

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 1, 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. 96-1282

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**In the Interest of Todd J.J.,
a Person Under the Age of 18:**

State of Wisconsin,

Petitioner-Respondent,

v.

Todd J.J.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

SCHUDSON, J.¹ Todd J.J. appeals from the juvenile court's order waiving its jurisdiction in this matter and transferring jurisdiction over Todd J.J. to the adult criminal court on a first-degree intentional homicide charge. Todd J.J. argues that the juvenile court erroneously exercised discretion in concluding

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

that the waiver criteria had been satisfied by clear and convincing evidence. We reject his arguments and affirm.

The evidence offered at the waiver hearing consisted of the waiver petition, the testimony of Anthony Zingale, an intake worker for the Juvenile Probation Department, and the court-ordered psychological report of Dr. Burton Silberglitt.

The waiver petition contained two different versions of the crime. According to one witness, Kent Thomas, on March 20, 1996, at approximately 2:30 p.m., Todd J.J. and others walked up and started "visiting and hanging out" outside the grocery store. Thomas stated that he noticed a black male can collector walking down the street searching for cans. Thomas stated that he had seen the can collector "in the neighborhood before and he has never known [him] to bother anybody or even engage with local people in conversation." Thomas stated that the can collector approached the area where he and the others were standing and was "swinging his arms around in the street as though he was boxing with someone who was not there." Thomas said "that he believed that it was just a simple way that this person kept himself amused and did not appear to be bothering anyone and was not saying anything as he was doing this." Thomas said that "all of a sudden, Todd [J.J.] walked up to the black male can collector and punched him in the side of the head for no reason." Thomas reported that the can collector "did not even appear to be upset" and kept walking. Thomas reported that Todd J.J. then kicked the can collector in the back of the legs. The can collector turned around, took a can of beer from which he had been drinking, and shook some of the liquid onto Todd J.J. The others then teased Todd J.J. who then got a gun from Jeffrey C., one of the members of the group, and caught up with the can collector. Todd J.J. struggled briefly with the can collector and then shot him several times.

The coroner's report indicated that "gunshot wounds #1 and #2 punctured the victim's lung and gunshot wound #2 pierced and fatally wounded the victim's heart." The report also noted that the victim had also been shot in the abdomen.

The waiver petition also contained Todd J.J.'s confession. According to the version he gave shortly after the shooting, Todd J.J., who had

just turned fifteen a month before the shooting, stated that as a “bum” walked past him, “he felt something which felt like his ‘butt’ was pinched or squeezed.” He alleged that the can collector then propositioned him. Todd J.J. stated that the collector kept walking. Todd J.J. said he got a gun, “walked up from behind the bum and at first he just planned on pistol whipping the bum.” According to the petition, Todd J.J. stated:

When he walked up to the bum, the bum turned around and the bum grabbed his left arm. Todd further states he tried to pull away, but the bum didn't let go.... He doesn't know how many times he shot, but he “kept pulling the trigger until it wouldn't shoot anymore.”

The evidence also included the psychological report by Dr. Burton Silberglitt. Dr. Silberglitt noted that Todd J.J. had reported that he had been selling drugs for “a guy named Jeff” for approximately one year and that Jeff had given him the gun with which he shot the can collector. Dr. Silberglitt reported that when he asked Todd J.J. why he shot the can collector, “Todd stated, with a haughty voice tone, ‘I felt that was the only option I had.’” Dr. Silberglitt noted that when he asked Todd J.J. to describe the victim's behavior at the moment of the shooting and why he shot the man, Todd J.J. “was clearly still involved in justification and certainly there was zero empathy for the victim and essentially an absence of guilt.” Dr. Silberglitt concluded:

There are no compelling reasons within this evaluative psychological profile to indicate a rationale that would imply emotional difficulties that would indicate that Todd would profit from any type of treatment that is specific to the juvenile system, and no indication of great deficits or mental retardation or even suboptimal intellectual endowment, for he is of Average intelligence and is certainly cognizant of his premeditation, and indeed, attempted to justify it, as the examiner indicated, certainly not a particularly immature youth. Nothing within this evaluative procedure provided indication that would preclude the waiving of this juvenile to the adult system of justice to face consequences for his actions.

Todd can be described as a Conduct Disorder, aggressive type, with continuing homicidal potential in the absence of guilt or remorse, plus a tendency to justify his actions.

Finally, probation intake worker Anthony Zingale, testified that Todd J.J. told him "initially that he did this for a friend, for some money and for some drugs," but that Todd J.J. later was in "a posture of denial." Zingale also testified about Todd J.J.'s school record, that "he may be living on the streets sporadically," that Todd J.J.'s alcohol treatment evaluation indicated "[b]latant use" of marijuana and alcohol, and that Todd J.J. said he was "high" when he shot the victim. Zingale testified that Todd J.J. should not remain in the juvenile system; that he did not know if the ten years remaining for him in the juvenile system would be enough time to change Todd J.J.'s "attitudes, values and belief system."

