

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2002

Cornelia G. Clark
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 Nos. 01-3172, 01-3173

Cir. Ct. No. 00-JV-114, 00-JV-114A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JEFFREY A.T.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Shawano County:
EARL W. SCHMIDT and JAMES P. JANSEN, Judges.¹ *Affirmed.*

¶1 PETERSON, J.² Jeffrey A.T. appeals from a juvenile court dispositional order adjudging him delinquent of one count of first-degree sexual

¹ Judge Jansen presided over the postdispositional proceedings.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

assault of a child and one count of fourth-degree sexual assault, contrary to WIS. STAT. §§ 948.02(1) and 940.225(3m), and from an order denying postdispositional relief. Jeffrey argues: (1) the dispositional order is based upon a recommendation made in violation of § 938.33 because the court report did not include a written analysis of any less restrictive alternatives; and (2) the failure to include the written analysis of any less restrictive alternatives reflects an improper policy preference for serious juvenile offender program placement in order to save the county money. We disagree and affirm the orders.

BACKGROUND

¶2 On October 27, 2000, Jeffrey (D.O.B. 8-11-85) sexually assaulted his younger brother. He made his initial appearance on November 6 and entered a general denial and a denial by reason of mental disease or defect. The court appointed Dr. Allen Hauer to conduct an examination. Hauer found that although Jeffrey was suffering from some mental disorders, he was mentally responsible for his conduct. Jeffrey withdrew his mental disease plea.

¶3 At a pretrial conference on December 18, 2000, the State provided Jeffrey a copy of the Department of Social Service's disposition report. The report recommended placement in the serious juvenile offender program at Lincoln Hills School.³ A tentative plea agreement was reached, but the plea was delayed because the county received a referral concerning an August 27, 2000, incident

³ According to the State, this is the usual procedure in Shawano County. The State provides the juvenile and his attorney with a copy of the proposed disposition report so they can make an informed decision on whether the matter is to be set for a plea and disposition or a factfinding hearing.

involving Jeffrey's girlfriend, but no petition had been filed. Jeffrey was accused of having consensual sex with his girlfriend, who was under eighteen.

¶4 On December 21, 2000, the circuit court found Jeffrey delinquent for first-degree sexual assault of a child following entry of a no-contest plea. During the plea colloquy, the State acknowledged that it would be recommending the serious juvenile offender program at Lincoln Hills. The court set the disposition hearing and the initial appearance for the new referral for January 3, 2001.

¶5 On January 3, 2001, the circuit court adjourned the dispositional hearing at Jeffrey's request to permit a representative of Homme Home to assess Jeffrey and to determine if placement there would be appropriate. Jeffrey entered a denial for the new referral—a charge of fourth degree sexual assault—and the court set a fact-finding hearing for January 25.

¶6 On January 25, 2001, Jeffrey entered a plea of no contest to the fourth-degree sexual assault charge and was found delinquent. A disposition hearing was then held for both cases.

¶7 At the disposition hearing, the circuit court received the department's written disposition report prepared by Lynnae Zahringer, a written report prepared by Susan Ackerman regarding Jeffrey's assessment and his suitability for Homme Home, and a two-page letter Dr. Hauer sent to the court recommending a community placement or a residential facility like Homme Home.

¶8 During the hearing, Ackerman testified that Homme Home was willing to work with Jeffrey depending upon available space. She stated that it would be two to four weeks before Jeffrey could be admitted. However, she also

recommended placement in a secure setting like Lincoln Hills before placement at Homme Home.

¶9 Zahringer testified, recommending that Jeffrey be placed in the serious juvenile offender program at Lincoln Hills School. She described the program and noted that it is designed for juveniles who commit first-degree sexual assault and other serious crimes. She stated that Jeffrey was particularly appropriate for the program, in view of the number of sexual assaults he had committed, the variety and ages of his victims, the failure of his prior counseling and psychological treatment, his noncompliance with rules while in secure detention, and his apparent attitude toward his current offenses. Zahringer described Jeffrey's past psychological evaluations and community-based treatments, as well as the counseling he had received earlier.

