COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1998

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. 97-2523

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

IN THE INTEREST OF LARRY T.E.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LARRY T.E.,

RESPONDENT-APPELLANT.

APPEAL from a non-final order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

CURLEY, J. Larry T.E. appeals from the trial court's order waiving jurisdiction and referring his case to the adult criminal circuit court. Larry claims that the trial court erroneously exercised its discretion when it waived jurisdiction by placing undue emphasis on the "protection of the public." Larry also claims that the trial court's decision was erroneous because there was no

evidence introduced at the waiver hearing to establish the nature or seriousness of the offense. This court concludes that the trial court properly exercised its discretion when it decided to waive jurisdiction. This court also concludes that Larry has waived his right to argue that the State failed to present evidence of the nature or seriousness of the offense. Therefore, the order is affirmed.

I. BACKGROUND.

This case arises from a drive-by gang shooting which took place on August 6, 1995, on the south side of the City of Milwaukee. On that date, a group of young people were sitting on the porch of a home located at 2357 South 16th Street. Larry was a passenger, along with other juveniles, in a car driven by another juvenile that passed by the home. As the car passed the home, the people in the car and the people on the porch flashed gang signs at each other, and one of the people on the porch shouted, "Fuck you whore ass niggers." The driver turned the car around and drove back towards the house. As the car passed the house, Larry pointed a gun out of the window and fired about five to six shots in the direction of the people on the porch. Larry later told the police that he accidentally fired the gun while he was "working it." One of the people on the porch, Larry Burnette, was killed after being hit by one of the gunshots.

On May 16, 1997, the State filed a petition alleging that Larry was delinquent for committing first degree reckless homicide while armed, party to a crime, contrary to §§ 939.05, 939.63, and 940.02(1), STATS. On May 21, 1997, the State filed a petition requesting waiver of Larry into adult court. At the hearing on the waiver petition, Larry presented evidence that he is a schizophrenic, that his I.Q. is 52, that he has a stuttering problem, that he is of relatively short stature, and that he is generally immature. Larry argued that because of these facts

it is in his best interests for the juvenile court to retain jurisdiction. The State contested some of Larry's claims,[1] and argued that in order to protect the public, Larry should be waived into adult court. Although the trial court concluded that nearly all of the factors favored retaining jurisdiction, the trial court concluded that the seriousness of the offense required waiver in order to protect the public. Thus, the court waived jurisdiction. Larry now appeals.

II. ANALYSIS.

Waiver of jurisdiction under § 48.18, STATS., 1993-94, is within the sound discretion of the juvenile court. *See* ***J.A.L. v. State***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). 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. ***C.W. v. State***, 142 Wis.2d 763, 766, 419 N.W.2d 327, 328 (Ct. App. 1987). Larry claims that the trial court erroneously exercised its discretion by unreasonably placing undue emphasis upon the "protection of the public," and by failing to give paramount consideration to the remaining statutory factors related to Larry's best interests.

Any juvenile waiver decision under Chapter 48, STATS., 1993-94, must be based on the criteria listed in § 48.18(5), STATS., 1993-94, which reads:

> If prosecutive merit is found, the judge, after taking relevant testimony which the district attorney shall present and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the following criteria:
>
> (a) The personality and prior record of the child, including whether the child is mentally ill or

[1] For example, the State presented evidence that Larry's I.Q. is 73 and that drugs and alcohol may have contributed to his schizophrenic symptoms.

> developmentally disabled, whether the court has previously waived its jurisdiction over the child, whether the child 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 child's motives and attitudes, the child's physical and mental maturity, the child'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 willful manner, and its prosecutive merit.
>
> (c) The adequacy and suitability of facilities, services and procedures available for treatment of the child and protection of the public within the juvenile justice system, and, where applicable, the mental health system.
>
> (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.

