COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2186 **Cir. Ct. No. 2016JV10**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A.O.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: LINDSEY GRADY, Judge. *Affirmed*

¶1 DUGAN, J.[1] A.O. appeals from the circuit court's non-final order waiving juvenile court jurisdiction to adult court. A.O. contends that the trial court failed to give sufficient and proper consideration to the statutory criteria, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

suitability of A.O. receiving services in the Serious Juvenile Offender program (S.J.O.P.). This Court disagrees and affirms the trial court's order.

BACKGROUND AND PROCEDURAL HISTORY

¶2 The following facts provide background for the issue A.O. raises. We refer to additional facts in the discussion section as needed.

The Petitions for Delinquency and Waiver of Juvenile Jurisdiction

¶3 On January 6, 2016, the State filed a petition in the Milwaukee County Circuit Court, 2016JV10, alleging that A.O., then 17 years old, was delinquent. The petition alleged that on January 4, 2016, A.O. violated the following state criminal laws: (1) armed robbery, party to a crime—count one; (2) operating auto without owner's consent (take and drive), party to a crime—count two; (3) armed robbery— count three; (4) operating auto without owner's consent (take and drive), party to a crime—count four; (5) operating auto without owner's consent (drive or operate)—count five; and (6) obstructing an officer—count six.

¶4 With respect to counts one and two above, the State alleged that A.O. was involved in an armed robbery carjacking at about 3:45 p.m. on January 4, 2016. M.M. was driving home from work and was stopped at a stop sign at the intersection of South 26th Street and West Maple Street in the City of Milwaukee. A car pulled alongside of her and then pulled diagonally in front of her, blocking her car. M.M. told police that a male got out of the rear driver's side seat, pointed a gun at her and told her to get out of her car. A second male, who got out of the front passenger seat, walked around the front of her car and stood at the passenger side of her car. The male with the gun told her to hurry up and get out of the car.

When she got out, the male with the gun got into the driver's seat of her car and the second male got into the front passenger seat. The two males drove off in her car and the other car followed them. M.M.'s purse with cash, gift cards, credit cards, and a debit card, was in her car. She also had personal items in the trunk.

¶5 With respect to counts three and four above, the State alleged that on January 4, 2016, A.O. was involved in an armed robbery carjacking where A.J.-F. was robbed of her vehicle, purse, identification, cash and iPhone. A.J.-F. told police that she was driving to a friend's house. When she was approaching the intersection of West Maple Street and South 24th Street a car passed her on the left and stopped in front of her. The front passenger of that car got out with a gun in his hand. He pointed the gun at her. A.J.-F. was scared that she would be shot because the individual held her at gunpoint as he walked up to her window and yelled, "[g]et out, get out." A.J.-F. got out of her car with her purse. The individual with the gun demanded that she give him her purse. He then drove off in her car and the other car followed him. A.J.-F. stated that her purse contained her rent money in the amount of $550.00, her debit card, her Mexican identification card and her iPhone.

¶6 With respect to counts five and six above, the State alleged that on January 4, 2016 at about 10:10 p.m., A.O. was driving A.J.-F.'s stolen vehicle and fled from police. Officer Almas of the Milwaukee Police Department stated that he saw the vehicle at the intersection of South 26th Street and West Scott Street in the City of Milwaukee. He was in a marked squad car and activated his lights and siren to stop the vehicle. The vehicle fled the squad car accelerating to speeds of seventy miles per hour. The chase lasted approximately 1.8 miles with the vehicle disregarding multiple stop signs and red traffic control lights and weaving in and out of traffic lanes causing other vehicles to stop abruptly. The stolen vehicle

came to a stop as a result of damage it suffered during the chase and the two occupants fled on foot. They were eventually taken into custody after a foot pursuit. A.O. was identified as the driver of the stolen vehicle.

¶7 The State further alleged that during an interview with police, A.O. admitted that he was involved in carjacking M.M.'s car, but stated that the other person involved, who he would not name, had the gun. He also admitted carjacking A.J-F's vehicle and also admitted having the gun and demanding her purse. As to the fleeing incident, A.O. stated that he knew he had a warrant out for him and wanted to get away so he fled from the police. He admitted traveling at speeds up to ninety miles per hour.

¶8 When the State filed the delinquency petition on January 6, 2016, it simultaneously filed a petition for waiver of jurisdiction requesting that the case be transferred to adult court. The facts in the delinquency petition were incorporated into the waiver petition as support for the waiver. The waiver hearing was set for June 16, 2016.

