COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 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. 96-1281

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

LYNNSIE F.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed.*

DEININGER, J.[1] Lynnsie F., who turned seventeen after the filing of a delinquency petition but before a plea hearing, appeals from an order waiving juvenile court jurisdiction under § 48.18, STATS. She claims the trial court erred by failing to base its decision on the criteria of § 48.18(5), and by basing its decision on an improper factor. We conclude that under the special circumstances of § 48.12(2),

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

STATS.,[2] the trial court based its decision on the relevant criteria of § 48.18(5), and not upon an improper factor. We therefore affirm.

FACTS

On March 27, 1996, the State filed a petition alleging Lynnsie F. to be delinquent for committing the offense of disorderly conduct on March 19, 1996, in violation of § 947.01, STATS. A plea hearing was initially scheduled for April 10, 1996. On March 29, 1996, however, the State filed a waiver petition under § 48.18(1), STATS., and a waiver hearing was set for April 25, 1996. Lynnsie F. became seventeen years of age on April 7, 1996.

At the beginning of the waiver hearing the State told the trial court that it was "not willing to entertain a consent decree" because of other pending charges against Lynnsie F. Lynnsie F. asked "that the Court retain jurisdiction in juvenile court" and moved for dismissal "based on a motion of prosecutive merit." The trial court denied the motion and waived juvenile court jurisdiction, stating:

> Well, 938.12[sic] does give the Court basically two options because the third option can only be with the acquiescence of

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[2] Section 48.12(2), STATS., provides as follows:

> (2) If a court proceeding has been commenced under this section before a child is 17 years of age, but the child becomes 17 years of age before admitting the facts of the petition at the plea hearing or if the child denies the facts, before an adjudication, the court retains jurisdiction over the case to dismiss the action with prejudice, to waive its jurisdiction under s. 48.18, or to enter into a consent decree. If the court finds that the child has failed to fulfill the express terms and conditions of the consent decree or the child objects to the continuation of the consent decree, the court may waive its jurisdiction.

1995 Wis. Act 27, § 2432.

> the district attorney which he has -- he is not doing, so the consent decree is out. The Court choices are waiver or dismissal. The criteria for waiver that counsel has directed the Court's attention to is the prosecutive merit of this case. I would note just from the allegations in the petition this is charged as a disorderly conduct. I suspect under the circumstances it could have just as well have been charged as battery.

The trial court went on to note that the delinquency petition alleged that Lynnsie F. had slapped her stepfather and hit him one or two times, distinguishing the allegations from "general disorderly conduct" such as "someone playing their stereo too loudly and disturbing someone." Finding the conduct to be "directed to a specific person in an aggressive, violent manner," the trial court concluded that the charge had prosecutive merit.

Lynnsie F.'s trial counsel then called the court's attention to § 48.18(5)(b), STATS., noting that "there are different criteria that the Court should look at," but still focused her argument on "another ... look" or the "second prong test" of prosecutive merit. In response, the trial court reaffirmed its finding that the offense in question was one that "should be dealt with by the courts."

SECTION 48.18(5), STATS.,[3] CRITERIA

[3] Section 48.18(5), STATS., provides as follows:

> (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:
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> (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,

Lynnsie F. first argues that the trial court erred by not basing its waiver decision on the criteria of § 48.18(5)(a) and (c), STATS. Lynnsie F. correctly notes that the "[S]tate did not offer, and the court did not request evidence on any of the sec. 48.18(5)(a) factors." She claims this failure to be error, citing ***In the Interest of P.A.K.***, 119 Wis.2d 871, 350 N.W.2d 677 (1984). She also argues that the trial court failed to consider any of the criteria under § 48.18(5)(a) and (c), contrary to this court's holdings in ***In the Interest of C.W.***, 142 Wis.2d 763, 419 N.W.2d 327 (Ct. App. 1987); ***In the Interest of G.B.K.***, 126 Wis.2d 253, 376 N.W.2d 385 (Ct. App. 1985); and ***In the Interest of C.D.M.***, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985).

None of the cases cited by Lynnsie F., however, address the circumstances under § 48.12(2), STATS., which applies to a child who reaches the age of seventeen prior to an adjudication of delinquency in the juvenile court.

This court has had occasion to review the application of § 48.18, STATS., to the "special situation" arising under § 48.12(2), STATS., in ***In the Interest of K.A.P.***, 159 Wis.2d 384, 464 N.W.2d 106 (Ct. App. 1990). There, a juvenile

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> prior offenses, prior treatment history and apparent potential for responding to future treatment.
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> (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 willful manner, and its prosecutive merit.
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> (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.
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> (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.

delinquency petition was filed against a seventeen year old.[4] At the plea hearing, the child denied the allegations. Before an adjudication on the petition however, the child attained age eighteen. Section 48.18(2) requires that a waiver petition be filed "prior to the plea hearing." Since that had not been done, the trial court refused to allow the State to file a waiver petition.

We first found the statute in question to be ambiguous because "reasonable minds could differ as to whether the legislature intended to impose the time deadline of the waiver statute on the special waiver situation contemplated by sec. 48.12(2), Stats." ***Id.*** at 389, 464 N.W.2d at 108. We concluded that "[t]he leading idea of sec. 48.12(2), Stats., is to redefine the juvenile court's jurisdiction when this special situation arises," and held that the § 48.18(2), STATS., deadline for filing a waiver petition in a "conventional delinquency proceeding" does not apply to the § 48.12(2) situation. ***Id.*** at 390, 464 N.W.2d at 108.

Similarly, we now hold that the criteria of § 48.18(5)(a) and (c), STATS., are not relevant and need not be considered when a § 48.12(2), STATS., situation arises.

