

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 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. 97-3522

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF ANDRE D.W.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANDRE D.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

BROWN, J. Andre D.W. appeals a court order waiving juvenile jurisdiction. He contends that the court erroneously exercised its discretion because the petition for waiver did not have prosecutive merit, because the juvenile court made erroneous findings of fact not supported by the record, and because the juvenile court did not give sufficient consideration to the factors

favoring the retention of juvenile jurisdiction. Based on our review of the record, we conclude that the juvenile court did not erroneously exercise its discretion. We affirm.

Andre was placed in the Ethan Allen School for Boys following his 1997 conviction for second-degree sexual assault of a child. Approximately one month after his arrival at Ethan Allen, an incident allegedly occurred there which resulted in the State filing a petition alleging four separate counts of sexual intercourse with a person who had not yet attained the age of sixteen contrary to § 948.02(2), STATS. The allegations in the petition stemmed from Andre's sexual contact with Christopher H., one of his roommates at Ethan Allen. Andre was fifteen years old at the time the State filed the petition.

At the same time, the State asked for waiver to adult court. Andre contested the waiver of jurisdiction and the juvenile court then conducted a waiver hearing. After listening to testimony, the court found that the allegations in the petition had prosecutive merit. The court then applied the criteria listed in § 938.18(5), STATS., and found that waiver of juvenile jurisdiction was appropriate, stating:

From what I've heard ... I'm convinced that the facilities, services and procedure available for [the] treatment of Andre and the protection of the public within the juvenile system are inadequate and unsuitable.... [I]t seems obvious to the court that Andre has a very deep-seeded misunderstanding and problem about proper[ly] expressing [his] sexuality in light of having two victims and multiple offenses for this kind of sexual assault.

It is also clear and I'm convinced that it would be against the best interests of the public and of Andre to remain in juvenile court

Waiver of jurisdiction under § 938.18, STATS., 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). We review a court's exercise of discretion to determine if it was erroneously exercised. *See id.*

Andre first argues that the petition does not have prosecutive merit. “[T]he juvenile court in determining prosecutive merit must determine that the state has sufficient evidence to compel the juvenile to be subjected to a criminal trial.” *T.R.B. v. State*, 109 Wis.2d 179, 190, 325 N.W.2d 329, 334 (1982). Under § 948.02(2), STATS., the elements for second-degree sexual assault of a child are: (1) that the defendant had sexual intercourse with a person; and (2) that the person had not yet attained the age of sixteen.

The petition for delinquency submitted to the court stated that Christopher H. was fourteen years old at the time of the assaults. Andre, however, argues that under § 938.18(4), STATS., the State cannot rely on allegations in the delinquency petition to prove prosecutive merit. He claims that in order to show prosecutive merit, the State must present testimony and other relevant evidence to prove Christopher H. was fourteen years old at the time of the assaults.

The court may base its prosecutive merit decision solely on the delinquency petition. *See P.A.K. v. State*, 119 Wis.2d 871, 883, 350 N.W.2d 677, 684 (1984). Andre acknowledges *P.A.K.*, but claims that *P.A.K.* is no longer good law because it interpreted § 48.18(4), STATS., 1993-94, which has been repealed and replaced by § 938.18(4)(a), STATS. We disagree. There is no substantive difference between these two statutes; they both state that prior to reaching the issue of waiver, the court must first determine if the matter has prosecutive merit.¹

¹ Section 48.18(4), STATS., 1993-94, states:

Therefore, *P.A.K.* is still the controlling law. The State does not have to enter testimony or other relevant evidence to prove Christopher H.'s age at the time of the assaults and the juvenile court may base its decision on prosecutive merit on the delinquency petition.

The State also introduced the testimony of Detective Peter M. Korn, who testified that Andre signed a statement in which he admitted to having sexual intercourse with Christopher H. Andre's signed statement was also introduced into evidence. The State, therefore, has shown that there is sufficient evidence to compel the juvenile to be subjected to a criminal trial for violating § 948.02(2), STATS., and we affirm the juvenile court's decision that the matter has prosecutive merit.

