

State of Michigan
In the Supreme Court

In re NDD

The People of the State of Michigan

Petitioner-Appellee,

v.

NDD

Respondent-Appellant.

MSC No. 169064

COA No. 370602

Livingston County Circuit Court –
Family Division

Case No. 2019-015969-DL

Respondent-Appellant NDD's
Reply to Appellee's Supplemental Brief

Joshua Pease (P75354)
MAACS Youth Appellate Defense Counsel

Counsel for NDD

State Appellate Defender Office
212 East César E. Chávez
Lansing, Michigan 48906
Phone: (517) 334-1200
jpease@sado.org

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Arguments

- I. Consideration of the waiver factors must be based on the facts placed on the record, not speculation about matters outside of the record.**

Discussion

The prosecution incorrectly analyzes the statutory waiver factors. As to Factor A, the prosecution speculates about what could have happened during the alleged offense. They claim unlawfully driving away an automobile “can cause serious economic harm....” Appellee’s Supplemental Brief at 19. But at the phase-two hearing, they never presented any evidence that the complainant in this case suffered any economic harm, serious or otherwise. They then claim that “great economic and physical harm may occur if the offender becomes involved in a crash.” Appellee’s Supplemental Brief at 19. Again, though, they presented no evidence at the phase-two hearing that there was a crash or any degree of economic or physical harm.

Factor A focuses on the facts of the offense as alleged, not speculation about what could have happened. One of the considerations within this factor is “the impact on any victim.”¹ MCL 712A.4(4)(a). The record in this case demonstrates none of the negative impact on the victim that the prosecution dreams up. And while they point out that the Court of Appeals in *People v Fowler* did not require a finding of actual harm to the complainant in that particular case to satisfy the seriousness of the offense factor, the child in *Fowler* was charged with

¹ With the 2024 amendments to MCL 712A.4(4), “the impact on any victim” became its own separate factor, but it was still included in Factor A at the time the waiver order against NDD was entered.

assaultive and weapons crimes,² vastly different from and far more serious than taking a go-kart for a joyride. *Fowler*, 193 Mich App 358, 360 (1992). The prosecution excluded from their *Fowler* citation the sentence in which the Court stated that “[t]hese crimes are far more serious than the property and traffic offenses for which defendant first became involved in the juvenile system.” *Id* at 365. Despite their claims to the contrary, the prosecution never demonstrated how proofs regarding Factor A show that NDD’s alleged offense was actually serious in nature.

The prosecution also attempts to improperly shift the burden to NDD. They claim that “[n]o evidence was presented that NDD and his co-conspirator were merely joyriding as opposed to stealing the go-carts in question.” Appellee’s Supplemental Brief at 20. The prosecution never presented evidence that NDD and the other person intended to permanently steal the go-karts, and it is the prosecution, not NDD, who had the burden of proof at the waiver hearing. MCR 3.950(D)(2)(c). Perhaps recognizing that the record in support of waiver is thin, the prosecution requests that this Court remand to expand the record. The prosecution does not explain their failure to establish their desired record in the first instance.³ The prosecution has waived any such relief,

² “We agree with the lower court that these offenses are of a serious nature, *especially considering the fact that a weapon was involved.*” *Fowler*, 193 Mich App at 364-65 (emphasis added).

³ The prosecution has a pattern of presenting extra-record information in this case. At oral argument in the Court of Appeals, the assistant prosecutor who was present did not request an opportunity to expand the record and instead took the liberty of using their time to give the panel numerous allegations which appeared nowhere in the record, including criticizing undersigned counsel for arguments made in a different case regarding a different statute.

as they actively opposed a similar request which NDD made in the Court of Appeals.⁴

As to Factor B, the prosecution claims that “[a]ll signs pointed to [NDD and his co-conspirator] being equal partners in this endeavor.” Appellee’s Supplemental Brief at 20. Once again, this claim is wholly unsupported by the record the prosecution made in the juvenile court. They presented no facts at the waiver hearing about the co-conspirator’s role in the offense, and their claim that they were “equal partners” is speculative at best.

As to the remaining factors, NDD relies on the analysis provided in his supplemental brief.

II. Subsequent amendments to MCL 712A.4(4) did not supersede or abrogate *People v Dunbar*, and the issue was preserved in the juvenile court.

