COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1306 **Cir. Ct. Nos. 03JV000318**
03JV000318A

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DURRELL M.E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Durrell M.E. appeals from the nonfinal circuit court order waiving juvenile court jurisdiction under WIS. STAT. § 938.18. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e),(3) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

argues that the court's decision to waive juvenile jurisdiction was erroneous because "the record … does not reflect a reasonable basis for [the] determination" and the court "failed to articulate any rationale [for its decision], other than the seriousness of the offense." This court disagrees and, therefore, affirms.

I. BACKGROUND

¶2 In two amended delinquency petitions filed March 17, 2003, the State charged Durrell with armed robbery, possession of a dangerous weapon by a child, and first-degree recklessly endangering safety, party to a crime. *See* WIS. STAT. §§ 943.32(1)(a), (2); 939.05; 948.60(2)(a); 941.30(1). According to the amended petitions, on February 14, 2003, Durrell, then sixteen-years-old, assisted Quincy B. in an armed robbery in the City of Wauwatosa and an armed robbery and carjacking in the City of Milwaukee.

¶3 At approximately 8:34 p.m. on February 14, Wauwatosa police officers were dispatched to 2502 Pasadena Boulevard in the City of Wauwatosa for an armed robbery complaint. The victim reported that Durrell and Quincy both pointed handguns directly at him and demanded he give up his car keys. He told Durrell and Quincy, however, that he had given the keys to his son who was in the house. Then, with guns held to his head, the victim was ordered to hand over his wallet and get inside his car's trunk. The victim told police that as he was attempting to get into the trunk, he noticed the guns were no longer pointed at him so he ran away. He said that as he ran, he heard two gunshots fired in his direction.

¶4 Police recovered two 9mm shell casings near the scene of the crime and Quincy, in a post-arrest statement, told police that Durrell had fired the gun

while holding it up at an angle. He said that he asked Durrell if he had shot the victim and Durrell replied, "No, but I should have."

¶5 On the same night, at approximately 9:00 p.m. in the City of Milwaukee, Police Detective Leon Bosetti was dispatched to 4460 North 52nd Street to investigate a reported armed robbery and carjacking. The victim told Detective Bosetti that Durrell and Quincy approached him with handguns and demanded the keys to his 2003 Honda Pilot SUV. The victim reported that Durrell and Quincy drove away with his car, his wallet, a number of suitcases, traveling bags, a laptop computer and a bottle of champagne.

¶6 On February 16, 2003, Milwaukee Police Officer Glen Meister saw Quincy driving the stolen SUV. He reported that he stopped the SUV and Quincy exited the driver's door and ran. He was apprehended soon thereafter. In his post-arrest statement, Quincy told police that he assisted Durrell in the armed robberies and carjacking and that he had a BB gun and Durrell had a 9mm. Quincy also told police that Durrell left the stolen SUV in his possession. In a post-arrest statement, Durrell admitted that he was involved in the Milwaukee armed robbery and carjacking but stated that he was sorry and that he had the BB gun and Quincy had the 9mm.

¶7 At Durrell's waiver hearing on April 28, 2003, brief testimony was presented by Anthony Zingale, an Intake Specialist at the Milwaukee County Children's Court Center; Dr. Tyrone Carter, a Psychologist; Steven Robertson and Timothy Tangle, from Christian Faith Fellowship; and Durrell's mother, uncle and aunt.

¶8 Tracking the statutory waiver criteria, Mr. Zingale described Durrell's characteristics and recommended that he not be waived to adult court

because, in his opinion, Durrell "would be a good candidate for the SJO [Serious Juvenile Offender]" program as this was "his first referral" and he had never received services within the juvenile justice system.

¶9 Dr. Carter testified that Durrell's I.Q. was within the high borderline range but that vision problems may have reduced his score. He also stated that Durrell was immature and withdrawn and that he was between two and five years below the tenth grade level. Dr. Carter testified that Durrell's family was intact and supportive and he characterized Durrell as compliant, dependent, and a bit sheltered. Because of these factors, Dr. Carter recommended that Durrell be considered for the SJO program rather than waived to adult court.

¶10 Durrell's aunt, uncle, and mother all testified that Durrell was raised in a Christian family with rules that he followed. His mother testified that although she frequently had to tell Durrell to clean up his room and do his chores, he had never been violent and was never a disciplinary problem. All three witnesses testified that Durrell's behavior on the night of February 14, 2003, was aberrant and that he should not be waived to adult court.

¶11 Mr. Robertson and Mr. Tangle related their very positive experiences working with Durrell in their church's youth group where they focus on "moral instruction, spiritual guidance and knowledge." Mr. Robertson and Mr. Tangle both stated that they had known Durrell and his family for seven years. Mr. Robertson testified that he saw Durrell in the youth group about three times a week for two to three hours each time. He characterized Durrell as "naïve, seeming a lot younger than his age, a follower, gentle, nice, obedient and cooperative." They both opined that Durrell would be amenable to treatment in the juvenile system.

¶12 The State recommended waiver, contending that the crime was "a premeditated, willful, very serious offense against two innocent people … [and] what makes it aggravating is [that] … all of this information about [Durrell being] loving, caring, wonderful, obedient, … doesn't match up with what happened [the night of February 14, 2003]." The State pointed out that Durrell has the "structure and love of a home" and "as far as treatment needs, he has had better treatment for the last seven years than we can even think about at 16 years that the Court can provide him." The court inquired as to the State's position on the SJO program and the State responded:

> The Serious Juvenile Offender Program is a good program, but what services would we offer? What would we give him? That's kind of where you come down on it. Again, I don't know what we could do better than his family has tried to do for the last 16 years and what his church has tried to do for the last seven. Again, we have a kid that knows better. He made a conscious choice that night.
>
> I think the level of the offense rises to a waiver case.

