

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2006AP1041

Cir. Ct. No. 2005JV1688

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF SHAWN B.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SHAWN B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY E. TRIGGIANO, Judge. *Affirmed.*

¶1 FINE, J. Shawn B. appeals the trial court's order sentencing him under the Serious Juvenile Offender Program to the Ethan Allen School for five

years. The only issue presented on this appeal is whether the social-service agency report considered by the trial court complied with the statute. We affirm.

I.

¶2 In November of 2005, Shawn B., then some five months older than sixteen, pled guilty to armed robbery and attempted armed robbery. *See* WIS. STAT. §§ 943.32(1) & (2), 939.32. His violation of § 943.32(2) (“Whoever violates sub. (1) by use or threat of use of a dangerous weapon, a device or container described under s. 941.26 (4) (a) or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon or such a device or container is guilty of a Class C felony.”) made him eligible for the Serious Juvenile Offender Program under WIS. STAT. § 938.538. *See* WIS. STAT. § 938.34(4h)(a). As required by WIS. STAT. § 938.33(1), the designated social-service agency submitted a pre-disposition report. Shawn B. contends on appeal that the report did not satisfy § 938.33(3r), which provides:

If a juvenile has been adjudicated delinquent for committing a violation for which the juvenile may be placed in the serious juvenile offender program under s. 938.34 (4h) (a), the report shall be in writing and, in addition to the information specified in sub. (1) and in sub. (3) or (4), if applicable, shall include an analysis of the juvenile’s suitability for placement in the serious juvenile offender program under s. 938.34 (4h) or in a juvenile correctional facility under s. 938.34 (4m), a placement specified in s. 938.34 (3), or placement in the juvenile’s home with supervision and community-based programming and a recommendation as to the type of placement for which the juvenile is best suited.

Shawn B.’s complaint focuses on his contention that the report did not “include an analysis of the juvenile’s suitability for placement in the serious juvenile offender program.” He does not contend that the report was deficient in any other respect.¹

¹ WISCONSIN STAT. § 938.33 reads in full:

(1) REPORT REQUIRED. Before the disposition of a juvenile adjudged to be delinquent or in need of protection or services, the court shall designate an agency, as defined in s. 938.38 (1) (a), to submit a report that contains all of the following:

(a) The social history of the juvenile.

(b) A recommended plan of rehabilitation or treatment and care for the juvenile, based on the investigation conducted by the agency and any report resulting from an examination or assessment under s. 938.295, that employs the most effective means available to accomplish the objectives of the plan.

(c) A description of the specific services or continuum of services that the agency is recommending that the court to [*sic*] order for the juvenile or family, the persons or agencies that would be primarily responsible for providing those services, and the identity of the person or agency that would provide case management or coordination of services, if any, and whether or not the juvenile should receive an integrated service plan.

(d) A statement of the objectives of the plan, including any desired behavior changes and the academic, social and vocational skills needed by the juvenile.

(e) A plan for the provision of educational services to the juvenile, prepared after consultation with the staff of the school in which the juvenile is enrolled or the last school in which the juvenile was enrolled.

(f) If the agency is recommending that the court order the juvenile’s parent, guardian, or legal custodian to participate in mental health treatment, anger management, individual or family counseling, or parent training and education, a statement as to the availability of those services and the availability of funding for those services.

(continued)

(2) HOME PLACEMENT REPORTS. A report recommending that the juvenile remain in his or her home may be presented orally at the dispositional hearing if all parties consent. A report that is presented orally shall be transcribed and made a part of the court record.

(3) CORRECTIONAL PLACEMENT REPORTS. A report recommending placement of a juvenile in a juvenile correctional facility or a secured residential care center for children and youth shall be in writing, except that the report may be presented orally at the dispositional hearing if the juvenile and the juvenile's counsel consent. A report that is presented orally shall be transcribed and made a part of the court record. In addition to the information specified under sub. (1) (a) to (d), the report shall include all of the following:

(a) A description of any less restrictive alternatives that are available and that have been considered, and why they have been determined to be inappropriate. If the court has found that any of the conditions specified in s. 938.34 (4m) (b) 1., 2., or 3. applies, the report shall indicate that a less restrictive alternative than placement in a juvenile correctional facility or a secured residential care center for children and youth is not appropriate.

