

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2019

Sheila T. Reiff
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP2449

Cir. Ct. No. 2018JV166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF T.J.B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

T.J.B.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LLOYD CARTER, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ T.J.B. appeals from an order granting the State’s motion waiving juvenile jurisdiction for a delinquency petition filed against him.² T.J.B. argues the court erroneously exercised its discretion when it failed to sufficiently consider evidence related to the statutory criteria for waiver and that certain of the court’s findings were unsupported by the record. Because the court examined relevant evidence and used a rational process of applying that evidence to the criteria listed in WIS. STAT. § 938.18(5), we conclude the court properly considered the interests of the juvenile and the public and exercised its discretion without error. We affirm.

BACKGROUND

¶2 The facts of the case are largely undisputed. On August 16, 2018, the State filed a petition to waive juvenile jurisdiction and a delinquency petition charging T.J.B. with two counts of possession of THC, two felony counts of possession with the intent to distribute THC near a park, one count of possession of a dangerous weapon by a person under eighteen, and one count of possession of drug paraphernalia.

¶3 The court held two waiver hearings and heard testimony presented by the State in favor of waiver and by T.J.B.’s trial counsel in opposition to waiver. The court also considered a psychological evaluation and two waiver reports.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version.

² This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3).

¶4 At the first hearing on the petition, Detective David Coats recounted incidents that led to his statement that T.J.B. was on their radar, including an incident in which a friend of T.J.B.'s had been hallucinating after smoking marijuana, a complaint from T.J.B.'s neighbor in November of 2017 that T.J.B. was possibly selling drugs outside of his residence, and subsequent discovery of T.J.B. in a vehicle in which marijuana was located. Coats testified T.J.B. "had been named numerous times as being the main manufacturer/dealer in Sussex." T.J.B. had previously been issued citations for truancy, possession of tobacco, possession of marijuana, and possession of drug paraphernalia in 2016, 2017, and 2018. Coats testified that his interactions with T.J.B. led him to conclude that he was physically mature and was not mentally ill or developmentally disabled.

¶5 Coats arranged two controlled buys of marijuana between T.J.B. and a confidential informant. T.J.B. met the informant at a park and sold 180.3 grams of marijuana in exchange for \$1100. A few days later, T.J.B. met the informant at a park and sold another 234 grams of marijuana in exchange for \$920.

¶6 After the sale, T.J.B. showed the informant a black semi-automatic handgun concealed in T.J.B.'s backpack. Coats testified that these amounts were "way more than a personal stash" and were not the sales of "your street level dealer." He further testified that they were planned drug transactions, and this type of sale could be dangerous to public safety, the parties involved, and to law enforcement.

¶7 Coats also received information from a concerned parent stating they had learned of a Snapchat photo posted by T.J.B. displaying semi-automatic rifles and handguns.

¶8 Coats went to T.J.B.’s residence and informed T.J.B.’s mother about the investigation. T.J.B.’s mother produced a silver handgun she previously confiscated from T.J.B.’s bedroom. T.J.B.’s mother consented to Coats searching T.J.B.’s bedroom. A second handgun matching the description of the gun shown during the second controlled buy was discovered, along with bullets. The firearm had a scratched off serial number, and T.J.B. was not legally permitted to possess a gun. When T.J.B. was arrested he appeared under the influence and “[e]xtremely disoriented” to the point that he was taken to the hospital for medical clearance. Marijuana and drug paraphernalia were found in T.J.B.’s backpack.

¶9 After T.J.B.’s arrest, a confidential informant provided screenshots of T.J.B. posting pictures of large amounts of cash and marijuana, with one picture captioned “when your drug dealer makes more than you.”

¶10 At the second hearing, Robert Alioto, a social work supervisor in the juvenile intake unit, testified that the juvenile justice system was suitable for T.J.B. Alioto reported that since T.J.B.’s arrest, T.J.B. complied with detention, attended school, and joined a boxing gym. No contraband was found during searches, and all drug tests were negative. T.J.B.’s family was engaged in his treatment, and they reported he was more compliant since initiating treatment.

¶11 Alioto testified that T.J.B. had struggled with alcohol and other drug abuse (AODA) issues, specifically regarding marijuana, for about two years. He had been using marijuana since the end of eighth grade. Alioto testified that, based on the psychological evaluation and T.J.B.’s behavior during the prior two and one-half months, and one completed AODA session, he believed that if T.J.B. were placed through a juvenile order he would be compelled to complete AODA’s eight-week treatment program, and he opined that T.J.B. could recover in the ten

months prior to T.J.B. turning eighteen. Alioto stated that T.J.B. questioned his need for therapy and felt he was not addicted to drugs.