The Waiver Hearing

¶9 The State called several witnesses at the waiver hearing. The first was Lenior Calvin, a parole agent with the State of Wisconsin Department of Corrections (DOC) for twenty-one years. His duties include advising inmates leaving Lincoln Hills School (Lincoln Hills) to reintegrate into the community successfully. Calvin supervised A.O. when he was released from Lincoln Hills to the Harper House Group Home (Harper House) on December 14, 2015. As a part of his supervision A.O. was on electronic monitoring. Calvin testified that A.O. went "AWOL" (absent without permission) three times from Harper House. The first was on December 18, 2015, for twenty-four hours, the second was from

January 1 to 2, 2016, and the third was on January 3, 2016 until A.O. was arrested for the conduct in this case.

¶10 The State's second witness was Douglas Ponzer, a social worker for the DOC for twenty-four years with the past nineteen years spent at Lincoln Hills, as a reintegration social worker. Ponzer is responsible for coordinating the groups for youth to make sure that they get in their programs, documenting their progress through those programs and making recommendations regarding release back into the community or retention at the institution. Ponzer supervised A.O. until he was released to Harper House in December 2015.

¶11 Ponzer described programs that A.O. participated in while at Lincoln Hills, including the Aggression Replacement Training Program (A.R.T.); the Juvenile Cognitive Intervention Program (J.C.I.P.), a decision-making program; and, the school's A.O.D.A. (Alcohol and Other Drug Abuse) program. Ponzer stated that A.O. completed the ten-week A.R.T. program, but it took him several attempts to complete it because A.O. had to restart the program on several occasions because he had been in security and missed too many groups so that he had to redo the program. A.O. also completed the three to three and one-half month J.C.I.P., but it took him longer because he was in and out of the program several times due to his restarts with security.

¶12 The A.O.D.A. program is a sixteen-week program, but A.O. took a little over five months to complete the program due to security placements. A.O. was also assigned to the additional J.C.I.P. Repeaters Program. Ponzer also testified that A.O. had approximately 12 to 15 separate security incidents between March 2014 and December 2015. Ponzer explained that security incidents generally include fighting, participating in a disturbance, which is usually

referenced to some allusion to a gang raid, gang terminology, threats, disobeying orders, disruptive conduct, lying, unauthorized property, entry into an unauthorized room or area, or misuse of medication.

¶13 To clarify A.O.'s history at Lincoln Hills, Ponzer explained that on August 28 or 29, 2013, A.O. was ordered placed at Lincoln Hills for two years, but that order was stayed and Milwaukee County placed A.O. on one-year supervision at Norris Adolescent Center (Norris), a residential treatment center. A.O. remained at Norris until he was placed in detention on February 5, 2014. After a March 20, 2014 hearing, the stay was lifted and A.O. was ordered placed at Lincoln Hills for two years. A.O. remained there until his December 2015 release.

¶14 Part way through Ponzer's testimony, the trial court adjourned the hearing. The waiver hearing continued on September 22, 2016, with Ponzer explaining that A.O. was released to Harper House in December 2015, but was taken into custody on January 5, 2016, and was returned to Lincoln Hills on March 18, 2016. Upon his return, A.O. repeated and completed the entire J.C.I.P. program on September 16, 2016. A.O. also had three security incidents between May 31, 2016 and the September 22, 2016 hearing date: (1) on May 31, 2016, A.O. was involved in a fight; (2) on June 6, 2016, while in restrictive housing, A.O. went over the fence in the security area; and (3) on July 5, 2016, A.O. exposed his penis to a female teacher from the security unit.

¶15 In response to the State's question, Ponzer stated that, if A.O. remained in the juvenile system, there was no programming under S.J.O.P. available to him that he had not already taken other than the Victim Impact Program. He explained that the programs that A.O. could be offered were programs that A.O. already completed at least once. Ponzer went on to say that

"we've offered [A.O.] every service that we can, and despite that we continue to see the acting out, the manipulative behaviors that we do. So I don't know that anything's going to change dramatically."

¶16 Addressing the issue of the S.J.O.P., Ponzer explained that "[A.O.] arrived in March of 2014. It is now September of 2016. With the exception of three months he spent in detention, he's been with us for about [twenty-six] months, and in that [twenty-six] months we have not seen a significant change in his overall thinking and behavior." He went on to say that:

> Up until this point in time, we haven't seen a significant change in him. If he were adjudicated S.J.O., the only option we would have with him is to sanction him back to the institution if he failed to cooperate with his rules of supervision in the community. I don't know that -- if that would have a dramatic impact on him in the future, if he [sic] demonstrate insight, maturity that we haven't seen yet or not.

The waiver hearing was adjourned again.

