

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 18, 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. 98-1801

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF JORGE T.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JORGE T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

SNYDER, P.J. Jorge T. appeals from an order waiving juvenile jurisdiction to the criminal court. On April 15, 1998, the Walworth county district attorney filed a delinquency petition alleging disorderly conduct, gang related and with a dangerous weapon, contrary to §§ 947.01, 939.625(1)(a) and (b), and 939.63(1)(a), STATS., and party to the crime of obstructing an officer contrary to

§§ 946.41(1) and 939.05(1), STATS. He also applied for waiver of the charges to the adult criminal court. After a lengthy contested hearing, the juvenile court granted the waiver. We affirm the waiver order.

On March 23, 1998, Lake Geneva Police Officer Michael Rasmussen, in civilian clothes and an unmarked car, was patrolling a known gang hangout area watching for graffiti offenses. He testified that Jorge and an adult companion¹ were “flashing gang signs” at him from their car. The gang signs were those commonly used by Latin King gang members and Rasmussen testified that Jorge admitted to being a member of the Latin Kings. After Rasmussen observed the car’s occupants flashing gang signs at him a second time, he stopped the vehicle. Jorge and his companion exited the car, rapidly approached the unmarked cruiser and made aggressive gestures toward Rasmussen indicating they wanted to fight. Rasmussen testified that he believed that Jorge was going to stab him. Rasmussen notified dispatch of his location, exited his vehicle, identified himself as a police officer and ordered Jorge and his companion to place their hands on the car. Jorge ran, dropping the beer bottle he was holding, and was apprehended later that night.

The decision whether to waive juvenile jurisdiction in a given case is one which is committed to the sound discretion of the juvenile court. *See D.H. v. State*, 76 Wis.2d 286, 302-03, 251 N.W.2d 196, 205 (1977). Discretion contemplates a process of reasoning depending on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. *See id.* at 310, 251 N.W.2d

¹ Rasmussen identified the adult companion as a male named “Maruri,” who was arrested as a coactor and pled guilty to charges arising out of the incident.

at 208-09. A juvenile court may waive jurisdiction to the adult criminal court where it is established by clear and convincing evidence that it would be contrary to the best interests of the child or the public to retain jurisdiction. *See* § 938.18(6), STATS.

In reviewing the juvenile court's exercise of discretion, we note that the prior ch. 48, STATS., legislative intent, "[t]he best interests of the child shall always be of paramount consideration," *see* § 48.01(1)(h), STATS., 1993-94, is no longer applicable in ch. 938, STATS., proceedings.² The legislative intent of ch. 938 is to "promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively." Section 938.01(2), STATS. The legislative purpose of the Juvenile Justice Code is, *inter alia*, to protect citizens from juvenile crime and to hold juvenile offenders directly accountable for their acts. *See* § 938.01(2)(a), (b).

The first step in the waiver process is for the court to determine if the matter has prosecutive merit. *See* § 938.18(4)(a), STATS. If prosecutive merit is found, the court must exercise its discretion in applying the § 938.18(5) factors. After considering those factors, the juvenile court must provide a statement of the relevant facts and the reasons motivating waiver. *See D.H.*, 76 Wis.2d at 305, 251 N.W.2d at 206. Not all of the factors need be resolved against the juvenile, but the trial court must show that it examined the relevant factors. *See id.* at 310, 251 N.W.2d at 208. The juvenile court shall state its findings and if it determines on

² Chapter 938, STATS., "The Juvenile Justice Code," was created by 1995 Wis. Act 77, effective July 1, 1996, separate from ch. 48, STATS., "The Children's Code."

the record that it is established by clear and convincing evidence that it would be contrary to the interests of the juvenile or the public to hear the case, it shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate criminal proceedings. *See* § 938.18(6).

Jorge stipulated to the existence of § 938.18(4)(a), STATS., prosecutive merit for purposes of proceeding to a contested hearing on the subsec. (5) waiver factors. After hearing testimony from witnesses both for and against waiver of jurisdiction to criminal court, the juvenile court waived the matter to criminal court.³ While the juvenile court was required to consider all relevant factors contributing to its waiver decision, Jorge primarily focuses on: (1) this being his first juvenile court referral, (2) the underlying offenses being relatively minor violations not meriting waiver, (3) the court wrongly emphasizing his gang relationship in granting waiver, and (4) the court wrongly ignoring available treatment and rehabilitative alternatives to waiver in the juvenile justice system.

We first address Jorge's argument as to the waiver occurring on his first delinquency referral to the juvenile court. The court acknowledged that Jorge's prior record did not include prior criminal offenses or actual juvenile offenses and stated that "we haven't waived jurisdiction over him in the past, nor has he previously been convicted." While § 938.18(5), STATS., requires the court to consider the prior record of the juvenile (including whether he or she has been previously found delinquent, has been previously waived to criminal court and, if so, convicted of the offense(s) waived, and whether a prior conviction or delinquency involved infliction of serious bodily injury), the statute cannot be read

³ The juvenile court heard the testimony of nine witnesses during the bifurcated hearing.

to preclude waiver without a previous referral to, or formal involvement with, the juvenile court.

