STATE V. DOE, 1983-NMSC-105, 100 N.M. 649, 674 P.2d 1109 (S. Ct. 1983)

STATE OF NEW MEXICO, Petitioner,
vs.
JOHN DOE, Respondent.

No. 15083

SUPREME COURT OF NEW MEXICO

1983-NMSC-105, 100 N.M. 649, 674 P.2d 1109

December 21, 1983

Original Proceeding on Certiorari, Fred T. Hensley, District Judge

Motion for Rehearing Denied January 11, 1984

COUNSEL

Paul Bardacke, Attorney General, Marcia E. White, Assistant Attorney General, Santa Fe, New Mexico, for Petitioner.

Winston Roberts-Hohl, Santa Fe, New Mexico, Morris Stagner, Clovis, New Mexico, for Respondent.

JUDGES

Riordan, J., wrote the opinion. WE CONCUR: H. VERN PAYNE, Chief Justice, WILLIAM FEDERICI, Justice, HARRY E. STOWERS, JR., Justice. DAN SOSA, JR., Senior Justice, Respectfully Dissenting.

AUTHOR: RIORDAN

OPINION

*{*650}* RIORDAN, Justice.

{1} Respondent John Doe (Doe) was charged in the children's court division of the district court (children's court), with committing the delinquent acts of aggravated battery, NMSA 1978, Section 30-3-5, criminal sexual penetration, NMSA 1978, Section 30-9-11, and attempted first degree murder, NMSA 1978, Section 30-2-1 (Cum. Supp.1983) and NMSA 1978, Section 30-28-1(A). The children's court attorney filed a pre-trial motion, pursuant to NMSA 1978, Section 32-1-30 (Repl. Pamp.1981), for transfer of the case to district court for prosecution as an adult. The pre-trial motion was

granted by the children's court, and Doe appealed. The Court of Appeals reversed the children's court and set aside the transfer order. We granted certiorari and reverse the Court of Appeals.

{2} The issue presented for review is whether the children's court may transfer a child to district court pursuant to Section 32-1-30, when there is evidence that the child **may** be amenable to treatment in available facilities.

{3} We will not recite the testimony of the expert witnesses called at the hearing. The testimony as well as the existing case law is adequately discussed in the Court of Appeals opinion in this case. The parties agree that the only dispute in this appeal is whether there has been compliance with Subsection 32-1-30(A)(4). Subsection 32-1-30(A)(4) (emphasis added), provides that:

A. Notwithstanding the provisions of Section 32-1-29 NMSA 1978, after a petition has been filed alleging a delinquent act, the court may, before hearing the petition on its merits, transfer the matter for prosecution in the district court if:

* * * * * *

(4) the [children's] court **has considered** whether the child is amenable to treatment or rehabilitation as a child through available facilities.

{4} Section 32-1-30 was enacted in 1975, some three years after the Children's Code, NMSA 1978, Sections 32-1-1 through 32-1-45 (Repl. Pamp.1981 and Cum. Supp.1983), was first adopted. Prior to that time, there was no **discretionary** transfer to district court. The sole transfer provision was Section 32-1-29. One major difference between the two provisions is the paragraph in question because under Section 32-1-29, the children's court must find that the child is **not** amenable to treatment or rehabilitation as a child through available facilities. Because of this legislative history, we can assume with a degree of certainty that the Legislature intended to allow the children's court more judicial latitude in transferring a child to district court under the conditions set out in Section 32-1-30.[1]

{5} The State claims that the Court of Appeals opinion added two requirements to Section 32-1-30, that the Legislature did not intend, when they remanded the case to children's court with instructions to make the following specific factual determinations: (1) whether the current facilities and treatment options are inadequate, considering Doe's mental condition and his needs, and (2) whether the implementation of an adequate treatment program is not feasible within the time restraints placed upon juvenile authorities to accomplish the rehabilitation. Although these determinations may appropriately be made by the Children's Court to show whether it "has considered" whether the child is amenable to treatment or rehabilitation as a child through available facilities, they are not mandatory nor exclusive under the statute. We therefore determine that these added two requirements are not required in a transfer hearing

under Section 32-1-30 and the Children's Court does not need to make specific findings on those subjects.

