

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 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.

**Nos. 98-1050
98-1051**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF CHRISTINA J.P.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

CHRISTINA J.P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL L. LA ROCQUE, Judge. *Reversed and cause remanded with directions.*

VERGERONT, J.¹ Christina J.P., born March 23, 1981, appeals a trial court order waiving jurisdiction of the juvenile court. Christina contends that

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

the court did not consider all relevant factors under § 938.18(5), STATS.; did not apply the “clear and convincing evidence” standard required by § 938.18(6), STATS.; and made a factual error. We conclude that the trial court considered the relevant statutory factors and applied the correct legal standard. However, because of a factual error, we reverse and remand to permit the trial court to exercise its discretion, taking into account the correction of this error.

BACKGROUND

Two delinquency petitions were filed on February 4, 1998, each charging Christina with one count of party to the crime of burglary committed on November 25, 1997, in violation of §§ 939.05 and 943.10(1)(a), STATS., a Class C felony.² One petition alleged that Christina participated in a burglary of a feed mill during which a wooden door was broken, a handle on the refrigerator door was broken, and a calculator was taken. According to the petition, Mike E. began to kick at the door; when a cat ran out, Michael J. became scared and went back to the car; Christina remained with Mike E.; Mike E. kicked down the door and went inside; Christina looked inside. The other petition alleged that she and Michael J. entered a liquor store after Mike E. gained entry by prying open the back door; all three ran when a burglar alarm went off; Mike E. went back into the store and took a safe containing over \$900; the three drove off with the safe in the car and shared in the money from the safe.

The hearing on the petition to waive the juvenile court jurisdiction was held on April 7, 1998. Angela Hillestad, Christina’s social worker, testified that she began supervising Christina when she was referred because of a battery

² We have consolidated the appeals concerning the two petitions.

incident at school, which resulted in a consent decree. Prior to this incident, Christina had no other history with the juvenile court. The battery incident occurred the fall before the burglaries, and the consent decree was signed six days before the burglaries. Hillestad became involved with Christina about a month or two before the consent decree was entered. As a result of the consent decree, Christina was referred to a drug and alcohol assessment program, a therapist, a program to monitor her community service, and a program called Alternatives to Aggression. The individual therapy had not begun at the time of the waiver hearing and the first appointment for drug and alcohol assessment had yet to occur. Christina had participated in the Alternatives to Aggression program and she promptly completed the twenty hours of community service required by the consent decree.

At the time of the hearing, Christina was living with her boyfriend in an apartment on her parents' property. He is one of the two other persons involved in the burglaries. Hillestad testified that Christina was living in the apartment because her family decided she should do so after incidents of her father becoming angry and threatening to kill her. According to Hillestad, Christina's father was uncooperative with Christina's treatment needs in the past and he recently refused to participate in the drug and alcohol assessment.

Hillestad recommended that the court waive Christina into adult court. Her reasons were that the services she was currently receiving were ones she could continue to receive in adult court and that her lifestyle was more like that of an adult than a juvenile: she lived in a separate apartment with her boyfriend, had been employed, was responsible for car insurance, did not look to her parents for guidance, and was pretty much on her own, allowed to come and go as she pleased. Another reason was that Christina's age, seventeen, limited

out-of-home placements for her in the juvenile system because residential treatment centers, group homes and foster homes typically do not accept seventeen or eighteen year old children. Hillestad testified that if Christina remained under the jurisdiction of the juvenile court and did not follow through with the treatment services, Hillestad had the option of returning to court and asking for sanctions or closing the case. If Christina were charged with another crime, the option would be automatic waiver to adult court. Hillestad also testified that if Christina were to remain in the juvenile system, Hillestad would recommend a group home rather than a foster home or residential treatment facility (putting aside the difficulty in placing her in any of those because of her age). However, since there are no group homes in her school district for her, were Christina to remain in the juvenile system, Hillestad would likely recommend that she stay in the town and school district where she is now living, rather than be removed from that town to a group home.

