

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0927-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DURAN THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Duran Thomas appeals from the judgment of conviction entered after he pled guilty to one count of first-degree reckless homicide, and one count of first-degree recklessly endangering safety, contrary to

WIS. STAT. §§ 940.02(1) and 941.30(1).¹ Thomas was also charged in both counts with using a dangerous weapon and as a party to the crime, contrary to WIS. STAT. §§ 939.63 and 939.05. Thomas was fourteen years-old when these crimes were committed. Pursuant to WIS. STAT. § 938.183(1)(am), he was charged as an adult, and pursuant to WIS. STAT. § 938.183(1m)(c), he was sentenced as an adult. He now argues that because of § 938.183(1m)(c)'s alleged ambiguity, the statute is unconstitutional. Further, he submits that the trial court erroneously exercised its discretion at sentencing when it denied his request for a juvenile disposition. We reject Thomas's arguments and affirm.

I. BACKGROUND.

¶2 In August 1998, Thomas was charged with one count of first-degree intentional homicide, later amended to first-degree reckless homicide, and one count of first-degree recklessly endangering safety. Relying on WIS. STAT. § 938.183(1)(am), the State charged him as an adult. The complaint alleged that in July 1998, Thomas and two other individuals fired gunshots at several people congregated on the front porch of a house in the city of Milwaukee. According to the complaint, Thomas and the other two individuals went to the house because they were involved in a feud with several individuals they believed were at the house. In the past, this feud has led to several robberies and incidents of gunshots being fired. In this incident, Thomas's role consisted of arming himself with a handgun, approaching the house and firing several shots at the people standing on the front porch. One of the gunshots struck Omar Johnson in the head, killing

¹ All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise indicated.

him. After the shooting, Thomas, assisted by several family members, fled to Texas where he was eventually apprehended and returned to Wisconsin.

¶3 Because Thomas was fourteen years old, he requested that the trial court hold a reverse waiver hearing authorized by WIS. STAT. § 970.032 to determine whether he should be removed from adult court and placed under the jurisdiction of the juvenile court. The trial court conducted a hearing, but at its close, the trial court concluded that Thomas should remain in adult court.

¶4 Thomas then pled guilty to both charges in December 1998. After the acceptance of his guilty pleas, but before sentencing, Thomas's attorney withdrew and his current counsel was substituted in. Thomas's new counsel appeared on his behalf for the first time at the sentencing hearing. At that time, Thomas's attorney took the position that the charges should be dismissed, arguing that WIS. STAT. § 938.183(1m)(c) was unconstitutional. Because Thomas had not filed a formal motion prior to the hearing, the trial court refused to hear the motion, but granted Thomas thirty days to file the motion challenging the constitutionality of the statute. The trial court then set a scheduling date and postponed sentencing. Although Thomas eventually filed the motion, he did not do so within the thirty days. When the parties appeared on the scheduling date, the trial court noted that Thomas had failed to file the motion within the allotted time, refused to hear it, but did agree to include the motion in the record. The court then proceeded to sentencing.

¶5 At sentencing, the court determined that Thomas should not be sentenced as a juvenile, concluding that Thomas should be sentenced as an adult, in the best interests of both Thomas and the public. Thomas was sentenced to

twenty years in prison on count one, and a concurrent nine-years in prison on count two.

II. ANALYSIS.

¶6 We elect not to consider Thomas's argument regarding the constitutionality of WIS. STAT. § 938.183(1m)(c). This court has repeatedly indicated that we will generally not review an issue raised for the first time on appeal. *E.g.*, *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). "This is especially so for a claim that a statute is unconstitutional." *City of Mequon v. Hess*, 158 Wis. 2d 500, 506, 463 N.W.2d 687 (Ct. App. 1990). Although Thomas notified the trial court that he intended to raise the issue of the constitutionality of § 938.183(1m)(c), he failed to do so in a timely manner, and the trial court never considered the issue. *See Preloznik v. City of Madison*, 113 Wis. 2d 112, 126, 334 N.W.2d 580 (Ct. App. 1983) ("As a general rule, we will not decide a matter not presented to the trial court."). Thomas has not persuaded us that justice would be served by our considering the issue here. *See Olson v. Dunbar*, 149 Wis. 2d 213, 219, 440 N.W.2d 792 (Ct. App. 1989). Moreover, the motion was filed following the acceptance of Thomas's guilty plea. By pleading guilty, Thomas waived the right to raise all non-jurisdictional defects and defenses including constitutional challenges. *State v. Bangert*, 131 Wis. 2d 246, 293, 389

N.W.2d 12 (1986). Therefore, Thomas’s challenge to the constitutionality of § 938.183(1m)(c), raised for the first time on appeal, is both untimely and waived.²

¶7 Next, Thomas argues that the trial court erred when it refused his request for a juvenile disposition and sentenced him as an adult. Specifically, Thomas contends that in imposing sentence, the trial court “based its decision on the type and seriousness of the offense,” and failed to consider mitigating factors such as his age and the abuse he suffered as a child. He concludes, therefore, that the trial court erroneously exercised its sentencing discretion and this court should remand this case for resentencing. We disagree.

