

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 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. 97-3285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LOUIS R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS P. DONEGAN, Judge. *Affirmed.*

FINE, J. This is an appeal from the trial court's order waiving the jurisdiction of the Children's Court over Louis R. See § 938.18, STATS. He argues that the trial court erroneously exercised its discretion. We affirm.

The petition for waiver was filed one month before Louis R. would have turned sixteen. It alleged that he committed the crimes of first-degree recklessly endangering safety, *see* § 941.30(1), STATS., and possession of a dangerous weapon by a child, *see* § 948.60(2), STATS. It also alleged that he had previously been adjudicated delinquent for the crimes of second-degree recklessly endangering safety, *see* § 941.30(2), STATS. (reduced from an original charge of first-degree recklessly endangering safety), and possession of cocaine with intent to deliver, *see* §§ 961.16(2)(b)1 & 961.41(1m)(cm), STATS. (a marijuana charge was dismissed). The petition also noted that Louis R. had previously spent time in one of Wisconsin's secure juvenile detention facilities, the Ethan Allen School in Wales, Wisconsin. None of these facts is disputed. It is also not disputed that in connection with the incidents underlying the waiver petition, Louis R. is alleged to have chased and shot a 9-millimeter handgun at another person; he admitted firing one round.

Only two persons testified at the waiver hearing: a social worker employed by the Department of Health and Social Services, and a psychologist. The psychologist testified that Louis R. did not have “an adult male role model” while growing up, came from a “dysfunctional family,” and was fourteen when his mother was incarcerated for the sale of drugs. He told the trial court that Louis R. behaved well in structured environments, but that “without the support and structure provided by the treatment programs [in which Louis R. participated after his first juvenile adjudication], the probability is that he would regress back to negative attitudes and behaviors.” The psychologist also told the trial court that if given a chance, Louis R. would “respond positively” in a program that gave him “positive support, positive environment, positive role models and support figures,” and that a two-year period under what Louis R.'s lawyer characterized as “strict

supervision” in the juvenile justice system “would be sufficient time to effect the kind of change that he would need to have to--to function in a positive manner.” He further opined that Louis R.'s transfer to the adult criminal justice system was not needed to protect society. The social worker also told the trial court that Louis R. responded well in structured environments, and that he did not believe that Louis R. should be waived into adult court.

The trial court found that the State had established by clear and convincing evidence that waiver was appropriate. It noted that this was the second time that Louis R. had shot at another person, and that he had a history of drug-related crimes. The trial court recognized that Louis R. had responded temporarily to treatment within the juvenile justice system, but noted that “once you're out, you're still carrying a gun and shooting it.” Summarizing Louis R.'s young life so far, the trial court concluded that he was pursuing “a gangster lifestyle”: “Living on dope, dealing dope and shooting people.” In light of Louis R.'s relapses, the trial court concluded that the two years of possible treatment within the juvenile justice system was not “enough,” and that the public did not deserve “any less than whatever the full time found appropriate in the adult system will provide” for Louis R. It also found that the case had “fairly strong” prosecutive merit.

A determination of whether to waive Children's Court jurisdiction is within the trial court's discretion, and will not be overturned on appeal if that decision has a “reasonable basis.” *State v. C.W.*, 142 Wis.2d 763, 766–767, 419 N.W.2d 327, 328–329 (Ct. App. 1987). Under § 938.18(5), STATS., the trial court must consider, as relevant here, the following factors: the “personality and prior record of the juvenile”; the “type and seriousness of the offense” and its “prosecutive merit”; the “adequacy and suitability” of juvenile facilities and

services “for treatment of the juvenile and protection of the public.”¹ A trial court may waive jurisdiction of the Children's Court over a juvenile if it determines that the seriousness-of-the-offense criterion requires waiver even though waiver would not be in the best interests of the juvenile. *B.B. v. State*, 166 Wis.2d 202, 210, 479 N.W.2d 205, 208 (Ct. App. 1991). Here, however, the trial court did not go that far; it looked at both the need to protect the community and Louis R.'s need for lengthy, supervised structure. Although Louis R. complains that the trial court ignored his good traits, his amenability to treatment in structured environments,

¹ Section 938.18(5), STATS., reads in full:

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.

and the unanimous testimony of both the psychologist and the social worker that he should not be waived, the ultimate decision on how to balance the various criteria is the trial court's—not any witness's, irrespective of that witness's degree of expertise. *See* § 938.18(5) & (6), STATS. (trial court makes waiver decision based on statutory criteria); ***G.B.K. v. State***, 126 Wis.2d 253, 259, 376 N.W.2d 385, 389 (Ct. App. 1985) (weight given each criterion is within trial court's discretion); ***First Nat'l Bank v. Wernhart***, 204 Wis.2d 361, 369, 555 N.W.2d 819, 822 (Ct. App. 1996) (fact-finder not bound by the opinions of any expert witness, even though those opinions are not contradicted). The trial court's decision to waive jurisdiction over Louis R. has a “reasonable basis” founded in the record; Louis R. has not demonstrated that the trial court erroneously exercised its discretion.

By the Court.—Order affirmed.

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