Will Swierenga, a social worker hired by Christina, testified. He interviewed Christina, her boyfriend and her father. He testified that a significant level of internal violence plagued the family, and Christina observed her father getting out of control, destroying furniture and abusing her mother. Christina was a recipient of extensive emotional abuse. According to Swierenga, Christina's father blames her for his assaultive behavior, and she responds by feeling guilty and responsible for his behavior. Her father interfered with her treatment needs and made it clear he wants her out of the family home. In Swierenga's opinion, Christina should remain in the juvenile system so that the plans made as part of the consent decree can be carried out. He agreed with Hillestad that Christina should stay in the town where she now lives because of support in the school district. However, he felt that her current living quarters were inadequate, and that she

should not return to her family's home because it is unsafe. Swierenga noted that Christina's boyfriend would probably be out of the picture because that relationship appeared to be ending. He questioned whether emancipating her so that she could live independently was the correct approach because, in his view, she lacked some skills for independent living due to the turmoil in her family life. In Swierenga's view, adult probation agents do not have the role of finding placements for seventeen year olds with no visible means of support. While he recognized the difficulty of finding out-of-home placements for seventeen-year-olds within the juvenile system, in his view that was more appropriately the role of the juvenile system, and he felt that the juvenile system was better equipped to manage Christina's current needs than the adult system.

JoAnn Bell, the psychologist at Christina's school, testified that Christina was an active participant in the school's Alternatives to Aggression program and she was in a special education program for emotional disturbance. Christina's school behavior, attendance and grades had improved during the last three months. She was more willing to talk to people about problems and accept help. In Bell's conversations with Christina, Christina accepted responsibility for what she did and anticipated there would be consequences for her conduct. Bell echoed the testimony of the other two witnesses that Christina's father had interfered with efforts to provide treatment for her. Bell felt that it was in Christina's best interest to remain in the juvenile system because she was responding to the treatment programs. She acknowledged, however, that nothing at Christina's school would differ if she were in the adult system rather than the juvenile system, and the individual counseling that she needed would be available under either system.

The trial court granted the petition for waiver. It considered that Christina's age, her lifestyle, her attitudes, and the seriousness of the offense all favored waiver to adult court. The court also concluded that the services she was currently receiving were what she needed, and they would be available under either the adult or juvenile system. The court did not consider that placement in a group home was a factor favoring juvenile court, because of the unavailability of such a placement. The court recognized the difficulties of Christina's home life and the impact that it had on her, but did not consider that to outweigh the factors favoring waiver.

DISCUSSION

Court's Decision on Waiver

Section 938.18(5), STATS., provides that if prosecutive merit is found, the judge shall base the decision whether to waive jurisdiction on the criteria stated in para. (a) through (d).³ Section 938.18(6) provides that "[a]fter

³ Section 938.18(5), STATS., provides:

(5) 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

(continued)

considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record and, if the court determines that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public to hear the case,” the court shall enter an order waiving jurisdiction.

Waiver of jurisdiction under § 938.18, STATS., is within the discretion of the juvenile court. *In re J.A.L.*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The court has discretion as to the weight it affords each of the criteria under § 938.18(5). *Id.* We look to the record to see whether discretion was exercised, and if it has been, we look for reasons to sustain the court’s decision. *Id.* at 961, 471 N.W.2d at 501. We will reverse a juvenile court’s waiver determination if and only if the record does not reflect a reasonable basis for its determination, or the court does not state relevant facts or reasons motivating the decision. *Id.* The court need not resolve all the statutory criteria against the juvenile to order waiver. *See In re C.W.*, 142 Wis.2d 763, 768-69, 419 N.W.2d 327, 329-30 (Ct. App. 1987).

Christina first argues that the court did not consider all the relevant statutory factors in making its decision. In her first brief, she does not explain

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.

what those factors are but relies entirely on this italicized statement by the court, made at the beginning of its oral decision:

These are difficult decisions and I recognize the court has to find waiver by clear and convincing evidence, but I think it applies here. None of these decisions is black and white. *There are obviously factors that weigh in Chrissy's favor in terms of waiver, but I'm not going to go down the check list because all of them don't apply.* (Emphasis added.)

Christina argues that it is obvious that the court did not consider relevant factors that favored her. We do not interpret the court's statement in this way. We think the court acknowledged that there were factors weighing in Christina's favor and also stated that it was not going to mention factors listed in the statute that did not apply.

In her reply brief, Christina lists specific statutory factors that, she contends, were relevant but that the court did not consider: her emotional disturbance, the absence of prior treatment history, her apparent potential for responding to treatment, the absence of any previous waiver and the absence of any previous delinquency proceeding. Generally we do not consider arguments raised for the first time in the reply brief because the respondent does not have the opportunity to respond. *Schaeffer v. State Personnel Comm'n*, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). However, because in her first brief Christina made the general argument that the trial court failed to consider relevant factors, we will address the specific relevant factors she refers to in her reply brief.

