COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0181 **Cir. Ct. No. 01 JV 509B**

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

IN THE INTEREST OF ROMEL M.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROMEL M.,

RESPONDENT-APPELLANT.

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

¶1 SCHUDSON, J.[1] Romel M. appeals from the nonfinal circuit court order[2] waiving juvenile court jurisdiction under WIS. STAT. § 938.18.[3] He argues that the court failed to apply the proper criteria under § 938.18(5) "in finding that the evidence produced at the waiver hearing established by clear and convincing evidence that it was contrary to the best interest of the juvenile and the public" for the juvenile court to retain jurisdiction. This court disagrees and, therefore, affirms.

I. BACKGROUND

¶2 The facts relevant to resolution of this appeal are undisputed. In a delinquency petition dated October 30, 2001, the State charged Romel with felony murder, party to a crime. According to the petition, on October 25, 2001, Romel, then about fifteen and one-half years old, and an accomplice attempted an armed robbery of James Ripple, who was sitting in a car. When Ripple began honking the car horn in an apparent attempt to seek help from the driver of a passing bus, Romel's accomplice fatally shot him. On November 6, 2001, the State petitioned for waiver of juvenile court jurisdiction over Romel's case.

¶3 At Romel's waiver hearing on January 8, 2002, testimony was presented by two witnesses: Kim A. Klinkowitz, Romel's juvenile probation

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

[2] This court granted Romel M.'s petition for leave to appeal from the nonfinal order. *See* ***State ex rel. A.E. v. Circuit Court***, 94 Wis. 2d 98, 105a, 292 N.W.2d 114 (1980) (per curiam on reconsideration); WIS. STAT. § 808.03(2).

[3] The order indicates that the waiver decision was based on "[c]onsideration of the evidence presented on the criteria listed in Wisconsin Statutes 48.18(5)." Section 48.18 of the Wisconsin Statutes was repealed by 1995 Wis. Act 77, §§ 87-99. WISCONSIN STAT. § 938.18(5) is substantially the same as the former § 48.18(5).

officer since April 30, 2001, and Dr. Joseph L. Collins, a psychologist who had reviewed various records relevant to Romel's case and interviewed Romel on November 12, 2001, and January 5, 2002.

¶4 Mr. Klinkowitz testified that Romel had had several prior contacts with the juvenile justice system, including three for operating a vehicle without the owner's consent, resulting in delinquency adjudication and one year of supervision expiring April 26, 2002. Klinkowitz testified that, other than the alleged felony murder, Romel had complied with probation conditions, was not mentally ill, was physically mature for his age, had no developmental disabilities, and had no substance abuse problems. He opined that juvenile jurisdiction for Romel was not appropriate because "there is not adequate time available" for "adequate treatment … in the facilities, institutions, and services available in juvenile court." He concluded that waiver was in the best interests of both Romel and the public.

¶5 Klinkowitz acknowledged that during the six months he had supervised Romel, up until the referral for the felony murder, he had not checked to see how Romel was doing in school. He also acknowledged that probation services had not included any counseling or therapy for Romel during this period, and that he had not met with Romel's parents since the first field office meeting. While conceding that Romel would meet the criteria for participation in the serious juvenile offender program within the juvenile system, *see* WIS. STAT. §§ 938.34(4h) and 938.538, Klinkowitz opined that the program was not "appropriate" in this case. Finally, Klinkowitz advised that in charges stemming from the Ripple homicide, a nineteen-year-old was being prosecuted in the adult

system[4] and a seventeen-year-old also was being prosecuted, though he was not sure of the status of the latter case.

¶6 Dr. Collins testified that Romel was neither mentally ill nor developmentally disabled, and that he "probably would generally be functioning[/]scoring between borderline to low-average range of measured intelligence." He acknowledged that certain tests indicated that Romel had some weaknesses—"not quite knowing the difference between right and wrong"[5] and "application of judgment in social situations"—and that "both the subjective and projective data … revealed Romel to be a follower." Dr. Collins also explained that Romel was "anywhere from three to six years behind in basic academics." He said that Romel had neither shown remorse nor taken any responsibility for Mr. Ripple's death.

¶7 Dr. Collins testified that, in his opinion, Romel satisfied the waiver criteria in a number of ways: "[H]e does not have cognitive disability status. He is not seriously emotionally disturbed. He presents conduct disorder. He has a prior record. He shows little or no contrition or remorse, and the nature of the crime … is very serious here …." Dr. Collins also testified, however, that other criteria militated against waiver:

> I think looking, first of all, at the age factor, he is 15. I used the term "immature." I think probably a more appropriate term would be "naive." We have facilities and programs available within the juvenile system. We have access to the serious juvenile offender program.…

[4] Dr. Collins later testified that the primary actor in the homicide was an adult member of Romel's family.

