COURT OF APPEALS
DECISION
DATED AND RELEASED

December 21, 1995

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. 95-3361

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

IN THE INTEREST OF BENJAMIN M.R.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN M.R.,

Defendant.

APPEAL from an order of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

SUNDBY, J. This court[1] held oral argument in this case on November 9, 1995, and announced its tentative decision. The court also ordered that the delinquent, Benjamin M.R., be returned to his home pending this

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

court's review of the trial court's decision placing Benjamin in Homme Home, a treatment facility located approximately eighty miles from Benjamin's home.

Benjamin was found delinquent on September 8, 1995. He does not dispute that finding. On October 3, 1995, the trial court entered its dispositional order placing Benjamin under the supervision of the County Department of Social Services for twelve months and designating Homme Home as the placement facility. Benjamin claims that the trial court thereby misused its discretion. We agree in part and reverse the order and remand for further proceedings.

Benjamin does not contest that part of the dispositional order which placed Benjamin under the supervision of the department. He claims, however, that the trial court erroneously exercised its discretion when it failed to comply with § 48.355(1) STATS., which requires that the juvenile court "shall employ those means necessary to maintain and protect the child's well-being which are the least restrictive of the rights of the parent or child and which assure the care, treatment or rehabilitation of the child and the family, consistent with the protection of the public." Section 48.355(1) further provides:

> Wherever possible, and, in cases of child abuse and neglect, when it is consistent with the child's best interest in terms of physical safety and physical health the family unit shall be preserved and there shall be a policy of transferring custody from the parent only where there is *no less drastic alternative*.

(Emphasis added.)

Benjamin also complains that the juvenile judge did not make written findings of fact and conclusions of law as required by § 48.355(2)(a), STATS., which provides in part:

> In addition to the order, the judge shall make written findings of fact and conclusions of law based on the evidence presented to the judge to support the

> disposition ordered, including findings as to the child's condition and need for special treatment or care if an examination or assessment was conducted under s. 48.295.

This is not grounds for reversal if the trial court adequately stated its reasons for its decision in a memorandum decision, written or oral. *See* § 805.17(2), STATS. We are satisfied that the trial court explained its reasoning, although it applied an incorrect standard.

At oral argument, the parties agreed that "means ... which are the least restrictive of the rights of the parent or child" and "no less drastic alternative" are synonymous. The parties also agreed that the "no less drastic alternative" was undoubtedly derived from JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973). The authors proposed as a guideline for child placement, instead of the "in-the-best-interests-of-the-child" standard, "the least detrimental available alternative for safeguarding the child's growth and development." ***Id***. at 53.

The authors quoted at length from a decision in which the juvenile court judge was required to choose between placing a child with his common-law parents or his biological parents. The judge reviewed conflicting state policies, one of which favored the interests of the parents and the other which favored the interests of the child. ***Id***. at 108-11. The court concluded:

> But after reviewing the arguments for each of these policies, I return to the guidelines that have governed my decisions. I am convinced that, by and large, society must use each child's placement as an occasion for protecting future generations of children by increasing the number of adults-to-be who are likely to be adequate parents. Only in the implementation of this policy does there lie a real opportunity for beginning to break the cycle of sickness and hardship bequeathed from one generation to the next by adults who as children were denied the least detrimental alternative.

***Id*.** at 111.

The authors also quoted a study, Anna Freud & Thesi Bergmann, *Children In The Hospital*, 22-23 (1965):

> Psychoanalytic child psychology leaves no doubt that children are emotionally dependent on their parents and that this dependence is necessary for purposes of normal development; also, that relationships in a hospital are, at best, poor substitutes for family relationships....

Id. at 122 n.14. This is equally true of relationships in correctional or other care facilities.

Section 48.355(1), STATS., uses the standard, "[w]herever possible." The word "possible" has a common meaning. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1771 (1976) defines "possible" as "falling within the bounds of what may be done ...." Clearly, it is "possible" to preserve Benjamin's family unit and still serve the rights of the parent and child and assure his care, treatment or rehabilitation.

Benjamin's social worker, Crystal Young, with the approval of her supervisor, Shirley M. Williams, reported to the court that Benjamin will be required to complete a sexual perpetrator's assessment with Ron McGuire's Therapy Center and follow the recommendations for his treatment. Clearly the department concluded that it was possible to treat Benjamin and still preserve the family unit. Benjamin has no prior court involvement. He admits the sexual assault offenses with which he was charged and acknowledges the inappropriateness of his behavior.

