COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2289 **Cir. Ct. No. 2015JV253**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF T.D.M., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

T.D.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: DAVID P. WILK, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] T.D.M. appeals a nonfinal order[2] waiving juvenile court jurisdiction over him. He argues the circuit court erroneously exercised its discretion when it determined it would be contrary to T.D.M.'s and the public's best interests to retain him in the juvenile court system. We disagree and affirm.

Background

¶2 In September 2015, the State filed a delinquency petition charging T.D.M. with burglary and theft, as a party to the crime, and obstructing an officer. The petition was accompanied by a petition to waive T.D.M. into adult court. The delinquency petition alleged T.D.M. and his girlfriend stole cigarettes after breaking into a gas station around 1:12 a.m. on September 22, 2015, and that T.D.M. initially provided a false name to responding officers. A waiver hearing was held on October 29, 2015, at which a social worker with the Kenosha County Division of Children and Family Services was the only witness.

¶3 On direct examination, the social worker testified she began working with T.D.M. six months prior to the hearing and prepared and filed with the court a written waiver report in regard to the petition. She "adopt[ed] into testimony all of the information contained in th[e] report." She testified the division was recommending waiver of T.D.M. into adult court, "bas[ed] … on the services already provided to [T.D.M.] and his response to such services, specifically his response to the services after he was … discharged from the ACE program."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] This court granted leave to appeal by order dated November 16, 2015. *See* WIS. STAT. RULE 809.50(3).

¶4 The social worker testified T.D.M. had previously been adjudicated for possession of marijuana and criminal damage to property. T.D.M. had been "placed out of home" in "Choices To Change group care," but due to his "continued defiance and behavior problems at that placement," he was removed and placed into the ACE program. T.D.M. was discharged from the ACE program on August 19, 2015, and thereafter immediately violated his curfew, had drug tests that came back positive, failed to comply with a referral for individual therapy, and allegedly committed the current offenses on September 22, 2015. As to the "after-care plan" T.D.M. was afforded following his discharge from the ACE program,

> [T.D.M.] was provided with house arrest, GPS. He was not placed on house arrest the whole time. He did earn a curfew based on his compliance, but he was initially given house arrest, GPS, the Youth Competency program, individual therapy through Professional Services Group, continued case management through DCFS, and he was also working on his community service work with Mr. [D.] from Professional Services Group.

Hours before the alleged offense in this case, T.D.M. had met with the social worker, his mother, and a youth competency worker "to address his violations." T.D.M. was "polite" but "very shut down" and not communicating with them. T.D.M. was believed to be a father, so the social worker had referred him to a teen parenting program, but he did not comply with the program.

¶5 The social worker also testified T.D.M. was expelled from middle school in 2013 and was later expelled from the school district. His expulsion from middle school was the result of T.D.M. having "continued behavioral problems"; specifically, "his escalated behaviors and significant disrespect towards staff includ[ing] inappropriate gestures, swearing, threats and ignoring staff … instructions." Prior to his expulsion from the school district, he was also "found to

have marijuana in his possession." She confirmed T.D.M. did not suffer from any mental health issues or developmental disabilities that would prevent him from knowing right from wrong, and if the juvenile court retained jurisdiction, the division "would [not] have the ability to enroll him in school." The social worker believed T.D.M.'s lifestyle was more akin to an adult's than a juvenile's because "he's an alleged father, he's not enrolled in school, cannot be enrolled in school and he's consistently violated his curfew. He comes and goes as he chooses."

¶6 The social worker testified that services still available to T.D.M. if he remained in juvenile court are "treatment foster care, residential care or juvenile corrections." She did not believe those options were suitable for T.D.M. because she did not believe T.D.M. would benefit from continued services or out-of-home placement, and the services in correctional placement were "duplicative" of those he already received in the ACE program.

¶7 On cross-examination, the social worker confirmed that if T.D.M. remained in juvenile court, the division would have "more than two years to provide services to him," which "can be" a sufficient amount of time; treatment foster care, residential treatment and corrections "haven't been tried"; and T.D.M. "did well when he was in the ACE program," which is a program with "much more structure than community supervision." She agreed that the ACE program was not "entirely" like juvenile corrections because in the ACE program a juvenile has the opportunity to earn a home visit, while corrections would not afford such an opportunity. When asked, in light of the fact T.D.M. had performed well in the structured custodial setting of ACE, why she did not believe the juvenile corrections option was appropriate for T.D.M., the social worker responded: "Because at some point he has to be released from such custody and prove that he can do well in a nonsecure setting. And so far he has not shown that to me or the

Division." She testified that if T.D.M. was placed in corrections, the department of corrections would provide schooling for him.