[5] Later in his testimony, Dr. Collins acknowledged that Romel knew right from wrong, was "well aware of the concepts of the criminal justice system and the juvenile system and what a waiver was," and, during the interview, had "lobbied" him to oppose waiver.

> … The other factor I noted here is that he probably is not the primary actor in the death of this person.

¶8 Dr. Collins also discussed what he viewed as the impact of "truth in sentencing" and the likely lengths of incarceration for Romel in the juvenile and adult systems. Finally, asked to offer his opinion on waiver, Dr. Collins concluded: "[T]here is a slight preference for a continuation of juvenile jurisdiction, but … I could easily understand why a judicial official would disagree with my recommendation and waive him to adult court." Dr. Collins admitted that his recommendation might have been different if the sentence Romel would have been exposed to in adult court would have been less than fifty years.

¶9 After noting the need to consider the criteria under WIS. STAT. § 938.18(5), the court, tracking the criteria, concluded:

> It was clear from the testimony … that Romel is not mentally ill. He is not developmentally disabled. The court has not previously waived jurisdiction over him. He has not previously been convicted following a waiver of the Court's jurisdiction. He has been previously found delinquent of two operating auto without owner's consent. However, those offenses did not involve bodily injury to anybody else. He is appropriately physically mature. He is mentally, apparently, less mature. Dr. Collins described him as being naive, and his level of academic achievement is a matter of record ….
>
> His motives and attitudes—well, one of the problems I think that is troubling both me and Dr. Collins is Romel's attitude towards the offense that he committed. His pattern of living doesn't seem to be substantially different from [that of] a 15-year-old. He has difficulties with school, but he apparently [] lives with his family.
>
> The potential for responding to future treatment, I think, is another of those areas which gives me concern. There is no disagreement that the offense which is before the Court is extremely serious.… It involves just the completely useless and pointless death of a person who was going about his business. The offense was obviously committed in a violent fashion. It was, I believe, committed aggressively. It was premeditated or willful. The record indicates that Romel was not the primary actor,

> but he was nevertheless a participant in the offense. He was a participant in what was supposed to have been an armed robbery, which went very wrong.
>
> The adequacy and suitability of facility services and procedures available for the treatment of the juvenile and protection of the public within the juvenile justice system, mental health system, does not appear to be applicable. The real issue that is the most difficult issue here is that … although the services available in the juvenile system are more intensive …, are delivered more quickly, more directly, and … are geared toward juveniles with the mentality that is associated with juveniles[, t]he problem … is that on a serious juvenile offender disposition, which is the most serious disposition available to me, there is a maximum of three years which he can be placed in corrections with two years of supervision associated with the three years in corrections.
>
> There is also the consideration that there has been at least one adult charged with this offense, and … arguably there is some desirability to disposing of the entire offense in one court, considering that Romel was one of the two most primary actors in this offense.
>
> … I have to find by clear and convincing evidence that it would be contrary to either Romel's best interests or the best interests of the public to hear this case here in juvenile court, and given the fact that at this point Romel is unable to see that he has done anything wrong, that he was responsible for the act which occurred, I have no way of finding by clear and convincing evidence that three years would be enough programming to make Romel safe to return to the public, and so, therefore, I will find by clear and convincing evidence that three years is not enough possible incarceration, a five-year order is not enough to protect the public, and I am going to find by clear and convincing evidence that it is in the best interests of the public to waive jurisdiction over Romel to adult court ….

II. DISCUSSION

¶10 This court recently summarized the standards of review governing appeals from waivers of juvenile jurisdiction:

> Waiver of juvenile jurisdiction under [WIS. STAT. § 938.18] is within the sound discretion of the circuit court. We review the circuit court's decision for misuse of discretion. We first look to the record to see whether

> discretion was in fact exercised. If discretion was exercised, we will look for any reason to sustain the court's discretionary decision. We will "reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for the determination or a statement of the relevant facts or reasons motivating the determination is not carefully delineated in the record."
>
> The paramount consideration in determining waiver is the best interests of the child. It is within the circuit court's discretion how much weight should be afforded each of the factors under [WIS. STAT. § 938.18(5)]. The circuit court must state its finding with respect to the criteria on the record. If the circuit court determines by clear and convincing evidence that it would be contrary to the best interests of the child or the public for the juvenile court to hear the case, it must enter an order that waives jurisdiction and refers the matter to the district attorney for appropriate proceedings in criminal court.

State v. Elmer J.K., 224 Wis. 2d 372, 383-4, 591 N.W.2d 176 (Ct. App. 1999) (citations omitted).

