

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 1997

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. 97-1309

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF JUSTIN F., A
PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JUSTIN F.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Affirmed.*

NETTESHEIM, J. Justin F. appeals from a trial court order waiving him into adult court. Justin raises three challenges to the trial court's decision, each relating to the manner in which the trial court addressed or failed to address certain statutory waiver criteria. Because we conclude that the trial court

properly exercised its discretion in reaching its decision to waive Justin into adult court, we affirm the order.

FACTS

Justin was born on August 28, 1980. On December 10, 1996, the State filed a delinquency petition alleging that Justin possessed marijuana within 1000 feet of a school contrary to §§ 961.41(3g)(e) and 961.495, STATS. The State filed a petition for waiver of juvenile court jurisdiction. At that time, Justin was nine months away from turning seventeen. The waiver petition alleged that Justin would “reach his seventeenth birthday on August 28, 1997, leaving insufficient time for disposition of the charges and adequate treatment within the juvenile justice system.” Subsequently, the State filed a further delinquency petition charging Justin with battery contrary to § 940.19, STATS. In conjunction with this petition, the State again filed a further petition for waiver of juvenile court jurisdiction.

The juvenile court conducted hearings on the waiver petitions on March 20 and April 11, 1997. At the close of testimony and arguments, the court concluded that “the waiver petition should be granted because it is not in the best interest of [Justin] and the public for the circuit court with juvenile jurisdiction to hear the matter.” Justin appeals, challenging the court’s decision based on its consideration of the waiver criteria.

DISCUSSION

A juvenile court may waive its jurisdiction if the court is satisfied that the State has proved, by clear and convincing evidence, that it is contrary to the best interests of both the minor and the public for it to retain jurisdiction. The decision to waive juvenile jurisdiction under § 938.18, STATS., after consideration

of the factors therein, is within the sound discretion of the juvenile court.¹ *See J.A.L. v. State*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The juvenile court has discretion as to the weight it affords each of the criteria in deciding

¹ Section 938.18, STATS., provides in relevant part:

(5) If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria:

(a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, the juvenile's physical and mental maturity, the juvenile's pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.

(b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or wilful manner, and its prosecutive merit.

(c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system 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.

(d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in circuit court.

(6) 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 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 waiving jurisdiction and referring the matter to the district attorney for appropriate proceedings in the court of criminal jurisdiction, and the court of criminal jurisdiction thereafter has exclusive jurisdiction.

whether to waive jurisdiction. *See id.* In exercising its discretion, the court is not required to make specific findings with respect to each factor. *See B.B. v. State*, 166 Wis.2d 202, 209-10, 479 N.W.2d 205, 207-08 (Ct. App. 1991). This court will uphold the trial court's decision to waive jurisdiction if the record indicates that discretion was in fact exercised and there is a reasonable basis for the decision. *See id.* at 207, 479 N.W.2d at 207.

Justin raises three challenges to the trial court's decision: (1) the trial court failed to address each criteria and set forth specific findings with respect to the criteria set forth, (2) the trial court misused its discretion by disregarding testimony favorable to a nonwaiver decision, and (3) the trial court erroneously exercised its discretion when it failed to consider evidence that Justin was diagnosed with dyslexia. Each of these arguments is generally aimed at the manner in which the trial court addressed the criteria under § 938.18, STATS.

In support of his first argument that the trial court failed to set forth specific findings as to each criteria, Justin cites to the following language from *State v. C.W.*, 142 Wis.2d 763, 768, 419 N.W.2d 327, 329 (Ct. App. 1987): "The statute, however, mandates that *all* the other criteria listed in [§ 938.18, STATS.,] must be considered by the juvenile court, and findings as to these criteria must be set forth in the record." Based on our review of the trial court's decision, we conclude that the trial court addressed each and every criteria under § 918.18, STATS., and made a finding as to each criteria based on the evidence presented at the waiver hearings.

