In re Michael R.

Supreme Court of New York, Appellate Division, First Department

January 23, 1996, Decided

No Number in Original

Reporter
223 A.D.2d 465 *; 636 N.Y.S.2d 780 **; 1996 N.Y. App. Div. LEXIS 14351 ***

In the Matter of Michael R., a Person Alleged to be a Juvenile Delinquent, Appellant.

Core Terms

first degree, clinical psychologist, restrictive placement, third degree, placement, predatory

Case Summary

Procedural Posture
Respondent juvenile sought review of an order by the Family Court of Bronx County (New York), which adjudicated him a juvenile delinquent upon a finding that he committed acts which, if committed by an adult, would have constituted the crimes of rape in the first degree, sodomy in the first degree, unlawful imprisonment in the first degree, sexual abuse in the third degree, and attempted assault in the third degree.

Overview

The juvenile was adjudicated a juvenile delinquent upon a finding that committed acts which, if committed by an adult, would have constituted first-degree rape, first-degree sodomy, first-degree unlawful imprisonment, third-degree sexual abuse, and third-degree attempted assault. The juvenile was then placed in a secure facility. The juvenile appealed, arguing that the presentment agency failed to turn over Rosario materials as required by N.Y. Fam. Ct. Act Law § 331.4(1)(a). The court held that because the juvenile committed a violent felony, the placement guidelines of N.Y. Fam. Ct. Act Law § 353.5(2), restrictive placement, not N.Y. Fam. Ct. Act Law § 352.2, least restrictive alternative available, applied. The record did not support the juvenile's assertion that the presentment agency failed to turn over Rosario materials as required by N.Y. Fam. Ct. Act Law § 331.4(1)(a).

Outcome
The order of the trial court adjudicating the juvenile a juvenile delinquent and placing him a secure facility was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

HN1[↓] **Juvenile Offenders, Juvenile Proceedings**

In a juvenile proceeding, a presentment agency is required to turn over Rosario materials under N.Y. Fam. Ct. Act Law § 331.4 (1)(a).

Criminal Law & Procedure > Juvenile

Offenders > Juvenile
Proceedings > General Overview

HN2 **Juvenile Offenders, Juvenile Proceedings**

When a juvenile commits a designated felony act, the placement guidelines of N.Y. Fam. Ct. Act Law § 353.5(5) (restrictive placement), not N.Y. Fam. Ct. Act Law § 352.2 (least restrictive available alternative) applies. N.Y. Fam. Ct. Act Law § 352.2(2)(a).

Counsel: For Appellant: T. Begley.

A. Beckoff, Presentment Agency

Judges: **[***1]** Concur--Rosenberger, J. P., Ellerin, Nardelli, Williams and Tom, JJ.

Opinion

[*465] [780]** Order of disposition, Family Court, Bronx County (Susan Larabee, J.), entered November 3, 1994, which adjudicated respondent a juvenile delinquent upon a finding that he committed acts which, if committed by an adult, would constitute the crimes of rape in the first degree, sodomy in the first degree, unlawful imprisonment in the first degree, sexual abuse in the third degree, and attempted assault in the third degree, and placed him with the Division for Youth for a initial period of 3 years with no credit for time spent in detention and the first 12 months to be in a secure facility, unanimously affirmed, without costs.

The record does not support respondent's assertion that ***HN1*** the presentment agency failed to turn over *Rosario* materials as required by Family Court Act § 331.4 (1) (a). The cryptic language appearing on the bottom **[**781]** of one of five police informational reports permits no more than mere speculation as to the possible existence of missing notes.

A strong case for restrictive placement was shown here. The crime was violent and predatory; respondent has a record of truancy and escalating criminal **[***2]** conduct; the 12-year-old, slightly built victim sustained physical injuries as a result of the attack; the clinical psychologist thought it highly likely that respondent would continue his predatory ways in light of strong gang involvement and lack of remorse; and both the clinical psychologist and Probation Department recommended a long-term, highly structured placement (*see*, Family Ct Act § 353.5 [2]; Matter of Katherine W., 62 NY2d 947). ***HN2*** As respondent committed a designated felony act, the placement guidelines of Family Court Act § 353.5 (5) (restrictive placement), not section 352.2 (least restrictive available alternative) applied (Family Ct Act § 352.2 [2] [a]).

