COURT OF APPEALS
DECISION
DATED AND RELEASED

September 14, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-1220
95-1221

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

IN THE INTEREST OF JUSTIN F. W.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JUSTIN F. W.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

VERGERONT, J.[1] Justin F.W. appeals from two orders waiving juvenile court jurisdiction over him. He asserts that the trial court: (1) improperly denied his request for a continuance to permit his expert

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

psychologist to review more records; (2) failed to consider certain statutory factors; (3) made an erroneous finding that the services in the juvenile justice system were inadequate to protect the community and rehabilitate him; (4) improperly refused to order a report on his suitability for certain programs; and (5) erroneously exercised its discretion in concluding that his best interests and the interest of the public required waiver.[2] We reject his contentions and affirm.

The delinquency petitions charge Justin with one count of robbery by use of force against the victim while using a dangerous weapon, contrary to §§ 943.32(1)(a), 943.32(2) and 939.05, STATS.; two counts of robbery by threatening the imminent use of force by use of a dangerous weapon, one of which was as a party to the crime, contrary to §§ 943.32(1)(b), 943.32(2) and 939.05; and two counts of carrying a concealed weapon contrary to § 941.23, STATS. The charges arose out of incidents that occurred on the same evening in which three individuals were robbed of Magic Cards[3] and other items. The petitions allege that Justin and two other individuals participated in the robberies. Justin conceded that the petitions had prosecutive merit.[4]

The waiver hearing was initially scheduled for April 6, 1995, but was set over until April 25, so that a psychologist, Dr. Michael Spierer, could meet with Justin. By letter dated April 18, counsel for Justin requested a continuance of two weeks because Dr. Spierer would not be able to meet with Justin and prepare a report by April 25. The court's staff called counsel and advised him that it was not likely the hearing would be postponed.

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[2] We granted Justin's petitions for leave to appeal the two waiver orders by order of this court dated May 2, 1995. The two appeals were consolidated by order of this court dated May 19, 1995.

[3] Magic Cards are collectors' items and certain of the cards have substantial value.

[4] One petition was filed with respect to two of the robbery victims and a second petition was filed with respect to the third victim. Waiver proceedings on the two petitions were consolidated.

Justin, his counsel, his witnesses and Dr. Spierer appeared at the scheduled time on April 25. Justin's counsel repeated his request for a continuance. He explained that Dr. Spierer had met for several hours with Justin immediately before the hearing and had been able to review a substantial amount of Justin's school records and records from prior counseling. However, Justin's counsel had not yet received certain mental health records he wanted Dr. Spierer to review. Counsel stated that he felt Dr. Spierer's opinion as to Justin's level of maturity and what would be appropriate for his welfare and the welfare of the community would be helpful, if not necessary, to the court in making its determination on waiver.

The trial court denied the request, stating that its staff had already indicated to counsel that the hearing was not likely to be postponed and that he had already been granted one request. The court then stated:

> I consider information from a psychologist to be interesting and perhaps useful, but not at all necessary for a waiver hearing. I don't think that testimony of a psychologist is required and I tried to be consistent in not unduly delaying waivers to get testimony from psychologists. If they're available, fine, if they're not, fine, is the way I look at it.

The court permitted a brief recess so that counsel could confer with Dr. Spierer. Dr. Spierer testified at the hearing.

The granting of a continuance is a matter for the court's discretion. ***In re D.H.***, 76 Wis.2d 286, 300, 251 N.W.2d 196, 204 (1977). We will uphold a discretionary determination if the court applied the correct legal standard to the relevant facts and, using a rational mental process, reached a conclusion that a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

Justin argues that the trial court's denial of a continuance deprived him of the opportunity to present evidence and that the denial was based, not upon the individual facts of his case, but on what "appears to have [been] a

blanket rule against continuances for the purpose of procuring psychological testimony."

Although we agree that certain comments of the trial court, in isolation, could be interpreted as applying a "blanket rule," we conclude that, taken in their entirety and in context, the trial court's remarks demonstrate a reasoning process that reached a reasonable result. The trial court is entitled to place a high priority on prompt waiver hearings. It is clear that the court did not have a blanket policy for denying requests for delays because one request had already been granted. And, although court staff indicated that the second request would likely be denied, the court specifically gave counsel the opportunity, on April 25, to explain why a second continuance was needed.

