

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

NO. 21861

IN THE MATTER OF: STEPHFON W.,
A CHILD UNDER 18 YEARS OF AGE, AND
BETTY B., PARENT OR CUSTODIAN OF SAID CHILD,
Appellants

Appeal from the Circuit Court of Marion County
Honorable Rodney B. Merrifield, Judge
Case No. 92-J-173

REVERSED AND REMANDED

Submitted: February 8, 1994
Filed: March 25, 1994

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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY dissents and reserves the right to file a dissenting opinion.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

NO. 21862

IN THE MATTER OF: GEORGE ANTHONY W.,
A CHILD UNDER 18 YEARS OF AGE, AND
JOANN O., PARENT OR CUSTODIAN OF SAID CHILD,
Appellants

Appeal from the Circuit Court of Marion County
Honorable Rodney B. Merrifield, Judge
Case No. 92-J-174

REVERSED AND REMANDED

Submitted: February 8, 1994
Filed: March 25, 1994

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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY dissents and reserves the right file a dissenting opinion.

SYLLABUS BY THE COURT

1. The primary purpose of a preliminary hearing under W. Va. Code, 49-5-9 (1982), is to require the State to prove there is probable cause to believe that the child is a delinquent child.

2. The juvenile transfer statute, W. Va. Code, 49-5-10 (1978), and W. Va. Code, 49-5-1 (1978), which contains general provisions regarding hearing rights, provide substantial due process rights that must be accorded a juvenile at a transfer hearing, including: (1) an advance written notice of the grounds relied upon for transfer; (2) an opportunity to be heard in person and to present witnesses and evidence; (3) the right to confront and cross-examine adverse witnesses; (4) a neutral hearing officer; (5) the right to have counsel present including court-appointed counsel if indigent; (6) a record of the evidence presented at the hearing; (7) findings of fact and conclusions of law upon which the transfer decision is based; and (8) a right of direct appeal to this Court.

3. "'W. Va. Code § 49-5-10(d) [1978] requires that the circuit court make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the crimes specified for transferring the proceeding to criminal

jurisdiction.' Syllabus, In the Interest of Clark, 168 W. Va. 493, 285 S.E.2d 369 (1981)." Syllabus Point 4, In the Interest of Moss, 170 W. Va. 543, 295 S.E.2d 33 (1982).

4. "The probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence."

Syllabus Point 3, In the Interest of Moss, 170 W. Va. 543, 295 S.E.2d 33 (1982).

5. "'Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors. W. Va. Code, 49-5-10(d)." Syl. Pt. 4, State v. C.J.S., 164 W. Va. 473, 263 S.E.2d 899 (1980), overruled in part on other grounds [in] State v. Petry, 166 W. Va. 153, 273 S.E.2d 346 (1980) and State ex rel. Cook v. Helms, 170 W. Va. 200, 292 S.E.2d 610 (1981).' Syl. Pt. 2, State v. Sonja B., 183 W. Va. 380, 395 S.E.2d 803 (1990)." Syllabus Point 4, State v. Gary F., ___ W. Va. ___, 432 S.E.2d 793 (1993).

6. The State may not rely on the evidentiary transcript of the preliminary hearing or the findings of fact and conclusions

of law made at such hearing to establish probable cause at the transfer hearing.

7. "'At a transfer hearing, the court must determine the validity of a confession before allowing it to be used against the accused.' Syllabus Point 6, In the Interest of Moss, 170 W. Va. 543, 295 S.E.2d 33 (1982)." Syllabus Point 4, Matter of Mark E.P., 175 W. Va. 83, 331 S.E.2d 813 (1985).

Miller, Justice:

We consolidated these two appeals because they involve a common issue in connection with a juvenile transfer hearing under W. Va. Code, 49-5-10 (1978). The issue is whether the State may rely solely on the evidence it introduced at the preliminary hearing and foreclose the defense from introducing evidence at the subsequent transfer hearing. We determine that this may not be done.

The Circuit Court of Marion County, by order dated January 20, 1993, transferred Stephfon W. and George Anthony W., from juvenile jurisdiction to adult criminal jurisdiction. The defendants are charged with first degree murder.