¶13 The defense recommended the SJO program as "precisely what [Durrell] needs … to keep him on the straight and narrow." The defense argued: "[t]he criteria of the statute is [sic] whether [Durrell] has had programs. Specifically[,] the wording is whether there are adequate and suitable facilities and services available for the juvenile and protection of the public within the juvenile justice system, et cetera. It is not whether he has had available options and opportunities. Clearly he has. The question is whether those opportunities or similar opportunities are available."

¶14 The court, commenting on the premeditated and aggressive nature of the crimes, questioned whether the juvenile justice system was appropriate for Durrell:

> I have frankly some serious questions of whether the juvenile justice system is up to the task here if with the good family that Durrell comes from, all of the obvious love and attention that his parents have shown him over the years, the things that they have done for him, the positive influence of a good family in his life all of these years, the positive interests and influence of the church in his life, and he still goes out and does something like this. It sounds like the programs at the church are pretty intensive. It is four hours a week, two different occasions in these youth groups. I look at that and I put it next to the offenses that are alleged to have occurred here in which Durrell is alleged to be involved and these are very serious offenses.
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> It is a crime for a juvenile to possess a gun or it's an offense in the criminal code. The allegations here are not only that Durrell had this 9 millimeter gun, but that he fired it twice in the direction of another human being, and then he makes the statement that he did not shoot him but he should have. I write that off to bravado and foolishness of youth.
>
> It sounds like there are two different Durrells. There is the product of the family that he came from, wonderful family, good family by any standard, by any measure, and then having this happen on the other hand. I have trouble reconciling this. I have serious questions[,] if Durrell stays in the juvenile system[,] of whether or not he would be able to be helped given all of the help and the positive support and love and nurturing that he has received at church and at home.
>
> So that I am going to find by clear, satisfactory and convincing evidence that the State has demonstrated that because of the extreme seriousness of the offenses involved here that this is a case that should be venued in the adult criminal system and the Court is going to so find.

Thus, the court concluded that both Durrell's best interests and the community's best interests required waiver.

II. DISCUSSION

¶15 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."

State v. Elmer J.K., III, 224 Wis. 2d 372, 383-84, 591 N.W.2d 176 (Ct. App. 1999) (citations omitted).

¶16 The first step in the waiver process requires the court to determine if the delinquency petition has prosecutive merit. *See* WIS. STAT. § 938.18(4)(a). If prosecutive merit is found, the court must review the factors set forth in § 938.18(5). *See* ***D.H. v. State***, 76 Wis. 2d 286, 305, 251 N.W.2d 196 (1977) (addressing WIS. STAT. § 48.18).

¶17 WISCONSIN STAT. § 938.18(5), provides:

> **Jurisdiction for criminal proceedings for juveniles 14 or older; waiver hearing.**
>
> ….
>
> (5) 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.
>
> (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.

If, after considering these factors, the court deems waiver to be appropriate, it must articulate the reasons. *See* ***D.H.***, 76 Wis. 2d at 305. A juvenile court may waive jurisdiction to the adult criminal court if the evidence establishes, by clear and convincing evidence, that "it would be contrary to the best interests of the child or of the public" to retain jurisdiction. WIS. STAT. § 938.18(6).

¶18 Durrell argues that the trial court erroneously exercised discretion because "no testifying witness recommended waiver … into adult court" and the court "waived Durrell … only because of the seriousness of the offense."[2] While it is true that no witnesses recommended waiver, the court's determination was based on more than just the seriousness of the offense.

[2] Durrell also contends that, in its decision, the court "made no reference to, nor did [it] consider, the Serious Juvenile Offender Program." He is incorrect. Although the court's decision discussed the juvenile justice system, rather than specifying the Serious Juvenile Offender program, the record shows that the SJO was indeed considered as it was the only program the witnesses recommended.

¶19 The court expressed its conclusion in terms of "questioning" the appropriateness of the juvenile justice system for Durrell rather than specifically detailing the factors underlying its determination. That is understandable. After all, at some point in waiver proceedings, courts, lacking crystal balls, necessarily rely on their experience in assessing whether the juvenile justice system is sufficient to serve the juvenile and protect the community. Here, given Durrell's age, character, level of maturity, and particularly given the fact that despite his strong support system he still engaged in these serious crimes, the court could reasonably conclude that waiver was appropriate.

¶20 To conclude that waiver is appropriate, a juvenile court need not determine 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."). And the current Juvenile Justice Code does not direct the juvenile court to give the child's best interests prevailing consideration over the public's best interests. *See* WIS. STAT. §§ 938.01(2)(a), (b); 938.18(6).

¶21 Here, the court, weighing the criteria, reasonably assigned great significance to the fact that despite the strong support system Durrell has had all his life, he still engaged in serious crimes. While its conclusion may have been a close call, the circuit court's careful consideration of the testimony, accurate application of the statutory criteria, and reasonable exercise of discretion are evident in the record. Thus, this court concludes that the circuit court did not erroneously exercise discretion in waiving juvenile court jurisdiction.

By the Court.—Order affirmed.

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