COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP845

Cir. Ct. Nos. 2006JV10
2006JV40

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

IN THE INTEREST OF JESSE K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESSE K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 BROWN, J.[1] Jesse K., a juvenile, appeals an order waiving him into adult court. Jesse claims that the state failed to meet its burden under WIS. STAT. § 938.18(6) to show by clear and convincing evidence that it would be contrary to Jesse's best interests or the best interests of the public for the juvenile court to hear the case. Jesse also argues that the juvenile court considered improper factors in its decision and reached a decision not rationally based upon the evidence presented at the waiver hearing. We find ample evidence in the record to support the court's discretionary decision and accordingly affirm.

¶2 Jesse's charges arise from three separate incidents. On December 1, 2005, Jesse allegedly approached a fellow student at his high school from behind and asked to use her cell phone. When she refused, he reached around her, grabbed her breast and squeezed hard enough to cause her pain. This incident resulted in charges of sexual assault of a child under sixteen years of age, simple battery, and disorderly conduct. On February 21, 2006, Jesse allegedly approached another female classmate in the hallway and touched her on the buttocks. The next day, Jesse allegedly grabbed and squeezed the same classmate's breast, causing her pain. Each of these two incidents resulted in one charge of fourth-degree sexual assault. Jesse denies that he committed any of the alleged acts.

¶3 The district attorney petitioned the juvenile court to waive Jesse into adult court, and the court held a waiver hearing. The State called one witness from the Walworth County Department of Human Services, who also prepared a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

waiver investigation report for the court. The report listed several previous police and court contacts for Jesse, including previous delinquency adjudications on two charges of fourth-degree sexual assault from 2004. The report concluded, however, that Jesse should not be waived into adult court and that he could be adequately treated within the juvenile system.

¶4 Jesse called four witnesses: one of his high school teachers; a police officer and acquaintance of Jesse's; his mother; and Dr. David Thompson, a clinical and forensic psychologist who had examined Jesse in 2004 and 2005.

¶5 At the end of the hearing, the court ordered that juvenile jurisdiction over Jesse be waived. It discussed the reasons for its decision extensively on the record; specific aspects of its reasoning are described below.

¶6 Jesse petitioned this court for appeal of a nonfinal order pursuant to WIS. STAT. § 808.03(2). We granted the petition, in accordance with ***State ex rel. A.E. v. Circuit Court for Green Lake County***, 94 Wis. 2d 98, 105a, 292 N.W.2d 114 (opinion on reconsideration) (1980).

¶7 WISCONSIN STAT. § 938.18(6) directs the juvenile court to waive the juvenile into adult court if it finds by clear and convincing evidence that a failure to do so would be contrary to the best interests of the juvenile or of the public. Juvenile waiver decisions are within the sound discretion of the juvenile court. ***J.A.L. v. State***, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991). We will uphold a discretionary decision so long as the record reflects that the juvenile court exercised its discretion and that there was a reasonable basis for the decision. ***Id.*** at 961. The juvenile court has discretion as to the weight it gives to each of the waiver criteria. ***Id.*** at 960. It need not resolve every criterion against the juvenile

in order to waive juvenile jurisdiction. ***G.B.K. v. State***, 126 Wis. 2d 253, 256, 376 N.W.2d 385 (Ct. App. 1985).[2]

¶8 Jesse first claims that the juvenile court's decision was erroneous because the record does not show clear and convincing evidence in favor of waiver. Specifically, according to Jesse, there was insufficient evidence as to the adequacy and suitability of the juvenile system.

¶9 "Adequacy and suitability of the juvenile system" is a paraphrase of one of the factors a court must consider in deciding whether to waive a juvenile into adult court. WIS. STAT. § 938.18(5)(c).[3] It is not the only factor. Even if we

[2] Previous versions of the waiver statute were located in the Children's Code, which instructs courts to make the child's best interest the "paramount consideration" in construing its provisions. WIS. STAT. § 48.01(2); *see, e.g.*, WIS. STAT. § 48.18 (1993-94). However, it is now found in WIS. STAT. ch. 938, the Juvenile Justice Code; this chapter directs that protection of the public and treatment of the juvenile's needs are "equally important purposes" of the code. WIS. STAT. § 938.01(2)(a) and (f). It is therefore no longer correct to say, as both Jesse and the State do, that the paramount consideration in determining waiver is the best interest of the child.