I.

W. Va. Code, 49-5-10(a), provides, in relevant part:

"Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing and with reasonable notice to the child, the parents, guardians, or custodians of the child, and the child's counsel, the court shall conduct a hearing to determine if juvenile jurisdiction should be waived and the proceeding should be transferred to the criminal jurisdiction of the court."

The facts surrounding the criminal charges are as follows.

Ralph Minor found his sister, Dortha Minor, dead in her Fairmont home on November 23, 1992. Ms. Minor's death was believed to be a homicide according to the Fairmont City Police who conducted the investigation. Several suspects and possible witnesses were questioned, including Stephfon W. He was in juvenile court on another charge and also was detained on a capias warrant. During the initial questioning at the courthouse, Stephfon allegedly stated that George Anthony W. murdered Ms. Minor. Police later brought George Anthony to the police station for questioning. He allegedly told the police that he attacked Ms. Minor and that Stephfon was an active participant in the murder. When confronted with this information, Stephfon admitted his active participation in the murder to the police. Inculpatory statements were taken from both juveniles.

Both juveniles were appointed separate counsel and the circuit court held a combined preliminary hearing for them on December 4, 1992. During this hearing, the State introduced the juveniles' confessions and additional testimony was given by the investigating officer as to the circumstances surrounding the confessions as well as other corroborating evidence. Counsel for

the juveniles did not offer any evidence, but did cross-examine the State's witnesses.

At the preliminary hearing, the State submitted proposed findings of fact and conclusions of law. Counsel for the juveniles objected to the findings and conclusions relative to the voluntariness of the confessions. Thereafter, the circuit court entered pretrial orders in both cases. These orders basically incorporated the findings of fact and conclusions of law that had been proposed by the prosecuting attorney. Both orders found probable cause that the juveniles committed first degree murder and also found their confessions to be voluntary. Objections by counsel were preserved in the orders.

On December 16, 1992, the circuit court held a combined transfer hearing on the juveniles. Defense counsel moved for a continuance based on the fact that they needed more time to prepare evidence regarding the involuntariness of the juveniles' confessions. They also sought to obtain the transcript of the preliminary hearing. The motion for continuance was denied.

At the urging of the prosecuting attorney, the circuit court accepted the probable cause findings of fact and conclusions

of law made at the preliminary hearing. Over objections by defense counsel, the trial court ordered the juveniles transferred to adult criminal jurisdiction.

II.

There are critical distinctions between a preliminary hearing in a juvenile proceeding and a hearing whereby the juvenile court waives its jurisdiction and transfers a juvenile to adult criminal jurisdiction. The primary purpose of a preliminary hearing under W. Va. Code, 49-5-9 (1982), is to require the State to prove "there is probable cause to believe that the child is a delinquent child." W. Va. Code, 49-5-9(a)(3). This hearing is the first opportunity for the juvenile, who now must have counsel, to challenge the validity of his arrest.

W. Va. Code, 49-5-8 (1982), covers the procedures for taking a juvenile into custody and for the detention hearing, which is the first judicial hearing. The detention hearing is required to be held immediately after a juvenile is taken into custody. Under W. Va. Code, 49-5-8(d), "[t]he sole mandatory issue at the detention hearing shall be whether the child shall be detained pending further court proceedings." It also provides that at the detention hearing, the presiding official "shall inform the child of his right to remain silent, that any statement may be used against him and of his right to counsel If the child or his parent, guardian or custodian has not retained counsel, counsel shall be appointed as soon as practicable."

Moreover, there is no requirement in the juvenile preliminary hearing statute, W. Va. Code, 49-5-9, that the juvenile offer any evidence or even contest the evidence of probable cause.

It is the State's burden to prove that probable cause exists. If the juvenile wishes, he may testify, cross-examine the State's witnesses, or offer evidence on his own behalf. See W. Va. Code, 49-5-1(d) (1982). This preliminary hearing is analogous to the preliminary examination before a magistrate for an adult defendant under Rule 5.1 of the West Virginia Rules of Criminal Procedure.