Discussion

The prosecution argues that NDD did not preserve the issue of whether the requirements of *People v Dunbar*, 423 Mich 380 (1985) were followed. Trial counsel for NDD clearly argued that juvenile court was the more appropriate setting for NDD as opposed to the criminal legal system. She asserted that “we strongly disagree that there aren’t still services to explore to help this young man.” Transcript of Hearing to Waive Jurisdiction dated November 1, 2023 (Tr. 11/1/23) at page 70. She explained how the juvenile court system is uniquely situated to

⁴ NDD did not renew his motion to remand and is not seeking remand for an evidentiary hearing now. Such a hearing is not necessary to resolve the issues before this Court.

rehabilitate children in NDD's position and specifically said that "we feel it would be in the public's best interest to attempt to try to rehabilitate [NDD] with the services at the juvenile court's disposal instead of kicking him up to adult court." Tr. 11/1/23 at 70-71. Counsel invoked a comparison of the juvenile and adult services and thus preserved the *Dunbar* issue for appeal.

Because this issue was preserved, this Court reviews for an abuse of discretion. The juvenile court's failure to make the required *Dunbar* findings is an error of law, which is inherently an abuse of discretion requiring reversal. See *People v Swain*, 288 Mich App 609, 628–29 (2010).

The prosecution relies heavily on *People v Moore*, unpublished *per curiam* opinion of the Court of Appeals, issued March 8, 2005 (Docket No 257118), to argue that *Dunbar* no longer applies to traditional waiver decisions. This is a misreading of *Moore* and ignores the actual impact of post-*Dunbar* amendments to MCL 712A.4(4). It also simultaneously ignores the place that the Juvenile Code philosophy in general, and waiver philosophy more specifically, holds in the *Dunbar* requirement. *Dunbar* remains good law, and juvenile courts must still compare the services available in both juvenile and adult facilities as part of their findings.

No appellate court in Michigan has ever cited *Moore* for any reason, let alone for the assertion that *Dunbar* has been superseded by statutory amendments, and it appears that no other Court of Appeals panel has reached the conclusion which the prosecution draws from *Moore*. On the other hand, the Court of Appeals has reaffirmed the applicability of *Dunbar* numerous times. See, e.g., *In re NDD*, unpublished *per curiam* opinion of the Court of Appeals, issued August 15, 2025 (Docket No 370602); *In re Shelton*, unpublished *per curiam*

opinion of the Court of Appeals, issued May 18, 2023 (Docket No 363578); *In re Robertson*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2023 (Docket No 360538); *In re Westbrook*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No 338559).⁵ The case law, though unpublished, firmly establishes the continued viability of the *Dunbar* comparison requirement.

There are other compelling reasons to disregard the prosecution's arguments regarding *Dunbar*. First, the *Moore* Court did not specifically say that *Dunbar* was no longer applicable. It noted that the waiver statute had been amended since *Dunbar*, particularly the criteria the court must consider when making the waiver decision. But it did not hold that the amendments to the statute abrogated *Dunbar*. The only meaningful amendment to the predicate clause of MCL 712A.4(4) was to give greater weight to two criteria. The old version read:

Upon a showing of probable cause, the court shall conduct a hearing to determine whether or not the interests of the child and the public would be served best by granting a waiver of jurisdiction to the criminal court. In making the determination, the court shall consider the following criteria....

The amended version reads:

Upon a showing of probable cause under subsection (3), the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction. In making its determination, the court shall consider all of the following criteria, giving greater weight to the seriousness of the

⁵ All of these opinions were issued long after the amendments to MCL 712A.4(4) in the 1990s.

alleged offense and the juvenile's prior record of delinquency than to the other criteria....

The 1998 amendments to the statute did not change the juvenile court's obligation to conduct a best-interests determination or its obligation to fully evaluate the case and the child to determine whether to waive jurisdiction.

Moreover, the 1998 amendments did not dull *Dunbar's* force or reasoning. Traditional waiver is, at its core, a decision about whether a child should be sentenced as an adult.⁶ Adult sentencing is mandatory for a child who is waived and convicted, *People v Veling*, 443 Mich 23, 39 (1993), while adult sentencing is not available for a child adjudicated in juvenile court. MCL 712A.18(1). Because it is a sentencing decision, waiver necessarily invites a comparison between a juvenile disposition and an adult sentence. Which option better rehabilitates the child, and which better protects society?