(b) A recommendation for an amount of child support to be paid by either or both of the juvenile's parents or for referral to the county child support agency under s. 59.53 (5) for the establishment of child support.

(3r) SERIOUS JUVENILE OFFENDER REPORT. If a juvenile has been adjudicated delinquent for committing a violation for which the juvenile may be placed in the serious juvenile offender program under s. 938.34 (4h) (a), the report shall be in writing and, in addition to the information specified in sub. (1) and in sub. (3) or (4), if applicable, shall include an analysis of the juvenile's suitability for placement in the serious juvenile offender program under s. 938.34 (4h) or in a juvenile correctional facility under s. 938.34 (4m), a placement specified in s. 938.34 (3), or placement in the juvenile's home with supervision and community-based programming and a recommendation as to the type of placement for which the juvenile is best suited.

(continued)

(4) OTHER OUT-OF-HOME PLACEMENTS. A report recommending placement in a foster home, treatment foster home, group home, or nonsecured residential care center for children and youth, in the home of a relative other than a parent, or in the home of a guardian under s. 48.977 (2) shall be in writing, except that the report may be presented orally at the dispositional hearing if all parties consent. A report that is presented orally shall be transcribed and made a part of the court record. The report shall include all of the following:

(a) A permanency plan prepared under s. 938.38.

(b) A recommendation for an amount of child support to be paid by either or both of the juvenile's parents or for referral to the county child support agency under s. 59.53 (5) for the establishment of child support.

(c) Specific information showing that continued placement of the juvenile in his or her home would be contrary to the welfare of the juvenile, specific information showing that the county department or the agency primarily responsible for providing services to the juvenile has made reasonable efforts to prevent the removal of the juvenile from the home, while assuring that the juvenile's health and safety are the paramount concerns, unless any of the circumstances specified in s. 938.355 (2d) (b) 1. to 4. applies, and specific information showing that the county department or agency has made reasonable efforts to achieve the goal of the juvenile's permanency plan, unless return of the juvenile to the home is the goal of the permanency plan and any of the circumstances specified in s. 938.355 (2d) (b) 1. to 4. applies.

(4m) SUPPORT RECOMMENDATIONS; INFORMATION TO PARENTS. In making a recommendation for an amount of child support under sub. (3) or (4), the agency shall consider the factors that the court considers under s. 301.12 (14) (c). At or before the dispositional hearing under s. 938.335, the agency shall provide the juvenile's parent with all of the following:

(a) Its recommendation for child support.

(b) A written explanation of how the parent may request that the court modify the amount of child support under s. 301.12 (14) (c).

(c) A written explanation of how the parent may request a revision under s. 938.363 in the amount of child support ordered by the court under s. 938.355 (2) (b) 4.

(continued)

¶3 Pursuant to a minimal plea bargain, Shawn B. pled guilty to the charges as they were filed. The State told the trial court that it “would recommend that the Court transfer Shawn’s custody to the Department of Corrections ... pursuant to the Serious Juvenile Offender provision of the Code.” The prosecutor also told the trial court that under the plea bargain, “the defense is free to argue” presumably against such a commitment.

¶4 The written predisposition report had, as material to Shawn B.’s contention on appeal, a handwritten recommendation: “Given current serious offense & past delinquency history & services provided in the past, recommendation is DOC-SJO [Department of Corrections-Serious Juvenile Offender].” (Bracketed material added.) On the form and immediately above the handwritten recommendation, is a series of pre-printed check-box possible assessments and recommendations:

The above named youth was reviewed for specialized services or placement.

(5) IDENTITY OF FOSTER PARENT OR TREATMENT FOSTER PARENT; CONFIDENTIALITY. If the report recommends placement in a foster home or a treatment foster home, and the name of the foster parent or treatment foster parent is not available at the time the report is filed, the agency shall provide the court and the juvenile’s parent or guardian with the name and address of the foster parent or treatment foster parent within 21 days after the dispositional order is entered, except that the court may order the information withheld from the juvenile’s parent or guardian if the court finds that disclosure would result in imminent danger to the juvenile or to the foster parent or treatment foster parent. After notifying the juvenile’s parent or guardian, the court shall hold a hearing prior to ordering the information withheld.