¶8 The trial court’s decision to retain adult jurisdiction over Thomas is discretionary and will not be disturbed by this court absent an erroneous exercise of discretion. *Cf. State v. Dominic E.W.*, 218 Wis. 2d 52, 56, 579 N.W.2d 282 (Ct. App. 1998) (“A decision to retain or transfer jurisdiction in a reverse waiver situation [under WIS. STAT. § 970.032] is a discretionary decision for the trial court.”); *B.B. v. State*, 166 Wis. 2d 202, 207, 479 N.W.2d 205 (Ct. App. 1991) (“Waiver of jurisdiction under [WIS. STAT. § 48.18] is within the sound discretion

² We also note that Thomas’s argument is confusing and undeveloped. In particular, Thomas appears to assert inconsistent positions in the sealed motion filed with the trial court and in his brief to this court. In his brief to this court, Thomas argues that WIS. STAT. § 938.183(1m)(c) “is ambiguous and violates the due process clause of the state and federal constitutions.” The State responds by arguing, *inter alia*, that Thomas is precluded from asserting that § 938.183(1m)(c) is unconstitutionally vague because it is a procedural statute. In his reply brief, Thomas contends that his “brief to this court did not raise the issue of vagueness, but rather asserted that the statute was ambiguous.” This may be technically correct, however, in his sealed motion filed with the trial court, Thomas raised the following three arguments: (1) § 938.183(1m)(c) “is impermissibly vague and unconstitutional”; (2) “The statute ... is unconstitutionally vague because it raises but fails to provide notice regarding [certain] questions”; and (3) “Authorities in support of argument that [§ 938.183(1m)(c)] is unconstitutionally vague, poorly drafted and provides no notice to the defendant as to what he stands to lose.” Thus, Thomas appears to have asserted inconsistent positions in his original motion and his appellate brief.

of the juvenile court.” (citation omitted)). We will sustain the trial court’s discretionary decision if we find that it “(1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Whether the trial court properly exercised its discretion is a question of law, which we review *de novo*. *State v. Pittman*, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993). We are satisfied that the trial court properly exercised its discretion in retaining jurisdiction over Thomas.

¶9 In order to obtain a juvenile disposition, Thomas was required to demonstrate by clear and convincing evidence that a juvenile disposition would be in his best interests as well as in the public’s best interest. WIS. STAT. § 938.183(1m)(c)2. In deciding whether Thomas met this standard, the trial court was obligated to consider the four criteria set forth in WIS. STAT. § 938.18(5). Section 938.18(5)(a) requires the trial court to consider:

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.

The record clearly demonstrates that the trial court considered all of these factors. In particular, the trial court noted that Thomas was fourteen-years-old when the shooting occurred; he had no prior juvenile record; he was not mentally ill or

developmentally disabled; and the court had not previously waived jurisdiction over him. In considering Thomas's physical maturity, the court noted he was five feet eleven inches tall, weighing one hundred and sixty pounds, and "appear[ed] at least physically to be appropriate particularly for his age," as Thomas was "taller than his chronological peers and athletically built."

¶10 In considering Thomas's mental health, the court referred to the presentence report of Dr. Kenneth H. Smail who, pursuant to court order, conducted a mental health examination of Thomas. The court indicated that Dr. Smail diagnosed Thomas as a "non-psychotic adolescent who is experiencing substantial emotional and interpersonal conflict." His treatment history indicated that "his profile [was] consistent with others who overreact to minor affronts by being markedly guarded and withdrawing with an air of aloofness." Dr. Smail determined that Thomas was "prone to self-righteous indignation and rationalization for his own difficulties," and that "beneath his veneer of detachment is an individual in substantial emotional distress." The court noted that according to Dr. Smail, Thomas was likely to experience prominent feelings of depression, isolation and pessimism, and that "the efficiency of his thinking may be compromised by anxiety, ruminative thoughts and indecision." Ultimately, Dr. Smail determined that Thomas had an adjustment disorder with mixed disturbance of emotions and conduct, as well as cannabis abuse, but that he did not exhibit a conduct disorder.

¶11 The trial court characterized Thomas's pattern of living as "very disturbing." The court asserted:

As both counsel have indicated, it has not been a good situation. He has not had the benefit of two caring parents who have provided for him. His sister has been helping take care of him. He's been on his own to a large extent.

