

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 5, 1997

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. 97-0423**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN THE INTEREST OF MATTHEW R.L.,  
A PERSON UNDER THE AGE OF 18:  
STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**MATTHEW R.L.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County:  
JOHN J. PERLICH, Judge. *Reversed and cause remanded with directions.*

ROGGENSACK, J.<sup>1</sup> Matthew R.L. appeals a non-final order<sup>2</sup> waiving him into adult court to face one charge of conspiring to deliver marijuana

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

<sup>2</sup> This court granted Matthew's petition for leave to appeal on February 10, 1997.

and one charge of possessing drug paraphernalia. He claims that the juvenile court abused its discretion when it waived jurisdiction without properly considering the adequacy and suitability of alternate services available to him in the juvenile justice system. For the reasons discussed below, this court agrees and reverses the order waiving Matthew to the circuit court and remands for further proceedings in juvenile court.

### **BACKGROUND**

Matthew was born on July 22, 1980. His first contact with the juvenile justice system occurred in September of 1991, when he was eleven years old. Matthew was one of a group of juveniles who broke into a warehouse and stole several winter coats. He received a referral for burglary and entered into a consent decree, which required that he remain on supervision for a year. The following year, in September of 1992, he was referred for retail theft, and was placed on informal supervision from October of 1992 to October of 1993.

In March of 1994, Matthew was referred for criminal trespass and damage to property, but the charges were dismissed for lack of prosecutive merit. The following month, he was again referred for trespass when he went into a school where he was not a student to settle a dispute with a student of that school. That matter was dismissed with a letter to his parents.

In January of 1995, Matthew was one of a group of boys who vandalized a school bathroom. He was referred for criminal damage to property and disorderly conduct. The petition was dismissed. In July of 1995, just before his fifteenth birthday, Matthew accompanied a friend on a “carhopping” spree, and stood by while the friend stole various electronic items from a car and a trailer. Matthew did not take or keep any of the stolen items himself. As a result of this

incident, Matthew was adjudged delinquent as a party to the crimes of theft and burglary.

In November of 1995, Matthew was referred for selling marijuana. Matthew said what he had sold was not marijuana and no marijuana was ever found on the presumed purchasers. He was not prosecuted. Shortly thereafter, Matthew's father called the social worker assigned to Matthew's case to report that he had found marijuana, drug paraphernalia and \$130 in his son's room. This incident was handled informally, with twenty days of home detention.

In April of 1996, Matthew and a number of other students were involved in a fight at school, which resulted in a referral for battery, disorderly conduct and intimidating a witness. However, a jury found Matthew not guilty of all charges.

In June of 1996, Matthew was referred for retail theft of two packs of beer from a local convenience store. In October of 1996, he was referred for disorderly conduct because he swore in the presence of the associate principal of his high school. Later that month, he was referred for underage drinking, possession of tobacco and a curfew violation. Throughout this time, Matthew was also truant from school on a fairly regular basis.

On December 9, 1996, while the retail theft matter was still pending, Matthew was referred on the present charges of felony conspiracy to deliver marijuana and misdemeanor possession of drug paraphernalia. The basis for the delinquency petition was that while law enforcement officers were executing a search warrant of the home of a suspected marijuana trafficker, they noticed Matthew's number blinking on the pager of one of the residents. A police officer called the number, and took a message from Matthew that he had the three ounce

baggies which the pager owner had requested earlier. When the officer told Matthew that another individual wanted an ounce of marijuana, Matthew responded that that was all right. On the basis of Matthew's remarks over the phone, the police got a search warrant and found about ten grams of marijuana in Matthew's parents' home, where he lived.

The State petitioned to waive sixteen-year-old Matthew into adult court. The sole witness at the waiver hearing was a social worker, Harold Grosland. After going through Matthew's referral history, Grosland testified that he did not think the juvenile justice system had much left to offer Matthew, short of placement in a secure correctional facility. He said that Matthew would be very resistive to a foster home or a group home placement, and that alcohol and drug treatment were unlikely to be successful because Matthew didn't really admit to having any dependency problems. Grosland also said that the limited benefit to Matthew of secure detention did not justify the \$130 per day cost of such a sanction to Matthew's parents, who were good people but completely frustrated with Matthew's behavior. Grosland said he believed that waiver into adult court was necessary to hold Matthew accountable for his actions. He did not review the suitability of any of the residential facilities available through juvenile corrections.