¶12 Alioto confirmed the juvenile justice system only had jurisdiction over T.J.B. until his eighteenth birthday. Because T.J.B. was already seventeen years old, he would only be eligible to receive treatment and be on supervision with the juvenile justice system for the next ten months or until October 10, 2019. After T.J.B.'s eighteenth birthday, there would be no funding of services through the Department of Health and Human Services, no opportunity for corrections, and no opportunity for sanctions.

¶13 On December 11, 2018, after hearing arguments of counsel, reviewing the testimony and other evidence from both hearings, and weighing the applicable statutory criteria, the court granted the motion waiving juvenile jurisdiction to the adult criminal court system. T.J.B. appeals.

DISCUSSION

¶14 Whether to waive juvenile court jurisdiction under WIS. STAT. § 938.18 is a decision committed to the sound discretion of the circuit court. *J.A.L. v. State*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991). After hearing all of the evidence, the court shall state its findings with respect to the statutory criteria, and if the court decides that there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to keep the case, the court shall then waive jurisdiction and the matter will move to a court of criminal jurisdiction. Sec. 938.18(6). It is within the court's discretion to determine how much weight to afford each of the statutory criteria. *J.A.L.*, 162 Wis. 2d at 960.

¶15 As a reviewing court, we will not reverse a juvenile court's decision to waive jurisdiction unless we determine the court erroneously exercised its discretion. *Id.* Such error occurs if the court fails to carefully delineate the facts or reasons motivating its decision or if it makes a decision not reasonably supported by the facts. *Id.* at 961. We first look to the record to confirm that discretion was indeed exercised in evaluating WIS. STAT. § 938.18(5). *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Assuming the exercise of discretion, we look for reasons to sustain the court's decision. *J.A.L.*, 162 Wis. 2d at 961.

¶16 T.J.B. asserts the circuit court made insufficient findings related to the criteria of WIS. STAT. § 938.18(5) and issued a decision not reasonably supported by the facts. Specifically, he contends: the court ignored evidence relating to his physical maturity, his motives, attitudes, and the program availability in the juvenile system; the record did not support the court's findings regarding the potential for future treatment, his pattern of living, and aspects of its consideration of how serious the offenses were; and the court failed to address the agency reports, much less make findings regarding their content. We disagree.

¶17 The court began its decision by noting that it had reviewed the entire record, which included the psychological evaluation, the reports, the testimony, and the briefs. The court discussed each of the statutory criteria, carefully setting forth its analysis of each of the considerations in WIS. STAT. § 938.18(5)(a)-(d), giving emphasis or providing more weight to those that it found relevant and applicable. This was clearly within its discretion.

¶18 WISCONSIN STAT. § 938.18(5)(a) lists the defendant's personality, physical and mental maturity, pattern of living, prior treatment history, apparent

potential for responding to future treatment, and whether there are mental illness or developmental disability issues. Addressing these issues, the court discussed the findings of the psychological evaluation, including the tests administered, background information the doctor reviewed, and the behavioral observations and test results. The court discussed T.J.B.'s personality, including his lower intellectual functions in comparison to his peers and his lack of conduct disordered youth patterns. The court noted that T.J.B. had no indication of developmental disability but did exhibit identifiable mental health and substance abuse issues. The report noted that T.J.B. had unspecified anxiety disorder, adjustment disorder, adjustment disorder with depressed mood, and cannabis use disorder per T.J.B.'s self report. The psychological report noted that T.J.B. remained at risk for continued use.

¶19 The court addressed T.J.B.'s maturity, intellect, history of substance abuse, and motivations, specifically noting that, per the reports and testimony, T.J.B. has the ability to intellectually and emotionally benefit from treatment if motivated to do so. Further, the court noted that the report and Alioto recommended behavioral treatment and monitoring of substance abuse and cravings. The court concluded that treatment was necessary, noted that similar treatment is available in both a juvenile and adult setting, and stated that it was unclear if the treatment would be more effective in one setting over another.

¶20 T.J.B. argues the court failed to assess his potential to respond to future treatment. He complains that the court ignored Alioto's testimony regarding T.J.B.'s positive behavioral improvements during the prior two and one-half months. To the contrary, as noted above, the court reviewed the entire record, highlighted certain findings and testimony, and noted that T.J.B. was amenable to treatment. However, the court expressed concern as to whether the short period of

time in which to consider the many identified changes in T.J.B.'s behavior, including his improved relationship with his family, provided sufficient information upon which to conclude that he was sufficiently motivated to make changes that would ensure his interests would best be served in the juvenile system or that the public would be protected.

