

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 4, 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. 96-0608

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN THE INTEREST OF JESSICA C.,
A PERSON UNDER THE AGE OF 18:

JESSICA C.,

Petitioner-Appellant,

v.

STATE OF WISCONSIN,

Respondent-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL G. MALMSTADT, Judge. *Affirmed.*

FINE, J. This is an appeal from the trial court's order waiving the jurisdiction of the Children's Court over Jessica C. See § 48.18, STATS.¹ She

¹ Section 48.18, STATS., as applicable to Jessica C., provides:

Jurisdiction for criminal proceedings for children 14 or older; waiver hearing.

(1) (a) Subject to s. 48.183, a child or district attorney may apply

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to the court to waive its jurisdiction under this chapter in any of the following situations:

1. If the child is alleged to have attempted to violate s. 940.01 on or after the child's 14th birthday or is alleged to have violated s. 161.41 (1), 940.01, 940.02, 940.05, 940.06, 940.225 (1), 940.305, 940.31 or 943.10 (2) on or after the child's 14th birthday.
 2. If the child is alleged to have committed, on or after the child's 14th birthday, a violation, at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9), that would constitute a felony under ch. 161 or under chs. 939 to 948 if committed by an adult.
 3. If the child is alleged to have violated any state criminal law on or after the child's 16th birthday.
- (b) The judge may also initiate a petition for waiver in any of the situations described in par. (a) if the judge disqualifies himself or herself from any future proceedings on the case.
- (2) The waiver hearing shall be brought on by filing a petition alleging delinquency drafted under s. 48.255 and a petition for waiver of jurisdiction which shall contain a brief statement of the facts supporting the request for waiver. The petition for waiver of jurisdiction shall be filed prior to the plea hearing.
- (2m) If it appears that the child may be suitable for participation in the youthful offender program under s. 48.537 or the adult intensive sanctions program under s. 301.048, the judge shall order the department of corrections to submit a written report analyzing the child's suitability for participation in those programs and recommending whether the child should be placed in either of those programs.
- (3) (a) The child shall be represented by counsel at the waiver hearing. Written notice of the time, place and purpose of the hearing shall be given to the child, any parent, guardian or legal custodian, and counsel at least 3 days prior to the hearing. The notice shall contain a statement of the requirements of s. 48.29 (2) with regard to substitution of the judge. Where parents entitled to notice have the same address, notice to one constitutes notice to the other. Counsel for the child shall have access to the social records and other reports consistent with s. 48.293.
- (b) The child has the right to present testimony on his or her own behalf including expert testimony and has the right to cross-examine witnesses at the hearing.
- (c) The child does not have the right to a jury at a hearing under this section.

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- (4) The judge shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive its jurisdiction.
- (5) If prosecutive merit is found, the judge, after taking relevant testimony which the district attorney shall present and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the following criteria:
 - (a) The personality and prior record of the child, including whether the child is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the child, whether the child has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the child's motives and attitudes, the child's physical and mental maturity, the child's pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.
 - (b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or wilful manner, and its prosecutive merit.
 - (c) The adequacy and suitability of facilities, services and procedures available for treatment of the child and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the child for placement in the youthful offender program under s. 48.537 or the adult intensive sanctions program under s. 301.048.
 - (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in circuit court.
- (6) After considering the criteria under sub. (5), the judge shall state his or her finding with respect to the criteria on the record, and, if the judge determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the child or of the public to hear the case, the judge shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate criminal proceedings in the circuit court, and the circuit court thereafter has exclusive jurisdiction. In the absence of evidence to the contrary, the judge shall presume that it would be contrary to the best interests of the child and of the public to hear the case if the child is alleged to have violated any state criminal law on or after the child's 16th birthday and if the court has waived its jurisdiction over the child for a previous

argues that the trial court erroneously exercised its discretion, improperly prohibited Jessica C. from circumventing waiver by refusing to accept her proffered guilty plea, and shifted the burden of proof to Jessica C. on the issue of whether the waiver petition had prosecutive merit. We affirm.

I.

