COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3098

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

IN THE INTEREST OF EUGENE E.,

A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EUGENE E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

EICH, C.J.[1] Eugene E., a minor, appeals from an order waiving him into adult criminal court to face charges of carrying a concealed weapon,

[1] This appeal is decided by a single judge pursuant to § 752.13(2)(e), STATS.

obstructing an officer, pointing a firearm at another person, possession of a dangerous weapon, and conspiring to permit a person sentenced for a crime to escape from custody.[2] The last three charges were subject to penalty enhancers for concealing identity and criminal gang association. Eugene E. argues that the circuit court erroneously exercised its discretion in ordering waiver when it failed to make specific findings on each and every statutory criterion listed in § 938.18(5), STATS. He also argues that he was denied effective assistance of counsel at the waiver hearing because his attorney failed to request a psychological examination.

Waiver of juvenile court jurisdiction is committed to the sound discretion of the trial court. ***J.A.L. v. State***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). We will reverse only if the record does not reflect a reasonable basis for the court's determination. ***Id***. at 961, 471 N.W.2d at 501. In deciding whether to waive jurisdiction, the court must first look to see whether the case has prosecutive merit. If it does—and Eugene E. does not contest such a finding—§ 938.18(5), STATS., states that 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

[2] By order dated October 20, 1997, we granted leave to appeal the circuit court's nonfinal order waiving Eugene E. into adult court.

> 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 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 … or the adult intensive sanctions program ….
>
> (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.

Eugene E. concedes that the circuit court discussed the first two criteria at some length. He states only that the court made no finding at all with respect to § 938.18(5)(d), STATS., and that, while it did discuss matters relevant to § 938.18(5)(c), it failed to make a "specific finding as to the suitability of Eugene E. for placement in the Serious Juvenile Offender program or the Adult Intensive Sanctions program." He grounds his argument on a statement in ***State v. C.W.***, 142 Wis.2d 763, 768, 419 N.W.2d 327, 329 (Ct. App. 1987), that § 938.18(5) "mandates that *all* the … criteria listed … must be considered by the juvenile court, and findings as to those criteria must be set forth in the record." (Emphasis in original.)

Pointing to additional language in ***C.W.*** that "*where evidence is properly before the ... court with respect to each of the [statutory] criteria …* the court is required … to consider each of these criteria," ***id***. at 769, 419 N.W.2d at 330 (emphasis added), the State maintains that, under ***C.W.***, the juvenile court

need consider only those criteria upon which the parties presented evidence. We think the State's interpretation of ***C.W.*** is proper.

In an earlier case, ***G.B.K. v. State***, 126 Wis.2d 253, 256, 376 N.W.2d 385, 388 (Ct. App. 1985), we held that the burden of proving no adequate alternatives to waiver in the juvenile system does not fall on the State and the court need not "resolve every statutory waiver criterion against the child" before jurisdiction may be waived. In so holding, we referred to the supreme court's decision in ***P.A.K. v. State,*** 119 Wis.2d 871, 350 N.W.2d 677 (1984), and said:

> [In ***P.A.K.***], the court held that sec. 48.18 [now 938.18], Stats., does not require the [S]tate to present evidence on all the listed waiver criteria, noting that if the legislature had so intended, it could easily have so stated. The statute does no more than direct the juvenile court to state on the record its findings with respect to the criteria actually considered.

G.B.K., 126 Wis.2d at 256, 376 N.W.2d at 388.

We briefly mentioned ***G.B.K.*** in ***C.W.*** and distinguished it as being limited to "the issue of whether the [S]tate must provide evidence, as part of its case, that no alternative to waiver exists." ***C.W.***, 142 Wis.2d at 769, 419 N.W.2d at 330. We then said:

> The issue presently before us, however, is whether the juvenile court must consider each of the statutory criteria and make specific findings concerning then when evidence is present in the record as to each of the criteria. We now hold that where evidence is properly before the juvenile court with respect to each of the criteria set forth in sec. 48.18(5), Stats., the court is required … to consider each of these criteria and set forth in the record specific findings with respect to the criteria.