See State v. Haught, 179 W. Va. 557, 371 S.E.2d 54 (1988); Desper v. State, 173 W. Va. 494, 318 S.E.2d 437 (1984).

The transfer of a juvenile to adult criminal jurisdiction under W. Va. Code, 49-5-10, is a matter of substantially more gravity. If the transfer is made, the juvenile loses the beneficial protection of our juvenile laws and is treated the same as an adult criminal. We outlined the protections afforded a juvenile at a transfer hearing in In Re E.H., 166 W. Va. 615, 623-24, 276 S.E.2d 557, 563 (1981):

W. Va. Code, 49-5-1(d), states, in pertinent part: "In all proceedings under this article, the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses."

"Moreover, the [juvenile] transfer statute, W. Va. Code, 49-5-10 (1978), and W. Va. Code, 49-5-1 (1978), which contains general provisions regarding hearing rights, as well as State v. McArdle, 156 W. Va. 409, 194 S.E.2d 174 (1973), [modified on other grounds, State v. Hatfield, 169 W. Va. 191, 286 S.E.2d 402 (1982)], provide substantial due process rights that must be accorded a juvenile at a transfer hearing, including: (1) an advance written notice of the grounds relied upon for transfer; (2) an opportunity to be heard in person and to present witnesses and evidence; (3) the right to confront and cross-examine adverse witnesses; (4) a neutral hearing officer; (5) the right to have counsel present including court-appointed counsel if indigent; (6) a record of the evidence of the hearing; (7) findings of fact and conclusions of law upon which the transfer decision is based; and (8) a right of direct appeal to this Court."

W. Va. Code, 49-5-10(a), provides for advance written notice of the grounds relied on for transfer to be given the juvenile. W. Va. Code, 49-5-1(d), gives the right in all juvenile proceedings for a "meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." The neutral hearing officer is a fundamental due process right. See Syllabus Point 5, State v. Brown, 177 W. Va. 633, 355 S.E.2d 614 (1987); Code of Judicial Conduct Canon 3C(1) (1993). The right to counsel is contained in W. Va. Code, 49-5-1(c). The right to a record of the evidence in a transfer proceeding and the requirement of findings of fact and conclusions of law are contained in W. Va. Code, 49-5-1(d). The requirement for findings of fact and conclusions of law at a transfer hearing also is found in W. Va. Code, 49-5-10(e). The right to a direct appeal in a transfer hearing is contained in W. Va. Code, 49-5-10(f). Many of these rights are constitutionally required as the United States Supreme Court recognized in In Re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). See also State ex rel. Smith v. Scott, 160 W. Va. 730, 238 S.E.2d 223 (1977); State v. McArdle, 156 W. Va. 409, 194 S.E.2d 174 (1973), modified on other grounds, State v. Hatfield, 169 W. Va. 191, 286 S.E.2d 402 (1982).

Moreover, we consistently have required that at a transfer hearing, the circuit court must make an independent determination of whether there is probable cause. As we stated in Syllabus Point 4 of In the Interest of Moss, 170 W. Va. 543, 295 S.E.2d 33 (1982):

"'W. Va. Code § 49-5-10(d) [1978] requires that the circuit court make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the crimes specified for transferring the proceeding to criminal jurisdiction.' Syllabus, In the Interest of Clark, 168 W. Va. 493, 285 S.E.2d 369 (1981)."

See also State v. Largent, 172 W. Va. 281, 304 S.E.2d 868 (1983).

A further indication of the solemnity of a transfer hearing is the requirement contained in Syllabus Point 3 of Moss:

"The probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence."

In State v. Beaman, 181 W. Va. 614, 383 S.E.2d 796 (1989), overruled, in part, on other grounds, E.B. v. Canterbury, 183 W. Va. 197, 394 S.E.2d 892 (1990), we rejected the contention that an indictment returned against a juvenile was sufficient evidence to establish probable cause at a transfer hearing.

The Syllabus of State v. Beaman, supra, is: "The return of an indictment against a juvenile defendant, while establishing probable

This case is similar to the case of In the Interest of Clark, 168 W. Va. 493, 285 S.E.2d 369 (1981), where the court held the transfer hearing and took testimony from the juvenile referee.