¶10 Zahringer also indicated that the only placement she considered was the five-year placement in the serious juvenile offender program because any other placement would mean that Jeffrey could only be treated for two and a half years, or until he turned eighteen. Zahringer did not consider this sufficient because of the past failed treatment attempts.

¶11 Jeffrey objected to the court report and argued that the State was statutorily mandated to look at other alternatives, analyze them, and discard them only if they are inappropriate. *See* WIS. STAT. § 938.33(3)(a). He suggested adjourning the disposition hearing for two to four weeks to allow this process to be completed.

¶12 The circuit court disagreed and noted that it had heard extensive testimony regarding placement alternatives. The court stated that it would be very time consuming and unnecessary to require the department to review all of the

available programs, assess Jeffrey's suitability for them, and document why they were not appropriate. The court noted that it was the court's decision to decide between the serious juvenile program and residential treatment at Homme Home. The court also noted that Jeffrey had been in previous community-based programs without success, that community-based out-of-home placement would not be appropriate due to Jeffrey's age, which would limit the duration of treatment, and his record of multiple offenses and victims. Accordingly, the court concluded that Jeffrey should be placed in the serious juvenile offender program.

¶13 Jeffrey filed a postdispositional motion and argued that the circuit court must vacate the dispositional order for two reasons. First, the dispositional report violated due process because it failed to comply with WIS. STAT. § 938.33 by failing "to give serious consideration to any other option but a serious juvenile offender placement." Second, the court report was improper because it "is consistent with a policy of recommending [serious juvenile offender] placement in order to save the county money." Attached to the motion was a Department of Corrections document indicating Shawano County had a high rate of placing juveniles in the serious juvenile offender program.

¶14 At the postdisposition hearing, in addition to the allegations in the written motion, Jeffrey submitted an offer of proof that his mother would testify that, from very early on in the process, Zahringer had already recommended serious juvenile offender placement. Jeffrey argued this was consistent with the department's policy to recommend the serious juvenile offender placement to save the county money.

¶15 Jeffrey also made an offer of proof that his trial attorney was prepared to testify that the district attorney told him that the county always

recommends the serious juvenile offender program to save money. The circuit court rejected Jeffrey's arguments and denied his postdispositional motion.

DISCUSSION

I. WISCONSIN STAT. § 938.33

¶16 Jeffrey argues that the dispositional order is based upon a court report that violates WIS. STAT. § 938.33 because the report did not include a written analysis of less restrictive alternatives. Jeffrey contends that written consideration of lesser alternatives is mandatory and not directory.

¶17 This case involves a question of statutory interpretation, which this court reviews independently of the circuit court. *State v. Michels*, 141 Wis. 2d 81, 87, 414 N.W.2d 311 (Ct. App. 1987). If the language of the statute is clear and unambiguous, the primary source of statutory interpretation is the statute itself. *Robert Hansen Tkg., Inc. v. LIRC*, 126 Wis. 2d 323, 332, 377 N.W.2d 151 (1985). Because we find the language of WIS. STAT. § 938.33 unambiguous, it is not necessary for this court to look beyond the language of the statute to ascertain legislative intent. *See id.*

¶18 WISCONSIN STAT. § 938.33(1) provides that "[b]efore the disposition of a juvenile adjudged to be delinquent ... the court shall designate an agency ... to submit a report" containing, among other things, a social history of the juvenile, a recommended plan of rehabilitation, a recommendation of specific services for the juvenile or family, a statement of the plan's objectives and a plan for the provision of educational services to the juvenile. Section 938.33(3)(a), which addresses "correctional placement reports," requires a "description of any less restrictive alternatives that are available and that have been considered"

¶19 Jeffrey contends that the clear meaning of WIS. STAT. § 938.33(3)(a) requires the court report to include a description of less restrictive alternatives. We disagree. Admittedly, the statute repeatedly uses the word “shall.” However, nothing in the statute requires the court report to consider and evaluate less restrictive alternatives. The statute’s clear and unambiguous words only require the report to include a description of less restrictive alternatives *if* less restrictive alternatives have been considered. Here, no other placement was considered.