Jessica C. was born on November 4, 1981, and was fourteen years old when the petition for waiver was filed. The delinquency petition alleged that Jessica C. committed first-degree intentional homicide and armed robbery, both as party to a crime, *see* §§ 940.01(1), 943.32(1)(a) & (2), and 939.05, STATS., in connection with the brutal robbery-slaying of an elderly woman suffering from multiple sclerosis. According to the delinquency petition, Jessica C. admitted her involvement and was aware that the juvenile who planned the robbery, Jacob B., had armed himself with a plunger handle and a knife in order to, as she related what he allegedly told her, “stab someone if they tried to stop them or if a pig tries to arrest them.”

Jessica C. told the police that she and Jacob B., both wearing gloves, went into the victim's apartment, that Jacob B. hit the woman with the plunger handle, which broke, and that Jacob B. then stabbed the woman while Jessica C. searched the woman's dresser. According to the delinquency petition, Jessica C. told the officers that Jacob B. “was stabbing the lady fast and a lot and she could hear the blood and the sound of the knife going in the lady” but that “she never tried to stop Jacob from stabbing the old lady.” The petition also related that Jessica C. told the officers that she found socks in the dresser and “asked Jacob if she could put the socks into the lady's mouth to `shut her up' as

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violation.

- (8) When waiver is granted, the child, if held in secure custody, shall be transferred to an appropriate officer or adult facility and shall be eligible for bail in accordance with chs. 968 and 969.
- (9) If waiver is granted, sub. (1) does not restrict the authority of the district attorney to charge the offense he or she deems is appropriate and does not restrict the authority of any court or jury to convict the child in regard to any offense.

she was moaning” from her wounds, and that they had previously discussed this possibility “during their planning.” Jacob B. told her that gagging the woman was not necessary “so she just dropped” the socks. According to the petition's recitation of Jessica C.'s confession, Jessica C. told the officers that Jacob B. stabbed the woman “at least 50 times.” A third juvenile, Billy B., helped Jacob B. and Jessica C. enter the apartment building, but did not participate in the robbery/murder. Jacob B. was waived to adult court; Billy B. was not.

II.

A determination of whether to waive Children's Court jurisdiction is within the trial court's discretion, and will not be overturned on appeal if that decision has a “reasonable basis.” *State v. C.W.*, 142 Wis.2d 763, 766–767, 419 N.W.2d 327, 328–329 (Ct. App. 1987). Under § 48.18(5), STATS., the trial court must consider the following factors: the “personality and prior record” of the juvenile; the “type and seriousness of the offense” and its “prosecutive merit”; the “adequacy and suitability” of juvenile facilities “for treatment of the [juvenile] and protection of the public”; and the “desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime” in adult court. A trial court may waive jurisdiction of the Children's Court over a juvenile if it determines that the seriousness of the offense criterion requires waiver even though waiver would not be in the best interests of the juvenile. *B.B. v. State*, 166 Wis.2d 202, 210, 479 N.W.2d 205, 208 (Ct. App. 1991).

In a carefully crafted, well-reasoned written opinion, the trial court determined that an analysis of the criteria under § 48.18(5), STATS., warranted waiver. First, the trial court recounted Jessica C.'s horrific “childhood”: she “suffers from substantial mental illness and depression” as the result of being raised by her grandparents for the first four years of her life during which she was abused by her grandfather; when she was eleven, Jessica C. went to live with her father, “who was a total stranger” to her, who also abused her; she was also sexually abused by a person described by the trial court as “an older adolescent.” Additionally, the trial court also noted that Jessica C. “has been hospitalized in a mental health facility for two occasions as the result of suicide attempts”; that juvenile system professionals “have been attempting to provide services” to Jessica C. and her family “in an attempt to deal with school and

family problems” but that she “has cooperated [] sporadically with these efforts,” and had exhibited “runaway behavior.” The trial court concluded its analysis of the first § 48.18(5) criterion:

These efforts at counseling [Jessica C.] have had mixed results, however, based upon the testimony adduced at the [waiver] hearing she is amenable to treatment. There is no clear evidence from which a conclusion can be reached concerning [her] potential for responding to future treatment.

The trial court concluded that factors relevant to the first § 48.18(5) criterion “weigh heavily against waiver.”