[3] WISCONSIN STAT. § 938.18(5) reads:

> If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on 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 extent to which it was committed in a violent, aggressive, premeditated or willful manner, and its prosecutive merit.

(continued)

were to agree with Jesse that there was not clear and convincing evidence on this point, it would not be dispositive, since there are other factors to consider.

¶10 In any case, we cannot agree that there was a lack of evidence presented as to the unsuitability of the juvenile system. The hearing transcript shows that the court heard and considered evidence regarding Jesse's previous treatment within the juvenile system. It noted that despite this treatment, Jesse had continued to behave in the ways that had gotten him into the system in the first place. It discussed the fact that, since Jesse would be turning eighteen in a year and three months, any court supervision of Jesse within the juvenile system would end at that time.[4] The court opined that, given Jesse's track record and serious problems, he was unlikely to be rehabilitated in such a short period. We hold that this constitutes clear and convincing evidence that the juvenile system was not the

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> (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 the court of criminal jurisdiction.

2005 Wis. Act 344, § 158-62 renumbered the statute, dividing parargraph (a) into two parts, and made some slight wording changes. It went into effect, however, after the proceedings in this case. 2005 Wis. Act 344 (date of publication April 28, 2006); WIS. STAT. § 991.11 (effective date of statutes generally day after publication).

[4] As the court stated, Jesse's offenses did not make him eligible for longer-term supervision within the serious juvenile offender program. *See* WIS. STAT. §§ 938.538, 938.34(4h).

appropriate place for Jesse. Jesse in effect acknowledges this, noting that the State "attempted to show a pattern of behavior from Jesse that could not be addressed in the juvenile system." We cannot see how this is logically distinct from showing the inadequacy and unsuitability of the juvenile system.

¶11 Jesse's brief on this point essentially consists of a long and selective rehash of the testimony of each witness. Though a great deal of the cited testimony strikes us as irrelevant to Jesse's argument, the gist of the section seems to be that Jesse will respond better to the juvenile system than the adult one. Two of the witnesses offered opinions to this effect: the police officer testified that Jesse is naïve and likely to be picked on in the adult system; and Dr. Thompson testified that the juvenile system would offer a better environment and more appropriate treatment programs for Jesse, while the adult system would take a more punitive approach. Even if we assume that the witnesses were competent to give these opinions, the juvenile court was not bound by them. ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). This is true even of expert testimony, and even where it is uncontroverted by other expert or lay testimony. ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 203, 311 N.W.2d 219 (Ct. App. 1981) ("[A]n expert's testimony must pass through the screen of the fact trier's judgment of credibility …." (citation omitted)). As noted above, the court clearly identified facts strongly supporting its conclusion that the juvenile system would not adequately rehabilitate Jesse or protect the public from his actions. So long as the court's conclusion was reasonable, as we have held it was, the contrary conclusions of Jesse's witnesses, no matter how many, are simply irrelevant. *See* ***J.A.L.***, 162 Wis. 2d at 961 (Appellate court must uphold juvenile court decision where there is a reasonable basis for it delineated in the record.).

¶12 Jesse's next argument is that the record as a whole does not reflect a reasonable basis for the waiver under the criteria listed in WIS. STAT. § 938.18(5). Jesse concedes that the court considered all of the relevant criteria. He argues, however, that the evidence weighs more strongly against waiver than in favor of it. Jesse's argument fails because it is little more than a request that this court exercise the discretion that properly belongs to the juvenile court. ***J.A.L.***, 162 Wis. 2d. at 960 (weight given to each factor is within the juvenile court's discretion). Jesse points us to various passages from the transcript related to each and every relevant statutory criterion and also includes a recapitulation of his argument about the adequacy and suitability of the juvenile system. We will not readdress that claim. We will also limit our discussion of the rest of Jesse's "reasonable basis" claims to the following illustrative example.

¶13 WISCONSIN STAT. § 938.18(5)(b) directs the court to consider the type and seriousness of the offense, including "the extent to which it was committed in a violent, aggressive, premeditated or willful manner." Jesse contends that "the court erred in determining that [his] alleged acts were willful."

¶14 Whether or not Jesse's actions were willful is a question of fact. We must therefore affirm the juvenile court's finding of willfulness if, given the evidence and reasonable inferences drawn from it, a reasonable fact finder could have come to the same conclusion. *See* ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980).

