

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 2, 2014**

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. 2013AP2769**

Cir. Ct. No. 2013JV374

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE INTEREST OF KADEEM R., A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**KADEEM R.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Racine County:  
FAYE M. FLANCHER, Judge. *Affirmed.*

¶1 BROWN, C.J.<sup>1</sup> This is a review of a juvenile court order waiving Kadeem R. into adult court.<sup>2</sup> Whether to waive jurisdiction, once prosecutive

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12).

merit is found, is within the discretion of the juvenile court. Because the court did not erroneously exercise its discretion, we must affirm.

¶2 Kadeem and another juvenile cased a vacant home and then decided to burglarize it. Due to the alertness of a neighbor, however, the attempt was foiled and Kadeem was caught, as was his accomplice. At the time, Kadeem was sixteen years old. He was alleged to be delinquent based on a charge of attempted burglary, as a party to a crime. The State petitioned to waive him into adult court.

¶3 The juvenile court was made aware of the following: this was Kadeem's first offense; he was only sixteen; although it was attempted burglary, and although the State characterized this as a serious crime, this was a nonviolent, attempted property crime; and services were available in the juvenile system which would help address Kadeem's needs while providing protection to the public.

¶4 At trial, the case manager testified that there was a full range of services available within juvenile court jurisdiction, anywhere from placement in counseling and programming through group homes and residential treatment. The ACE program and Lincoln Hills were all options. Finally, the juvenile court was informed that the assistant district attorney who had previously been assigned to the case had agreed to dismiss the waiver petition on the merits, but because he

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<sup>2</sup> This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

was in another courtroom, the case was handled in court by a different assistant district attorney, who refused to go along with dismissal.<sup>3</sup>

¶5 The juvenile court was not convinced. There was no issue as to prosecutive merit, so the court went right to the question of whether waiver would be contrary to the best interests of the juvenile or the public. The court recognized that Kadeem was sixteen, but noted that he would soon be seventeen. The court further recognized that he has had no prior offenses in juvenile court. But the court considered the charge, a Class F felony, to be “one of the most serious offenses a juvenile can commit.” The court mentioned that there has been “significant testimony on the huge increase in burglaries in this community.” The court recalled that “it is so bad that the Racine Police Department made a presentation to the judges at a judges meeting not long ago emphasizing how dangerous this is for people in this community.” The court thought it significant that the codefendant had a machete and that both “[t]hese kids are using gloves.” Then the court said the following:

It’s clear based on the underlying petition here and based on all of the other petitions that this Court is now seeing repeatedly; because all of these cases seem to be assigned to this Court, that these juveniles are becoming somewhat savvy and using gloves. They are getting these weapons. They are getting these gloves from an adult who is still unidentified.

What aggravates this further is that these juveniles were seen to be casing this house.

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<sup>3</sup> On appeal, Kadeem also emphasizes that it was his accomplice who carried the machete in his backpack, not him, and that there was no evidence he even knew about the machete. Additionally, Kadeem argues that his accomplice, who was fourteen years old at the time and the one who actually had the machete, will remain in the juvenile court.

Based on what the court considered to be the serious nature of the offense and given the proximity to age seventeen, the court found that the State had met its burden and waived Kadeem to adult court.

¶6 The paramount consideration in determining waiver is the best interests of the child or the public. WIS. STAT. § 938.18(6). Whether to waive a juvenile into adult court is a discretionary determination made by the juvenile court. *State v. C.W.*, 142 Wis. 2d 763, 766-67, 419 N.W.2d 327 (Ct. App. 1987).<sup>4</sup> A discretionary determination is not the equivalent of unfettered decision making, but is to be made based upon the facts appearing in the record and in reliance on the appropriate and applicable law. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). It must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. *Milwaukee Women's Med. Serv., Inc. v. Scheidler*, 228 Wis. 2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999).

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<sup>4</sup> However, the legislature seems to have made it a question of fact. WISCONSIN STAT. § 938.18(6) states in pertinent part:

After considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record, and if the court determines on the record that there is clear and convincing evidence that is contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction ....

The legislature is thus speaking of fact-finding with a clear and convincing evidentiary burden. The courts are speaking of the decision as a discretionary one. No case has resolved this anomaly. And since the supreme court has cited both standards, one right after another, without explanation, this court is in no position to tackle the issue. *See, e.g., J.A.L. v. State*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991). Besides, whatever standard we use, it does not affect our result in this case.

¶7 Kadeem's argument is that the State failed to meet its burden of proof of showing clear and convincing evidence that it would be contrary to the best interests of the child or of the public to have this case remain in juvenile court. This is because the only issue the State addressed was the seriousness of the crime to the exclusion of other factors. Correlatively, Kadeem asserts that the juvenile court likewise failed to state what clear and convincing evidence the court relied upon for its decision, focusing only on the type of offense. Kadeem argues that the court did not consider his lack of a juvenile record or prior juvenile contact. He also argues that the court did not consider the absence of prior treatment or his potential to respond to future treatment. In particular, he complains that the court did not consider the availability of the ACE program in the detention center and juvenile corrections. Nor, according to Kadeem, did the court consider the desirability of having both co-actors tried in one court.

¶8 Looking at the transcript, this court must disagree in part. The court did explicitly consider that this was Kadeem's first offense. The court also impliedly considered the adequacy and suitability of services available in the juvenile system by commenting that he was on the cusp of his seventeenth birthday, which suggests to this court that the time remaining as a juvenile would not be adequate in the juvenile court's view.

¶9 But more to the point, case law is clear that the statutes do not require a finding against the juvenile on every criterion before waiver is warranted. *G.B.K. v. State*, 126 Wis. 2d 253, 256, 376 N.W.2d 385 (Ct. App. 1985). The statute does no more than direct that the juvenile court state on the record its findings with respect to the criteria actually considered. *Id.*

¶10 So, the real question is whether the seriousness of the crime merited waiver. Here, the court said that it considered attempted burglary to be a serious crime, one of the most serious a juvenile can commit. A strong argument can be made that when one considers all the Class A, B, C, D, and E crimes, a Class F crime is not quite the same. This is especially so when reading WIS. STAT. § 938.18(5)(b), the criterion which states that one consideration is “[t]he type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.” The crime here was against property and was not violent or aggressive.

¶11 However, what makes this crime serious, and what this court believes the juvenile court was concerned about when it called this a serious crime, is that a rash of burglaries were being committed in Racine with the use of latex gloves; that one of the juveniles here admitted that he had obtained a pair of blue latex gloves from a box that an adult person, last name unknown, had in his house; and that this same adult provided the machete to use. This suggests more than simply two kids coming up with a spur-of-the-moment idea to get into a vacant house and see what they could find. Rather, it suggests that Kadeem is part of a premeditated, willful, and recurring plan to burglarize places with the aid of gloves so as to avoid detection. That is what makes this serious.

¶12 When considering the attempted burglary in this context and coupling that with the fact Kadeem was only two months away from his seventeenth birthday, it is evident that this was clear and convincing evidence which would justify waiving him to adult court in the public interest. As such, the court did not misuse its discretion in waiving Kadeem to adult court.

*By the Court.*—Order affirmed.

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