In considering the seriousness-of-the-offense criterion established by § 48.18(5)(b), STATS., the trial court concluded that the factors surrounding the crime and Jessica C.'s involvement as revealed by her confession to the authorities “weigh heavily in favor of waiver.” The trial court recognized, however, that aspects of Jessica C.'s confession were contradicted by her later exculpatory statements to an investigator hired to present evidence against waiver of the Children's Court jurisdiction that, as noted by the trial court, “raise serious questions concerning the ultimate outcome of a trial in this case.” Specifically, the investigator testified at the waiver hearing that he believed based on what Jessica C. told him that Jessica C. had not been fully advised of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Further, he told the trial court that Jessica C. disputed some of the things that were in her confession to the authorities, including, *inter alia*, that she denied offering to gag the victim with the socks, that she did not know prior to their entry into the victim's apartment that Jacob B. had a knife, and that, in effect, Jacob B. forced her to participate after she wanted to withdraw from the planned robbery.²

² Jessica C. did not testify at the waiver hearing, and her statements to the investigator were thus inadmissible hearsay. See RULES 908.01(3) and 908.02, STATS. Her confession, used against her at the waiver hearing, was not hearsay. See RULE 908.01(4)(b)1, STATS. The rules of evidence, however, are not “binding at a waiver hearing under s. 48.18.” Section 48.299(4)(b), STATS.

The trial court opined that Jessica C.'s statements to the investigator put into question whether she would be convicted of first-degree intentional homicide in juvenile court, and thus, if Children's Court jurisdiction were not waived, the juvenile system would not have sufficient time to treat her: Jessica C. could be kept under Children's Court jurisdiction until she was twenty-five only if she were convicted of first-degree intentional homicide, *see* § 48.366(1)(a)1, STATS. This factor, the trial court concluded, "weigh[ed] heavily in favor of waiver."

In connection with the fourth criterion—whether the actors could be tried together in adult court—the trial court concluded that it was not material to the decision of whether or not to waive jurisdiction over Jessica C. because although Children's Court jurisdiction over Jacob B. was waived, the Children's Court retained jurisdiction over Billy B.

III.

As noted, Jessica C. asserts several claims of trial-court error. We discuss them in turn.

1. *Alleged Erroneous Exercise of Discretion.*

Although Jessica C. recognizes that whether to waive Children's Court jurisdiction over a juvenile is in the trial court's discretion, she argues that the trial court erroneously exercised its discretion because, according to her, it ignored the unanimous opinion of those who testified at the waiver hearing. This is how she puts it in her appellate brief: "Yet, even considering the seriousness of the crime charged, every person who testified concluded that the juvenile system was appropriate and Jessica should not be waived." This argument, however, ignores the trial court's exclusive role to determine whether waiver is warranted: the trial court makes this decision, the witnesses—whether or not they are "experts"—can illumine the trial court's decision but may not dictate it. See *Pautz v. State*, 64 Wis.2d 469, 476, 219 N.W.2d 327, 330-331 (1974) ("[T]he opinion of an expert, even if contradicted, is not required to be accepted as such testimony must pass through the screen of the fact trier's judgment of credibility.") (citation omitted); *Krueger v. Tappan Co.*, 104 Wis.2d 199, 203, 311 N.W.2d 219, 222 (Ct. App. 1981) ("The jury is not bound by the opinion of an expert, however, even if the opinion is uncontradicted."). Moreover, one of the witnesses testifying at the waiver hearing, an intake specialist with the Milwaukee County juvenile probation department, testified on cross-examination that if the allegations in the delinquency petition were true so that Jessica C.'s role was as revealed by her confession to the law-enforcement authorities, his opinion on waiver was, as he termed it, "wishy washy": "Yes, I think she should be waived because [the crime] was serious and [because of] her involvement in the offense. No, I don't think she should be waived because of the problems she has: emotionally unstable and problems she's had in her past life." This was the nub of the trial court's analysis as well; it did not erroneously exercise its discretion in coming down on the "waiver" side of the issue.³

³ Jessica C. also argues that the trial court ignored the different levels of culpability between the

2. Proffered Guilty Plea.

In response to the trial court's expressed concern that the juvenile system would not have sufficient time to treat her if Jessica C. were not found guilty of first-degree intentional homicide, Jessica C. offered to plead guilty to first-degree intentional homicide. The trial court rejected the proffered plea, however, opining: "I have to make a decision on the waiver first. And once I make a decision on the waiver, what happens after that I have no control over [the case]." In arguing that the trial court erred in rejecting her plea, Jessica C. contends that the trial court "should not be able to have it both ways" – that is, that the trial court should not be able to base a decision to waive the Children's Court jurisdiction over her because she might not be found guilty in Children's Court of first-degree intentional homicide, and then reject her offer to accept conviction in Children's Court to that charge. Although superficially appealing, Jessica C.'s argument is contrary to the statute.