*{*651}* **{6}** Section 32-1-30 is clear and unambiguous. It requires **only** the **consideration** by the children's court of the child's amenability to treatment before the children's court makes its findings. **State v. Doe,** 99 N.M. 460, 659 P.2d 912 (Ct. App.1983). This consideration by the children's court and its discretionary transfer under Section 32-1-30 will not be reversed on appellate review, absent an abuse of discretion. **See State v. Doe,** 93 N.M. 481, 601 P.2d 451 (Ct. App.1979). Furthermore, it is not an appellate court's right or duty to re-try the case for a different or better result. **Cf. State v. Garcia,** 99 N.M. 771, 781, 664 P.2d 969, 979, **cert. denied,** ... U.S. ..., 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983). The fact that the Children's Court heard evidence of the advantages and disadvantages of the two alternatives is indicative that it "has considered" the matter within the purview of the statute.

{7} The evidence in this case, although from only two witnesses, points out the treatment problems with Doe, whether he is transferred to district court or handled in children's court. The children's court properly considered whether the transfer should take place and decided that it should. Having reviewed the record, we determine that the children's court did not abuse its discretion.

{8} The Court of Appeals is reversed. This case is remanded to the district court for trial, pursuant to the March 15, 1983 Order on the alleged delinquent acts.

{9} IT IS SO ORDERED.

WE CONCUR: PAYNE, Chief Justice, FEDERICI, Justice, STOWERS, Justice.

SOSA, Senior Justice, respectfully dissenting.

DISSENT

DAN SOSA, JR., Senior Justice, dissenting.

{10} I respectfully dissent.

{11} Under the majority view, any findings or conclusions of the children's court need not be supported by specific reasons or findings, but only a cursory statement that the court "considered" evidence leading to its conclusion. This ruling will preclude any meaningful inquiry as to the specific findings or reasoning of the court that were paramount to its decision. The amenability of a child to treatment or rehabilitation as a child through available facilities is an evidentiary question. **See State v. Doe,** 93 N.M. 481, 601 P.2d 451 (Ct. App.1979). The majority's holding would make it impossible for this Court to even consider a possible abuse of discretion by the children's court. Findings and conclusions not on the record cannot be scrutinized. The majority should not so readily abdicate any portion of the power to review the proceedings of the

children's court that was vested in this Court by the New Mexico Constitution. N.M. Const. art. 6, § 2. Applying this power Rule 101(b) of Rules for Appellate Procedure for the Children's Court provides, "These rules shall not be construed to extend or limit the jurisdiction of the supreme court * * * as established by law." NMSA 1978, Crim., Child. Ct., Dom. Rel. & W/C App. R. 101(b) (Repl. Pamp.1983). The Bill of Rights of the New Mexico Constitution states, "All persons * * * have certain natural, inherent and inalienable rights * * *." N.M. Const. art. 2, § 4. Had the framers of our Constitution meant all persons except those under the age of eighteen, they would have so stated. It is clear that in New Mexico children as well as adults have rights to due process and fair judicial procedures.

{12} When a court orders the disposition of a child, be it for confinement in an institution, for treatment and rehabilitation, or for transfer to the district court, we should, at the very least, require delineation of those specific findings and conclusions the court "considered" when arriving at its decision. Is this Court willing to say we owe a child less due process in this serious matter than an adult?

{13} The effect of today's holding is to remove abuse of discretion as a basis for an appeal from a children's proceeding. This Court has a duty to zealously guard every party's *{*652}* fundamental right to review, **no matter what his age.** Criminal Procedure Rule 38(d) applies to a trial without a jury for an adult. It provides that "the court shall make a general finding and shall, in addition, make **specific findings of fact and conclusions of law** on **all** ultimate facts and conclusions of law." NMSA 1978, Crim.P.R. 38(d) (Repl. Pamp.1980) (emphasis added). The majority opinion denies the child the right to obtain specific findings and conclusions, a right given by Rule 38 to the adult in similar circumstances.

{14} It is well established that due process and fair treatment are essential in the proceedings of the children's court. **Application of Gault,** 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); **Kent v. United States,** 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The Supreme Court in **Kent** dealt with the minimum requirements for transfer from children's court to district court. It held the children's court did not have complete latitude to transfer the child because the transfer process carries the necessary requirements of due process, fairness and full investigation. The Court recognized some degree of discretion was given to the children's court as to factual considerations, their weight, and conclusions reached, but it determined that discretion "does not confer upon the Juvenile Court a license for arbitrary procedure." **Kent,** 383 U.S. at 553, 86 S. Ct. at 1053. The Court further stated, "there is no place in our system of law for reaching a result of such tremendous consequences * * * **without a statement of reasons.** It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner." **Id.** at 554, 86 S. Ct. at 1053 (emphasis added). The holding of the majority is contrary to both the holding in **Kent** and our own Criminal Procedure Rule 38(d).