Concur--Rosenberger, J. P., Ellerin, Nardelli, Williams and Tom, JJ.

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Matter of Jermaine D.

Supreme Court of New York, Appellate Division, Second Department

May 2, 2006, Decided

2005-03221, 2005-03224, (Docket Nos. E-14852-02/04A, D-37153-04)

Reporter
29 A.D.3d 576 *; 815 N.Y.S.2d 634 **; 2006 N.Y. App. Div. LEXIS 6015 ***; 2006 NY Slip Op 3580 ****

[**1]** In the Matter of Jermaine D., a Person Alleged to be a Juvenile Delinquent, Appellant.

Core Terms

probation, placement, constitute crime, robbery, adult, juvenile delinquency, criminal possession, designated felonies, fourth degree, time spent, no credit, delinquency, detention, weapon

Case Summary

Procedural Posture
Defendant juvenile appealed orders by the Kings County Family Court (New York) that, inter alia, adjudged him to be a juvenile delinquent for fourth-degree criminal possession of a weapon, and found that he had violated his probation; defendant claimed that the trial court erred in directing a restrictive placement with the New York State Office of Children and Family Services (OCFS).

Overview

While on probation for first-degree robbery, defendant admitted to fourth-degree criminal possession of a weapon under N.Y. Penal Law § 265.01. The trial court determined that defendant required supervision and confinement, that he was beyond parental and court control, and that his delinquent behavior was escalating. The appellate court held that the family court providently exercised its discretion in directing a restrictive placement with the OCFS, upon a finding that defendant violated conditions of probation of a prior order of disposition in connection with a designated felony act. The trial court made its determination in accordance with *N.Y. Fam. Ct. Act §§ 352.2(3), 353.5*.

Outcome
The orders were affirmed.

Headnotes/Syllabus

Headnotes

[*1]** Infants--Juvenile Delinquents--Restrictive Placement

Counsel: Peter Dailey, New York, N.Y., for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart and Jane L. Gordon of counsel), for respondent.

Judges: THOMAS A. ADAMS, J.P., WILLIAM F. MASTRO, STEVEN W. FISHER, JOSEPH COVELLO, JJ. ADAMS, J.P., MASTRO, FISHER and COVELLO, JJ., concur.

Opinion

[*576] [634]** In a juvenile delinquency

proceeding pursuant to Family Court Act article 3, the appeal is from (1) an order of disposition of the Family Court, Kings County (O'Donoghue, J.), dated March 2, 2005, which, upon a fact-finding order of the same court dated December 13, 2004, made upon the appellant's admission, finding that he had committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the fourth degree, adjudged him to be a juvenile delinquent and placed him with the New York State Office of Children and Family Services for a period of 12 months in a limited secure facility, with no **[***2]** credit for the time spent in detention pending disposition, to run concurrently with appellant's placement under Docket No. E-14852-02/04A, and (2) an order of the same **[**635]** court also dated March 2, 2005, which found that the appellant violated a condition of a term of probation previously imposed by the same court in an order of disposition dated September 17, 2004, vacated the order of disposition dated September 17, 2004, and placed the appellant in the custody of the New York State Office of Children and Family Services for a period of three years, consisting of 12 months in **[*577]** secure placement, followed by 12 months in residential limited secure placement, followed by 12 months at the discretion of the New York State Office of Children and Family Services, with no credit for the time spent in detention pending disposition.

Ordered that the orders are affirmed, without costs or disbursements.

On September 17, 2004, following his adjudication as a juvenile delinquent for an **[****2]** act which, if committed by an adult, would have constituted the crime of robbery in the first degree (*see* Penal Law § 160.15)--a designated felony act pursuant to Family Court Act § 301.2 (8) **[***3]** --the appellant was placed on probation for a period of 24 months. Approximately three months later, on December 13, 2004, the appellant admitted having committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a weapon in the fourth degree (*see* Penal Law § 265.01).

