

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2479

**Cir. Ct. Nos. 2012JV294
2012JV311**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF JACE H., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JACE H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
BARBARA H. KEY, Judge. *Affirmed.*

¶1 REILLY, J.¹ The State sought the waiver of Jace H. into adult court, utilizing the offenses alleged in two pending juvenile court cases as the basis for the waiver petition. The juvenile court waived Jace into adult court. It was thereafter determined that the offenses alleged in one of the two juvenile cases could not legally serve as a basis to waive juvenile court jurisdiction, and the court vacated its waiver order as to those charges. The juvenile court rejected Jace’s motion to deny the waiver petition in the case where the offenses formed a legal basis for waiver. Jace appeals the denial of his request for dismissal of the waiver petition or, alternatively, for a new waiver hearing. We affirm.

BACKGROUND

¶2 The State filed two petitions in juvenile court alleging Jace was delinquent. In case No. 12JV294, the State alleged that Jace had committed seven child sex crimes involving a fourteen-minute incident broadcast over the internet where Jace is seen sexually assaulting a developmentally delayed four-year-old girl. In case No. 12JV311, the State alleged that Jace had committed two child sex crimes involving Jace “fingering” a twelve-year-old female against her will.²

¶3 The State filed a petition seeking waiver into adult court for both cases and relied upon both delinquency petitions to establish prosecutive merit. The waiver petition stated that it was based on Jace violating the state criminal laws alleged in the delinquency petitions on or after his fifteenth birthday.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Although not an issue on appeal, we note that the delinquency petition in case No. 12JV311 appears to substitute the birth date of the victim’s mother for that of the victim. This birth date is contrary to the evidence of the case.

¶4 At the waiver hearing, the juvenile court relied on both delinquency petitions to establish prosecutive merit. Other evidence received by the court included testimony from seven State's witnesses, a report from a court-appointed psychologist, and letters from Jace's school principal and a family friend. The court found that the alleged crimes showed premeditation, willfulness, manipulateness, and sexual deviancy. The court granted the waiver petition, concluding that retaining jurisdiction would not adequately address the seriousness of the offenses or protect the public and that adult jurisdiction would ensure that Jace receive the services and oversight that he requires.

¶5 Following the waiver hearing, Jace retained new counsel who filed a motion for a new hearing on the ground that Jace received ineffective assistance of trial counsel. Jace argued that his trial counsel was ineffective for not presenting evidence to show that juvenile supervision was adequate, that adult facilities would not meet his needs, or that his risk of reoffending was low. A supplemental motion charged that the waiver order was illegal as it improperly relied on two offenses from No. 12JV311 that were alleged to have occurred before Jace turned fifteen years old. The State conceded mistake in including the delinquency petition from No. 12JV311, but disputed that the error required dismissal of the waiver petition.

¶6 The juvenile court concluded that consideration of the offenses alleged in No. 12JV311 was harmless error as evidence from those offenses would have been admitted at the hearing regardless of the State's mistake. The court also found that Jace did not receive ineffective assistance of counsel. The court

vacated that part of the waiver order pertaining to No. 12JV311, but left the waiver intact for No. 12JV294. Jace appeals.³

DISCUSSION

¶7 WISCONSIN STAT. § 938.18 governs jurisdiction of criminal court proceedings for juveniles who are fourteen years of age or older and the process by which a juvenile may be waived into adult court. The statute establishes two stages for a hearing when a juvenile court is petitioned to waive its jurisdiction over a juvenile. *P.A.K. v. State*, 119 Wis. 2d 871, 875, 350 N.W.2d 677 (1984). First, the juvenile court determines whether “jurisdictional factors” exist that allow it to consider waiver to adult court. *Id.* The “jurisdictional factors” are the age of the juvenile on the date of the alleged offense, as delineated by § 938.18(1), and “whether the [S]tate’s allegation that the juvenile has violated a state criminal law has prosecutive merit” per § 938.18(4). *P.A.K.*, 119 Wis. 2d at 875. The juvenile court then determines whether it will waive jurisdiction by considering the criteria for waiver from § 938.18(5). *P.A.K.*, 119 Wis. 2d at 875.