¶20 Zahringer testified that the only placement she considered for Jeffrey was the five-year placement in the juvenile offender program because of the nature of the sexual assaults Jeffrey committed. Because Zahringer did not consider less restrictive alternatives, WIS. STAT. § 938.33(3)(a) did not require a description of those alternatives in the report.

¶21 Further, WIS. STAT. § 938.33(3r), addresses the "serious juvenile offender report" and provides, in pertinent part, that:

If a juvenile has been adjudicated delinquent for committing a violation for which the juvenile may be placed in the serious juvenile offender program ... the report shall be in writing and, in addition to the information specified in sub. (1) and in sub. (3) or (4), if applicable, shall include an analysis of the juvenile's suitability for placement in the serious juvenile offender program

Under the statute, the court report is only required to include an analysis of the suitability of the serious juvenile offender placement. It does not require an examination of less restrictive alternatives. The statute only requires that less restrictive alternatives be considered if applicable under subsec. (3). Section § 938.33(3)(a) only requires analysis of less restrictive alternatives if those alternatives have been considered. Therefore, because Zahringer did not consider

less restrictive alternatives, the report was not required to analyze less restrictive placements.

¶22 Jeffrey's argument would force the department to consider every less restrictive alternative program and to explain why that particular placement is not appropriate. We agree with the trial court's statement that "[t]o say that you are to look at every program out there before you make your recommendation, I think is, is a little bit of an impossibility." We conclude that the court report did not require a written analysis of any less restrictive alternatives and that it did not violate WIS. STAT. § 938.33(3)(a) or due process of law.

II. POLICY PREFERENCE

¶23 Jeffrey argues that the department recommended that Jeffrey be placed in the serious juvenile offender program in order to save the county money. We disagree.

¶24 Jeffrey is seeking relief from a judgment. Even if his allegation is correct, he does not demonstrate why he is entitled to relief. For example, Jeffrey does not claim ineffective assistance of trial counsel. Nor does he allege mistake, surprise, excusable neglect, newly discovered evidence or fraud. *See* WIS. STAT. § 806.07(1).

¶25 Judgments are generally final. *See Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 151-52, 519 N.W.2d 723 (Ct. App. 1994). Relief is granted only in narrow circumstances and is appropriate "only when the circumstances are such that the sanctity of the final judgment is outweighed by the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 550, 363 N.W.2d 419 (1985) (citation

omitted). Jeffrey's offer of proof involved evidence known or available prior to disposition. It is not newly discovered nor, apparently, any other exception to the rule of finality.

¶26 What is important is that the circuit court decided Jeffrey's placement based on the merits. The court's determination of an appropriate disposition is within its reasoned discretion. *J.K. v. State*, 68 Wis. 2d 426, 435-36, 228 N.W.2d 713 (1975). We will affirm the court's decision if the court examined the relevant facts, applied a proper standard of law and reached a reasonable conclusion. *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999).

¶27 Here, the circuit court had before it Jeffrey's proposal that he be placed at Homme Home and Ackerman's testimony indicating availability to accommodate Jeffrey in two to four weeks. The court also had the department's court report and Zahringer's testimony explaining why she thought that serious juvenile offender placement was appropriate. The court followed the department's recommendation. In doing so, the court noted that Lincoln Hills was a more structured setting and that the department was familiar with Jeffrey's past treatment and determined that Lincoln Hills would be the best alternative. The court reached a reasonable conclusion.

By the Court.—Orders affirmed.

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

