COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1579 **Cir. Ct. No. 02-JV-386B**

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

IN THE INTEREST OF KENYON H.,

A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KENYON H.,

RESPONDENT-APPELLANT.

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

¶1 FINE, J. Kenyon H. appeals from the trial court's order waiving the jurisdiction of the children's court and transferring him to the jurisdiction of the adult criminal court for further proceedings on the charges that have been filed

against him. Kenyon claims that the trial court erroneously exercised its discretion. We disagree and affirm.

I.

¶2 In March of 2002, a delinquency petition was filed against Kenyon, then almost sixteen years old, charging him with having committed five counts of armed robbery by threat of force while concealing his identity, as party to a crime. *See* WIS. STAT. §§ 943.32(1)(b) & (2); 939.641; and 939.05. The petition also charged three misdemeanor counts: two counts of battery while armed, as party to a crime, *see* WIS. STAT. §§ 940.19(1); 939.63; and 939.05, and one count of possession of a dangerous weapon by a person younger than eighteen, *see* WIS. STAT. § 948.60(2)(a). The petition, based largely on Kenyon's confessions, alleged that in connection with two of the armed robbery counts, Kenyon used a gun while he was masked to take money from the victims. The petition also alleged in connection with the other three armed-robbery counts that Kenyon helped others rob the victims but did not, himself, wield a gun.

¶3 The trial court held a waiver hearing at which Kenyon's probation officer and aunt testified, as well as a psychologist who had examined Kenyon. The trial court also had the report of another psychologist who had examined Kenyon. At the hearing it became clear that Kenyon's life was dysfunctional in many respects and, also, that his anti-social activities were out of control.

¶4 Kenyon was on probation for setting, with another juvenile, a couch in a garage on fire with some charcoal lighter fluid. He was also on probation for possessing marijuana. His probation officer told the trial court that Kenyon did not do well on probation and, also, that during the two months Kenyon was in secure custody on the armed robbery charges, he did not do well in the detention center—at

one point threatening to kill the teachers. Kenyon also had a chaotic childhood. His mother was a drug addict with whom he rarely lived, and his aunt, who tried to provide a home for him, kicked him out of the house because of his brushes with the law and his refusal to comply with her rules of the house. Kenyon's aunt poignantly summarized his young life by noting: "He didn't have a home life."

¶5 One of the psychologists who examined Kenyon testified that Kenyon had a "conduct disorder, adolescent onset type," and has "borderline intellectual functioning," which he attributed to "causal social factors." He defined the "conduct disorder" as "a pattern of illegal and antisocial behaviors." He told the trial court that he did not believe that the trial court should send Kenyon to adult court because, in the psychologist's view, there were adequate facilities within the juvenile justice system to rehabilitate Kenyon: "I think there's a good chance of rehabilitation without [Kenyon's] going to adult court." Kenyon's probation officer, however, had another view. He told the trial court that none of the programs available to Kenyon in the juvenile justice system permitted the kind of treatment that Kenyon needed for a "long enough" time, and that retaining jurisdiction over Kenyon in the juvenile system would not adequately "protect the community." The probation officer testified on cross-examination by Kenyon's lawyer: "Based on [Kenyon's] treatment needs and [the] current allegations, it's my opinion [that] his needs would best be met in the adult system."

¶6 As noted, one of the psychologists who examined Kenyon did not testify and his report was considered by the trial court without objection. His report indicated that the "[i]ntellectual data obtained" in connection with Kenyon "revealed average to bright normal resources for utilization." The psychologist opined that Kenyon's "[s]trengths were primarily evident in verbal fluency, comprehension, and gross motor coordination," and that Kenyon's "[w]eaknesses were evident in

processing of arithmetic problems, logical reasoning, fund of information, and on some timed fine motor tasks." The psychologist also wrote that Kenyon's "[p]otential is clearly average to above average; [that Kenyon's] operating efficiency probably will be substantially lower because of lack of development or failure to obtain particular educational skills." The psychologist diagnosed Kenyon with suffering from "[c]onduct disorder group type," and opined that "[a] critical review of general criteria for waiver suggest[s] that [Kenyon] meets most of the criteria for waiver to Adult Court." (Capitalization in original.)

¶7 The trial court granted the State's petition to waive Kenyon to the jurisdiction of the adult criminal court. In excerpts from its oral decision set out in the briefs, but not, for some reason not apparent from the record, included with the materials in the appellate record forwarded to us, the trial court essentially held that although "more intensive" services for Kenyon were available in the juvenile justice system, and that, "in at least one sense it's always in the best interest of the juvenile to be kept in the juvenile system," there was "clear and convincing evidence that it would be contrary to the best interest of the public to keep this case in juvenile court" because, in essence, the time during which to treat Kenyon within the juvenile system was limited and that "nobody is a crystal ball reader to be able to say [that Kenyon is] going to respond promptly" enough to make retention in the juvenile system warranted.[1]

[1] The transcript of the waiver hearing filed with this court omits pages seventy-three to ninety-three of the ninety-four page volume. The omitted pages appear to encompass the arguments of the lawyers and the trial court's oral decision. It was Kenyon's burden to ensure that the record was sufficient to address the issues he raises on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986); WIS. STAT. RULE 809.15(2) (The parties receive ten-day notice of the provisional contents of the record prior to its transmittal to the appellate court.). When the appellate record is incomplete in connection with an issue raised by the appellant, (continued)

II.

