

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 2003

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 Nos. 03-1874
03-1875**

Cir. Ct. Nos. 03-JV-16, 03-JV-101

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF AARON N., A PERSON UNDER THE
AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

AARON N.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: J.D. MCKAY, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Aaron N. appeals orders waiving him into adult court. He argues (1) the court violated his right to due process because it

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(continued)

discouraged him from presenting expert testimony; (2) the court erred by indicating Aaron would be subject to juvenile court jurisdiction for a maximum of eight months; (3) the court erred by asking the prosecutor what its sentencing recommendation would be if the case was waived to adult court; and (4) the court erred by failing to use a demonstrated rational process and by failing to address all the required statutory factors. We disagree and affirm the orders.

BACKGROUND

¶2 On January 17, 2003, the State filed a waiver and delinquency petition alleging one count each of burglary and disorderly conduct against Aaron. The petition alleged that Aaron entered an apartment through a door that was ajar, ate scrambled eggs, and took approximately \$10 in cash. The petition also alleged that when the police approached Aaron, he threatened the officers and used profanity.

¶3 On May 8, 2003, the State filed a second waiver and delinquency petition alleging three counts of operating a motor vehicle without the owner's consent. Aaron was fifteen years old when the offenses in both petitions occurred and turned sixteen while the petitions were pending.

¶4 A waiver hearing was held on July 1, 2003. The State's only witness was an officer from juvenile detention. He testified regarding Aaron's conduct while he was in custody, stating that Aaron was confined to his cell in "lockdown" because of discipline violations. He also stated that Aaron made threats, used profanity, urinated on the cell door and wiped feces on the door.

We granted Aaron N.'s petitions for leave to appeal on July 17, 2003.

¶5 Aaron called a social worker who had filed a report disfavoring waiver. The social worker also testified that he did not recommend waiver. Aaron then requested to call an expert witness, Dr. Gerald Wellens, a psychologist who examined Aaron and Aaron's medical records. The court indicated it was not necessary to call the psychologist because the court had enough information to make its decision. However, the court also stated it would not prevent Aaron from calling the witness if he wished to do so. Aaron decided not to call the psychologist.

¶6 During the State's closing arguments, the court asked the prosecutor what its sentence recommendation would be if Aaron were waived into adult court. However, the court stated it was "not trying to limit [the State's] options." The State responded that it would likely recommend long-term probation supervision.

¶7 The court decided to waive Aaron into adult court. It noted that Aaron had only eight months left in the juvenile system. It also commented that Aaron would likely get a lengthy term of probation in the adult system and warned the State against incarceration as a penalty because it would not be in Aaron's best interests.

STANDARD OF REVIEW

¶8 A juvenile court's decision to waive jurisdiction to adult court is a discretionary decision for the juvenile court. *In re J.A.L.*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991). WISCONSIN STAT. § 938.18(5) provides four criteria upon which the court must base its decision whether to waive jurisdiction. These criteria include the personality and prior record of the juvenile, the type and seriousness of the offense, the adequacy and suitability of facilities, services and

procedures available within the juvenile system, and the desirability of consolidating the case with a pending proceeding of another person in criminal court.

DISCUSSION

A. Presentation of Expert Testimony

¶9 Aaron first argues the circuit court erred by discouraging him from presenting expert witness testimony. He claims that his due process rights were violated as a result. The admissibility of evidence, whether testimonial or physical, is a matter within the sound discretion of the trial court. *State v. Migliorino*, 170 Wis. 2d 576, 589-90, 489 N.W.2d 678 (Ct. App. 1992). It is also within the court's discretion to allow expert testimony when the testimony is likely to assist the fact finder in reaching a decision. WIS. STAT. § 907.02. The trial court's exercise of discretion will not be overturned upon appeal if it was reasonably made in accordance with accepted legal standards. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶10 Aaron contends that it was unfair for the court to discourage him from calling a witness by saying the court had heard enough, and then issuing an adverse ruling. Instead, Aaron argues he had a right to call the psychologist because he would testify regarding the criteria the court must consider when determining whether waiver is appropriate.

¶11 However, our review of the record shows that Aaron was not prevented from calling the psychologist as a witness. The relevant portion of the waiver hearing is as follows:

[Aaron's attorney]: I could call Dr. Gerald Wellens, Your Honor, who has reviewed my client's mental health history, assessed him, and could speak to the conduct issues, if the Court would so desire.