¶21 The court noted that T.J.B. appears to be a follower and concluded it could be a challenge for him as he attempts to change his attitude and behaviors. The court noted T.J.B. “struggles to take responsibility for his behaviors” and tends to “blame others.” The court addressed T.J.B.'s maturity at length, noting his young age, but also discussed the fact that the crimes were not spontaneous or impulsive, but rather, were deliberate, organized drug transactions requiring a certain level of sophistication to arrange and execute.

¶22 The court also questioned whether T.J.B.'s current cooperation was due to the threat of adult system and placed substantial weight on the fact that T.J.B. only had ten months remaining before turning eighteen and would no longer have access to treatment.

¶23 T.J.B. complains that the court ignored evidence regarding his physical maturity—that he is smaller than the average sixteen or seventeen year old boy. The court's analysis made clear that it thoroughly considered the psychological evaluation, the two waiver reports and Alioto's testimony, which raised this issue. That the court did not find this singular fact dispositive or even persuasive, namely that T.J.B. was arguably motivated to show machismo or bravado rather than presenting a danger with his ownership and display of a gun, does not amount to an erroneous exercise of discretion, particularly given the myriad of other weighty factors.

¶24 Along the same lines, T.J.B. argues the court failed to consider his motives and attitudes, as indicated under WIS. STAT. § 938.18(5)(am). Again, we disagree. The court analyzed T.J.B.’s minimal prior record when evaluating § 938.18(5)(am), noting only minor citations for truancy and possession of tobacco. However, as discussed above, the circuit court discussed and considered at length T.J.B.’s maturity, personality, pattern of living, and treatment and behaviors exhibited before, during and after the crimes, and reached conclusions as to his motives and attitudes. That the court weighed the facts and reached different conclusions as to whether the changed behavior within the prior two and one-half months under DHHS supervision provided sufficient information upon which to have confidence that the improved behaviors would continue into the future after only ten months in the juvenile system, does not equate to a failure to consider the facts. The court considered all the facts and determined that T.J.B. would benefit from a longer period of treatment. For the same reasons, we reject T.J.B.’s contention that the court did not provide reasoning as to why the court disagreed with Alioto’s recommendation. The court extensively laid out the facts it found compelling and its reasons for disagreeing with Alioto’s recommendation.

¶25 The court put a substantial amount of weight on the criteria of WIS. STAT. § 938.18(5)(b), including the type and seriousness of the offense, whether it was against persons and the extent to which it was committed in a violent, aggressive, premediated, or willful manner. The court noted that the drug offense charges were extremely serious in nature, and determined that this was the overriding factor. As the detective testified, T.J.B. sold a substantial amount of marijuana during both controlled buys, far more than a “personal use stash.” T.J.B. had a reputation for being the “main manufacturer/dealer in Sussex,” which was supported by other information provided to Coats and the court.

¶26 The court noted that the drug transactions were prearranged and showed a sense of willfulness. Significantly, even if they were unused, T.J.B. possessed two different firearms, one of which he showed to a buyer. While T.J.B. contends that his handling of the guns indicated a desire to exhibit machismo, the court reached a different less benign conclusion—that he was sending a clear message during drug transactions involving substantial amounts not to cross him, which is clearly supported by the fact that T.J.B. had the two guns, one a semiautomatic, and bullets. As the court stated: “Conducting illegal drug transactions is one thing. Conducting illegal drug transactions with higher levels, that is, greater weights of controlled substances, is yet another issue. Doing it with a firearm is taking it to substantially yet another level.” The court considered all of the facts and did not erroneously exercise its discretion in concluding that the presence of a firearm during the drug transaction was a very serious, substantial factor to consider.

¶27 The court heavily weighed the factors of WIS. STAT. § 938.18(5)(c), the adequacy and suitability of services and procedures for treatment, the protection of the public, and the suitability for placement in the juvenile offender program. The court expressed great concern over the limited ten-month time treatment and supervision available for T.J.B. in the juvenile system. The adult system enabled far longer treatment and supervision options. While both the juvenile system and the adult system offered relatively similar treatment options from a mental health and substance abuse standpoint, the juvenile system was only available to T.J.B. until his eighteenth birthday, only ten months away. The court concluded that the length of time available to rehabilitate T.J.B. and address his needs in considering protection of the public was greater in the adult system.

Ultimately, when considering both the interests of both the public and of T.J.B., the court found that the availability of longer treatment was significant.

¶28 The circuit court’s consideration of the facts of the case, accurate application of statutory criteria, and reasonable exercise of discretion are evident throughout the record. The court considered both the protection of the public and the best interests of T.J.B. The court reasonably weighed the factors under WIS. STAT. § 938.18(5) and reasonably assigned substantial weight to the seriousness of the crimes and the limited time remaining for supervision in the juvenile justice system. Thus, the circuit court did not erroneously exercise discretion in waiving juvenile court jurisdiction.

By the Court.—Order affirmed.

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