Id. We concluded that our holding in ***C.W.*** "in no way affects our previous holding in ***G.B.K.***" ***Id***. at 769, 419 N.W.2d at 329.

We think these cases suggest that, while a circuit court should consider the § 938.15(5), STATS., criteria in deciding whether to waive juvenile court jurisdiction, when no evidence is before the court on a particular criterion—especially one that is not central to the case or the juvenile's situation—the waiver proceeding is not flawed if the court's exercise of discretion is otherwise legally sound.[3]

In this case, for example, the circuit court engaged in extensive discussion, and made appropriate findings, on every aspect of § 938.18(5)(c), STATS., except the "suitability of the juvenile for placement in the serious juvenile offender program … or the adult intensive sanctions program."[4] And the State points out that the offenses Eugene E. faces do not make him eligible for either program. Reversing the circuit court's ruling on that basis would make no sense.

As for the absence of any discussion of § 938.18(5)(d), STATS., which relates to the "desirability" of disposing of the entire offense in one court if the juvenile is charged along with persons who will be tried in adult court, it is true, as Eugene E. points out, that while the offenses with which he is charged

[3] In short, ***C.W.*** does not overrule ***G.B.K***. Indeed, the supreme court held in ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997), that the court of appeals cannot overrule a prior published decision.

[4] As indicated above, § 938.18(5)(c), STATS., generally requires consideration of the adequacy and suitability of juvenile-court services and facilities. The circuit court discussed the adequacies and inadequacies of both the juvenile justice system and the "adult" system at some length and concluded that, while the juvenile system does have programs Eugene E. could find advantageous, placement in the adult system would best serve his needs and the needs of the public.

involve a conspiracy to aid in the escape of a prisoner serving a sentence for a crime, the circuit court did not make a specific finding with respect to the ages of his co-conspirators or where they will be tried.

The record in this case indicates that the conspiracy, which involved as many as six people—only two of whom were thought to be juveniles—was, according to one of the investigating detectives, "extremely sophisticated," involving a high level of planning and sophisticated equipment, such as bullet-proof vests, electronic pagers, a code system, and automatic weapons. The evidence leads us safely to conclude that at least half, and probably most, of the people involved in the crime were adults who would be tried in adult criminal court. It thus appears that, on the record, any consideration of § 938.18(5)(d), STATS., could lead to a single reasonable conclusion: trying Eugene E. in adult court serves the interest of judicial economy.

Thus, the criterion in § 938.18(5)(d), STATS., unlike the others, has little if any bearing on the "merits" of retaining or waiving juvenile court jurisdiction. It speaks to the desirable economies in trying a juvenile in adult court with the adults involved in the same activity. We conclude that the circuit court did not commit reversible error by failing to mention the place of trial of the adults (and the other juvenile) involved in these offenses.

Finally, Eugene E. argues that the decision to waive juvenile court jurisdiction should be reversed because his counsel was ineffective in representing him. It has long been the rule that a defendant waives a claim of ineffective assistance of counsel when he or she fails to raise it in the trial court. ***State v. Waites***, 158 Wis.2d 376, 392-93, 462 N.W.2d 206, 212 (1990). In ***State v. Mosley***, 201 Wis.2d 36, 50, 547 N.W.2d 806, 812 (Ct. App. 1996), we stated:

> "[W]here a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged." It is a prerequisite to a claim of ineffective assistance of counsel that the testimony of the trial counsel be preserved so that the appeals court can review the reasoning behind the attorney's decisions."

(Quoted source omitted.)

Because nothing in this record indicates that Eugene E. raised the issue in the circuit court and had a hearing on his ineffective-assistance claim, the issue is not before us.

By the Court.–Order affirmed.

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