

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 21, 1996

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.

NOTICE

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No. 94-2468

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF JAMES L. C.,
A CHILD UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JAMES L. C.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

SUNDBY, J.¹ Appellant James L.C. appeals from the juvenile court's September 8, 1994 order waiving the court's jurisdiction over him. On

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. "We" and "our" refer to the court.

November 17, 1994, we remanded this matter to the trial court for a *Machner*² hearing. After that hearing, the trial court determined that while James's trial counsel's performance was indeed deficient, that deficient performance did not prejudice appellant. We agree and affirm the trial court's order.

James L.C. has a history of bizarre sexual conduct. On October 25, 1993, he was placed by the county department of human services on informal supervision for six months because of numerous acts of lewd and lascivious behavior perpetrated by him over the course of a year. A condition of this disposition was that he receive treatment with Dr. George Planavsky, a psychiatrist. On March 4, 1994, he was charged in a delinquency petition with one count of lewd and lascivious behavior occurring on February 5, 1994. He was placed on formal supervision of the department until November 27, 1994, when he would become eighteen. He was placed with his mother and ordered to have an assessment and counseling at the Ron McGuire Family Therapy Center. On May 18, 1994, he was admitted to the St. Francis Psychiatric Unit when he was found to be in a drug-induced psychotic state. On June 9, 1994, he was placed at the Scarseth House until November 27, 1994.

On September 1, 1994, James absconded from Scarseth House. He was apprehended September 2, 1994, while operating a stolen vehicle. On September 8, the State filed two delinquency petitions, one charging James with one count of lewd and lascivious behavior, and the other charging one misdemeanor count and one felony count of operating a motor vehicle without the owner's consent, party to a crime. On the same day, the juvenile court granted the State's petition to waive its jurisdiction over James and referred the petitions to the district attorney for appropriate criminal proceedings. The court found that there were no adequate and suitable facilities, services and procedures available to treat a juvenile of James's age.

The juvenile court had available to it the report of Sandy Garry, a therapist employed by the Ron McGuire Family Therapy Center. She met with James on several occasions to complete a diagnostic evaluation. The therapist's report related a history of family and personal dysfunction, including physical and psychological abuse, neglect, inattention to basic needs, drug and alcohol

² *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

abuse, and inappropriate sexual behavior. James admitted to numerous acts of exposing behavior, far beyond those with which he was charged. He was unable to feel remorse for his exposing behavior because he didn't do anything physical to his victims. Throughout the evaluation, James frequently referred to himself as "crazy" or not "normal." The therapist recommended that James participate in an individualized therapy program with in-patient treatment as a sanction for relapse.

The delinquency petitions and the waiver petition were heard simultaneously. James personally informed the court that he wished to proceed at that time on the waiver petition. The only witness was Andrea Cunningham, a social worker with the county department of human services. She testified that James had a combination of problems, including drug and alcohol abuse and deviant sexual behavior. She further testified that the department was asking the court to waive its jurisdiction because, "there aren't any facilities or services remaining within the juvenile system that are adequate to deal with this child's problems and to also protect the public." She believed that he would be better served by being treated as an adult, one of the factors being that he would become eighteen in approximately two-and-one-half months. James's counsel did not cross-examine Cunningham with respect to her conclusions or recommendations. However, the court inquired as to James's prior behavior, his evaluation and treatment. Cunningham testified that she was not sufficiently aware of the adult system to know whether James's needs might be better met if the court were to waive its jurisdiction over him. She had not received a report from Dr. Planavsky or had a chance to speak with him. She did express her opinion that James might be deterred if he knew there were more severe consequences. When asked whether Lincoln Hills would be an appropriate placement, Cunningham testified that because of this "quick" hearing, she did not have time to check out "all those things." The court asked Cunningham if she had any idea what kind of inpatient treatment would be available as a punitive consequence to re-offending. She said she did not.

After the court admitted the therapist's report into evidence, James's counsel commented:

The only statement I would make is you're always concerned when you represent somebody and he apparently [has] totally given up, doesn't want to

fight, just wants to go along with whatever happens and ... that's the case with [James].

And after reading this thing from Ron McGuire Family Therapy Center ... I can understand ... where some of those attitudes come from.... I think he thinks he's a real bad person and there's no hope for him and that's why he's given up and doesn't want to [fight] anymore. At least now I understand it; I didn't before.

The following are excerpts from the trial court's oral decision:

[A]lthough the ... juvenile ... does not wish to contest the waiver issue, I nevertheless think this is a close question as to whether the Court should waive him into adult court...

... I would make the following observations of whether he's ... "mentally ill" I think is somewhat up in the air.... [W]hether his condition amounts to mental illness, ... without expert testimony, ... I don't really know how to resolve that.

....

... It appears that he has a fatalistic view of his problems and his position and his likelihood for ever being a ... "normal functioning member of the community." And while I don't pretend to be a psychiatrist or psychologist, everything I've heard here today suggests that he may be suffering from some degree of depression at this time.

....

Prior treatment has been minimal, mainly because of the sequence of events here. It's my understanding from reviewing the petition and the court file that he was adjudicated delinquent because of the indecent

exposure behavior this spring ... and he was to obtain counseling and ... that was amended to placement at Scarseth House in May.

