn 18 before he could adequately avail himself of services under the juvenile court system is sufficient to support the trial court’s waiver under the applicable standard of review. But when the facts of a case reflect that a determinate sentence may be feasible, and the juvenile argues that feasibility defeats the State’s burden of proof in a waiver-of-juvenile-court-jurisdiction proceeding, the policies behind preserving juvenile court jurisdiction over children when possible are not served by allowing a prosecutor discretion to not avail itself of a procedure and offer no explanation for that decision.

While the State is the only party that can seek a determinate sentence, that does not mean that the State’s decision not to do so when it would be appropriate should insulate it from inquiry. The State should seek a determinate sentence if aging out of the system is the only barrier to a juvenile’s adequate punishment and rehabilitation. If the State chooses not to, it should be put to the burden—at a minimum—of establishing why such a choice is not appropriate unless it is otherwise obvious on the record that a determinative sentence and reasonable rehabilitation are not viable options in the case. Putting such information in the record will enable juvenile courts to make more informed decisions, decreasing the risk of juveniles being forced into criminal court simply because of their age in contravention of laws requiring that they be served in juvenile court when possible.