¶8 The social worker discussed reference in her waiver report to T.D.M. previously being arrested and receiving municipal citations for disorderly conduct and trespass, but stated she did not know the disposition of those charges. She further discussed references in her report to T.D.M. being arrested and referred for a "supervisory review for Disorderly Conduct, Resisting and Possession of THC," and that those charges served as the basis for "a request for change of placement," but that she did not know the disposition regarding those alleged offenses, except that they did not result in delinquency adjudications. The social worker confirmed T.D.M. did not have his own apartment or driver's license, never held a job, and relies upon his mother "for his sustenance," acknowledging this was more "childlike" than adult in nature.

¶9 On redirect examination, the social worker confirmed the division had been providing T.D.M. with services "for approximately 18 months" and, "based on his behavior from coming out of the ACE program," "where he's been," and "what he[had] demonstrated" she had no reason to believe T.D.M.'s behavior would improve. She confirmed T.D.M.'s "whereabouts had been unknown" for the last three months of 2014 and so during that time period he "wasn't depending on his mother." The social worker testified that a "supervisory review" is "generally given from the district attorney's office to [the division] in lieu of charging a youth." She confirmed the division does not receive referrals for supervisory reviews from municipal court, so "the assumption" is the charges on which T.D.M. was referred for a supervisory review "were referred to the district attorney's office and then forwarded to [her] in lieu of charging."

¶10 On recross-examination, the social worker confirmed she did not know if T.D.M. was "stopping by and getting assistance like money or food at his mother's house" during the three months he was "on the run."

¶11 Following testimony and argument by the parties, the circuit court waived T.D.M. into adult court. He appeals.

Discussion

¶12 We will affirm a circuit court's decision to waive a juvenile into adult court unless the court erroneously exercised its discretion. ***State v. Tyler T.***, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192. "A juvenile court erroneously exercises its discretion if it fails to carefully delineate the relevant facts or reasons motivating its decision or if it renders a decision not reasonably supported by the facts of record." ***Id.*** On review, we look for reasons to uphold the court's waiver decision, ***id.***, and will reverse the 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," ***J.A.L. v. State***, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991).

¶13 In making the waiver determination, a circuit court considers, as relevant here:

> (a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment.
>
> (am) The prior record of the juvenile, including 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, and the juvenile's prior offenses.
>
> (b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.
>
> (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 … or the adult intensive sanctions program ….

WIS. STAT. § 938.18(5). Ultimately, to waive a juvenile into adult court, the circuit court must conclude the evidence is clear and convincing that "it is contrary to the best interests of the juvenile or of the public" for the case to be heard in juvenile court. Sec. 938.18(6).

¶14 The circuit court here, considering the testimony at the waiver hearing, the "contents of the court files," and the waiver report, found that T.D.M. does not have a mental illness or developmental disability, he has not been previously waived into adult court, and there is "evidence of prior delinquencies." The court stated T.D.M.'s "pattern of living" is "more akin to adult living than juvenile living," specifically pointing out that "for at least large periods of time [T.D.M. was] not reliant upon his mother," with his whereabouts being "wholly unknown" for the last three months of 2014. The court added that T.D.M. "has allegedly fathered a child," has "not availed himself of services," is not attending school, violates curfew, and "comes and goes as he pleases."

¶15 T.D.M. claims "the trial court placed too much weight on some of the waiver criteria and not enough weight on others." This argument, however, does not take T.D.M. far in that, as he himself acknowledges in his brief, "[t]he

weight to be afforded to each of the factors under WIS. STAT. § 938.18(5) is within the court's discretion," citing ***G.B.K. v. State***, 126 Wis. 2d 253, 259, 376 N.W.2d 385 (Ct. App. 1985). Nonetheless, T.D.M. argues the court erroneously exercised its discretion by placing "too much weight" on various considerations and drawing "unreasonable inferences from the facts."

¶16 T.D.M. argues "when considering [his] pattern of living, the court placed too much weight on a three-month period of time where the defendant was in 'runaway' status," specifically pointing out that the court stated "while there was argument that he is reliant upon his mother, for at least large periods of time he is not reliant upon his mother." T.D.M. states there was "no evidence … as to where he was during this three month period" or that he was "supporting himself independently and leading an adult-like lifestyle." T.D.M. states the social worker testified that he "never had a job, he didn't own a car, he didn't have a driver's license, he didn't maintain his own residence, and he was entirely dependent upon his mother for his sustenance." T.D.M. asserts the court mistakenly inferred that the three-month period when he ran away from home was "evidence of T.D.M.'s alleged adult-like lifestyle," and also complains of the court's conclusion that the fact he may have fathered a child out of wedlock suggested an "adult-like lifestyle," arguing that this was more indicative of immaturity than maturity. T.D.M. claims this "pattern of living" factor "favors retention of his case in juvenile court."