Section 48.18(1)(a), STATS., permits the district attorney to "apply to the court to waive its jurisdiction under this chapter." Section 48.18(2), STATS., requires that the district attorney's petition for waiver "be filed prior to the plea hearing." Section 48.12(1), STATS., gives to the Children's Court "exclusive jurisdiction" over juveniles "alleged to be delinquent" except, *inter alia*, those over whom jurisdiction is waived pursuant to § 48.18, STATS. A waiver petition, if granted, divests the Children's Court of jurisdiction over the juvenile. Section 48.18(6), STATS. Although our review of the trial court's decision is *de novo*, see *De Bruin v. State*, 140 Wis.2d 631, 635, 412 N.W.2d 130, 131 (Ct. App. 1987) (interpretation of statute subject to *de novo* review), we agree with the trial court that this statutory scheme clearly envisions that the district attorney's petition for waiver be heard and decided prior to the plea hearing.

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three juveniles: Jacob B., the ring-leader was waived; Billy B., who was admittedly less culpable than either Jacob B. or Jessica C., was not waived. The trial court noted that if Jessica C.'s second version of the events was true, her situation would be more akin to that of Billy B. than to that of Jacob B. Nevertheless, the trial court came down on the side of waiver, inferentially giving more credibility to Jessica C.'s initial statement to the authorities than to her second statement given to the public defender's investigator. This was well within the trial court's discretion. See *Kolpin v. Pioneer Power & Light Co., Inc.*, 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991) (trial court's discretionary decision will be upheld if there are facts of record that support it); *Schneller v. St. Mary's Hospital Medical Ctr.*, 162 Wis.2d 296, 311–312, 470 N.W.2d 873, 879 (1991) (trial court's finding of fact may be implicit from its ruling).

3. *Prosecutive Merit.*

Jessica C. asserts that the trial court erred by “[a]llowing the State to rely upon documents it has created, namely delinquency and waiver petitions, as reliable evidence and placing the burden on the juvenile to rebut by making a specific assertion and to offer to prove the facts asserted.” This, she contends, placed the burden on her to demonstrate that the case against her did not have prosecutive merit and “is diametrically opposed to fundamental concepts of due process and equal protection.” The law in this state is settled, however, that under § 48.18(4), STATS., the trial court may determine prosecutive merit from the documents alone, and that if “the juvenile contends that the information in the petitions is unreliable or that the petitions do not establish probable cause, the juvenile may present testimony at the hearing to demonstrate that his contentions have merit.” *P.A.K. v. State*, 119 Wis.2d 871, 885-886, 350 N.W.2d 677, 685 (1984). As the State points out in its brief, the burden of showing prosecutive merit is on the State; the juvenile may remain mute.

Although *P.A.K.* did not discuss or analyze whether § 48.18(4), STATS., construed to permit the State to show prosecutive merit without presenting live testimony passes constitutional muster, this court sees little difference between the determination of prosecutive merit under § 48.18(4) by a neutral judicial officer and a determination by a neutral judicial officer whether a complaint written by law-enforcement authorities states sufficient probable cause to “justify bringing into play the further steps of the criminal process.” *State ex rel. Cullen v. Ceci*, 45 Wis.2d 432, 442, 173 N.W.2d 175, 179 (1970) (citation omitted). See also *State ex rel. White v. Simpson*, 28 Wis.2d 590, 137 N.W.2d 391 (1965). Unfortunately, Jessica C.'s analysis on this point is non-existent, and, accordingly, we discuss it no further. See *State v. Shaffer*, 96 Wis.2d 531, 545-546, 292 N.W.2d 370, 378 (Ct. App. 1980) (appellate courts may disregard arguments that are inadequately briefed).

By the Court. – Order affirmed.

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