¶11 Romel argues that the juvenile court "failed to consider a very important statutory criteria, [sic] his prior treatment history, before making the waiver determination." He contends that he received "no services and no treatment within the juvenile justice system." He maintains that "[i]t is impossible to know the effect that consideration of prior treatment history would have had upon [the juvenile court's] ultimate decision, because it was not considered," and that the court's failure to address that criterion constituted "an abuse of discretion." This court disagrees.

¶12 While the record reflects that Romel received no counseling or therapy through juvenile probation, it does not establish what additional services, if any, Romel required, or whether he received other assistance outside of what juvenile probation might have offered. Romel acknowledges that "[i]t is impossible to know the effect that consideration of prior treatment history would have had upon [the juvenile court's] ultimate decision, because it was not

considered." More precisely, it is impossible to know the effect that any additional evidence of Romel's treatment needs, and any additional evidence of intervention provided (by family, school, or other sources), would have had on the waiver decision. Such speculation, however, is not a proper basis for a decision. *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 791, 541 N.W.2d 203 (Ct. App. 1995) (verdict cannot be based on "conjecture and speculation"); ***Cudd v. Crownhart***, 122 Wis. 2d 656, 662, 364 N.W.2d 158 (Ct. App. 1985) (verdict cannot be based on "mere speculation").

¶13 Romel also argues that the juvenile court relied on "a non-statutory factor"—his failure to show remorse or accept responsibility. He then concedes, however, that "it may be proper to consider acceptance of responsibility, as a minor subset of his personality and attitudes." He maintains, nevertheless, that it should not be "the overriding factor in the determination of waiver."

¶14 Romel's argument has no merit. Clearly, lack of remorse and non-acceptance of responsibility relate to a juvenile's personality and amenability to treatment. *See* WIS. STAT. § 938.18(5)(a), (c). These factors, in turn, relate to the assessment of how much time, in either the juvenile or adult systems, is appropriate and necessary to serve the best interests of both the juvenile and the public. *See* § 938.18(5)(c).

¶15 Romel also argues that "it is impossible to determine from the record whether the court considered his best interest as a paramount consideration in making the waiver determination." He adds:

> [T]he court merely analyzed most, but not all of the statutory factors, and did not provide an analysis of how its finding regarding each of those factors fit into the best interests of the child[] determination.

> … In fact, the court found that it was in the best interest of the public to waive jurisdiction over Romel M. to adult court, but made no finding as to what was in the best interest of the juvenile.

Once again, Romel's argument has little merit.

¶16 To determine that waiver is appropriate, a juvenile court need not make a finding that each and every statutory criterion supports waiver. *See* ***B.B. v. State***, 166 Wis. 2d 202, 209, 479 N.W.2d 205 (Ct. App. 1991) ("We have held that sec. 48.18, Stats., does not require a finding against the juvenile on every criterion before waiver is warranted."); *see also* ***G.B.K. v. State***, 126 Wis. 2d 253, 256, 376 N.W.2d 385 (Ct. App. 1985) ("If the legislature had intended to require the submission of evidence to or specific findings by the court as to each individual factor, it would have used language designed to effect that purpose."). "[A]lthough the juvenile court is directed to give its primary or foremost weight to the child's interests, it has discretion in weighing all the factors" under the statute addressing waiver of jurisdiction for criminal proceedings for juveniles ages fourteen or above. ***B.B.***, 166 Wis. 2d at 209. Moreover, while a juvenile court always must give "paramount consideration" to the juvenile's best interests, that does not mean that the juvenile court must conclude that the best interests of the juvenile will always outweigh the best interests of the public. ***Id.*** at 208-09. Indeed, waiver is warranted when clear and convincing evidence establishes that it is contrary to the best interests of the juvenile *or* the public for the juvenile court to hear the case. WIS. STAT. § 938.18(6); ***Elmer J.K.***, 224 Wis. 2d at 384.

¶17 This court has carefully reviewed the entire record. Several significant factors, as accurately summarized in the circuit court's decision, strongly supported waiver. Indeed, even Dr. Collins expressed only a "slight preference" for continuing juvenile court jurisdiction, and the court was not

required to embrace Dr. Collins' opinion. *See* ***J.A.L. v. State***, 162 Wis. 2d 940, 969, 471 N.W.2d 493, 505 (1991) ("The juvenile court was not required to accept the experts' estimates of the time needed for treatment and rehabilitation as necessarily accurate."). On appeal, even Romel acknowledges that "in every sense this was a very close determination as to whether waiver was appropriate."

¶18 The record reflects the circuit court's careful consideration of the testimony, accurate application of the statutory criteria, and reasonable exercise of discretion. Thus, this court concludes that the circuit court did not erroneously exercise discretion in waiving Romel to adult criminal court.

By the Court.—Order affirmed.

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