COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1918

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF JAWUN B.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAWUN B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Reversed.*

¶1 SCHUDSON, J.[1] Jawun B. appeals from the juvenile court order waiving juvenile court jurisdiction under § 938.18, STATS. He argues that "the court did not make any finding that it was not in the best interest of the child to stay within the juvenile court system by clear and convincing evidence" and, further, that the court's finding that it was in the best interest of the public for him to be in the adult court system was not supported by the evidence. This court agrees and, therefore, reverses.

¶2 The facts relevant to resolution of this appeal are undisputed. In a delinquency petition dated December 18, 1998, the State charged Jawun with armed robbery, party to the crime. According to the petition and police reports, on October 3, 1998, Jawun, then about sixteen and one-half years old, and his older brother, Dontre, then about nineteen and one-half years old, confronted a man as he walked up to a residence in their neighborhood. Jawun, with his hand in his jacket pocket, "pressed his jacket into [the victim's] stomach" and told him to "give me what you got." The victim "felt [a] hard object" and "believed [it] to be some type of handgun." He then gave three rings to Jawun and $90.00 to Dontre. In adult court, Dontre pled guilty to the armed robbery and received probation with a stayed six-year sentence. In juvenile court, the State petitioned for waiver of Jawun.

¶3 At Jawun's waiver hearing, two witnesses testified: Tana Stewart, the intake specialist at the Children's Court Center who supervised Jawun's case

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e) & (3), STATS. This court granted Jawun B.'s petition for leave to appeal a nonfinal order, pursuant to ***State ex rel. A.E. v. Circuit Court***, 94 Wis.2d 98, 292 N.W.2d 114 (1980).

between December 17, 1998, when Jawun was arrested, and June 8, 1999, the date of the waiver hearing, and Jawun's mother.

¶4 Ms. Stewart testified that Jawun had had no prior contacts with the juvenile justice system, had received no treatment through either the court or school system, had not experienced school problems, was neither mentally ill nor developmentally disabled, had a quiet demeanor and respectful attitude, was physically and mentally mature, lived at home with his mother and brother, and had been "totally compliant" with the rules of in-house supervision during the six months preceding the waiver hearing. She explained that, in the juvenile system, probation services would be available to Jawun until age eighteen, and that corrections services, under the Serious Juvenile Offender Program, would be available for up to five years. *See* §§ 938.355(4)(b) and 938.538, STATS. Ms. Stewart further testified that because Jawun had "been responsive to all services or programs during the pendency of the proceedings," she "expected that he [would] continue to be compliant with any post dispositional services." She concluded that the juvenile system would provide both "adequate services or facilities" for Jawun and "adequate … protection of the public."

¶5 Jawun's mother testified that Jawun was "a good student" and had won many athletic awards. She said she had "never had a problem with him," that he always obeyed her rules, was "[v]ery well respected and well mannered," and attended church.

¶6 The State offered nothing to dispute the testimony of Ms. Stewart or Jawun's mother, and nothing to counter Ms. Stewart's conclusion that the juvenile justice system would adequately serve Jawun and protect the public. The

prosecutor, however, recommended waiver based on the seriousness of the charge. After reviewing the statutory waiver criteria, he simply argued:

> And I believe that, frankly, given the seriousness of the allegations and the charge, that the protection of the public criteria, the court should find that is a significant protection that needs to be addressed and that waiver to the adult system is most appropriate because it then, if the conviction is – ensues, allows the court options that might not be available to the juvenile court.

¶7 The court agreed. The court acknowledged that Jawun was "pretty close to an ideal son" with "commendably no prior history" of crime, but speculated that "[t]here may be things that were missed and require a long period … of supervision, longer than may be available or may result in the juvenile arena." Specifically, the court observed that "[c]ertainly nine months of probation" "would not ensure the appropriate protection of the public." The court, however, did not make any reference to *the five years* available through the Serious Juvenile Offender Program. After reviewing the statutory criteria for waiver of jurisdiction, the court concluded: "I am clearly satisfied by clear and convincing evidence that–to treat this case in the context of the juvenile arena would not be in the best interest of the public. It would demean the seriousness of this offense…."

¶8 Section 938.18(5), STATS., requires that the juvenile court "base its decision whether to waive jurisdiction" on the criteria specified in the statute. Section 938.18(6), STATS., provides that "if the court determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waving jurisdiction." Whether to waive jurisdiction is within the juvenile court's sound discretion, and this court "will uphold a discretionary determination

if the record reflects that the juvenile court exercised its discretion and there was a reasonable basis for its decision." ***B.B. v. State***, 166 Wis.2d 202, 207, 479 N.W.2d 205, 206-07 (Ct. App. 1991).

¶9 The State correctly points out that the court was not required to embrace Ms. Stewart's opinion that juvenile jurisdiction would be appropriate. *See* ***J.A.L. v. State***, 162 Wis.2d 940, 969, 471 N.W.2d 493, 505 (1991) ("The juvenile court was not required to accept the experts' estimates of the time needed for treatment and rehabilitation as necessarily accurate."). In this case, however, the court, other than speculating that "[t]here may be things that were missed and require a long period … of supervision," provided no basis for rejecting Ms. Stewart's uncontroverted opinion. Such pure speculation is not a proper basis for a decision. *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 791, 541 N.W.2d 203, 210 (Ct. App. 1995) (verdict cannot be based on "conjecture and speculation"); ***Cudd v. Crownhart***, 122 Wis.2d 656, 662, 364 N.W.2d 158, 161 (Ct. App. 1985) (verdict cannot be based on "mere speculation"). Moreover, as noted, although the court's comments are not entirely clear, the court's conclusion seems to have been based on the brief remaining time Jawun could have been on juvenile probation, without consideration of the five years available through the Serious Juvenile Offender Program.

¶10 This court has carefully reviewed the entire record. No evidence counters Ms. Stewart's opinion.[2] Essentially, the only factor on which the State

[2] This court recognizes that the record includes Ms. Stewart's court report, In-House Correctional Services reports, and references to Jawun's school records, some of which would seem to compromise Ms. Stewart's testimony that Jawun had been *totally* compliant. Essentially, however, these reports and references strongly support Ms. Stewart's assessment.

and court relied was the seriousness of the charge.[3] Indeed, on appeal, the State, doing little more than summarizing the record and citing the appropriate legal standards, barely responds to Jawun's argument. The State writes:

> The trial court properly exercised its discretion under sec. 938.18(6) in deciding to waive [Jawun] to adult court. The record demonstrates that the trial court properly considered the relevant facts and addressed the criteria of sec. 938.18 before rendering a decision. The waiver hearing presented the Court with information about the juvenile himself, the adequacy and suitability of facilities within the juvenile system, the amount of time remaining in the juvenile system, as well as the nature of the offense on which the State sought the waiver.

(record reference omitted). *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶11 Granted, the seriousness of the charge is a very important factor the juvenile court was required to consider. But until the legislature determines that a charge of armed robbery requires automatic adult court jurisdiction, the seriousness of the charge, virtually standing alone, does not justify waiver.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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[3] This court also recognizes that the juvenile court, tracking the statutory criteria, found that almost all the factors were either favorable to Jawun, or inapplicable to the waiver decision in his case. Other than the seriousness of the offense, only Jawun's mental and physical maturity, and the fact that he was neither mentally ill nor developmentally disabled, militated against continuing juvenile court jurisdiction. *See* § 938.18(5)(a), STATS. Notably, the juvenile court failed to refer to Jawun's "prior treatment history and apparent potential for responding to future treatment," *see* ***id.***, and "the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048," *see* § 938.18(5)(c), STATS.