

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 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. 97-3363
97-3477

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE INTEREST OF DEREK E.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

DEREK E.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

DEININGER, J.¹ Derek E. appeals two juvenile court orders waiving the juvenile court's jurisdiction over him. Derek claims the court erred in

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

finding that it would be in the best interest of both the public and Derek to waive juvenile court jurisdiction. He argues that waiver was inappropriate and a misuse of the court's discretion because the court failed to give proper weight to potentially effective dispositional alternatives available within the juvenile justice system. We conclude that the juvenile court did not erroneously exercise its discretion, and we therefore affirm the waiver orders.

BACKGROUND

Derek was born on January 17, 1981, and thus, at the time of the waiver hearings, he was within four months of his seventeenth birthday. On August 22, 1997, the State filed a delinquency petition alleging that Derek had committed four counts of misdemeanor theft. A petition for waiver of juvenile court jurisdiction under § 938.18, STATS., accompanied the delinquency petition. After conducting a hearing on the waiver petition, the juvenile court concluded that it would be in the best interest of both the public and Derek for him to be waived into adult court, and it entered an order waiving juvenile court jurisdiction on October 2, 1997.

Subsequently, the State filed a second delinquency petition, alleging that Derek had committed the following seven offenses, all of which occurred prior to the acts for which he had been waived on October 2, 1997: three counts of burglary as a party to the crime; three counts of misdemeanor theft as a party to the crime; and one count of felony theft as a party to the crime. A petition for waiver of juvenile jurisdiction also accompanied this delinquency petition. At the conclusion of the second waiver hearing, the court entered an order on October 28, 1997, waiving juvenile court jurisdiction on these offenses. Derek challenges both waiver orders in this consolidated appeal.

ANALYSIS

A juvenile court may waive its jurisdiction if it is satisfied that the State has proved, by clear and convincing evidence, “that it would be contrary to the best interests of the juvenile or of the public” for the juvenile court to retain jurisdiction. Section 938.18(6), STATS. The decision to waive juvenile jurisdiction under § 938.18, lies within the sound discretion of the juvenile court. *J.A.L. v. State*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The following are the statutory criteria on which the juvenile court must base its waiver decision:

(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 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 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.

Section 938.18(5).

In exercising its discretion to order a waiver of jurisdiction, the juvenile court is not required to find that every factor weighs in favor of waiving

jurisdiction. See *B.B. v. State*, 166 Wis.2d 202, 209-10, 479 N.W.2d 205, 207-08 (Ct. App. 1991). The juvenile court has discretion as to the weight it affords each of the criteria in deciding whether to waive jurisdiction. *J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. We will sustain the juvenile 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.

Before waiving juvenile court jurisdiction in both matters, the court considered all of the following: Derek's mental ability and grades in school; the fact that Derek had been referred to juvenile authorities twenty-one times and had been adjudicated delinquent several times; that Derek had been placed with his mother, aunt and uncle, and father over the past several years with little success in any of those environments; that the court had previously imposed sanctions of secure custody and home detention on Derek which produced little or no change in his behavior; and the seriousness of the offenses, which showed an escalating pattern of dangerousness and criminal activity. After weighing these facts, the court explained at both waiver hearings its rationale in granting the waiver requests. The following statements are representative of the court's comments at both hearings:

There have been 21 referrals and several findings of delinquency. The problem with [Derek] is that his conduct has spread across several counties ... and it hasn't seemed to matter where he's been placed ... [h]e still continues with the same problems.

....

...I think what is glaring here is the fact that nothing that we have tried to do has had much affect [sic] on his behavior. 21 referrals, the fact that he has had sanctions, and he's been on supervision doesn't appear to have curved [sic] or modified his behavior.

....

So first we have disorderly conduct charges, then we have cruelty to animal charges. Now we have property crime charges, and we have multiple charges on each of these. Plus we have alcohol and drug problems manifesting themselves in positive THC reactions....

....

And so the Court believes that it's necessary to protect the public, and in [Derek's] best interest to waive juvenile court jurisdiction because I don't see where a foster home treatment or a juvenile jail, since we've already tried juvenile jail through sanctions, I don't see where Lincoln Hills or Wales would add much benefit as opposed to the adult court system.