The *Dunbar* decision followed the rationale of an earlier Court of Appeals opinion, *People v Schumacher*, 75 Mich App 505 (1977). In *Schumacher*, the Court first laid out the language on which NDD now relies: “for waiver hearings held after the decision date of this opinion, there must be evidence on the record, to which the probate judge must specifically refer, regarding the ‘relative suitability of programs and facilities available to the juvenile and criminal courts for the child’.” *Id*

⁶ “While there are no doubt instances where it is necessary to waive jurisdiction over certain juvenile offenders, the decision to waive cannot be characterized as being consistent with the philosophy underlying the juvenile court system. In reality, the decision to waive juvenile court jurisdiction is not a decision to *rehabilitate*, but, rather, a decision to *punish* the juvenile upon conviction.” *People v Hana*, 443 Mich 202, 228 (1993) (CAVANAGH, CJ, dissenting) (emphasis in original).

at 514 (citation omitted). The *Dunbar* Court adopted this language and rationale.

The “relative suitability” determination is still required by caselaw and statute. One of the other important parts of *Schumacher* was to establish the standard of review for waiver decisions, and part of that standard is directly related to the “relative suitability” comparison. The Court determined that the appropriate standard is as follows:

[A]n order waiving jurisdiction will be affirmed whenever the judge’s findings, based upon substantial evidence and upon thorough investigation, show either that the juvenile is not amenable to treatment, or, that despite his potential for treatment, the nature of his difficulty is likely to render him dangerous to the public, if released at age (nineteen) or to disrupt the rehabilitation of other children in the program prior to his release.

Id. at 511-12 (parenthetical in original; quotation marks and citation omitted). The *Dunbar* Court adopted that standard, and no subsequent opinions (including *Moore*) have held that it is not an appropriate standard for reviewing waiver decisions. It remains good law.

Considering the services available in both juvenile and adult facilities falls squarely within the “thorough investigation” the juvenile court is required to conduct. A “thorough investigation” would entail investigating *all* relevant aspects of a child, their situation, and what services may be made available to them. This would naturally include what services are available to them as part of a juvenile disposition and what services they would alternatively receive if convicted and sentenced as an adult. For example, a finding that there are very limited rehabilitative services available for the child in the juvenile legal system would not be a “thorough” finding if there are even fewer appropriate services available in the criminal legal system. The juvenile court is

required to investigate and understand how subjecting a child to the criminal legal system may impact both the child and the public. That requirement was established in *Schumacher* and reiterated in *Dunbar*.

Further, the *Schumacher* Court relied on the stated philosophy of the Juvenile Code, which remains almost exactly the same today as it was in 1977. The Court looked at the language of MCL 712A.1, which read in part at the time of the decision:

This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, preferably in his own home, as will be conducive to the child's welfare and the best interest of the state and that when such a child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to the care which should have been given to him by them.

This provision remains in the current statute, MCL 712A.1(3), with nothing more than minor adjustments to clean up the language. A child's welfare and the care, guidance, and control they receive will naturally differ in the adult criminal legal system and the juvenile legal system. Because the philosophy of juvenile court mandates consideration of those factors, the court cannot waive its jurisdiction without first considering them.

Dunbar's requirement that juvenile courts compare the services available in the juvenile and adult systems remains today. It has not been superseded or abrogated by later amendments to MCL 712A.4(4). The waiver decision is still a comparison of how best to serve the interests of the child and the public, as it was at the time *Dunbar* was decided, and it is still a decision on whether a child should be sentenced as an adult if found guilty. Because the philosophy underlying the entire Juvenile Code, including the waiver statute, has not changed, *Dunbar*

remains enforceable, and a trial court errs when it does not compare the services available in both juvenile and adult facilities.

III. MCL 712A.4 is not merely a jurisdictional statute.

Discussion

Both the prosecution's supplemental brief and the Prosecuting Attorneys Association of Michigan amicus brief treat the waiver decision as merely a jurisdictional decision, rather than a process with Sixth Amendment significance. As explained in NDD's supplemental brief, the purpose of the traditional waiver statute is to allow a court to impose an adult sentence on a child. As explained in NDD's supplemental brief and below, the change in jurisdiction is merely the means by which that is accomplished.