¶17 We conclude the court did not err in finding T.D.M.'s pattern of living was "more akin to adult living than juvenile living." Even if T.D.M. did benefit from some assistance from his mother while he was not residing at home for three months, so do many young adults. The point is, he had left the nest and was making his home elsewhere than with his mother for that period of time.

Further, the court's conclusion that T.D.M. was living more of an adult-type existence was supported by the fact he had allegedly fathered a child, was no longer in school, did not adhere to a curfew and essentially "comes and goes as he pleases."

¶18 T.D.M. also argues his prior record and the nature of the current offense as a "property crime" should favor juvenile jurisdiction. We disagree. The court noted T.D.M. had acted as a "look-out" for the alleged burglary, indicating his actions were "willful." *See* WIS. STAT. § 938.18(5)(b). Even though the court viewed the alleged offense as a "property crime," in considering the "type and seriousness of the offense" combined with T.D.M.'s prior record of violations and alleged violations of the law, the court found retaining juvenile jurisdiction of the case would not be in the best interest of T.D.M. or the public, stating T.D.M. "has had extensive opportunity to show us what he can do and unfortunately he has." The record supports the circuit court's findings and conclusions.

¶19 T.D.M. also complains the circuit court "placed too much weight on his behavior following his release from the ACE program and not enough weight on his positive response to treatment in the ACE program." But, we agree with the social worker and the court that the more important consideration is not how T.D.M. did when in the ACE program, but how he did in the short time after he was released from the program. According to the undisputed testimony, within approximately a month of his release, he tested positive for drugs, violated curfew, failed to comply with a referral for therapy, and allegedly committed the current offenses. As the court noted, while T.D.M. has "done well in secure custody, … the issue is not his behavior while in custody…. The best predictor as to how he

would perform once out of corrections is how he has done in the past upon coming out of secure custody."

¶20 Related to T.D.M.'s physical and mental maturity, the circuit court found T.D.M. was "almost 16 years old, and has the physical and mental maturity of someone that age," but noted, based upon the social worker's report "adopted into her testimony," that "all of [T.D.M.'s peers] are 17 to 20 years of age and that he never spends time with peers his own age." The court also found T.D.M.'s treatment history to be "extensive," stating he

> has had group care, ACE program, community service work, Youth Competency program, UAs, house arrest, juvenile detention, GPS, WAIT group, intensive after-care program and AODA education. Additionally, he's been offered additional services that, for reasons unknown to me, and there was no testimony regarding them, he has chosen not to avail himself of. That lends concern to the Court about his potential for responding to future treatment.

Based on its review of the entire record, the court determined T.D.M. is "not suitable for placement in the SJO [serious juvenile offender[3]] program." We conclude the court did not err when it concluded T.D.M.'s likelihood of success with further juvenile programming does not appear promising.

¶21 T.D.M. further asserts it is contrary to his best interests to waive him into adult court because a criminal conviction will be detrimental for him for "the remainder of his life," and the public's interests will not be "greatly harmed" by keeping him in juvenile court. We see this case as the circuit court saw it—T.D.M. has been afforded a plethora of treatment and opportunities which proved to be unsuccessful, suggesting a continuation down a similar path would likewise

[3] *See* WIS. STAT. § 938.18(5)(c).

be unlikely to succeed with reforming T.D.M. for his own good and the good of the public.

¶22 The circuit court's determination is supported by relevant facts and delineated carefully in the record. *See* ***J.A.L.***, 162 Wis. 2d at 961. As the State notes, and we agree:

> There is nothing in this record that would demonstrate that the juvenile court misused its discretion. The court carefully considered the facts in front of it, applied those facts to the … statutory criteria required by [WIS. STAT. §] 938.18(5), and came to a reasonable conclusion that remaining in juvenile court was not in the best interest of the juvenile or the public.
>
> … [T.D.M.] essentially is asking this court to substitute [his] view of the waiver criteria for that found by the juvenile court. He asks this court to overrule the discretionary decision of the juvenile court, but provides no real legal basis to do so.

The circuit court did not erroneously exercise its discretion when it waived juvenile jurisdiction over T.D.M. in this case.

By the Court.—Order affirmed.

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