¶17 When the waiver hearing resumed on November 2, 2016, with cross-examination of Ponzer, he was asked whether there were additional security incidents between September 22, 2016, and November 2, 2016. Ponzer described an October 11, 2016, incident at Lincoln Hills where A.O. masturbated on top of his blanket when a female staff member came to his room to make a check. Ponzer noted that A.O. was aware that the female staff member was in his room to make the check at 12:15 p.m. A second alleged incident was referred because of allegations of a sexual nature, but Ponzer did not have any details. The incident allegedly occurred while A.O. was away from Lincoln Hills and in the custody of Milwaukee County.

¶18 Ponzer was also asked about the difference in programming between someone placed at Lincoln Hills in the S.J.O.P. and someone not in the program. He explained that "[t]he programming that they are offered would be the same programming. There's not different programming for S.J.O.s." He went on to explain that "[i]f someone goes back into the community after completing programming and fails and is returned to the institution, then the Joint Planning Review Committee looks at what failed in the community and tries to assess what programming would be appropriate to [redo]."

¶19 Also on cross-examination, Ponzer was asked whether it was documented that A.O. was a victim of sexual abuse for several years, by a family friend. Ponzer stated that the issue was raised earlier in A.O.'s stay but A.O. always denied that any such abuse occurred. He explained that if someone was a victim of sexual abuse, that person would be referred to Clinical Services and a clinician could meet with the person. Ponzer also stated that Lincoln Hills has a sex offender program, but it is for youth who sexually assault others, not for youth who are victims of sexual assault. Therefore, A.O. would never qualify for that program. However, if he were identified as a victim of sexual abuse, A.O. could work individually with a therapist at Lincoln Hills.

¶20 At the conclusion of the waiver hearing, the trial court found by clear and convincing evidence that it would be contrary to the juvenile's best interest or the best interest of the public to hear the case in juvenile court. By order dated November 3, 2016, the trial court granted the waiver petition in 2016JV10. This appeal followed.

DISCUSSION

¶21 A.O. argues that the trial court failed to give "sufficient and proper" consideration to the suitability of A.O. receiving services in the S.J.O.P, before making a waiver determination. He also asserts that testimony about A.O.'s prior post-traumatic stress disorder and his sexual acting out should have tipped the scales towards having the matter remain in juvenile court, because A.O. never received any type of sex offender or sexual assault victim treatment. For the following reasons, this court disagrees.

Standard of Review

¶22 Our supreme court has set forth the standard of review for a juvenile waiver appeal:

> The decision to waive juvenile court jurisdiction under WIS. STAT. § 938.18 is committed to the sound discretion of the juvenile court. We will reverse the juvenile court's decision to waive jurisdiction only if the court erroneously exercised its discretion. 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. In reviewing the juvenile court's discretionary decision to waive jurisdiction, we look for reasons to sustain the court's decision.

State v. Tyler T., 2012 WI 52 ¶24, 341 Wis. 2d 1, 814 N.W.2d 192 (citations omitted). Additionally, the trial court must exercise its discretion, considering each of the criteria laid out in WIS. STAT. § 938.18(5). However, it is within the trial court's discretion how much weight should be afforded each of the factors under the statute. See ***J.A.L. v. State***, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991).

The Trial Court Properly Exercised its Discretion in Considering the Criteria Set Forth in WIS. STAT. § 938.18(5)(c)

¶23 A.O. argues that the trial court did not properly apply the criteria set forth in WIS. STAT. § 938.18(5)(c), which requires that the court consider:

> *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[.]

However, A.O. concedes:

> The facts upon which the court based the waiver are essentially undisputed. A.O. recognizes that in every sense this was a very close determination as to whether waiver was appropriate. It is conceded that [the] question of whether waiver was appropriate, turned on the issue of adequacy and suitability of facilities, services, and procedures of treatment of juveniles. Sec. 938.18(5)(c). The evidence produced at the hearing regarding the other waiver criteria, is not in dispute.

(Bold type omitted.)

Therefore, the only issue on appeal is whether the trial court properly considered the factors in WIS. STAT. § 938.18(5)(c).

¶24 Although A.O. focuses on WIS. STAT. § 938.18(5)(c) and the availability of the S.J.O.P., the trial court has the discretion to determine how much weight it will afford to each factor under WIS. STAT. § 938.18(5). *See* ***J.A.L.***, 162 Wis. 2d at 960. To that extent, the trial court's analysis of the criteria ultimately focused upon the facility, services, and procedures available for treatment of A.O. in the juvenile justice system, the protection of the public under those circumstances, and the criteria under subsection (5)(b) of the statute. WISCONSIN STAT. § 938.18(5)(b) requires that the court consider "[t]he 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." While discussing both treatment and protection of the public within the juvenile system, the trial court also addressed the seriousness of the offenses set forth in the petition for waiver. The trial court's analysis reflects a careful balancing of available treatment and the protection of the public.

