COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0780

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

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

BENJAMIN M. B.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(e), STATS. Benjamin M.B. appeals from an order waiving him into adult court. Benjamin raises two issues on appeal: (1) whether the circuit court lacked jurisdiction to waive Benjamin into adult court once it accepted his not guilty plea; and (2) whether there was sufficient evidence to support Benjamin's waiver into adult court. We conclude that: (1) the court retained jurisdiction over Benjamin and was able to hear the motion for waiver into adult court; and

(2) there was sufficient evidence in the record to support the circuit court's finding that waiver into adult court was proper. We therefore affirm.

BACKGROUND

The initial appearance for Benjamin M.B., a seventeen year old, was set in the juvenile court for February 7, 1996. After informing Benjamin of the contents of the petition, the judge asked defense counsel if the juvenile was ready to admit or deny. The defense counsel responded that Benjamin was ready and immediately following Benjamin answered, "Not guilty. Oh, deny."

The judge then stated, "Okay. Then the matter will be set for trial. The clerk will enter the denial." The State immediately interjected that it intended to bring a motion for waiver into adult court. The judge acknowledged that he had failed to give the State the chance to stop him before he accepted the plea, withdrew his acceptance of the plea and allowed the State to proceed with its motion for waiver into adult court.

The waiver hearing was held on March 5, 1996. The State called as witnesses two juvenile probation officers who supervised Benjamin M.B. while he was on formal supervision in Rock County. Both testified that due to Benjamin's age, background and residence in Illinois, as well as other factors, the Wisconsin juvenile court system did not have appropriate services available for him. Based on this testimony, the judge waived Benjamin into adult court. Benjamin appeals.

JURISDICTION

Section 48.18(2), STATS., provides that "[t]he petition for waiver of jurisdiction shall be filed prior to the plea hearing." Based on 48.18(2), Benjamin argues that the judge erred in allowing the State to bring its motion after the plea was entered into the court. We disagree.

Benjamin prematurely entered his plea at the initial appearance before the State was given a chance to make an appearance, much less bring its motion for waiver into adult court. The State immediately brought its motion to the attention of the court. The judge, over objection, chose to withdraw the previously accepted plea and to hear the motion for waiver.

A trial court has the ability to correct errors that occur in the trial process. ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (Ct. App. 1991). In ***Fritsche***, we held that a trial judge could reconsider a nonfinal ruling when he determined that there has been an error. ***Id.*** Accepting a plea at the initial appearance before the State was given the opportunity to bring its motion would have been erroneous. Thus, the judge did not err by withdrawing a previously entered plea because the State was not given a chance to speak before the plea was taken.

If we followed the view urged by Benjamin, a trial court could never correct what it ultimately concluded was a mistake in the trial process. Such a doctrine would elevate form over substance. We conclude that the circuit court judge had the power to withdraw the juvenile's plea in order to hear the State's motion to waive Benjamin into adult court.

Even assuming that the judge's decision to hear the motion for waiver into adult court was error, Benjamin's substantive rights were not adversely affected. Error that does not affect the defendant's substantive rights shall be disregarded. Section 805.18(1), STATS.; ***In re Shawn B.N.***, 173 Wis.2d 343, 375, 497 N.W.2d 141, 153 (Ct. App. 1992). Thus, any error that might have occurred must be treated as harmless.

SUFFICIENCY OF EVIDENCE

Benjamin argues that the State failed to show by clear and convincing evidence that the facilities, services and procedures available to him were inadequate to support waiver into adult court. We disagree.

The decision of whether to waive juvenile jurisdiction is within the sound discretion of the juvenile court. ***In re J.A.L.***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). "We will uphold a discretionary determination if the record reflects that the juvenile court exercised its discretion and there was a reasonable basis for its decision." ***In re B.B.***, 166 Wis.2d 202, 207, 479 N.W.2d 205, 207 (Ct. App. 1991). In making this determination, the juvenile court's primary consideration must be the best interests of the child. ***In re D.H.***, 76 Wis.2d 286, 305, 251 N.W.2d 196, 206 (1977). We will reverse a juvenile court's waiver determination "if and only if the record does not reflect a reasonable basis for the determination or a statement of the relevant facts or reasons motivating the determination is not carefully delineated in the record." ***J.A.L.***, 162 Wis.2d at 961, 471 N.W.2d at 501.

Section 48.18(5), STATS., provides the criteria a court must consider in determining whether a juvenile should be waived into adult court: (1) the personality and prior record of the child; (2) the type and seriousness of the offense; (3) 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 (4) 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. The trial court addressed the criteria set forth in § 48.18(5) and found that those interests would not be best served by remaining in juvenile court.

The State introduced evidence from two witnesses who had supervised and treated Benjamin since 1992. Both testified that the juvenile justice system was no longer adequate to meet the needs of Benjamin. The witnesses looked to Benjamin's age, attitude, peer group and past experience in the juvenile system in making their determination of what was best for Benjamin. The witnesses also noted that Benjamin continued to have negative contacts with the law despite his supervision and felt that further supervision would not be in Benjamin's best interest. Last, the witnesses noted that Benjamin resided in Illinois, making supervision more difficult. Benjamin offered no evidence.

The trial court found that Benjamin's best interest would be met in adult court. The judge based his conclusion on the testimony of two witnesses

who arguably know Benjamin and his particular needs best. Both witnesses testified that the juvenile justice system had nothing left to offer Benjamin.

Benjamin argues that by failing to employ less restrictive alternatives, the court erroneously exercised its discretion. However, § 48.18, STATS., does not require that the court attempt all possible juvenile placements before it may waive the juvenile into adult court. Instead, § 48.18(6) requires only that the best interests of the child and the public be the primary consideration in analyzing the appropriate placement of the child.

Here, the court reasonably found that adult court would best serve the needs of Benjamin and the public. We conclude that the court did not erroneously exercise its discretion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.