First, the trial court addressed each of the criteria under § 938.18(5)(a), STATS. The trial court discussed Justin's prior offenses and personality noting that he is not mentally ill and does not have a developmental

disability with the exception of dyslexia. The court stated that Justin has previously been found delinquent but that his behavior did not result in great bodily injury. The court cited the motive for Justin's previous delinquency offense as wanting his mother's car. The court then discussed Justin's attitude, particularly with respect to his family, and his "defiant" responses to them. As to Justin's mental maturity, the court found it "average" and "age appropriate."

However, the juvenile court noted disagreement among the parties regarding Justin's response to previous treatment finding that "I think it is clear that you have been offered adequate treatment, and you have had a series of opportunities to respond, and you've done very poorly with that." The court discussed Justin's present treatment and continuing drug abuse. The court acknowledged Justin's recent willingness to participate in treatment stating that "for two years you have been offered some kind of treatment ... [and] haven't found it important enough or you haven't responded properly to treatment, and it would be naive of us to not be suspicious about your new found willingness to turn your life around."

The juvenile court then addressed the seriousness and types of offenses under § 938.18(5)(b), STATS., finding that the battery charge involved "violent and aggressive" behavior and both charges were "willful and premeditated." Turning to § 938.18(5)(c), the court considered the adequacy and suitability of services and facilities in the juvenile system and found that they could not provide adequate treatment for Justin. Finally, the court concluded that the waiver petitions should be granted because it was not in Justin's or the public's best interest for the matter to remain under juvenile jurisdiction. *See id.* at subsec. (6).

Based on the above summary of the trial court's decision at the waiver hearing, we conclude that the trial court considered each criteria, addressed the facts underlying its reasoning and made a finding as to each criteria. Although Justin argues broadly that the trial court did not make a specific finding as to each criteria, he does not point us to those criteria and those places in the record where the trial court's attention is lacking. In any event, we have reviewed the record and are unpersuaded.

Justin raises a specific challenge to the trial court's findings regarding the availability and suitability of treatment. Justin contends that the trial court erroneously disregarded testimony that Justin had been accepted into a residential treatment center and that Justin was amenable to treatment at a residential center. The record is to the contrary. The trial court addressed potential treatment for Justin. While acknowledging Justin's willingness to participate in treatment, the court stated its belief that Justin's "willingness to go into treatment at this time has to be viewed with some suspicion because of timing.... It is difficult to know whether, in fact, you are going to respond to future treatment. You have done a poor job responding to prior treatment." This statement is supported by testimony from the social worker who prepared Justin's waiver report. She testified as to the programs Justin had been offered in the past, his failure to respond to them, and his continuous abuse of marijuana. We conclude that the trial court appropriately addressed the treatment criteria under § 938.18, STATS.

Justin additionally argues that the trial court erroneously exercised its discretion by "ignoring one of the statutory criteria for waiver, in that the court stated that the diagnosis of learning disabled and dyslexia was not relevant because the superintendent of schools in Kenosha also suffered from dyslexia." In

addressing the criteria under § 938.18(5)(a), STATS., the court must consider whether the juvenile is mentally ill or developmentally disabled. Here, the court stated, “You are not developmentally disabled; although, you do have some dyslexia. Apparently, so does your superintendent of schools, and that apparently isn’t something that is long-term that ought to keep you back.” The trial court did not find Justin’s learning disability to be irrelevant. The trial court acknowledged evidence of Justin’s dyslexia and simply noted that dyslexia can be overcome. At best, the trial court did not weigh this factor as heavily in support of nonwaiver as Justin would have liked. However, the juvenile court has discretion as to the weight it affords each of the criteria in deciding whether to waive jurisdiction. *See J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. The trial court’s statement regarding Justin’s dyslexia does not constitute an erroneous exercise of discretion.

Justin’s final two arguments essentially point to evidence which would support a nonwaiver decision. However, it is not this court’s role on appeal to weigh the evidence presented at the waiver hearing. Instead, this court will uphold the trial court’s decision to waive jurisdiction if the record indicates that discretion was in fact exercised and there is a reasonable basis for the decision. *See B.B.*, 166 Wis.2d at 207, 479 N.W.2d at 207. We conclude that the trial court’s decision reflects an appropriate exercise of discretion. Accordingly, we affirm the order.

By the Court.—Order affirmed.

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