¶25 A.O. argues that the trial court should have engaged in greater discussion of the availability of sex offender treatment, the suitability of sex offender treatment, the success rate of sex offender treatment when dealing with individuals who are sexually acting out and have been the victim of sex abuse. He then states that the record establishes that there were services and treatment available to A.O. under the S.J.O.P. if the court ordered them.

¶26 A.O.'s argument boils down to the fact that he disagrees with the weight the trial court gave to the sex offender treatment program at Lincoln Hills. However as noted above the trial court has the discretion to determine how much weight it will afford to each factor under WIS. STAT. § 938.18(5). *See* ***J.A.L.***, 162 Wis. 2d at 960. Exercising that discretion the trial court ultimately gave more weight to the seriousness of the offenses A.O. faces and the protection of the public.

¶27 Additionally, the record does not support his argument. A.O. states that there was extensive testimony that A.O. began to act out in a sexually inappropriate manner during his last stay at Lincoln Hills. However, the only testimony was that of Ponzer, who described two incidents that occurred at Lincoln Hills. The first occurred on July 5, 2016, when A.O. exposed his penis to a female teacher from the security unit. The second incident occurred on October

11, 2016, when A.O. masturbated on top of his blanket at Lincoln Hills when a female staff member came to his room to make a check. Ponzer also stated that a self-reported third incident was reported as being of a sexual nature, but he did not have any details because it occurred while A.O. was in the custody of Milwaukee County.

¶28 This is hardly extensive testimony. From this, A.O. argues that he would benefit from the sex offender program and a program for victims of sexual abuse at Lincoln Hills. However, A.O. has not shown by any witness, let alone an expert medical witness, that A.O. would benefit from sex offender treatment or treatment for victims of sexual abuse. Additionally, Ponzer testified that although Lincoln Hills does have a sex offender treatment program, A.O. would not qualify because he has never been adjudicated as a sex offender.

¶29 A.O. further argues that because he was a victim of sexual abuse, he would benefit from the sex offender treatment program. However, the only evidence regarding the issue of A.O. being the victim of sexual abuse is Ponzer's answer to trial counsel's question on cross-examination whether "the [DOC's] notes reflect information that it had been documented that [A.O.] was a victim of sexual abuse by a family friend for several years?" Ponzer answered, "[t]hat issue had been raised earlier in [A.O.'s] stay…but [A.O.] had always denied that any such abuse had occurred." Additionally, A.O. ignores Ponzer's testimony that A.O. always denied that he was ever a victim of sexual abuse. Moreover, A.O. fails to explain, let alone offer proof, how placing the victim of sexual abuse in a sex offender treatment would benefit such a victim.

¶30 Ponzer also stated that Lincoln Hills does not have a sexual abuse victim treatment program. He explained that if A.O. was the victim of sexual

abuse, he had the opportunity to meet with a therapist at Lincoln Hills. Ponzer also stated that A.O. did meet with therapists, but the records are confidential and he did not know what the records contained. Moreover, consistent with his past denials, A.O. offered no convincing evidence that he was ever the victim of sexual abuse.

¶31 Although A.O. focuses on WIS. STAT. § 938.18(5)(c) and the availability of the S.J.O.P., the trial court has the discretion to determine how much weight it will afford to each factor under WIS. STAT. § 938.18(5). *See* ***J.A.L.***, 162 Wis. 2d at 960. At the beginning of its comments the trial court noted that the suitability and appropriateness of the treatment facility, Lincoln Hills, in the juvenile corrections system is extremely important in its analysis of all of the waiver criteria under WIS. STAT. § 938.18(5). The trial court explained that although the other criteria were not disputed it would quickly go through them, which it did.

¶32 Addressing A.O.'s treatment history, the court noted that A.O. has been subject to J.C.I.P., A.R.T., and other programs on multiple occasions. The trial court stated that "[i]n fact, if the [c]ourt denied the waiver, it would be round three…as far as what of the core services Lincoln Hills has that would be then offered to [A.O.]." It noted that in addition to the treatment at Lincoln Hills, A.O. has been subject to Norris programming in the community, when he was at Harper House, and other programs throughout his probation. The trial court concluded that "there's no absence of treatment history which would, I think, be a factor the [c]ourt would have to think about. So that's a non-issue."