Based on Justin's counsel's statements on April 25, it was reasonable for the court to conclude that a second continuance was not necessary. Dr. Spierer had met with Justin for several hours, reviewed, in counsel's words, "a substantial amount" of Justin's school records, as well as certain prior counseling records. And Dr. Spierer was present and able to testify. Justin's counsel did not explain in any detail the nature or significance of the records he had not yet obtained, or what additional evidence he hoped to provide if a continuance were granted. On appeal, Justin does not tell us what evidence he was unable to present because of the denial of a continuance. We conclude the trial court did not misuse its discretion in denying the request for a continuance.

We now consider the merits of the trial court's decision to waive its jurisdiction. Section 48.18(5), STATS., provides that if prosecutive merit is found, the judge shall base the decision whether to waive jurisdiction on the criteria stated in paragraphs (a) through (d).[5] Section 48.18(6), STATS., provides

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[5] Section 48.18(5), STATS., provides:

> If prosecutive merit is found, the judge, after taking relevant testimony which the district attorney shall present and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the following criteria:
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> (a) The personality and prior record of the child, including whether the child is mentally ill or developmentally disabled,

that after considering the criteria under subsec. (5), the judge shall state his or her finding with respect to the criteria, and if the judge determines on the record that it is established "by clear and convincing evidence that it would be contrary to the best interests of the child or of the public to hear the case, the judge shall enter an order waiving jurisdiction."

Waiver of jurisdiction under § 48.18, STATS., is within the discretion of the juvenile court. ***In re J.A.L.***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The court is to regard the best interest of the child as the paramount consideration. ***Id.*** The court has discretion as to the weight it affords each of the criteria under § 48.18(5). We look to the record to see whether discretion was exercised, and if it has been, we look for reasons to sustain the court's decision. ***Id.*** at 961, 471 N.W.2d at 501. We will reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for its determination, or the court does not state relevant facts or reasons motivating the decision. ***Id.*** at 961, 471 N.W.2d at 501.

(..continued)

whether the court has previously waived its jurisdiction over the child, whether the child 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 child's motives and attitudes, the child's physical and mental maturity, the child'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 child and protection of the public within the juvenile justice system, and, where applicable, the mental health system.

(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 circuit court.

Justin was born on July 31, 1977, and at the time of the waiver hearing was about three months away from his eighteenth birthday. The State presented the testimony of Paula Proctor, the social worker assigned by the Dane County Department of Human Services to Justin's case. She testified regarding Justin's history of learning disabilities, poor school attendance, brief attendance at Operation Fresh Start, prior individual counseling with Keith Wheeler for depression, and prior family counseling.

Proctor opined that there was no suitable treatment that could be made available to Justin were he to remain in the community or in his mother's home. Residential treatment and group homes or foster homes would not be appropriate, in her view, because Justin would be one of the older individuals, would not be a member of a group or home that would be age appropriate, and there would not be adequate time to work with him. The only option left in the juvenile system was a correctional facility, according to Proctor. Although she knew some treatment is available at a correctional facility, she did not know specifically what is available, nor did she know specifically what Justin's treatment needs are.

Dr. Spierer testified that Justin is suffering from major depression. Justin needs medication for his depression, which he took in the past but stopped taking, and individual psychotherapy. Dr. Spierer also testified that Justin probably also required a combination of group and family therapy. In Dr. Spierer's view, Justin also needs to get his high school diploma, probably through a high school equivalency program (GED), and he needs vocational training. Justin could get a GED, Dr. Spierer testified, but he would have to work hard and show up, and Dr. Spierer doubted that he is now able to control that. Dr. Spierer described Justin's physical development as normal for a seventeen-year-old boy, but his emotional development is behind; in his ability to function independently, he is more like a fourteen or fifteen-year-old.

In response to the court's question as to how Justin would function in the youth correctional facilities--Lincoln Hills and Ethan Allen--Dr. Spierer testified that Justin would have difficulty in those environments because he

would either be influenced by more streetwise youngsters to engage in wrongdoing or he would be victimized.[6]

Justin's mother testified that Justin lives with her and her older son. She described her efforts to make Justin attend school. She testified that Justin has chores at home, informs her of his whereabouts, and has not been a discipline problem.

The trial court also obtained the presence of Andrew Jones, who was supervising Justin in detention. Jones testified concerning Justin's behavior in detention, stating that Justin had generally been well behaved and compliant.