Next, Andre claims that the court erroneously exercised its discretion when it decided to waive juvenile jurisdiction. Section 938.18(5), STATS., lists the criteria the court must consider when it determines whether to waive juvenile jurisdiction. Andre, however, does not claim that the court failed to consider all of these criteria. Instead, he argues that a number of the court's findings with respect to these criteria are not supported by the record.

First, Andre claims that the record does not support the court's finding that he was uncooperative in treatment and that his potential for responding to future treatment was in doubt. We disagree.

The judge shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive its jurisdiction.

Section 938.18(4)(a), STATS., states:

The court shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive jurisdiction.

The State introduced the testimony of Brandie McPherson, Andre's social worker at Ethan Allen, who stated that Andre was placed in a treatment cottage and assigned a social worker, a youth counselor and a clinical psychologist. Andre, however, sexually assaulted Christopher H. immediately after being placed in the treatment cottage. His treatment was then delayed because following the assaults he had to be moved to a higher security building. Moreover, because Andre continued to commit security violations after he was moved to the higher security building, he could not begin treatment. McPherson opined that due to Andre's ongoing pattern of security violations, he would not be ready to receive treatment anytime soon. The record, therefore, supports the court's finding that Andre was uncooperative in treatment and that his potential for responding to future treatment was in doubt.

Second, the court found that the "facilities, services, and procedures available for treatment of the child and protection of the public" within the juvenile system were inadequate. Andre claims that this finding is unsupported by the record. We reject this argument. McPherson testified that Ethan Allen could not place Andre in a higher level of security or offer him a more intensive level of supervision or services. She further testified that because of Andre's behavioral history at Ethan Allen, including the sexual assaults, the juvenile system was not an adequate placement for Andre. The record, therefore, supports the juvenile court's finding that the juvenile system was no longer an adequate venue in which to treat Andre and protect the public.

Third, Andre argues that the record does not support the juvenile court's finding that his sexual contact with Christopher H. was premeditated and aggressive. To support his argument, Andre points to the statement he gave Korns in which he claimed that the sexual contact was consensual. But in his statement,

Andre said that he repeatedly witnessed his other roommate, Bruce L., threaten an unwilling Christopher H. with physical harm if he did not perform sexual acts for Bruce L. Moreover, Andre stated that Christopher H. never approached him and asked for sex. Instead, it was Bruce L. who asked Andre if he wanted Christopher H. to perform sexual acts for him, and when he agreed, Bruce L. then ordered Christopher H. to perform the acts. Thus, the record supports the trial court's finding that Andre's actions were aggressive and premeditated.

Finally, Andre claims that the court did not give sufficient consideration to several of the criteria which favor retention in the juvenile system. He argues that the court should have given more weight to Andre's age and educational needs, his level of emotional development and the fact that he had not previously been waived into adult court. Andre further argues that when the court considered Andre's treatment needs and the need for public protection, it should have given substantial weight to the possibility of his future commitment under ch. 980, STATS., even if the juvenile system retained jurisdiction.

Section 938.18(5), STATS., lists a number of criteria that the juvenile court must take into account when deciding the question of waiver, and each of these criteria is to be accorded only relative and not absolute weight. *See J.A.L.*, 162 Wis.2d at 969-70, 471 N.W.2d at 505. We will reverse a waiver decision "if and only if the record does not reflect a reasonable basis for the determination or a statement of the relevant facts or reasons motivating the determination is not carefully delineated in the record." *Id.* at 961, 471 N.W.2d at 501.

Although the court considered all of the relevant criteria, it decided to place a significant amount of weight on the seriousness of Andre's prior conviction for sexual assault, the seriousness of the alleged sexual assault, Andre's

potential for responding to further treatment in the juvenile system, and the need to protect the public. It is within the juvenile court's discretion to determine the weight it affords each of the criteria under § 938.18(5), STATS. *See J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. Thus, the juvenile court did not misuse its discretion by giving some factors more weight than the factors Andre points to which support the retention of juvenile jurisdiction. We decline to independently weigh the various criteria and substitute our judgment for that of the juvenile court.

By the Court.—Order affirmed.

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