A nearly identical process to MCL 712A.4 is utilized in a court-initiated designation under MCL 712A.2d(2). As with a traditional waiver, the designation case begins with the prosecution filing a petition in the juvenile court. If the charged offense is not a specified juvenile violation,⁷ the prosecution may request that the court designate the case as one in which the child would be tried in the same manner as an adult. *Id.* The court must then hold a hearing to determine whether to grant the designation request. MCR 3.952.

Both traditional waiver, MCL 712A.4(3), and court-initiated designation, MCL 712A.2d(4), require a probable cause hearing in the

⁷ The list of offenses which qualify as specified juvenile violations is enumerated in MCL 712A.2d(9). Unlawfully driving away an automobile is not on that list.

juvenile court. A court will waive or designate based on the exact same factors. MCL 712A.4(4); MCL 712A.2d(2). The prosecution has the burden of proving that waiver or designation is in the best interests of the child and public in both processes. MCR 3.950(D)(2)(c); MCR 3.952(C)(2). And both processes expose the child to an adult sentence. *Velting*, 443 Mich at 39 (adult sentencing is mandatory in traditional waiver proceedings); MCL 712A.18(1)(o) (allowing a court to enter an adult sentence in a designated proceeding).

Traditional waiver and court-initiated designation use the same process to reach the same end result: allowing a court to sentence a child as an adult. Yet only traditional waiver entails a transfer of jurisdiction. If the same result can be reached without waiving jurisdiction, then the statute is not merely about waiving jurisdiction; it is about exposing a child to a more severe punishment. The interim step of switching courts under the traditional waiver statute is a by-product of the process rather than the purpose of the process.

The prosecution likens the traditional waiver decision to a preliminary examination on a felony criminal charge. This comparison is inapt, as the sole inquiry at a preliminary examination is whether there is probable cause to believe that a felony was committed and that the defendant was the person who committed that felony. MCR 6.110(E). There is no second hearing to determine whether it is in the best interests of the defendant and public for the district court to bind the case over to circuit court, and the district court's decision does not extend beyond the elements of the offense. *People v Crumbley (On Remand)*, 346 Mich App 144, 167-68 (2023).

The prosecution also speculates about the difficulty of running trials where a jury would be required to consider the nine statutory

waiver factors. NDD has never argued that this Court must force such a situation. Instead, NDD has argued that MCL 712A.4 is facially unconstitutional. If this Court agrees, then the statute would be inoperative, and it would be the Legislature's responsibility to modify the statutory scheme so that it passes constitutional muster.

Finally, the prosecution has argued that the lack of a federal constitutional right to a trial by jury in juvenile court somehow impacts the analysis of the waiver decision (which primarily affects sentencing if the child is tried and convicted as an adult). It is unclear how this argument⁸ negates or is even related to NDD's argument that waiver violates his right to trial by jury under the *Apprendi* doctrine.

Despite the prosecution's protestations to the contrary, the process of MCL 712A.4 has significant impact on a child going well beyond a mere jurisdictional transfer and exposes the child to a greater maximum punishment than they would receive but for the judicial fact-finding within that process. On its face, this triggers a Sixth Amendment analysis under *Apprendi*. This Court should reject the prosecution's arguments and grant the relief which NDD seeks.

⁸ Undersigned counsel is unaware of any cases declaring that children do not have a right to a trial by jury under the Michigan Constitution of 1963. Given the quasi-criminal nature of juvenile delinquency proceedings in Michigan, their impact on criminal proceedings, and the adultification and criminalization of children in delinquency proceedings since *McKeiver v Pennsylvania*, 403 US 528 (1971), it is possible that such a right may exist, but that issue is not before this Court.

Relief Requested

For the reasons stated above and in NDD's supplemental brief, NDD respectfully requests that this Honorable Court reverse the opinion of the Court of Appeals, reverse the juvenile court's order waiving NDD into adult criminal court, and hold that MCL 712A.4 is unconstitutional.

Respectfully submitted,
State Appellate Defender Office

**Joshua
Pease**

Digitally signed by
Joshua Pease
Date: 2026.07.20
11:08:59 -04'00'

Joshua Pease (P75354)
MAACS Youth Appellate Defense Counsel
Counsel for NDD

State Appellate Defender Office
212 East César E. Chávez
Lansing, Michigan 48906
Phone: (517) 334-1200
jpease@sado.org

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