We disagree with Christina that the court did not consider her emotional disturbance, lack of past treatment and potential for responding to treatment. The court took into account the services she is currently receiving from the school, and we infer that includes the program for emotional disturbance. The

court's comments demonstrate that it recognized her need for the services she was currently receiving or scheduled to receive, including the individual therapy, and recognized that she had just begun receiving them. Based on the testimony, the court determined that she would continue to receive these if she were waived to adult court. The court specifically acknowledged and credited the testimony of Bell and Swierenga, which we understand to include an acknowledgment of their testimony that Christina was responding well to the treatment she was receiving.

Concerning the lack of a prior waiver and the lack of a prior delinquency adjudication, we do not conclude that the court erroneously exercised its discretion because it failed to state that it considered the lack of these circumstances. When it is clear, as it is here, that all parties and the court understand that there was no prior waiver and no prior adjudication of delinquency, we infer that the court knew that those circumstances were absent but did not consider their absence to be a significant factor favoring retaining jurisdiction in juvenile court. We therefore conclude that the court did consider the relevant statutory factors.

Christina also argues that some of the court's comments demonstrate that it was merely "leaning" toward waiver rather than finding by clear and convincing evidence that retaining juvenile jurisdiction is contrary to the best interest of the juvenile or the public, as required by § 938.18(6), STATS. We are not persuaded by this argument because it relies on attaching unwarranted significance to isolated phrases used by the court. It is clear from reading all the court's comments, that while the court thought a group home placement might be desirable if one were available, it was accepting the undisputed testimony that one was unavailable, given Christina's age; and also that even if one were available despite her age, that would require moving Christina from her school district,

which no witness thought would be good for her. It is also clear that the court accepted the testimony that Christina could get the necessary treatment services in either the adult system or the juvenile system. Both at the beginning and at the end of its comments, the court stated that it found by clear and convincing evidence that waiver was appropriate, and we are satisfied that that is the standard the court applied.

Christina's last argument is that the trial court made an incorrect factual finding regarding the allegations of one of the burglaries, and drew incorrect inferences from that, which influenced its decision. The court stated:

I recognize that the concepts we're dealing with here on waiver aren't necessarily fault based. I hear what's been said about Chrissy and her family and what's happened here and I have to have a whole lot of sympathy for her plight. I can see why she ended up where she is today. But at the same time the court has to consider other things than just Chrissy and I would be very skeptical about any advantage in the juvenile system and I think I would be ignoring the significance of these offenses. I looked at the probable cause charges here with respect to the burglary. One of the allegations is that the burglary alarm was set off in one of these places, at least one of the other kids ran away and Chrissy stayed behind. To me that makes me wonder how far down the road to a life of crime she is. That impacts on her motives and attitude as well as the testimony of her counselor. And Mr. Swierenga....

We agree with Christina that the court's statement regarding Christina's response to the burglar alarm is based on an inaccurate reading of the petitions. The petition concerning the liquor store burglary states that all three entered the store after Mike E. pried open the door and all three ran when the burglar alarm went off. When the police did not arrive, Mike E. went back into the store and took the safe. The court is no doubt confusing this burglary with that of the feed mill. That petition alleges that when a cat ran out of the building, after

Mike E. started kicking the door, Michael J. got scared and ran back to the car, where he waited. The petition states that Christina stayed, but it does not state that she entered the building, only that Mike E. entered and she looked in.

We have carefully considered how significant the court's mistake on the allegations of the petitions was to its assessment of Christina's attitudes, conduct and the ultimate decision on waiver, and we conclude that we are unsure how this mistake affected the court's decision. We understand the court's point to be that it viewed Christina's failure to run when a burglar alarm went off, when at least one of the others ran, as indicating that she was more committed or more prone to carrying out criminal conduct. We also understand that the court considered this to lessen the favorable impact of the testimony of her counselor and Mr. Swierenga that she was taking responsibility for her actions and making progress in addressing her problems. We do not, however, know whether, with a corrected understanding of the petitions, the court would make the same determinations regarding Christina's attitudes and conduct or arrive at the same conclusion regarding waiver. When the trial court has made an error that underlies the exercise of its discretion, we may not exercise the trial court's discretion for it but are to remand to permit the trial court to exercise its discretion. *See Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis.2d 426, 434-35, 293 N.W.2d 540, 545 (1980). We conclude the correct course is to remand to the trial court to give it the opportunity to reconsider its findings and conclusions in light of the allegations of the petitions.

By the Court.—Order reversed and cause remanded with directions.

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