¶8 A trial court's decision to waive the jurisdiction of the juvenile court over a juvenile and transfer the case to adult court is a matter vested within the trial court's discretion. ***Curtis W. v. State***, 192 Wis. 2d 719, 726, 531 N.W.2d 633, 635 (Ct. App. 1995). The legislature has provided guidelines that the trial court must consider in exercising its discretion. Thus, WIS. STAT. § 938.18(5) provides:

> 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 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.

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we must assume that the missing material supports the trial court's ruling. ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

> (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.

Moreover, the general purpose behind the Juvenile Justice Code was explained by legislature as follows:

> It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be equally important purposes of this chapter:
>
> (a) To protect citizens from juvenile crime.
>
> (b) To hold each juvenile offender directly accountable for his or her acts.
>
> (c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community.
>
> (d) To provide due process through which each juvenile offender and all other interested parties are assured fair hearings, during which constitutional and other legal rights are recognized and enforced.
>
> (e) To divert juveniles from the juvenile justice system through early intervention as warranted, when consistent with the protection of the public.
>
> (f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection of the public, by allowing the judge to utilize the most effective dispositional option.
>
> (g) To ensure that victims and witnesses of acts committed by juveniles that result in proceedings under this chapter are, consistent with the provisions of this chapter and the Wisconsin constitution, afforded the same rights as

> victims and witnesses of crimes committed by adults, and are treated with dignity, respect, courtesy and sensitivity throughout such proceedings.

WIS. STAT. § 938.01(2). The legislature has directed the courts to "liberally" construe the provisions of the Juvenile Justice Code, WIS. STAT. ch. 938, "in accordance with the objectives expressed" in subsection (2) of § 938.01. WIS. STAT. § 938.01(1). Thus, a trial court may waive a juvenile to adult court based only on its conclusion that the crimes with which the juvenile is charged are so serious that waiver is required to protect the public. ***B.B. v. State***, 166 Wis. 2d 202, 209–210, 479 N.W.2d 205, 207–208 (Ct. App. 1991) (decided when the juvenile court was required to "give paramount consideration to the juvenile's best interests," ***id.***, 166 Wis. 2d at 208, 479 N.W.2d at 207, which was before the effective date of ch. 938).

¶9 Kenyon essentially argues both that the evidence was insufficient to support the trial court's decision to waive him to adult court and that the trial court put too much emphasis on the need to protect the public. In his sufficiency-of-the-evidence portion of his argument he contends that there was no evidence from which the trial court could have ascertained the nature of the charges because there was no "testimony" about those charges, relying on WIS. STAT. § 938.18(5), which discusses the trial court's options after the "taking of testimony" at the waiver hearing. The trial court, however, had before it the delinquency petition, which recounted Kenyon's alleged confession. The appellate record before us does not indicate whether Kenyon objected to the trial court considering the delinquency petition in assessing the severity of the charges filed against Kenyon, and, if he did not, the issue was waived and he may not raise it for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980). Moreover, a court may consider its own files, *see* WIS. STAT.

RULE 902.01(2); ***D.B. v. Waukesha County Human Servs. Dep't***, 153 Wis. 2d 761, 768, 451 N.W.2d 799, 801 (Ct. App. 1989) ("court may judicially notice facts about its own usual procedures"), and the trial court may, unless evidence is presented to show that the allegations lodged in the juvenile petition are without basis, consider those allegations in determining whether the charges for which waiver is sought are serious. *See* WIS. STAT. § 938.299(4)(b) (the rules of evidence, other than those implicating privilege, do not apply at waiver hearings). Here, there was no evidence that Kenyon's statements to the police, upon which the allegations in the petition were largely based, were either coerced or untrustworthy. The trial court was within the ambit of its discretion to place great weight on the outrageousness of Kenyon's crimes—poverty does not excuse criminal activity. *See* ***State v. Morgan***, 195 Wis. 2d 388, 417–418 n.13, 536 N.W.2d 425, 435–436 n.13 (Ct. App. 1995) ("urban psychosis" is not a defense to criminal activity), *habeas corpus granted sub nom.* ***Morgan v. Krenke***, 72 F. Supp. 2d 980 (E.D.Wis. 1999), *rev'd* 232 F.3d 562 (7th Cir. 2000). The appellate record amply supports the trial court's exercise of its reasoned discretion in sending Kenyon to adult court to answer for his crimes. *See* ***State v. Kirschbaum***, 195 Wis. 2d 11, 21, 535 N.W.2d 462, 465 (Ct. App. 1995) (we will uphold a trial court's exercise of its discretion if the record supports the result even though the trial court may not have fully explained its rationale).

By the Court.—Order affirmed.

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