As Lynnsie F. concedes in her reply brief, the State is not obligated to provide evidence concerning waiver criteria which are "wholly irrelevant" to the case at hand. The State is not required to present evidence on all listed waiver criteria, and the juvenile court need only state on the record its findings with respect to criteria actually considered. ***In the Interest of G.B.K.***, 126 Wis.2d 253, 256, 376 N.W.2d 385, 388 (Ct. App. 1985).

The criteria under § 48.18(5)(c), STATS., focus on whether there are suitable services and/or facilities in the juvenile justice system to address the needs of the child, while those under § 48.18(5)(a) largely focus on whether the child is suitable for juvenile system services and facilities. Under the terms of § 48.12(2), STATS., however, a juvenile court disposition is precluded.[5]

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[4] The age for adult court jurisdiction for criminal offenses was then 18.

[5] As of July 1, 1996, § 48.12(2), STATS., has been repealed and replaced by § 938.12(2), STATS., which reads as follows:

> If a court proceeding has been commenced under this section

It would thus be a meaningless exercise for the State to produce evidence on, and for the court to consider, whether suitable dispositional services and/or facilities are available in the juvenile justice system. As the Wisconsin Supreme Court noted in analyzing § 48.12(2), STATS.:

> The initial jurisdiction of the juvenile court is framed in terms of the defendant's age at the time of prosecution because the juvenile court is only empowered under secs. 48.34 and 48.344, Stats., to impose rehabilitation treatment programs that are designed to benefit delinquent children. The programs are not designed to benefit an adult that has committed a criminal act, regardless of whether the criminal act was committed when the defendant was a child.

State v. Annala, 168 Wis.2d 453, 464, 484 N.W.2d 138, 142-43 (1992).

In contrast, the waiver criteria set forth in § 48.18(5)(b), STATS., are highly relevant to a waiver decision under the special situation of § 48.12(2), STATS. Section 48.18(5)(b) focuses not upon the the advisability of a juvenile disposition, but upon the offense, including "the type and seriousness of the offense ... whether it was against persons ... the extent to which it was committed in a violent, aggressive, premeditated or willful manner" and "prosecutive merit."[6] The

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> before a juvenile is 17 years of age, but the juvenile becomes 17 years of age before admitting the facts of the petition at the plea hearing or if the juvenile denies the facts, before an adjudication, the court retains jurisdiction over the case.

1995 Wis. Act 77, § 629.

Instead of being limited to the three options of the former § 48.12(2), STATS., it appears that a juvenile court may now retain jurisdiction over a 17 year-old through adjudication and disposition. The issue considered in ***In the Interest of K.A.P.***, 159 Wis.2d 384, 464 N.W.2d 106 (Ct. App. 1990), is now explicitly addressed in § 938.18(2), STATS., which permits the filing of a waiver petition at anytime prior to adjudication if the juvenile turns 17.

[6] Prosecutive merit is both a waiver criteria under § 48.18(5)(b), STATS., and a required preliminary finding under § 48.18(4). The juvenile court need not take testimony on the issue of prosecutive merit and may find it solely on the basis of the delinquency and waiver petitions. ***In the Interest of P.A.K.***, 119 Wis.2d 871, 887, 350 N.W.2d 677, 685 (Ct.

Wisconsin Supreme Court has likened the determination of prosecutive merit to the determination of probable cause in a preliminary examination for felony prosecutions. ***In the Interest of T.R.B.***, 109 Wis.2d 179, 190-192, 325 N.W.2d 329, 334-35 (1982). Before deciding to permit a criminal prosecution against a person who is on the mere threshold of adulthood, the juvenile court, like a judge at a preliminary hearing, must endeavor "to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of the crime ... and to discover whether or not there are substantial grounds upon which a prosecution may be based." ***Thies v. State***, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).

The trial court properly considered and stated its findings regarding the § 48.18(5)(b), STATS., criteria in deciding to waive juvenile court jurisdiction over Lynnsie F. They go to the very heart of the trial court's stated reasons for waiving juvenile jurisdiction.[7]

CONSIDERATION OF IMPROPER FACTOR

Lynnsie F. next argues that by accepting the State's assertion that it would not enter into a consent decree, the trial court improperly limited its consideration to the two remaining options: dismissal or waiver. She suggests the court must first determine whether to waive juvenile jurisdiction, and if it decides not to do so, the State must then decide whether to enter into a consent decree or "acquiesce in dismissal of the case."

This construction of § 48.12(2), STATS., is not supported by the language of the statute. Section 48.12(2) does not specify a two-step process, nor does it prescribe an order of preference to the three § 48.12(2) options.

Accordingly, the juvenile court should consider each of the three options in an order most appropriate to the facts at hand. If a consent decree is proposed to the court, it would seem most appropriate for the juvenile court to first consider whether it will accept the same, proceed under § 48.32(1), STATS., to

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App. 1984).

[7] The criteria under § 48.18(5)(d), STATS., did not apply in this case, but would seem to be a relevant consideration when applicable in a § 48.12(2), STATS., situation.

suspend the proceedings, and order supervision on certain terms and conditions. If a consent decree is not proposed, it may even be appropriate for the juvenile court to inquire of the parties whether they wish to consider a consent decree. But where one or more of the parties who must agree to a consent decree[8] states unequivocally that a consent decree will not be entertained and why that is so, it is not improper for the juvenile court to proceed to consider the two remaining options available under § 48.12(2), STATS.

By the Court.—Order affirmed.

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

[8] A consent decree under § 48.32(1), STATS., "must be agreed to by the child ...; the parent, guardian or legal custodian; and the person filing the petition under s. 48.25." The assistant district attorney who filed the petition stated unequivocally that the State would not entertain a consent decree and provided the trial court with the reasons for that decision. Lynnsie F.'s trial counsel did not take issue with the State's position nor did she request the court to consider a consent decree.