The filing of a waiver petition is a prosecutorial decision by the district attorney,⁴ *see* § 938.18(1)(a), STATS., and does not involve the exercise of court discretion. The juvenile court's first consideration is that of prosecutorial merit. Because Jorge stipulated that the waiver petition had § 938.18(4)(a) prosecutorial merit for purposes of proceeding to a subsec. (5) hearing, the court did not erroneously exercise its discretion by so finding and Jorge is not entitled to relief from waiver because this was his first juvenile court exposure.

We next consider Jorge's contentions that the underlying delinquencies are relatively minor and that the court placed an unwarranted and inappropriate weight on Jorge's gang association. Both alleged delinquencies are classified as criminal court misdemeanors.⁵ However, § 938.18(1)(a)3, STATS., allows the waiver of a juvenile alleged to have violated *any* state criminal law, including misdemeanors, if the violations occur on or after the juvenile's fifteenth birthday. The alleged misdemeanors are violations of state criminal law committed when Jorge was fifteen years old.⁶ In addition, the court found that the offense "was violent, aggressive, premeditated and willful," was "against persons"

⁴ Only the district attorney or the juvenile may apply to the juvenile court for waiver to the criminal court under § 938.18, STATS.

⁵ Disorderly conduct is a Class B misdemeanor enhanced with increased penalties for being gang related and while being armed with a dangerous weapon. *See* §§ 947.01, 939.625(1)(a), 939.63, STATS. While being gang related would increase the penalty, it does not change the misdemeanor classification. *See* § 939.625(1)(b). Party to the crime of obstructing an officer is a Class A misdemeanor. *See* §§ 946.41(1), 939.05(1) STATS.

⁶ The delinquency petition alleges that the violations occurred on March 23, 1998, and Jorge's date of birth is reported as June 3, 1982.

and was serious because it was “disorderly conduct with [a] gang ... for forwarding a gang purpose.” Because the court exercised its discretion in accordance with the controlling statute, Jorge is not entitled to relief because the offenses are relatively minor.

Jorge further argues that the waiver order is in error because the juvenile court wrongly considered his gang relationship and that his gang involvement was speculative, lacked credibility and was accorded undue weight. Jorge’s contentions are rebutted by his own admission of membership in the Latin Kings, as well as the evidence of gang-related tattoos, the flashing of gang signs and the evidence of Jorge’s prior gang-related altercations and involvements. Because consideration of Jorge’s gang association relates to his motive, attitudes and pattern of living, and addresses the extent to which the alleged delinquencies were aggressive, premeditated and/or willful, his argument fails. The trial court’s consideration of Jorge’s relationship with the Latin Kings is warranted under the statutory factors, is supported by the record evidence and is not an erroneous exercise of discretion.

Last, Jorge contends that the court failed to consider that adequate and suitable facilities, services and procedures for his treatment existed within the juvenile justice system. He argues that he was waived to the criminal court primarily because of his gang affiliation and that he could benefit from a juvenile out-of-home placement that would address his gang-related problems. He maintains that because he has no prior “treatment record” in the juvenile system, the court erred in not addressing the potential for such current treatment opportunity in lieu of waiver. We are not persuaded.

The juvenile court should, in part, base its waiver decision on the comparable adequacy and suitability of facilities available to the juvenile in the juvenile and the criminal courts. *See D.H.*, 76 Wis.2d at 309-10, 251 N.W.2d at 208. Here, the juvenile court cited to a prior history of attempted treatment and care, rejected by Jorge, of the same nature that would be available in the juvenile system. This treatment included a “very well-trained teacher who cared” and his father and police officers who tried but only found that “[Jorge] gives them lip service and turns back to the gangs right away [leaving] very little potential for responding to future treatment.”

The court then made specific findings concerning Jorge’s retention in the juvenile justice system:

Are the facilities that the Department can provide adequate or suitable? It is self-evident that they would not be if he does not have strong potential or even reasonable potential for responding to future treatment. I don’t think the Department of Human Services could do better than that teacher who testified. I, therefore, don’t think that their facilities or services are going to be adequate, nor are their services or procedures available for his treatment going to be adequate; and they’re certainly going to be inadequate for the protection of the public since the police have many contacts, so has his teacher, and so have [his] parents. And instead of responding, he’s gotten more enmeshed in the gang and gotten so far as to come close to what could have been a homicide. I have to protect the public too, and I can’t protect them if I leave him in the juvenile system.

We are satisfied that the juvenile court sufficiently considered the availability of treatment and rehabilitation under its jurisdiction. We are also satisfied that the juvenile court properly balanced the protection of the public in its decision as mandated in the Juvenile Justice Code’s legislative intent and purpose.

In sum, the juvenile court found that the underlying violation was a serious premeditated offense involving a threat of violence to a person and committed by one who had the benefit of meaningful intervention efforts and who had made a choice to be a gang member. The court further determined on the record that it would be contrary to the best interests of the public to hear the case. Because the juvenile court based its findings on the record evidence and properly applied the § 938.18(5), STATS., factors to the evidence, there was no erroneous exercise of discretion. The order waiving jurisdiction to criminal court prosecution must be affirmed.

By the Court.—Order affirmed.

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

