

1. E.A.F. was denied a fair hearing when the judge departed from his role as a neutral jurist and assumed the duty of the prosecutor;
2. The trial court abused its discretion in finding that there was clear and convincing evidence that E.A.F. should be sentenced as an adult when there was no evidence;
3. Delay in the proceedings unduly prejudiced E.A.F. in violation of the Sixth and Fourteenth Amendments to the United States Constitution; and
4. E.A.F. was denied effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendment to the United States Constitution and Art. II, §§ 7 and 20 of the Oklahoma Constitution.

Pursuant to Rule 11.2(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), this appeal was automatically assigned to this Court's Accelerated Docket. The propositions and issues were presented to this Court in oral argument on July 30, 2015, pursuant to Rule 11.2(E). At the conclusion of oral argument, the parties were advised of the Court's decision.

The District Court's order granting the State's motion to sentence E.A.F. as an adult is **REVERSED** with instructions to conduct a new hearing before a different judge. The hearing is to be conducted upon completion of E.A.F.'s psychological evaluation as required by 10A O.S.2011 § 2-5-208 (C)(1)(d).

On November 11, 2014, E.A.F. was 3 months shy of his eighteenth birthday when he and co-defendants L.K. and V.R. robbed and attempted to rob several individuals in Tulsa County. E.A.F. was charged, waived his preliminary hearing, and the State filed a motion to sentence him as an adult. E.A.F.

requested time for the Office of Juvenile Affairs to complete a Youthful Offender Study and the hearing on the State's motion was set for March 9, 2015. On March 9, 2015, the hearing was continued over E.A.F.'s objection.

The hearing began on March 18, 2015, at which time the State presented its sole witness and rested. After E.A.F.'s closing argument, Judge LaFortune, over E.A.F.'s objection, continued the hearing in response to the State's request to introduce testimony of additional witnesses to bolster its claims that the victims were traumatized and to show the court that the gun used by the defendant looked like a real gun, despite the fact that it was not. E.A.F. objected to the continuance because it would once again delay his potential treatment. The compromise reached by the parties was that Judge LaFortune would read the testimony from the preliminary hearing conducted on behalf of E.A.F.'s co-defendants, read the police reports and review the discovery packet in E.A.F.'s case. The hearing was continued until March 20, 2015.

On March 25, 2015, the parties appeared for the continued hearing.³ Judge LaFortune announced that he had read the preliminary hearing transcript and was having difficulty deciding whether or not to grant the State's motion, noting that "this is a very tough call for the Court." In evaluating how treatment might go for E.A.F., the court thought it might be helpful to know how E.A.F.'s incarceration had been progressing in the Tulsa County Jail. The record reflects

³ The record references the fact that although the hearing was set for March 20, 2015, it was not actually held until March 25, 2015; however, there is no explanation of why the hearing was further delayed.

that Judge LaFortune asked his deputy to check into E.A.F.'s behavior during his incarceration. As a result of that contact, the court learned: (1) that on November 14, 2014, E.A.F. was placed in 30 days segregation for some unspecified reason; (2) on December 15, 2014, he was found with a shank in his possession; and (3) on February 23, 2015, he was found to have been hindering an officer.

After receiving this information, the court called counsel for both sides into his office and told them he was re-opening the hearing on the State's motion to sentence as an adult and directed the State to subpoena the jail records relating to these incidents. The court then announced that there was going to be a hearing on the reported jail incidents, that E.A.F. would be allowed to defend against the allegations and argue about the effect on the court's decision, and that O.J.A.'s Officer Chris Terrell (E.A.F.'s case worker) would be called to testify about what effect these incidents might have on E.A.F.'s potential treatment. The court asked Terrell to formulate an expedited plan of treatment in the event the court overruled the State's motion.