Section 48.01(2), STATS., 1993-94, states that, with respect to any procedure under Chapter 48, STATS., 1993-94, including a decision to waive juvenile court jurisdiction, "[t]he best interests of the child shall always be of paramount consideration, but the court shall also consider … the interests of the public." "'Paramount consideration' does not, however, mandate the juvenile court to conclude as a matter of law, that the best interests of the child will always outweigh the public's interests." ***B.B. v. State***, 166 Wis.2d 202, 208-09, 479 N.W.2d 205, 207 (Ct. App. 1991). In fact, a juvenile court may properly exercise its discretion to conclude that, based on the seriousness of the offense, the protection of the public requires waiver, even though it finds that all of the other factors favor retaining jurisdiction. *See* ***id.*** at 209-10, 479 N.W.2d at 207-08.

Larry acknowledges the ruling in ***B.B.***, but attempts to distinguish that case from his own. Larry argues that the juvenile in ***B.B.*** was "manifestly

evil," and committed such heinous acts that "there is no conceivable factor which could outweigh the need to protect the public from such monstrous behavior." Larry characterizes the juvenile's crime in ***B.B.*** as the "premeditated, execution-style murder of five family members by a good student who then burned the bodies and later put the charred bones into a duffel bag and buried them." In contrast, Larry basically argues that his crime was much less serious. For example, he characterizes the shooting in the instant case as a "childish incident," involving the "spur-of-the-moment act of a 16 year old schizophrenic with an IQ of 52 who accidentally fired a pistol when waving it at a group of gang members who had just called him a 'whore-ass nigger.'" Larry argues that his crime, given these facts, was not serious enough to warrant waiver.

The trial court, however, disagreed. Pursuant to its oral ruling at the waiver hearing, the trial court stated:

> We then get to the type and seriousness of the offense. And here I don't have any problem with a finding that this factor weighs in favor of waiving him into the adult system. This is a crime which this community and communities around this country have become all too familiar with. One that undermines the very fabric of our society, where it's no longer safe for people to sit on their steps, to be out in their neighborhoods, and it's clearly about as serious as an offense as this Court can contemplate, recognizing that it's not intentional, not – not charged as intentional, and not intentional, that makes it worst [sic]. But this is about as bad as it gets. It clearly was committed in a violent manner. It clearly was committed in an aggressive manner … And I think that there is ample basis upon which to find that, although disputed, this was premeditated and willful, recognizing that we're not adjudicating the case here today.

This court agrees with the trial court, and concludes that the differences between Larry's case and ***B.B.*** do not bar the application of ***B.B.***'s rationale to Larry's facts. Although ***B.B.*** involved admittedly horrible actions by a juvenile, Larry's

actions were obviously also extremely serious and posed an enormous risk to the public. In fact, it is difficult to imagine a crime which threatens the public's safety more than a drive-by gang shooting. Thus, although this court agrees that Larry's best interests would likely be served by his remaining within the juvenile system, the trial court's conclusion that the public's protection required waiver was not erroneous.

Larry also argues that the trial court's decision was erroneous because the State failed to introduce evidence of the seriousness of the offense. In fact, during the waiver hearing, the State moved the court to take judicial notice of the waiver petition as proof of the seriousness of the offense. Larry failed to object, and the Court took judicial notice of the file. Similarly, during the argument portion of the hearing, Larry failed to argue that the State had not introduced any evidence of the seriousness of the offense. Therefore, this court concludes that Larry has waived his right to argue on appeal that the petition was not evidence, or that the State failed to present any evidence of the seriousness of the offense. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for first time on appeal).[2]

[2] Larry also raises two additional arguments. First, Larry argues that the trial court's conclusion that the public would be better protected by waiving him into adult court is erroneous. Larry essentially argues that if he is convicted in adult court and sentenced, he will be more dangerous to the public upon his eventual release than if he would be upon a sooner release from the juvenile system. This claim is entirely speculative and fails to show an erroneous exercise of discretion by the trial court. Larry also claims, in his reply brief, that the trial court's finding that his mental condition could not be adequately treated in the juvenile system is clearly erroneous. This alleged trial court error was not discussed in Larry's main brief, therefore, this court will not consider it. *See* ***Swartwout v. Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981) (appellate court will generally not consider issues raised for the first time in reply brief).

In conclusion, the trial court properly exercised its discretion in deciding to waive Larry into adult court. Therefore, this court affirms the trial court's order.

By the Court.—Order affirmed.

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