¶15 Again, we see ample evidence in the record to support the juvenile court's finding that Jesse's actions were willful. The court pointed out that Jesse had previously been adjudicated delinquent of charges similar to those he again

faced. It noted that the present charges involved assaults of the same victim on two consecutive days. It went on to state:

> The actions that … Jesse is alleged to have been involved in are violent. They involve the infliction of physical pain upon his victims…. [H]e apparently squeezes hard enough or hits the buttocks hard enough to cause pain. I doubt very much that he doesn't intend to cause pain under the circumstances.
>
> Now, it indicates the workers all seem to think, and Dr. Thompson thinks, this is all impulsive and not premeditated.
>
> I wish I could agree, but I don't. I don't see that. They've happened too often. I don't believe that his is total impulse. Walk by. All of a sudden, the idea snaps in the head; reach, grab, squeeze, is all just this instantaneous reaction. I don't believe it.
>
> I think that he knows what he's doing, and he has time to think about it and goes ahead and does it anyway. Their frequency and repetitive nature belies the claim that they are an uncontrolled, unthought-out impulsiveness.
>
> Clearly, they're willful. He knows he is not supposed to do this, and he does it.

¶16 Jesse charges that the court's finding of willfulness "is contrary to the evidence presented at the hearing and is a clear example of where the Court replaced the evidence presented with its own opinion." Jesse apparently relies upon the testimony of various witnesses to the effect that Jesse is very impulsive, as well as a statement in the waiver report that "[a]ll of the professionals in contact with Jesse concur with this impulsivity." This argument again confuses the respective roles of the witnesses and the court. Witnesses may, in the proper circumstances, offer opinions, but these opinions do not bind the court. ***Kienitz***, 227 Wis. 2d at 438. Jesse acknowledges this, but seems to be arguing that, since no expert witness offered an opinion to the contrary, the court was required to conclude that Jesse's acts were not willful. Again, this is simply not the case. The

court's job is to consider all of the evidence before it and to reach its own conclusion based upon that evidence. *See* ***J.A.L.***, 162 Wis. 2d at 961. In this case, that evidence included the descriptions of Jesse's acts in the delinquency petitions and the waiver investigation report. The court concluded from the frequency of these alleged acts, and from their nature, that they were the product of Jesse's will, rather than an uncontrollable "instantaneous reaction." The court was entitled to draw this conclusion based upon the evidence before it. An expert opinion to the contrary does not trump the court's own consideration of the entire record before it. *See* ***Krueger***, 104 Wis. 2d at 203.

¶17 Jesse finally contends that the court relied on facts not in evidence and considered improper factors in its waiver decision. Where a court bases a discretionary decision on an improper factor, it is an erroneous exercise of discretion. *See* ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).

¶18 First, Jesse claims that the court improperly based its decision on a belief that something should be done for the victims of his acts. However, the portion of the transcript to which Jesse refers shows quite clearly that the circuit court was referring to its concern with the protection of the public. The court stated that "you must stop the perpetrator, and then you won't have more victims." This is exactly the job that the court is charged with under WIS. STAT. § 938.18(6), which requires the finding that it would be contrary to the best interest of the juvenile *or of the public* to keep the case in juvenile court. The court concluded, for the reasons discussed at length in its oral decision, that it could best protect the public by waiving Jesse into adult court.

¶19 Jesse next argues that the juvenile court engaged in "speculation" when it stated that the Department of Corrections ought to be able to supply

appropriate treatment for Jesse. We have already addressed Jesse's argument about the adequacy and suitability of the juvenile system, and we decline to do so again. We do note, however, that Dr. Thompson testified that the DOC could refer Jesse to an appropriate outpatient program, and also that Jesse will remain under juvenile supervision for his previous delinquency findings.

¶20 Jesse finally claims that the court "speculated" that he had been involved in sexual misconduct previously while living in Illinois. However, the waiver investigation report submitted to the juvenile court quite clearly provides a factual basis for this conclusion. It states that Jesse's caseworker in Illinois related that Jesse was caught "compromising himself in brief moments alone with [his younger sister]" and that there were anecdotal reports of "Jesse touching neighborhood kids."[5]

¶21 On the record before us, we have no difficulty in concluding that the juvenile court properly exercised its discretion when it found that neither Jesse nor the public would be well served by his remaining within the juvenile system. We therefore affirm.

By the Court.—Order affirmed.

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

[5] Jesse also raises hearsay objections to some of the hearing testimony and documents in his reply brief. We need not consider this argument, as it was not raised in Jesse's brief-in-chief and is also not adequately developed. ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188; ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).