¶33 The trial court also considered the seriousness of both the current offenses that were the subject of the waiver and A.O.'s prior offenses. The trial

court noted that the offenses included several misdemeanors, two felonies, and the adult fleeing. The trial court described the offenses as "[c]rimes against property, crimes against people, both violent in nature as well as violating is how I will define a burglary. Some resisting arrests. That shows a certain willfulness, disregard for law enforcement. So those are all concerns." The trial court then said that A.O. was facing ninety-six years and three months if the State were to charge A.O. with all the offenses as an adult. It then stated that "[s]o to me that is a factor against waiver when you're looking at [A.O.]'s age.

¶34 The trial court then noted that A.O. did not do well while on probation and that within sixty days of being released from Lincoln Hills, A.O. had the new and serious charges against him. It then analyzed whether the new charges involved person and property and whether they involved violence and willfulness. It stated that "[t]he willfulness, the purposefulness here is of concern to the [c]ourt, and I will say that is certainly an aggravating factor." The trial court explained that it meant that:

> After spending a significant amount of time at Lincoln Hills, almost as soon as [A.O.] was released, he immediately picked up a new charge and essentially picked up the crime spree right where he left off. Dangerous driving, up to [eighty] miles per hour, is being alleged, and it was within [sixty] days of release, which is huge as far as how well did the J.C.I.P. and the [A.R.T.] and the programs that he, according to Lincoln Hills, successfully completed, how much did they change behavior. And the answer is not one bit.

The trial court then found the fact that A.O. did not change as a result of the programing that he completed, was significant when it considered the degree of willfulness in his conduct.

¶35 The trial court then addressed the adequacy and suitability of Lincoln Hills, the services available to A.O., protection of the public, and how much S.J.O.P. is really appropriate and suitable. It began by saying, "[a]s I started out saying, that's really the crux of it." Clearly, the trial court was giving the most weight to treatment in the juvenile facility and protection of the public. It noted that trial counsel made a good point that:

> The [c]ourt has a greater ability here in the juvenile system, because of our extreme reliance and confidence in programming and rehabilitative services, to interject more stuff into a dispositional order than would be at sentencing. Meaning the [c]ourt has a greater ability to say he needs to go in this program and that program, and because we only have one facility and because that facility has to service all of our juveniles, kids get the programming.

¶36 After first finding that A.O., based on his age, could only be placed at Lincoln Hills for approximately five months without S.J.O.P., the trial court concluded that it would not be appropriate. It then went on to address the question of whether Lincoln Hills would be appropriate with an S.J.O.P. placement and concluded that it would not.

¶37 The trial court explained:

> And the problem the [c]ourt has, despite [trial counsel's] good arguments and despite the fact that the juvenile system does have more programming, which I like, [A.O.'s] already been through their programming twice, and we're back here again. So, when [sic] the [c]ourt really has to say is Lincoln Hills suitable, well, no, because they don't offer him anything other than what he's got. Unless the [c]ourt specifically orders the sex offender treatment. I'll give you that.

It went on to say that although the sex offender treatment program might help prevent A.O. from becoming a sex offender, what the court had to consider was whether the sex offender treatment is "going to stop anymore burglaries, anymore

thefts, anymore obstructions, anymore batteries, anymore fleeings, anymore burglaries, armed robberies, take and drive" The trial court concluded that "the answer is no."

¶38 The court then held that Lincoln Hills was not suitable for A.O. because he completed the core programs twice and it did not successfully rehabilitate him. It stated that "[i]t's inadequate for this juvenile. It doesn't protect the public to just send [A.O.] back for more, more of the same. It's not good for him really, and it's certainly not good for the community given the nature of these very aggravated, very high-degree felony charges."

¶39 The trial court then found "that there is clear and convincing evidence that it's contrary to the best interest of [A.O.] or the public to hear this case in juvenile court." It then granted the petition for waiver of juvenile court jurisdiction.

¶40 Clearly, the trial court carefully considered and weighed all of the criteria required under WIS. STAT. § 938.18(5). It specifically considered A.O.'s argument that he would benefit from the sex offender treatment program at Lincoln Hills. However, the trial court exercised its discretion and determined how much weight should be afforded each of the factors under the statute and gave the most weight to the seriousness of the offenses and protection of the public. In the end, the trial court concluded that a three-year period was not a sufficient time to address A.O.'s needs and to protect the public.

¶41 Based on the evidence and the applicable law, this court concludes that the trial court considered and applied the criteria under WIS. STAT. § 938.18(5) and reasonably determined on the record that it was established by clear and convincing evidence that waiver would be in the best interest of the

public. Thus, this court concludes that the trial court did not erroneously exercise its discretion in waiving juvenile jurisdiction.

By the Court.—Order affirmed.

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