Most important is that Benjamin has an intact family consisting of his biological parents and four siblings. His family appears to be family-oriented, and actively involved with the Catholic Church and community activities. The parental discipline of the children is mutual. Benjamin's parents report that Benjamin's involvement in sexual activities has been "eye-opening."

They understand that his behavior has not been appropriate but they are willing to work at providing Benjamin with appropriate guidance.

The social worker reports that the small community of Loyal and the school have been polarized by the charges against Benjamin. Apparently, members of the community and the school are taking sides. The worker reports that the victims are being re-victimized by the school and the community. The department obviously believes that removing Benjamin from his family, his school and his community for at least twelve months would not resolve the polarization. It may be necessary to involve Benjamin's peers in awareness teaching to make them understand that behavior such as Benjamin's is unacceptable. The social worker reports that some of Benjamin's peers (and probable supporters) have chosen to make comments, noises and "give looks" at Benjamin's victims.

The sense which this court gets from the department's Dispositional Court Report is that Benjamin and some of his peers do not accept that each of their female peers is entitled to be treated with respect in all matters, especially sexual matters. If, as some of the testimony suggests, some of Benjamin's female peers have exhibited permissive attitudes, it may be necessary that they too be involved in awareness instruction. Involving others in awareness instruction or, if desirable, therapy will, of course, require the cooperation of parents.

The department's recommendations were that: (1) Benjamin be placed on one-year formal supervision with the department; (2) he be placed at home by the juvenile court; (3) he and his parents sign releases as requested by the department and other service providers; (4) he be required to complete a sexual perpetrator's assessment with the Therapy Center and follow the recommendations for his treatment; (5) his completed assessment be provided to the court; (6) he be read sanctions, which may be imposed for violations; (7) he provide his victims with written apologies when his therapist determines it is appropriate; (8) his parents participate in his therapy if recommended by his therapist; (9) he not initiate any contact with his victims in class or otherwise; and (10) he and his parents abide by the basic rules of supervision. We conclude that these recommendations meet the statutory standards.

Several of Benjamin's victims and their parents testified at the dispositional hearing. Their testimony was emotional and compelling. If the objective of the juvenile justice system were retributive rather than rehabilitative, Benjamin's acts would justify stern punishment. However, the department has faith that, with therapy, discipline, and supervision, Benjamin may learn respect for others, especially his female peers. We conclude, therefore, that there are less drastic alternatives than removing Benjamin from his home and breaking up the family unit.

We have a responsibility to review the record and the trial judge's comments to determine whether his order can be sustained despite the judge's failure to make written findings of fact and conclusions of law as required by § 48.355(2)(a), STATS. The trial court considered the following factors: Benjamin's unacceptable behavior extended over a period of time; some of Benjamin's sexual contacts were with friends and neighbors; some of his behavior occurred in the school system where it was totally inappropriate; the opinions of the school teachers may be discounted because none of them knew what the factual circumstances were; some of the victims were re-victimized; even though theoretically deterrence isn't part of the juvenile code, it still must be considered; the polarization of the community and the school; deterrence and the mental health of the school is a "spin-off" of Benjamin's placement outside his home; Benjamin may not understand the seriousness of his offenses and is going to go to school just as if virtually nothing happened; his rehabilitation is not going to be effected by being back in the school district around people "who are still remaining macho"; he is not presently participating in "macho" activities but the people around him are; and he must learn empathy and that is not going to be done under the circumstances.

We conclude that the juvenile judge did not make the findings required by § 48.355(1), STATS. Nowhere in his comments did the juvenile court judge find that it was not possible to preserve Benjamin's family unit and there was no less drastic alternative than to take him out of his home, his school and his community. Nor did the juvenile judge find that there was a less restrictive disposition than removing Benjamin from his home.

Much has been written recently about the problem of juvenile behavior.[2] The juvenile justice code has been rewritten. Communities, such as

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[2] *See*, *e.g.*, Melanie Conklin, *Suffer the Children*, ISTHMUS, Nov. 17, 1995, at 12.

Loyal, do not have to cope with the staggering problems of juvenile and adult criminality in major metropolitan communities. But the problems exist everywhere.

The profiles of juvenile offenders and victims contained in the August 1995 report of the National Center for Juvenile Justice makes clear that there is much misperception as to the causes of juvenile delinquency and its incidence. *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT (1995). Sixty-nine million Americans are under age eighteen. ***Id***. at 2. Between 1990 and 2010, the juvenile population will increase and become more racially and ethnically diverse. The greatest increase in the juvenile population will not be in Black Americans but in Asian/Pacific Islanders (125%) and Hispanics (71%). ***Id***.