Waiving jurisdiction, the juvenile court stated that this had been "an outright execution of a developmentally disabled person,"² and further:

And it makes me want to be physically ill up here. And it is a difficult expectation on my part to get beyond anything other than that. And let's be clear about that. The law says that while I have to consider these factors, the nature of the behavior and the type of offense that is involved can be of such overwhelming significance in the propriety of waiver ... that it can dictate the bottom line.

² Todd J.J. alleges that the juvenile court's statement regarding the mental condition of the victim was not supported by the evidence. Apparently, however, the court based its characterization of the victim's mental condition on Kent Thomas's statement that prior to Todd J.J.'s attack, the victim had been "swinging his arms around in the street as though he was boxing with someone who was not there," and Thomas' belief "that it was just a simple way that this person kept himself amused and did not appear to be bothering anyone and was not saying anything as he was doing this." Todd J.J. has not established that the court's characterization was "clearly erroneous."

And quite frankly, it does, in my opinion, in this case, although it's not the sole factor.

But I repeat, it's a difficult expectation. I am so aghast at the behavior that it's difficult to take into account the other factors that the law requires you to take into account.

The trial court, however, noted the following additional factors: Todd J.J. did not seem to show any remorse, other than for the fact he would have to remain in detention; no treatment modality existed that would provide Todd J.J. with a moral compass to control his behavior; and although Todd J.J. had no prior record, he had been selling drugs and “[h]is school situation is abysmal simply because of his behavior,” despite “some [in]nate intelligence.”

Finally, in deciding to waive Todd J.J. into adult court, the juvenile court commented that it hoped Todd J.J. went to prison for the maximum period of time available and, until there was some way to correct Todd J.J.'s moral compass, “the thought of [him] out on the streets is a frightening prospect.” The juvenile court concluded, “I don't enjoy sending 15-year-olds into the Adult prison system for virtually all of the rest of their lives. But there is no other reasonable or rational response.”

According to § 48.18(5)³ and (6), STATS., the juvenile court shall base its decision 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

³ As amended by 1995 Wis. Act. 27 §§ 2434m & 2434p; sections 48.18(5) and (6) have since been repealed and recreated without substantial revision in Chapter 938, the new “Juvenile Justice Code.”

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 serious juvenile offender program under s. 48.538 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.

“Waiver of jurisdiction under sec. 48.18, STATS., 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). Additionally, the juvenile court has discretion to weigh the criteria listed in sec. 48.18(5) in deciding whether to waive its jurisdiction. *Id.* A juvenile court waiving jurisdiction may properly conclude “that the type and seriousness of the offense greatly outweighed the other factors.” *In Interest of B.B.*, 166 Wis.2d 202, 209, 479 N.W.2d 205, 208 (Ct.App. 1991).

Todd J.J. argues that the juvenile court placed undue emphasis on the seriousness of the offense and “did not address with sufficient specificity the [other statutory] criteria because it was so consumed, in error, by its perception of the seriousness of the offense.” Counsel writes:

Counsel for Todd frankly concedes that he feels that he has missed something here. With the exception of the juvenile's statements to probation agent Zingale about shooting the can collector at the request of others, for money, and for drugs, and later denying involvement altogether, the facts of the shooting incident are very much in doubt as to whether they amount to first degree intentional homicide

Appellate counsel further states: “What the evidence reasonably spells out is that a very frightened fifteen (15) year old was grabbed by someone acting out of sorts and the fifteen (15) year old feared for his safety, despite the fact that he brought a gun to the dispute.” What appellate counsel “has missed” here is that his own client's account fails to support what counsel states “the evidence reasonably spells out.” Even the statements of Todd J.J. contain no expression of fear towards the can collector.⁴

⁴ Even more alarming to this court, however, is appellate counsel's additional comment in his brief, that “[o]ne cannot help but wonder if the Court was privy to more facts concerning the shooting than the record establishes.” Counsel's statement is completely unsupported. If appellate counsel believes some impropriety occurred, he may file a complaint with the Judicial Commission. This court directs attorney Thomas G. Wilmouth's attention to Supreme Court Rule 20:8.2(a) (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the ... integrity of a judge.”), Supreme Court Rule 20:3.3(a)(1) (“A

The record fully supports the juvenile court's conclusion, based on clear and convincing evidence and the criteria listed in § 48.18(5) & (6), STATS., that it would be contrary to the best interests of Todd J.J. and the public to hear his case in juvenile court. The fact that the juvenile court expressed its horror over Todd J.J.'s crime during its consideration of the evidence and the statutory criteria in no way renders the juvenile court's decision to waive him into adult court an erroneous exercise of discretion. Therefore, this court affirms the juvenile court's order waiving Todd J.J. into adult criminal court.

By the Court. – Order affirmed.

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

(..continued)

lawyer shall not knowingly make a false statement of fact or law to a tribunal.”), and Supreme Court Rule 20:3.1(a)(2) (“In representing a client, a lawyer shall not ... knowingly advance a factual position unless there is a basis for doing so”).