On this record, the Family Court providently exercised its discretion in directing a restrictive placement with the New York State Office of Children and Family Services (hereinafter OCFS), upon a finding that the appellant violated conditions of probation of a prior order of disposition in connection with a designated felony act (*see* Family Court Act § 352.2 [1], §§ 353.5, 360.3 [6]; *Matter of Alfredo H., 25 AD3d 798, 807 NYS2d 571 [2006]*; *Matter of Michael R., 223 AD2d 465, 636 NYS2d 780 [1996]*).

Contrary to the appellant's contention, the record reflects that the court made its determination in accordance with Family Court Act § 352.2 (3) and § 353.5. As noted in the order of disposition on the violation of probation charge, the court determined, based on competent **[***4]** evidence adduced at the dispositional hearing, that the appellant requires supervision and confinement, that he is beyond parental and court control, and that his delinquent behavior is escalating. Among other things, only three months into his period of probation following a prior knife-point robbery, the appellant, the court noted, "was found to have conspired to commit a gunpoint robbery with others also armed with loaded guns." We find no basis to disturb the court's determination, which is supported by a preponderance of the evidence (*see* Family Court Act § 353.5 [1]; *Matter of Ralph D., 163 AD2d 752, 557 NYS2d 1003 [1990]*).

The appellant's remaining contentions are without merit. Adams, J.P., Mastro, Fisher and Covello, JJ., concur.

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In re Warren W.

Supreme Court of New York, Appellate Division, First Department

June 29, 1995, Decided ; June 29, 1995, ENTERED

53399

Reporter
216 A.D.2d 225 *; 629 N.Y.S.2d 28 **; 1995 N.Y. App. Div. LEXIS 7123 ***

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

Core Terms

designated felonies, marked, days, time served, delinquency, juvenile, certified copy, fact-finding, allegations, transferred, juvenile delinquency, secure facility, pertinent part, time spent, presentment, proceedings, prominently, detention, placement, pleadings, modified, removal, annex, bail

Case Summary

Procedural Posture
Defendant, a juvenile, sought review of the judgment of the Family Court, New York County (New York) that made a designated felony finding against him.

Overview
Defendant, a juvenile, was indicted for second-degree robbery. Defendant was found guilty of an act that did not render him criminally responsible as a juvenile offender. The Family Court determined that defendant had committed a designated felony act. The Family Court denied defendant credit for time served in detention from the time of his arrest until the date of disposition. The court stated that the petition made by the Family Court was to be prominently marked as containing an allegation that the juvenile committed a designated felony act. The court held that the failure to mark the petition as a designated felony act petition precluded a finding that defendant committed an act that, if committed by an adult, would have constituted a designated felony offense. The court concluded that the designated felony finding had to be stricken and the period of placement reduced to 18 months. The court stated that a valid and sufficient accusatory instrument was a nonwaivable jurisdictional prerequisite in a delinquency proceeding.

Outcome
The court held that the designated felony finding had to be stricken and defendant's sentence had to reduced to 18 months.

LexisNexis® Headnotes

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

HN1[] **Juvenile Offenders, Juvenile Proceedings**

N.Y. Fam. Ct. Act § 311.1(5) reads: 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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

Governments > Courts > Clerks of Court

HN2[] **Juvenile Offenders, Juvenile Proceedings**

N.Y. Fam. Ct. Act §311.1(7) provides: When an order of removal pursuant to N.Y. Crim. Proc. Law § 725 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 N.Y. Fam. Ct. Act § 310.1(1) containing all of the allegations 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.

Counsel: **[***1]** For Appellant: R.E. Rogers.

For Presentment Agency: K. Alberton.

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

Opinion

[*225] [28]** 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 **[**29]** 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 **[***2]** 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.

HN1[] 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, HN2[↑] 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 [***3] 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 [***4] 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* [***5] *of* David T., 75 NY2d 927, 929).

[**30] 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 [***6] 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.

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FCA § 353.5(4)(d) Upon the expiration of the initial period of placement, or any extension thereof, the placement may be extended in accordance with section 355.3 on a petition of any party or the office of children and family services, or, if applicable, a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, after a dispositional hearing, for an additional period not to exceed twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday, or, for an act that was committed when the respondent was sixteen years of age or older, the respondent's twenty-third birthday.