So really he hasn't given the system a chance to work with his problems ... because he's committed new delinquent acts fairly shortly after being placed on that delinquency order or adjudication and dispositional order.

I would conclude that he has potential for responding to ... future treatment. I don't think by any means he's someone that should be given up on.

... [M]y observation, though, would be that the types, the depth and the unusual nature of these intertwined problems is such that he has a long-term need for treatment that would extend beyond the time period that would be left in the juvenile system.... So I don't know how we would accomplish what he needs to have accomplished in the juvenile court system.

....

... The adequacy and suitability of services and procedures available for treatment and protection of the public within the juvenile or mental health systems is a consideration.... [T]he facilities would appear to be the same, whether he's treated as a juvenile or an adult, and the treatment program would appear to be the same.

[T]he report that the Court has reviewed from [the therapist] ... indicates that ... one of the things needed is some immediacy to consequences....

... I think it's fair to say as a general proposition it usually is easier to inflict immediate consequences upon someone who's being treated as an adult rather than as a juvenile. So that certainly weighs in rather

strongly in favor of the adult system to deal with this unique problem.

Those are the only considerations that are relevant. I conclude that while I still think it's a close question ..., there is sufficient evidence [that] the State has met its burden and it has established by evidence which is clear, satisfactory and convincing that [James] should be ... waived to adult court.

James appealed from the dispositional order alleging, among other things, ineffective assistance of counsel. On November 17, 1994, we stayed the appeal and remanded the record to the trial court for a *Machner* hearing. In a decision entered January 31, 1995, the trial court concluded that counsel's performance was deficient but that that performance did not prejudice James.

Because the State does not contest the trial court's finding that James's counsel's performance was deficient at the waiver hearing, we need consider only the trial court's finding that James was not prejudiced by that deficient performance. The trial court recognized that James had to show both that his counsel's performance was deficient and that he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the trial court stated in its memorandum decision, "[t]he test is whether defense counsel's errors undermine confidence in the reliability of the results." *State v. Glass*, 170 Wis.2d 146, 154, 488 N.W.2d 432, 435 (Ct. App. 1992). The trial court applied the proper test when it stated that, "[t]he question is whether there is a reasonable probability that the court would have reached a different result, if counsel had not erred."

The trial court's finding that counsel's performance was deficient is supported by the record. He met with James for the first and only time for a few minutes before the first court appearance and then volunteered to have the waiver hearing immediately. In fairness to counsel, we believe the record shows that counsel was informing the court as to James's wishes. In fact, James himself told the court he was willing to proceed. However, we agree that counsel should not have proceeded with the waiver hearing without investigating the facts. As the trial court observed, this was a close case. In view of the imminence of James's eighteenth birthday, counsel should have been prepared to argue to the court that James could remain within the juvenile

court's jurisdiction long enough to obtain the therapy he needed. The therapist reported to the court that the Ron McGuire Family Therapy Center was prepared to provide James with treatment. Plainly, counsel was not aware of the length and nature of treatment which would have been available to James in that treatment facility or another facility.

Before the trial court entered its decision, it reopened the *Machner* hearing to allow James to present testimony of Michelle Munzenberger on the question of the prejudice to James because of counsel's deficient performance. She was qualified as an expert in social work. She testified that James's needs would "more thoroughly be dealt with in the juvenile system on the basis that as an adult he's not even being addressed on the issues of the lewd and lascivious behavior." She referred to the criminal charges against James pending in the criminal court.

Munzenberger testified that there are services available in the juvenile system to address the issues of alcohol and drug abuse and deviant sexual behavior. She believed that James was motivated to address his problems. She testified: "I don't feel he's been fairly dealt with as far as the least restrictive to most restrictive options as far as the juvenile code and I feel he needs to be given that opportunity." She expressed her opinion that James would be prejudiced by waiving him into adult court.

Before the juvenile court heard Munzenberger's testimony, it reviewed all of the statutory factors before reaching its conclusion that it was in James's and the public's best interest that the court waive its jurisdiction over him. We do not believe we may upset that exercise of the trial court's discretion. Without the urging of counsel, the trial court examined the therapist's report and was therefore aware of the recommendations of the therapist that James receive individual therapy with the possibility of the consequence of in-patient therapy if he did not cooperate with the therapy program. The court concluded that had it heard the testimony of Cunningham and Munzenberger at a hypothetical waiver hearing, it was not reasonably probable that the court would have concluded that the State had failed to carry its burden to show that waiver of the juvenile court's jurisdiction was in James's best interest and the best interest of the public.

Clearly, the trial court was impressed with the therapist's opinion that James could be benefited by dealing with any further offenses "swiftly and in a punitive fashion." While the therapist recommended that the punitive consequences include in-patient treatment, it was not inappropriate for the trial court to consider that in the criminal justice system, any additional offenses by James could be dealt with swiftly and in a punitive fashion.

The trial court demonstrated that it thoroughly understood the nature and extent of James's problems. It considered all of the statutory factors. In the circumstances, this court would be substituting its will for the discretion of the trial court were we to reverse the trial court's decision. That is an inappropriate function of an appellate court.

By the Court. – Order affirmed.

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