....

The Court: I honestly believe, and I say this to both counsel, that the information contained in the file, particularly the information as it was developed and generated by [another doctor], goes to those issues and addresses those issues. I'm not sure I need any clarification as it relates to those issues, but I'm not going to preclude you from putting something on if you feel it necessary.

....

[Aaron's attorney]: Your Honor, if I could briefly call Dr. Wellens, I'm going to limit the scope of his testimony simply to rebuttal on conduct issues elicited during the state's case at the jail and just put those quickly in perspective.

The Court: Well, you can do that. I think based on the history as set forth in this file that the rebuttal is self-evident, but I'm not going to preclude you—

[Aaron's attorney]: Given that comment, we'll forego that then.

¶12 Aaron specifically told the court he “could call” the psychologist “if the Court would so desire.” The court stated that it did not believe that it was necessary, but it would not prevent Aaron from calling the witness if he wanted to do so. After some discussion, Aaron determined that he would not call the witness. Aaron was given the opportunity to present the evidence and chose not to.

¶13 Further, near the end of the hearing, the court again gave Aaron the opportunity to call the psychologist, even after the court had already made its ruling. The court stated it was going to waive Aaron into adult court, and Aaron objected for the record. The court stated, “if you think I'm wrong, I'll reopen the

record and let Dr. Wellens testify.” Aaron did not take the court up on its offer. Consequently, the record shows no discretionary error by the court.

B. Time Remaining in the Juvenile System

¶14 Aaron claims the court misunderstood the scope and duration of the jurisdiction of the juvenile court system because the court stated its decision was based on the fact that Aaron had only eight months left in the juvenile system and his problems could not be solved in that period of time. Instead, Aaron argued the juvenile system actually had jurisdiction until he turned nineteen. Aaron maintains the court might have changed its ruling had it taken that extra time into account.

¶15 A reading of the transcript shows that the court’s primary concern was that Aaron needed more treatment than the juvenile system could provide. When the social worker testified, he stated that when a juvenile turns seventeen, placement and treatment become restricted. Aaron will turn seventeen in April 2004. The social worker testified that Aaron needed a great deal of structure and that waiving him into adult court could make longer-term supervision more likely. However, he did state that he felt the juvenile system could address Aaron’s needs.

¶16 The court was clearly concerned that Aaron’s needs could not be met by the time he turns seventeen, at which time the options become more restricted. The court was aware that Aaron’s problems included possible drug and alcohol abuse and mental health issues. Further, Aaron had been in secure detention numerous times and had repeatedly run away from home. Therefore, the court concluded that a long-term solution was necessary in order to help Aaron.

¶17 The court stated that “the telling factor in this case is the unfortunate circumstance of the juvenile system in that it comes to a screeching halt at a point in time chronologically. If I wasn’t confronted with that reality, I think I could handle the situation a little differently, but I am.” It further stated that its decision was based “pure and simply on the fact that Aaron [N.’s] needs cannot be resolved in an eight-month period of time. And if I knew a way or if someone had suggested a way to me to transition into adulthood from what’s available in the juvenile system, I would have done it.” Finally, the court commented that it wanted “to get started on the solution to Aaron’s problems right now. I don’t want to wait a year and then have the possibility exist that everything will just come to a screaming halt.”

¶18 The court’s comments do not evince a misunderstanding of the juvenile system, but an understanding that the options available to Aaron become more limited when he turns seventeen. The court was clearly concerned that there was not enough time in the juvenile system to assure adequate treatment. The adequacy of the juvenile system in Aaron’s case is one of the factors the court must analyze under WIS. STAT. § 938.18(5). We therefore conclude the court did not err when it based its decision on its opinion that Aaron’s problems could not be resolved in the eight-month period before he turned seventeen.

C. Questioning Regarding Sentence Recommendation

¶19 Aaron next contends that the court erred when it asked the prosecutor what its sentence recommendation would be if the matter were waived into adult court. He argues that it is inappropriate for the court to consider Aaron’s likely sentence in adult court because it is not among the enumerated factors to be considered for waiver.

¶20 In support of his argument, Aaron cites *In re C.W.*, 142 Wis. 2d 763, 419 N.W.2d 327 (Ct. App. 1987). There, we determined it was an erroneous exercise of discretion to rely heavily on what would be the sentence in adult court when deciding the appropriateness of waiver. *Id.* at 768. In *C.W.*, the court decided against waiver because the likely outcome would be probation. The court did not believe this was a sufficient remedy for the juvenile’s offenses. *Id.* at 766.