Juvenile Court Was Not Required to Deny Waiver Petition

¶8 The decision to waive jurisdiction under WIS. STAT. § 938.18 is committed to the sound discretion of the juvenile court. *State v. Tyler T.*, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192. We will reverse the juvenile court’s decision only if the court erroneously exercised its discretion. *Id.* Jace relies on the language of § 938.18 to argue that the juvenile court must deny a petition for

³ This court granted leave to appeal pursuant to *State ex rel. A.E. v. Circuit Court*, 94 Wis. 2d 98, 105d, 292 N.W.2d 114 (1980), and WIS. STAT. RULE 809.50(3).

waiver of its jurisdiction if the petition relies on factors not authorized by statute to support waiver into adult court. Jace's challenge involves a question of statutory interpretation, which we review de novo. See *State v. Kleser*, 2010 WI 88, ¶36, 328 Wis. 2d 42, 786 N.W.2d 144.

¶9 Jace's argument concentrates on WIS. STAT. § 938.18(4)(a), which states that if the juvenile court finds that "the matter" lacks prosecutive merit, then the court "shall deny the petition for waiver." He contrasts the § 938.18(4)(a) requirement that the juvenile court "deny the petition" to WIS. STAT. § 970.03(10), which allows the circuit court to "dismiss[] any count for which it finds there is no probable cause" in a multiple-count complaint. He also argues that as § 938.18(4)(a) requires consideration of "the matter" and not "the offenses," a juvenile court must deny a multiple-count petition that includes offenses that do not form the basis for waiver. We disagree.

¶10 We start by stating the obvious: WIS. STAT. § 938.18(4)(a) pertains to instances where a court concludes that a waiver petition lacks prosecutive merit. The court here did not find that the waiver petition lacked prosecutive merit; the court found that it lacked jurisdiction to consider waiver in No. 12JV311 due to Jace's age at the time of the offenses alleged in that case. This jurisdictional failure prevented the court from reaching the question of whether the petition has prosecutive merit as to No. 12JV311. See *P.A.K.*, 119 Wis. 2d at 875. The court still found prosecutive merit as to No. 12JV294. The court was not required to deny the petition as it relates to No. 12JV294 as, under § 938.18(4)(a), it found "the matter" had prosecutive merit.

¶11 WISCONSIN STAT. § 938.18(1)(c) provides that a petition may be filed in a juvenile court criminal proceeding requesting the court to waive

jurisdiction over a juvenile who “is alleged to have violated *any state criminal law* on or after the juvenile’s 15th birthday.” (Emphasis added.) The court here found that the waiver petition as it pertains to No. 12JV294 was based on allegations that Jace had violated several state criminal laws after his fifteenth birthday and had prosecutive merit. After considering the criteria in § 938.18(5), the court concluded that waiver of jurisdiction over the juvenile was appropriate for that case. The court did not erroneously exercise its discretion in reaching that conclusion.

Jace Was Not Entitled to a New Waiver Hearing Due to the Error

¶12 Jace contends that he is at least entitled to a new hearing due to the court’s mistaken reliance on the facts from No. 12JV311 at the waiver hearing. We review his claim that evidence was erroneously admitted at the waiver hearing for harmless error. *J.A.L. v. State*, 162 Wis. 2d 940, 970-71, 471 N.W.2d 493 (1991). Under this standard, we will uphold a waiver order “if, excluding the erroneous evidence, the waiver decision is sustainable as a proper discretionary act based on the other facts of the record.” *Id.* at 974.

¶13 Jace argues that the court’s reliance on the delinquency petition for No. 12JV311 “tainted” the waiver hearing by permitting the court to consider unsupported allegations without affording Jace an opportunity to challenge them. We disagree. The juvenile court had ample evidence to support its decision based on the facts of the record in No. 12JV294.