{15} The law in the Tenth Circuit is that among those interests of children that need protection is the right not to be confined unnecessarily. Interpreting **Application of**

Gault, the court in **Milonas v. Williams** stated, "[c]hildren as well as adults, have substantial liberty interests that are protected from state action by the fourteenth amendment." **Milonas v. Williams,** 691 F.2d 931, 943 (10th Cir.1982) **cert. denied,** ... U.S. ..., 103 S. Ct. 1524, 75 L. Ed. 2d 947 (1983).

{16} A statement of reasons can insure that the transfer of a child to the district court was not premised on misinformation or inaccuracies in the materials before the court. It is a powerful safeguard and prevents rash or arbitrary decisions. The Second Circuit has stated, "A Sphinx-like silence on the court's part precludes anyone (including the parties, the judge, and an appellate tribunal) from learning whether he acted in error." **United States v. Brown,** 479 F.2d 1170, 1173 (2nd Cir.1973). In **Brown,** this concept was reaffirmed as to sentencing, but it applies equally to a transfer involving serious implications of being tried as an adult as is the case here. A sentence (or transfer) will generally be upheld "unless the sentencing judge relied on improper or unreliable information in exercising his or her discretion or failed to exercise any discretion at all in imposing the sentence." **United States v. Zylstra,** 713 F.2d 1332, 1340 (7th Cir.1973).

{17} This Court has carefully followed the tenets expressed in **Gault** and **Kent** by stating, "When a juvenile is transferred to district court for criminal proceedings * * * **all** of the rights and safeguards in such cases required by law and the Constitution of the United States and the Constitution of New Mexico must be accorded him." **Williams v. Sanders,** 80 N.M. 619, 621, 459 P.2d 145, 147 (1969) (emphasis added); **see Neller v. State,** 79 N.M. 528, 445 P.2d 949 (1968); **Peyton v. Nord,** 78 N.M. 717, 437 P.2d 716 (1968). I see no reason why the full panoply of constitutional protections should not apply to transfer proceedings from the children's court to the district court considering the serious consequences of the transfer. *{*653}* The transfer process marks the beginning of jeopardy in the judicial proceeding for punishment as an adult.

{18} I align myself with those learned Justices of this Court, who have spoken out before me for the rights of the child. In **Peyton v. Nord,** where we stated a child had a right to a trial by jury, Justice Moise, writing for the majority concluded: "We are impressed with the continuing validity of the statement of Justice Bickley in his dissent in **In re Santillanes,** where [regarding the accused child] he said, 'The rights of the individual guaranteed by the constitution cannot be determined by the criterion of whether we think them useful or otherwise.'" **Peyton v. Nord,** 78 N.M. 717, 727, 437 P.2d 716, 726 (quoting **In re Santillanes,** 47 N.M. 140, 169, 138 P.2d 503, 521 (1943)).

{19} In **State v. Doe,** 98 N.M. 567, 650 P.2d 851 (Ct. App.), **cert. denied,** 98 N.M. 590, 651 P.2d 636 (1982), a juvenile appealed from an order transferring his case to district court. There the trial court entered findings which the appeals court could ascertain were based on the evidence presented. In that case both psychologists agreed the child had not responded to previous psychological treatment and both said he was **not** amenable to treatment within available facilities. That case is distinguishable from the instant case in that here there is agreement among the psychologists that the juvenile is amenable to treatment. In addition there is conflicting testimony concerning whether the treatment necessary can be obtained within available facilities. It is this conflicting

testimony that must be resolved by specific findings and conclusions made on the record. Absent these there would be little discernible basis for transfer to the district court. For this reason I am in agreement with opinion of the Court of Appeals ordering remand for further factual determinations, and hereby adopt that opinion as part of my dissent.

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1. Under Section 30-1-29, the child must be sixteen and the delinquent act must be a felony. Under Section 30-1-30, a child fifteen years or older who is charged with certain felonies may be transferred to district court.