The record showed that Matthew had "never been evaluated or provided any treatment and/or therapy." It also showed that on January 9, 1996, Matthew stated, "I Matt ... am admiting [sic] on this date that I belive [sic] that I have a drug problem and am asking for help and treatment," and that the only adjudications of delinquency were the two that occurred from the "carhopping" incident in 1995. The petition to waive acknowledged that none of the allegedly delinquent acts were violent and that the current offense did not involve violence or personal injury. And, although the court concluded that the serious offender

program under § 938.538, STATS., was not suitable, there was no factual testimony about that program or how it compared with Matthew's or the public's best interests.

The juvenile court granted the State's petition to waive Matthew into circuit court, reasoning that if two concerned parents in an intact home could not turn Matthew around, the juvenile justice system couldn't. "If they couldn't do it, a foster home, a treatment foster home, some other facility other than a correctional facility isn't going to help him. And that means that if we keep him in the juvenile justice system, the only thing we're going to do is lock him up in a correctional facility and warehouse him, and that doesn't help."

Matthew appeals the decision to waive jurisdiction, claiming the State did not prove by clear and convincing evidence that it was contrary to his best interests or the best interests of the public to have the case heard in juvenile court and that the juvenile court did not rationally consider all of the factors required by statute.

## DISCUSSION

### **Standard of Review.**

The decision whether to waive jurisdiction over a juvenile rests within the discretion of the juvenile court. *J.A.L. v. State*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). When reviewing a discretionary determination, this court examines the record to determine if the trial court logically interpreted the facts in the record and applied the proper legal standard to them. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (Ct. App. 1995). In considering whether the proper legal standard was applied, no deference is due, because this

court's function is to correct legal errors. Therefore, we will review *de novo* whether the juvenile court properly interpreted the factors listed in § 938.18, STATS., before applying them. See *State v. Carter*, 208 Wis.2d 142, 560 N.W.2d 256 (1997) (applying *de novo* review to the legal standard used in a sentencing context).

### **Waiver of Juvenile Jurisdiction.**

“The transfer of [a] juvenile to the adult criminal process is a grave step.” *D.H. v. State*, 76 Wis.2d 286, 292, 251 N.W.2d 196, 200 (1977). The juvenile court may waive its jurisdiction over a minor charged with a criminal offense only when “the court determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile<sup>3</sup> or the public to hear the case.” Section 938.18(6), STATS. In making its determination, the court shall consider the following criteria:

(a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile 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 juvenile's motives and attitudes, the juvenile's physical and mental maturity, the juvenile'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

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<sup>3</sup> Under Wisconsin's old juvenile code, “[t]he best interests of the child [were] always [to] be of paramount consideration.” Section 48.01(2), STATS., 1993-94. However, that directive has been deleted from the revised statutes, placing consideration of the public interest on an equal footing with concern over the juvenile's welfare. See 1995 Act 77 and § 938.01, STATS.

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 juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 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.

#### Section 938.18(5).

We are benefited by the analysis of the juvenile court which recited many of the statutory factors. For example, the court noted that Matthew was not mentally ill or developmentally disabled; he had not been waived into adult court before and had only two prior delinquency adjudications, neither of which involved the infliction of serious bodily injury; he was of average physical and mental maturity; he lived with his parents and went to school more or less when he felt like it; and that he continued to violate the rules of his supervision. The court further found that the present offense, although not violent, was serious in that it involved dealing drugs, not just using them. Each of these determinations was supported by evidence in the record, and this court will not substitute its judgment as to the weight to be given to properly considered factors. *B.B. v. State*, 166 Wis.2d 202, 209-10, 479 N.W.2d 205, 208 (Ct. App. 1991).