¶14 The delinquency petition in No. 12JV294 and testimony at the waiver hearing alleged that Jace had committed seven sex crimes involving a very

young, disabled child victim and broadcast his acts, which were seen around the world over the internet.⁴ In deciding to waive jurisdiction, the juvenile court considered several of the WIS. STAT. § 938.18(5) criteria in favor of keeping Jace in the juvenile court system, but ultimately determined that the § 938.18(5)(b) criteria regarding the seriousness of the offense strongly supported waiving jurisdiction so that Jace could be subject to longer-term supervision. In connection with the (5)(b) criteria, the court found that the allegations against Jace in both cases showed premeditated and willful behavior, manipulateness, and sexual deviancy.

¶15 The facts of the record in No. 12JV294 support the juvenile court’s decision to waive jurisdiction due to the seriousness of the offense and desirability of long-term supervision. A juvenile court does not erroneously exercise its discretion when it waives jurisdiction “after giving heavy weight to the severity of the offense and the short period of time left in the juvenile system.” *G.B.K. v. State*, 126 Wis. 2d 253, 260, 376 N.W.2d 385 (Ct. App. 1985). The weight given to the seriousness of the offense in No. 12JV294 was within the court’s discretion. *See J.A.L.*, 162 Wis. 2d at 960.

Jace Did Not Receive Ineffective Assistance of Counsel

¶16 Lastly, we consider Jace’s argument that his trial counsel was ineffective for not discovering the jurisdictional error in No. 12JV311 and for not presenting evidence regarding Jace’s risk of reoffense, treatment needs, and

⁴ A state official testified at the waiver hearing that an internet video of the assault came to federal attention by way of Danish law enforcement authorities. According to the delinquency petition for No. 12JV294, the video of the assault had been viewed nearly 56,000 times within five weeks of its posting on the internet.

available treatments. To prevail, Jace must show that his trial counsel performed deficiently and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court may dispose of an ineffective assistance of counsel claim solely for lack of prejudice. *State v. Carprue*, 2004 WI 111, ¶49, 274 Wis. 2d 656, 683 N.W.2d 31. We will not disturb the lower court's findings of fact unless they are clearly erroneous, but the ultimate determinations of whether an attorney's performance was deficient and whether the defendant was prejudiced are questions of law that we review independently. *State v. Harbor*, 2011 WI 28, ¶34, 333 Wis. 2d 53, 797 N.W.2d 828.

¶17 As we have already determined that the error in including No. 12JV311 within the waiver petition was harmless, we therefore conclude that Jace was not prejudiced by his trial counsel's failure to discover it.

¶18 We also conclude that Jace was not prejudiced by his trial counsel's failure to present his suggested evidence. At the *Machner*⁵ hearing, Jace presented research and testimony by two experts that he argued could have successfully rebutted the State's evidence as to the treatment and supervision needs and recidivism rates of juvenile sex offenders. Jace's argument suffers from a significant flaw in that the juvenile court actually found in Jace's favor on many of the issues raised by Jace's experts at the *Machner* hearing. None of the evidence from the *Machner* hearing rebutted either the severity of the offense or that adult courts could provide longer-term oversight, which were the main criteria that the juvenile court relied upon to waive jurisdiction.

⁵ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶19 The only way Jace’s suggested evidence could have altered the outcome is if he showed it was of sufficient weight to shift the balance of criteria considered at the waiver hearing. While Jace’s experts testified that he did not need more treatment than was available in the juvenile court system, this testimony did not directly address the court’s concern that the five-year limitation on oversight within the juvenile system might prove to be insufficient to address Jace’s needs or the seriousness of the offense. Additionally, the juvenile court questioned the credibility of his expert’s assessments of his future risk. Credibility determinations and weighing the evidence are within the court’s discretion. *See Johnson v. Miller*, 157 Wis. 2d 482, 487, 459 N.W.2d 886 (Ct. App. 1990). The juvenile court properly found no prejudice from trial counsel’s omission of the evidence presented at the *Machner* hearing as Jace did not demonstrate that “the decision reached would reasonably likely have been different” given the totality of the evidence. *Strickland*, 466 U.S. at 695-96. Jace was not entitled to a new waiver hearing on his ineffective assistance of counsel claim.

By the Court.—Orders affirmed.

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