The trial court concluded that there was clear and convincing evidence that it would be contrary to Justin's best interests and to the public's interests to retain the case in juvenile court. The trial court first made these findings: Justin has major depression and significant learning disabilities. He lives at home and helps with chores. He has attempted employment on three occasions but none have worked out. He has not consistently attended high school for a considerable period of time. He has a physical maturity level normal for his age, but a mental maturity level of a fourteen or fifteen-year-old. He has intelligence in the low average range. He has no prior offenses. He has received some prior therapy for depression and apparently profited to some extent, but treatment with medication was apparently unsuccessful. However, Dr. Spierer's testimony indicates that medication might be of assistance in treating his depression.

The court found that Justin is not ready for adult independent living and that his potential for receiving a high school diploma and developing skills for independent living and for maintaining employment is not clear. Based on the slow progress Justin had made in the school system with almost

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[6] Dr. Spierer also testified that Justin would have the same difficulties in the adult correctional system. The court recognized that the criteria under § 48.18(5), STATS., do not include an assessment of the adequacy and suitability of services in the adult correctional system, but only an assessment of the juvenile system, and, where applicable, the mental health system. Section 48.18(5)(c). However, the court allowed Dr. Spierer to answer this question of Justin's counsel, overruling the objection.

eleven years of special education programming and on his pattern of responding to treatment in the past, the court concluded that his progress in meeting these goals would be slow and could take several years.

The trial court then considered the nature of the charges against Justin. It acknowledged that Justin had told Dr. Spierer that he was a follower in the incidents. But, based on the allegations in the petition, it concluded that, if Justin was a follower, he was an extremely active follower. The allegations, as noted by the court, were that the offense was planned some days before it occurred; that Justin and another were given the assignment of obtaining weapons; that Justin admitted following the victim and hitting the victim on the back of the neck two times; that Justin advised the victim if he ever told anyone they would come back and kill him; that one of the co-accused indicated that the victim appeared to be unconscious when they walked away; that the two returned to the third person involved who told them the cards they had just stolen were worthless and to find another victim; that with the second victim, Justin did not do the physical accosting but he did take the property; and that under a green duffel bag lying next to Justin's feet, the police officer found a wooden stick three-and-one-half feet long, a small hatchet, a knife, a sheath, and tire iron.

The trial court concluded that these allegations were extremely serious because they involved violence and aggression against persons and were premeditated and willful, and that Justin committed a substantial share of the aggression.

The trial court also concluded that the facilities and services in the juvenile system are not adequate to treat Justin and to protect the public. The primary basis for this conclusion is the seriousness of the offense and Justin's age. The court considered that the fifteen-month period left until Justin turns nineteen is not long enough to give him the skills he needs to live an independent adult life; nor is fifteen months of supervision long enough to protect the public. The court found that the only resource suitable in the juvenile system for Justin is a youth correctional facility, and that is inadequate given that Justin can be there no longer than fifteen months.

Justin argues that the court failed to make findings with respect to Justin's motives and attitudes. We do not agree. The trial court specifically noted the testimony that he was a follower in the incidents but, in view of the allegations about his participation, nevertheless considered the offenses to be extremely serious. The trial court also found that he lived at home and helped with chores. The trial court was not required to find that he was generally compliant. Although there was testimony that he was compliant in detention, there was also Dr. Spierer's testimony and Justin's mother's testimony that he had been noncompliant with respect to school attendance.

Justin also argues that the trial court failed to consider his mental illness, response to prior treatment, learning disability, development immaturity, absence of prior delinquencies and juvenile pattern of living. Justin contends that, even though the trial court made findings on these factors, it did not explain why waiver was necessary in light of these factors. Justin's real argument here is that these factors, in his view, favor juvenile jurisdiction and the trial court should have given them more weight. We do not agree.

First, not all of these factors necessarily favor juvenile jurisdiction. Based on the testimony, the court could reasonably conclude that Justin's past responses to special education programming and to treatment for his depression indicated that Justin's progress would be slow. With only fifteen months in the juvenile system, the court could reasonably conclude that sufficient progress would not be made within that time. Second, the weight assigned to each factor is within the trial court's discretion. ***In re J.A.L.***, 162 Wis.2d at 960, 471 N.W.2d at 501. The court need not resolve all the statutory criteria against the juvenile to order waiver. *See* ***In re C.W.***, 142 Wis.2d 763, 769, 419 N.W.2d 327, 329 (Ct. App. 1987). It is not an erroneous exercise of discretion for the court to give heavy weight to the severity of the offense and the short period of time left in the juvenile system. ***In re G.B.K.***, 126 Wis.2d 253, 260, 376 N.W.2d 385, 389 (Ct. App. 1985).