....

But with the number of multiple incidents here in this case plus the other one that he's involved in where he's already been waived, plus the fact that he's had two prior adjudications of delinquency and poor results on supervision, it seems to me that the better approach would be to try something in the adult court system rather than spin our wheels in the juvenile court system.

Derek does not challenge the juvenile court's factual findings. Rather, his sole contention is that the court failed to properly weigh one of the factors under § 938.18(5)(c), STATS.: "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." See *State v. C.W.*, 142 Wis.2d 763, 769, 419 N.W.2d 327, 329-30 (Ct. App. 1987) (juvenile court is to consider each of the waiver criteria for which there is evidence present in the record). As the foregoing excerpts from the court's remarks indicate, the circuit court clearly considered the suitability of the juvenile justice system's resources to meet Derek's current needs, and Derek does not claim otherwise. He argues, however, that the court came to a wrong conclusion because, under § 938.355(6d), STATS., it is now easier to quickly impose punitive sanctions on juveniles who violate dispositional orders. We disagree.

At both waiver hearings, the juvenile court expressed concern that there were not “any immediate consequences to [Derek’s] actions” in the juvenile system because “[i]t takes literally months to get into court on ... a sanction violation, it takes at least two months usually between the time of the incident and the time the sanction is imposed.” Derek contends that such statements are illogical in light of § 938.355(6d), STATS., which provides, in part, that:

[I]f a juvenile who has been adjudged delinquent violates a condition specified in sub. (2) (b) 7., the juvenile's caseworker may, without a hearing, take the juvenile into custody and place the juvenile in a secure detention facility or juvenile portion of a county jail that meets the standards promulgated by the department of corrections by rule or in a place of nonsecure custody designated by the caseworker for not more than 72 hours while the alleged violation is being investigated, if at the dispositional hearing the court explained those conditions to the juvenile and informed the juvenile of the possibility of that placement If a juvenile is held in a secure detention facility, juvenile portion of a county jail or place of nonsecure custody for longer than 72 hours, the juvenile is entitled to a hearing The hearing shall be conducted ... within 72 hours ... after the time that the decision to hold the juvenile was made

Although Derek could be placed into custody immediately under § 938.355(6d), STATS., his detention could last only for the duration of the caseworker’s investigation, and no longer than seventy-two hours before a court hearing must be held to determine whether a condition of the dispositional order has been violated, and if so, the ramifications of that violation. In contrast, an adult probationer who violates his or her probation can be taken into custody immediately by a probation officer, who can then impose significant sanctions for the violation as an alternative to revocation, seek modifications to the conditions of probation, or commence revocation proceedings. *See* § 973.10, STATS. The juvenile court’s decision reflects contemplation over this difference between the two systems:

[In] adult court ... probation officers can supervise [Derek] a lot more closely and provide immediate consequences for his actions. They don't need to get the Court's permission in detaining or to hold him or revoke his probation. They don't have to come back to the court every single time something happens. They can immediately take actions if there is a violation.

Derek also argues that despite this difference, the juvenile court improperly waived him into adult court because it focused on the greater “efficiency” of the adult criminal justice system instead of addressing the fact that various juvenile system placements and resources had not yet been fully utilized. Juvenile courts, however, are not required to exhaust every potential disposition in the juvenile justice system prior to waiving a juvenile into adult court. *See G.B.K. v. State*, 126 Wis.2d 253, 256, 376 N.W.2d 385, 388 (Ct. App. 1985). The juvenile court here acknowledged that there were untapped juvenile alternatives but determined that “all we would be doing in my opinion is trying more alternatives [that] would not be anymore successful ... than what we've already tried.”

It seems clear that the court viewed an adult criminal disposition involving probation as being in both Derek's and the public's interest, in that it would give Derek a better opportunity to succeed in the community as a law-abiding citizen than would a secure custodial placement in the juvenile system. Given Derek's proximity to adulthood, and his unsuccessful response to numerous juvenile dispositions and sanctions, we cannot conclude that the court's determination regarding the relative abilities of the juvenile and criminal justice systems to meet Derek's rehabilitative needs was erroneous. Accordingly, we will not disturb the court's waiver orders.

By the Court.—Orders affirmed.

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