The State does not dispute E.A.F.'s claim that Judge LaFortune conducted his own investigation of this case by asking his deputy to investigate E.A.F.'s post-arrest jail conduct. Based on this information, the court re-opened the hearing, received additional evidence, and allowed E.A.F. to respond to the allegations. The record reflects that neither party objected to the re-opening of

the hearing, despite the fact that the State had rested, nor did the parties object to the introduction and consideration of this evidence.

Judge LaFortune's actions constituted a violation of his duty to review only the evidence presented to the court and to act as a neutral arbiter. The behavior was also a violation of the Code of Judicial conduct, specifically Canon 2, Rule 2.9(C), *Code of Judicial Conduct*, Title 5, Ch.1, App.4 (2011) which states:

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed. While a judge shall not independently investigate facts in a case, and shall consider only the evidence presented, a judge may seek information of a general nature that does not bear on a disputed evidentiary fact or influence the judge's opinion of the substantive merits a specific case.

To complicate matters, neither the State nor defense counsel objected to the judge's conduct, nor did defense counsel object to Judge LaFortune's re-opening of the case after the State had rested.⁴

We find merit in E.A.F.'s claim that he was denied a fair and impartial hearing. The judge departed from his role as neutral jurist, improperly conducted an independent investigation, engaged in *ex parte* communications regarding this case, and re-opened a hearing and directed the State to subpoena witnesses to present specific additional evidence to the court. Additionally, there was no psychological evaluation conducted prior to the hearing on the State's

⁴ The court shall only certify a defendant as eligible for imposition of an adult sentence if it finds by clear and convincing evidence that the accused would not reasonably complete a plan of rehabilitation or that the public would not be adequately protected if the person were to be sentenced as a youthful offender. See, 10A O.S.2011 § 2-5-208.D.; *K.M.C. v. State*, 2009 OK CR 29, ¶ 6, 221 P.3d 735, 737. It is the State's burden to present sufficient evidence at the hearing to support such a finding.

motion as required by 10A O.S.2011 § 2-5-208 C.1.d. The psychological evaluation is mandatory unless waived by the accused with the court's approval, and the court is required to consider the evaluation in ruling on the State's motion to sentence as an adult.

In *J.R.L. v. State*, 2000 OK CR 26, 17 P.3d 1041, this Court found counsel was ineffective for failing to secure a psychological evaluation prior to considering the defendant's request for certification as a youthful offender. The statute specifically required the court to consider the psychological evaluation, which this Court determined was necessary to properly evaluate the criteria set forth in the relevant statute. In recognizing that the District Court may have declined to conduct a psychological evaluation because of the statutory time constraint mandating a preliminary hearing be conducted within 90 days of charges being filed, this Court found the psychological evaluation cannot be disregarded. *J.R.L.* at ¶¶ 8-9. *J.R.L.* at ¶¶ 10-11.

The language in the Youthful Offender certification statute is the same as the language used in the statute governing the State's motion to sentence E.A.F. as an adult. See, 10A O.S.2011 § 2-5-205(E)(4) and 10A O.S.2011 § 2-5-208(C)(1)(d). Failure to order the study in this case was reversible error and defense counsel's failure to make sure that the study was conducted constituted ineffective assistance of counsel.

The question before this Court is whether the trial court abused its discretion in granting the State's motion to sentence E.A.F. as an adult.

An "abuse of discretion" has been defined by this Court as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application. . . . The trial court's decision must be determined by the evidence presented on the record, just as our review is limited to the record presented.

A.R.M. v. State, 2011 OK CR 25, ¶ 7, 279 P.3d 797, 799, *W.C.P. v. State*, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100. *Accord*, *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. We find merit in E.A.F.'s claims that the trial court abused its discretion by granting the State's motion to sentence him as an adult, and that he was denied effective assistance of counsel.

DECISION

The order of the District Court of Tulsa County granting the State's motion to sentence Appellant as an Adult in Tulsa County Case No. YO-2014-44 is **REVERSED** with instructions that a new hearing be conducted before a different judge on the State's Motion to Sentence Appellant as an adult. The hearing shall be conducted only after a psychological evaluation has been conducted. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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