Justin contends that the trial court's finding that the youth correctional services are inadequate to treat Justin and to protect the public is clearly erroneous. We do not agree. The trial court found that the only resource suitable for Justin in the juvenile system is the youth correctional facility. This is supported by Proctor's testimony. Proctor rejected all the options but a correctional facility as inadequate. As to that facility, she did not know whether

it would meet Justin's treatment needs. When asked by Justin's counsel whether the SPRITE program, a thirty-day "mini boot camp," would be appropriate for Justin, Proctor answered "no," because of its short duration. When asked whether the SPRITE program might be appropriate after a stay in a correctional facility, Proctor answered that that would depend on the recommendation from the correctional facility.

The trial court's determination that a youth correctional facility is inadequate is based primarily on its conclusion that fifteen months is inadequate--both because of the seriousness of the offense and the length of time needed for Justin to make progress in dealing with his educational, vocational and mental health needs. This conclusion is supported by the record.

Justin next contends that he was deprived of the opportunity to present evidence because the trial court did not order the Department of Social Services to submit a report analyzing his suitability for the adult intensive sanctions program under § 301.048, STATS., the juvenile boot camp program under § 48.532, STATS., and the corrective sanctions program under § 48.533, STATS., as he requested by motion. The denial of these requests, he asserts, is an erroneous exercise of the court's discretion. We disagree and conclude the trial court properly exercised its discretion in denying these motions.

The trial court denied the motion with respect to the adult sanctions program because § 48.18(2m), STATS., does not become effective until December 1, 1995.[7] Subsection (2m) provides that if it appears that a child who is the subject of a waiver hearing may be suitable for participation in the adult intensive sanctions program under § 301.048, STATS., the juvenile court "shall order the department of corrections to submit a written report analyzing the child's suitability for participation in [that] program ... and recommending whether the child should be placed" in that program. Justin's trial counsel agreed that this subsection was not yet effective, stating: "I think it is significant only considering prospectively that these are options that the court will have available within a very short time and it indicates sort of a policy shift as far as what the court should be considering." Justin's counsel appears to concede that at the time of the waiver hearing, April 25, 1995, the juvenile court did not have

[7] Section 48.18(2m), STATS., was created by 1993 Wis. Act 377.

this option, and he did not explain in any detail why the existence of that future option should affect the trial court's decision in April.

In addressing the request for a report on the juvenile boot camp, the trial court stated that it had been informed by a legislator that this was still in the planning process. The trial court invited Justin to present contrary information, but he did not. Section 48.532, STATS., provides that beginning in 1995, the department shall provide a juvenile boot camp for children and may place in the boot camp any child whose legal custody has been transferred to the department for placement in a secured facility. There is no requirement that the court order a report with respect to the juvenile boot camp.

Justin suggests that Proctor's testimony contradicted the trial court's information that a juvenile boot camp did not yet exist. We see no contradiction. Proctor testified about the thirty-day SPRITE program, which Justin's counsel described in his question to her as a "mini-boot camp." That is clearly not the juvenile boot camp referred to in § 48.532, STATS. When Proctor was asked about the juvenile boot camp referred to in § 48.532, she testified she had no information about that. Given this testimony and the information the trial court had that the juvenile boot camp did not yet exist, it was entirely reasonable for the court not to order a report and not to consider the juvenile boot camp as an option without some evidence from Justin that this facility existed. Justin was not prevented from presenting evidence on the juvenile boot camp.

With respect to the corrective sanctions program under § 48.533, STATS., there is no requirement that the court order a report on the appropriateness of this program. Justin was not prevented from presenting evidence on this program. The trial court did understand this program was available. But the court correctly pointed out, and Justin's counsel agreed, that this is only an option for a child who is first placed in a youth correctional facility and is then recommended for the program by the department. This program was only relevant for Justin if the trial court first determined that placement in a youth correctional facility was appropriate. As we have explained above, the trial court's conclusion that a youth correctional facility was inadequate was reasonable and supported by the record.

Finally, Justin argues that the trial court erroneously exercised its discretion in concluding that the best interest of the juvenile and the safety of the public required waiver. We disagree with Justin that there was not a reasonable basis in the record for the trial court's conclusion. Here again, Justin is disputing the weight the trial court attached to the time remaining for Justin in the juvenile system, the greater length of time it will take for Justin to successfully respond to treatment and acquire necessary skills, and the seriousness of the offense. This is within the trial court's discretion and we see no misuse of that discretion.

By the Court.—Orders affirmed.

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