Section 938.33 reflects amendments by 2005 Wis. Act 25, § 2458 and Wis. Act 344, §§ 362–365. None of the parties contends that any of the amendments affect this appeal.

Risk level: ___ low ___ medium ___ high ___ very high

Need level: ___ low ___ medium ___ high ___ very high

Service/placement level:

___ Level 1: Counsel and release, Consent Decree, Deferred Prosecution

___ Level 2: Court ordered supervision, Community-based services, including day treatment and foster care

___ Level 3: Treatment and foster care, Group home, Wraparound, RTC

___ Level 4: Corrections

___ Level 5: Serious Juvenile Offender

___ Level 6: Waiver

Supervision level: ___ administrative ___ regular ___ high ___ intensive

Override recommended: ___ yes ___ no

Approved ___ Section/Bureau Manager

The only areas that were checked are those designating the “Risk level” as “high,” the “Need level” as “medium,” and the “Supervision level” as “high.”

¶5 Before ordering disposition, the trial court heard from the staffing supervisor, who indicated that Shawn B.’s case “was staffed yesterday with my supervision; and they -- ‘they’ being the staffing committee -- recommended a period of time at the Division of Corrections, Ethan Allen, under [Serious Juvenile Offender] rules and guidelines.” The supervisor also told the trial court:

I had a fairly constructive conversation with Shawn this morning while we were in detention. And I -- me, personally, I’m not totally sold on the [Serious Juvenile Offender] at this point. I guess I don’t have a lot to really base it on other than the conversation I had with this young man. I think some time at Corrections would be good. But under those [Serious Juvenile Offender] parameters I -- like I said, I’m not totally sold on it. I don’t think he needs the whole five-year order at this time. But I think significant time at Corrections is needed here, Judge.

¶6 Shawn B.’s lawyer argued to the trial court that his client should be sent to the Ethan Allen correctional school until he was eighteen, which the lawyer characterized as “a good year and a half or more.” The trial court, after ascertaining that an order of correctional confinement could not be extended “beyond the 18th birthday unless” the order was under the Serious Juvenile Offender Program, determined that Shawn B.’s history and circumstances as well as the seriousness of the crimes made it important that he spend enough time under a structured environment, and that tipped the scales in favor of the Serious Juvenile Offender Program order.

¶7 Shawn B. does not on this appeal challenge the trial court’s exercise of its sentencing discretion. Rather, as noted, he only contends that the report submitted by the social-services agency did not comply with WIS. STAT. § 938.33(3r) because it allegedly did not, as the statute requires, “include an analysis of the juvenile’s suitability for placement in the serious juvenile offender program.” He did not make this argument before the trial court.

II.

¶8 We generally do not consider issues that are raised for the first time on appeal because the trial court does not have a chance to correct the alleged error. *See State v. Seeley*, 212 Wis. 2d 75, 81, 567 N.W.2d 897, 900–901 (Ct. App. 1997); *State v. DeMars*, 171 Wis. 2d 666, 676, 492 N.W.2d 642, 647 (Ct. App. 1992). This waiver rule applies here because if Shawn B. had contended that the report was inadequate, the trial court could have ordered that it be either re-written or revised, or could have, as permitted by WIS. STAT. § 938.33(3), if Shawn B. and his lawyer consented, asked the agency representative to flesh-out the report “orally.”

¶9 Moreover, the report *does* show on its face that alternatives to the Serious Juvenile Offender Program *were* considered with reasons for the report’s recommendation: “Given current serious offense & past delinquency history & services provided in the past, recommendation is DOC-SJO [Department of Corrections-Serious Juvenile Offender].” (Bracketed material added.) In our view, the report thus has the requisite “analysis.”

¶10 We affirm.

By the Court.—Order affirmed.

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