His testimony was that he conducted the preliminary hearing for the juvenile and found probable cause that the juvenile had committed the murder. A police officer testified that he investigated the murder and brought charges against the juvenile. We found this independent determination to be insufficient to show probable cause.

We do not agree with the State's argument that the fact that the circuit judge heard the matters presented at the preliminary hearing and made findings of fact and conclusions of law was sufficient to comply with the transfer hearing requirements. To allow such a result would destroy the concept of an independent examination of probable cause at a transfer hearing. Moreover, it would violate the juvenile's right to be heard, right to present witnesses, and right to confront and cross-examine adverse witnesses, all of which are due process rights required at a transfer hearing, as we have indicated earlier.

cause, does not provide the necessary facts upon which the juvenile court should base its decision as to the propriety of transfer, and it does not preclude the defendant's right to a transfer hearing."

What needs to be emphasized is that a transfer hearing is a separate and distinct proceeding from a preliminary hearing.

W. Va. Code, 49-5-10(d), requires that the State must establish probable cause at the transfer hearing: "The court may, upon consideration of the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, transfer a juvenile proceeding to criminal jurisdiction if there is a probable cause to believe that: [One of the following enumerated crimes was committed]." (Emphasis added).

Moreover, as this section also states, the judge at the transfer hearing is required to consider the juvenile's mental, physical, and emotional conditions. As we outlined in Syllabus Point 4 of State v. Gary F., ___ W. Va. ___, 432 S.E.2d 793 (1993):

"'"Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors. W. Va. Code, 49-5-10(d)." Syl. Pt. 4, State v. C.J.S., 164 W. Va. 473, 263 S.E.2d 899 (1980), overruled in part on other grounds [in] State v. Petry, 166 W. Va. 153, 273 S.E.2d 346 (1980) and State ex rel. Cook v. Helms, 170

W. Va. 200, 292 S.E.2d 610 (1981).' Syl. Pt. 2, State v. Sonja B., 183 W. Va. 380, 395 S.E.2d 803 (1990)."

For the foregoing reasons, we conclude that the State may not rely on the evidentiary transcript of the preliminary hearing or the findings of fact and conclusions of law made at such hearing to establish probable cause at the transfer hearing.

We also conclude for the same reason that the circuit court erred in utilizing its findings from the preliminary hearing to determine the confessions were voluntary. This action denied the juveniles their right of cross-examination and their right to testify

A recognized exception to this rule is contained in Syllabus Point 2 of State ex rel. Cook v. Helms, 170 W. Va. 200, 292 S.E.2d 610 (1981):

"When a court finds that there is probable cause to believe that a juvenile has committed one of the crimes specified in W. Va. Code, 49-5-10(d)(1) (treason, murder, robbery involving the use of or presenting of deadly weapons, kidnapping, first-degree arson, and first-degree sexual assault), the court may transfer the juvenile to the court's criminal jurisdiction without further inquiry. To the extent this holding is inconsistent with State v. R.H., 166 W. Va. 280, 273 S.E.2d 578 (1980) and State v. C.J.S., 164 W. Va. 473, 263 S.E.2d 899 (1980), those cases are overruled."

There may be an occasion where a witness who testified at a preliminary hearing is unavailable at the transfer hearing. If the requirements of Rule 804(b)(1) of the West Virginia Rules of Evidence

and present evidence on this issue at the transfer hearing. We consistently have held that if a confession is to be used at a transfer hearing, its voluntariness must be determined at that time. As we stated in Syllabus Point 4 of Matter of Mark E.P., 175 W. Va. 83, 331 S.E.2d 813 (1985):

"'At a transfer hearing, the court must determine the validity of a confession before allowing it to be used against the accused.' Syllabus Point 6, In the Interest of Moss, 170 W. Va. 543, 295 S.E.2d 33 (1982)."

For the foregoing reasons, we reverse the order of the circuit court and remand these cases for a new transfer hearing.

Reversed and remanded.

are met, the former testimony may be admitted.