In 1960, one birth in twenty was to an unmarried woman; by 1990, one birth in four was to an unmarried woman. ***Id***. at 10. Over the same period, the number of divorces nearly tripled. ***Id***. Two hundred thousand babies were born to mothers under age eighteen in 1991 and four out of five of these mothers were unmarried. ***Id***. at 12. It is a tragic fact that more children are living in single-parent households and in poverty. ***Id***. at 10.

The media reports the furor over the recent legislation banning local gun control ordinances. However, the possession of guns by juveniles is a very serious problem which must be addressed. In 1991, a gun was used in one in four violent offenses against juveniles. ***Id***. at 21. The recent large increase in the homicide rates of blacks and older juveniles is the result of increases in firearm homicides. On a typical day in this country in 1992, seven juveniles were murdered. ***Id***. at 24. However, little publicity is given to the number of young people who are killing themselves. For every two youths between the ages of zero and nineteen murdered in 1991, one youth committed suicide. ***Id***. at 27. Eighty-three percent of these persons were male; eighty-eight percent were between ages fifteen and nineteen; and eight-six percent were white. ***Id***. The significance of these statistics is that a high percentage of our young people are living lives of such hopelessness that suicide is considered an acceptable alternative to their misery.

In a recent guest editorial in the WISCONSIN STATE JOURNAL, Dr. Jack Westman, a long-time child psychiatrist at the University of Wisconsin Hospital, reported that the single greatest cause of juvenile delinquency and adult criminality is parental neglect. Jack Westman, *To Prevent Juvenile Crime Provide Adequate Parenting*, WIS. ST. J., May 26, 1995, at 13A. It appears that Benjamin does not have that problem and, in this court's opinion, society should consider long and hard whether an acceptable solution to the problem of juvenile delinquency is out-of-home placement, at least where there is an acceptable psychological or biological parent. The statistics on the number of children in substitute care are discouraging. In 1992, six hundred and fifty-nine thousand children were in substitute care. NATIONAL REPORT at 40. The cost to society of such care is staggering.

However, not all statistics are so gloomy. School dropout rates declined between 1978 and 1992. ***Id***. at 14. Illicit drug use by juveniles declined substantially during the 1980's, particularly the use of cocaine and alcohol. ***Id***. at 61. The number of children aged fifteen to twenty killed in alcohol-related traffic crashes declined fifty-four percent from 1982 to 1992. ***Id***. at 62.

To this court, the most discouraging statistic is the decline in the availability of services to keep and treat juveniles within the juvenile justice system. Between 1988 and 1992, the number of juveniles waived by the juvenile courts to criminal courts increased sixty-eight percent. ***Id***. at 154. From 1992 to mid-1995, fifty-seven appeals were received by our court from waivers of juveniles into adult court. Only three of these waivers were reversed. The reason most commonly given for waiver is the lack of adequate services and facilities to care for juveniles needing treatment for chemical addiction and psychological problems. If a child needs care and treatment and is kept in the juvenile justice system, the county pays the cost of such care and treatment. However, if the child is waived into the adult system, the state pays such costs. As a result, decisions as to whether a child will receive the necessary care and treatment in the juvenile justice system or in the adult system are made not on the basis of the best interest of the child but on who must bear the cost of care and treatment.

Most knowledgeable persons concede that a child is more likely to be rehabilitated in the juvenile justice system than in the adult justice system. Children waived into adult court may be imprisoned at age sixteen and placed

in the general prison population where the average age is twenty-nine, of whom seventy percent are either chemically addicted or drug abusers. Department of Corrections newsletters. Hopefully, despite the many legitimate criticisms of the new juvenile justice code, the transfer of jurisdiction over the juvenile justice system from the State Department of Health and Social Services to the Department of Corrections will be positive simply because new faces will be looking at old problems.

The problem of the juvenile delinquent is not going to go away in the near future and, if we do not recognize that juveniles begin as children and identify children and families at risk as early as possible, we will be bearing the costs of care and treatment and construction of correctional facilities and prisons for an increasing juvenile and adult criminal population. We must, however, deal with the problem of children who have become delinquents. Knowledgeable persons agree that reforming the conduct of a young person such as Benjamin is most likely to occur in a loving family which teaches family and community values but which is nonetheless ready to impose appropriate discipline when necessary.

Although this court reverses that part of the dispositional order which places Benjamin in Homme Home, we do not reverse the order insofar as it adjudges Benjamin delinquent and places him under the supervision of the department. Nor do we preclude the juvenile court from placing reasonable conditions on Benjamin's home placement and his activities outside his home.

By the Court.--Order affirmed in part; reversed in part and cause remanded with directions.

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