He has found some other associations, though. He has been a gang member since age eleven. Been drug dealing since age thirteen and apparently is a good associate of [one of the other individuals involved in the shooting] to the extent that he would receive the gun from [the other individual] in this incident and go over to help [the individual] in his dispute with these other individuals.

The court also noted that although Thomas did not appear to have undergone prior treatment for any of his emotional problems, he did demonstrate potential for responding to future treatment. Specifically, the court indicated that Thomas appeared to be a “resilient person ... who should be able to respond to rehabilitation.”

¶12 Contrary to Thomas’s assertions, it is clear that the trial court considered his age and his difficult home life. Although the trial court did not explicitly highlight the reports of abuse and neglect Thomas suffered as a child, the trial court did consider the presentence reports, as well as counsel’s argument, which set forth the incidents of abuse and neglect. Therefore, we reject Thomas’s assertion that the trial court failed to consider these mitigating circumstances.

¶13 Further, although Thomas confines his argument to the trial court’s alleged failure to consider these mitigating circumstances, our independent review of the remaining record supports our conclusion that the trial court properly exercised its discretion. Under WIS. STAT. § 938.18(5)(b), the trial court was required to consider: “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.” In considering this subsection, the court stated:

In looking at the type and seriousness of the offense, this is an extremely serious offense. It involves a homicide. That’s one of the most serious offenses that we have in

society. This was an offense, a crime of violence, a crime against person. It was committed in a violent and aggressive manner with regard to the use of the weapon.

Further, the court asserted that although Thomas “did not have the particular intent to commit a homicide, certainly he did have the intent to commit a very violent act and place other lives at risk. If not risk of death, at least risk of serious bodily injury and harm.” It is apparent that this factor weighed heavily in the trial court’s analysis. The weight to be given each factor is a determination particularly within the trial court’s discretion, *cf. Harris v. State*, 75 Wis. 2d 513, 520, 250 N.W.2d 7 (1977), and we will not upset that decision here.

¶14 Under WIS. STAT. § 938.18(5)(c), the trial court must then consider:

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 [WIS. STAT. § 938.538] or the adult intensive sanctions program under [WIS. STAT. § 301.048].

¶15 The record also indicates that the trial court considered this factor in making its decision. The trial court began by acknowledging that a juvenile disposition would provide Thomas with some services and facilities from which he would receive treatment. However, the court concluded that “even if [Thomas] were placed in the serious juvenile offender program that suitability of the facilities is not consistent with the appropriate protection of the public.” The court concluded that the public needed to be protected from Thomas for a longer period of time than that offered by the serious juvenile offender program. With respect to the maximum amount of incarceration Thomas would face in the serious juvenile offender program, the trial court voiced its concern that “even that period of time

would not be sufficient to address all of the problems that have Mr. Thomas here before the court today.” The court stated that Thomas needed to be confined for a substantial period of time to resolve the issues he has regarding “such things as criminal thinking, drug usage [and] drug dealing.”

¶16 The court also opined that confinement in an adult facility for a significant period of time would provide Thomas with “educational programs and psychological treatment concerning any emotional and inner-personal conflicts he has.” The court noted that if it granted a juvenile disposition, even as a serious juvenile offender, Thomas would be eligible for release under supervision “after as little as one year.” The court felt that this time period was too short and the supervision would not be adequate given Thomas’s particular needs. The court determined that the adult facilities would be better able to provide confinement and treatment more suitable to Thomas’s needs while protecting the public.

¶17 Finally, WIS. STAT. § 938.18(5)(d) required that the trial court consider “[t]he 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 the court of criminal jurisdiction.” Although the trial court did not articulate its thoughts regarding this factor, Thomas does not argue that this amounted to error. Moreover, our independent analysis of this factor satisfies us that the factor would not produce a result favorable to Thomas. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (An error is harmless if there is no reasonable possibility that the error contributed to the conviction.). The facts contained in the record regarding the circumstances surrounding the shooting—the involvement of Thomas’s older cousin and the other individual who gave Thomas the gun and told him to shoot while they were

shooting at others—weigh in favor of the trial court retaining jurisdiction over Thomas.

¶18 For these reasons, we conclude that the trial court properly exercised its discretion in finding that after “considering the factors under [WIS. STAT. § 938.18(5)] and in weighing all those factors ... [the trial court feels] that at this point [Thomas] has not provided clear and convincing evidence that it would be in the best interest of the juvenile and of the public to be adjudged delinquent with a [juvenile] disposition.” Therefore, we uphold the trial court’s decision to refuse Thomas’s request for a juvenile disposition, and we are satisfied that the trial court properly sentenced Thomas as an adult.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