However, when exercising its discretion at a waiver hearing, the juvenile court must consider *all* of the relevant statutory factors and it must set forth on the record all of its findings, before waiver may occur. *State v. C.W.*, 142

Wis.2d 763, 769, 419 N.W.2d 327, 329-30 (Ct. App. 1987).<sup>4</sup> One of these factors is the suitability of the juvenile for placement in the serious juvenile offender program under § 938.538, STATS. Section 938.18(5)(c), STATS. The serious juvenile offender program authorizes various “highly structured” sanctions that are “more restrictive than ordinary supervision in the community” for juveniles who have been adjudicated delinquent.<sup>5</sup> Section 938.538(2)(a) and (b). The trial court correctly concluded that Matthew’s past adjudications of delinquency did not rise to the level where Matthew could be considered for the serious offender program.

Matthew’s social worker testified that he thought foster care placement and alcohol and drug treatment were unlikely to work for Matthew and that he “would not recommend placement in anything short of a secure correctional facility.”<sup>6</sup> The juvenile court picked up on some of his testimony, commenting that “a foster home, a treatment foster home, some other facility other than a correctional facility isn’t going to help [Matthew].” However, the court then went on to state:

I think what [Matthew] really needs is some supervision with a club behind it. I think he needs to acknowledge the fact that he has a substance problem and deal with it. And I think you need a program that has some

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<sup>4</sup> Section 48.15(5), STATS., 1993-94, on which *C.W.* is based, is similar to § 938.18(5), STATS., on which the waiver at issue here is based.

<sup>5</sup> The criteria for placing a juvenile in the program are set forth in § 938.34(4h), STATS. We note that none of Matthew’s adjudications of delinquency involve violations of a statute set forth in § 938.34(4h).

<sup>6</sup> However, he testified to no factual underpinning on which he based his conclusion. Additionally, his suggestion of a secure correctional facility was summarily dismissed by the juvenile court.



force and some structure and some clout, and we wouldn't have that in the juvenile system....

I just don't see where it's going to, where there's anything left in the juvenile system. Even the serious juvenile offender program I don't see as being in his best interests at this point in time.

The problem with the juvenile court's analysis is twofold. First of all, despite noting that nothing short of a correctional facility was likely to help Matthew, the court never considered any of the correctional facility options<sup>7</sup> available in the juvenile justice system, or said why they were inadequate or unsuitable for Matthew's needs. The court seemed to believe that if Matthew's parents could not cause him to see the error of his ways, a corrections professional also could not do so.

Second, the juvenile court opined that Matthew was in need of "structure" and "supervision with a club behind it," exactly what the legislature seems to have had in mind when it established residential juvenile correctional facilities. And, nothing in the social worker's testimony suggested that a residential juvenile facility would provide inadequate supervision, since Matthew's prior sanctions included only detention and that was generally carried out at home. In this respect, then, the record fails to reflect a reasoned consideration of the suitability of residential juvenile facilities, as they specifically related to Matthew's needs. Section 938.18(5)(c), STATS. Moreover, the court's

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<sup>7</sup> There are a number of secured correctional facilities for juveniles in Wisconsin which provide discipline, counseling and education to teach offenders how to control their behavior. Many have excellent alcohol and other drug abuse (AODA) programs that offer skilled professional assessment and treatment when the juvenile needs it; *e.g.*, the Ethan Allen School in Wales, the Lincoln Hills School in Irma, Norris Adolescent Center in Mukwonago, Wyalusing Academy in Prairie du Chien, and Northwest Passage in Spooner, to name only a few.

expressed opinion that correctional facilities do no more than “warehouse” young offenders has no support in the record.

Although we can understand the frustration of all who have been involved in trying to turn around Matthew’s delinquent conduct, waiver into adult court can occur only when a careful consideration of all the relevant factors of § 938.18(5), STATS., has been made and the juvenile court has stated on the record why the facts presented to it caused it to conclude that the choices available in the juvenile justice system are contrary to the best interests of the juvenile or the public. That did not occur here.

### CONCLUSION

Because Matthew’s waiver into adult court was based in part on an unsubstantiated conclusion that juvenile correctional facilities are generally useless, without an analysis of at least some of the individual facilities and whether they could provide Matthew the structured environment the court found that he needed, the waiver represented an erroneous exercise of the juvenile court’s discretion. The order is reversed and the cause is remanded for further proceedings in juvenile court on the pending charges.

*By the Court.*—Order reversed and cause remanded with directions.

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