¶21 We stated in *C.W.* that “a juvenile court has no authority to deny waiver on the grounds that another court may give a more lenient sentence than the juvenile court thinks is appropriate.” *Id.* at 768. Here, the court was not concerned that Aaron’s sentence would be more lenient in adult court; nor did the court deny waiver on that basis. Therefore, our holding in *C.W.* is not applicable here.

¶22 Significantly, the court stated that it was in no way trying to limit the State’s options regarding sentence recommendation. It was simply expressing its opinion that it did not believe a prison sentence would be in Aaron’s best interests. However, the decision to grant waiver was not motivated by the likely sentence Aaron would receive in adult court. Instead, the court was concerned with giving Aaron the best treatment possible and concluded that he could best get that treatment through the adult court system. We therefore conclude the court’s questioning was not erroneous.

D. Statutory Factors

¶23 Finally, Aaron argues the court’s decision was not rational and that the court failed to address the statutory factors when it waived Aaron into adult court. WISCONSIN STAT. § 938.18(5) lists the factors the court must consider. These include the personality and prior record of the juvenile, the type and

seriousness of the offense, the adequacy and suitability of facilities, services and procedures available within the juvenile system, and the desirability of consolidating the case with a pending proceeding of another person in criminal court.² After considering these criteria,

the court shall state its finding with respect to the criteria on the record, and, if the court determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate proceedings in the court of criminal jurisdiction, and the court of criminal jurisdiction thereafter has exclusive jurisdiction.

WIS. STAT. § 938.18(6).

¶24 Aaron argues the court failed to clarify which criteria it considered and gave no determination on the record establishing by clear and convincing evidence that keeping Aaron in juvenile court was contrary to his best interests and the interests of the public.

¶25 We conclude the court did consider each of the relevant factors and stated on the record its reasons why waiver was appropriate. First, it considered Aaron's personality and prior record. WISCONSIN STAT. § 938.18(5)(a) states that the court should evaluate such factors as

whether the juvenile is mentally ill or developmentally disabled ... 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.

² The last factor does not apply in this case because there were no co-defendants.

The court stated that it was aware of Aaron's mental health condition and that the record was fully developed in that regard. Indeed, much of the court's determination was based on how best to ensure adequate treatment for Aaron's condition.

¶26 The court was also aware of Aaron's prior offenses and that he had a history of running away from home. Finally, the court noted that it agreed with Aaron's attorney's comments that Aaron's mental illness "speaks to [Aaron's] very character ... it speaks to his motives and how premeditated they can be when you've got a young man on the run unmedicated, and it speaks to his physical and mental and impulsivity and lack of being able to control it." The court responded that it "agree[d] with [Aaron's attorney] in that regard" but stated that the "fundamental question" was getting Aaron "some long-term supervision." The court therefore did consider Aaron's personality and prior record, although it also concluded this was not the most important factor in its decision.

¶27 Second, the court considered the type and seriousness of Aaron's offenses. The court reviewed the delinquency petitions and heard testimony as to these incidents and noted that this case involved "a long term mental health picture in the context of a criminal conduct." It also stated that, unlike Aaron, many people with mental health issues do not commit criminal acts. In this way, the court demonstrated that it considered the seriousness of the offenses. But again, this was not the most important factor.

¶28 Finally, the court considered the adequacy and suitability of the juvenile justice system, and concluded it was not sufficient to meet Aaron's needs. Of all the criteria, the court placed the most emphasis on this factor, which is within the court's discretion to do. See *In re J.A.L.*, 162 Wis. 2d at 960 ("The

juvenile court has discretion as to the weight it affords each of the criteria under [WIS. STAT. § 938.18(5)] in deciding whether to waive jurisdiction.”). The court determined that there would not be enough time in the juvenile system for Aaron to get the treatment he needed and therefore waiver was appropriate.

¶29 The court determined that waiver “is in the best interest of Aaron for the long run. I think it certainly is in the best interests of the public. The combination of the two things, they’re what this Court needs to consider”

¶30 We conclude the court’s determination was reasonable and that it considered the proper statutory criteria in determining that waiver was appropriate in this case. The court therefore properly exercised its discretion.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.32(1)(b)4.