

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 19, 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

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No. 95-1591

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF MICHAEL R.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

MICHAEL R.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Rock County:
JOHN H. LUSSOW, Judge. *Affirmed.*

VERGERONT, J.¹ Michael R. appeals from an order waiving juvenile court jurisdiction over him. He asserts that the record does not establish a reasonable basis for the court's finding that facilities and services in the juvenile system were inadequate or for the court's decision that he was not

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

likely to respond to a disposition within the juvenile system. We disagree on both points and affirm.

Michael's date of birth is November 23, 1978. The amended delinquency petition charged him with causing substantial bodily harm to another with intent to cause bodily harm, committed in association with a criminal gang with specific intent to assist in any criminal conduct by criminal gang members, contrary to §§ 940.19(2), 939.625(1)(a) and 939.625(1)(b)2, STATS.

The amended petition alleged that a group of juvenile males assaulted a juvenile. Pertinent allegations in the petition are as follows. The victim stated that during the assault, the perpetrators asked him, "Why are you claiming [membership in the Cryps gang]?" The victim stated that Michael struck him several times in the face and the back of the head, and that he was hit and kicked by others as well. At least three witnesses stated that they observed Michael strike the victim in the face a number of times and heard the victim's nose crack. Two of those witnesses stated that they saw Michael strike or kick the victim approximately twenty times; one said the victim was on the ground while Michael kicked him twenty times and the other said Michael kicked the victim in the head three to four times while on the ground. All three witnesses said they heard Michael say while he was assaulting the victim, words to the effect of, "Why are you claiming to be a member of my gang."

The petition also alleges that Michael told a police officer that he hit the victim in the nose, that it made a loud cracking sound and that he kicked the victim three to four times.

At the waiver hearing, the State called as a witness Thomas Seibert, a juvenile probation officer who had investigated the waiver issue. He had spoken to Michael, to Michael's father and to school officials. Seibert testified that Michael did not have any mental illnesses or developmental disabilities, and is mentally mature. His only prior record was one incident in which he ran away after a party and was picked up at school, then released back to school. According to Seibert, Michael is motivated by the image he has among his peers, mostly related to the gang activity "that Michael has allegedly been involved in." Michael was not doing well at school and had recently had a number of referrals to the principal's office for defiant and uncooperative

behavior. One incident involved a teacher observing Michael drawing a gang symbol. Seibert testified that Michael told him he had been a member of the Gangster Disciples, but at the present time he did not align himself with that gang. Seibert also testified that Michael had admitted to school peers and possibly school staff that he was a Gangster Disciple. Seibert thought that had occurred within the preceding four months. Gang-type graffiti has been confiscated from Michael's locker. Based on Seibert's conversation with Michael's father, he testified that Michael's father did not condone any type of gang activity, poor school performance, or late hours and was disciplining Michael "normally as a regular parent would."

Regarding available juvenile facilities, this was Seibert's testimony on direct examination.

Q Now, based upon your testimony here today, what would you, uh, how would you evaluate Michael's potential for responding to future treatment?

A My initial response and opinion would be that Michael would not respond to any type of treatment that would not allow him to be involved in gang-type activity; therefore, the possibility is that he would not respond well to any treatment provided by our department and that waiver to adult court would be appropriate at this time.

Q Is there any facility that you would consider adequate to address the needs both of Michael and of the community for protection?

A The--as any alternatives, are you asking or--

Q Yes. Have you considered other alternatives in making that recommendation?

A We considered the decision of corrections, as in Wales, at Ethan Allen or Lincoln Hills, but felt the more appropriate consideration would be waiver at this time.

On cross-examination, Seibert testified as follows:

Q Did you-- Are you familiar with those services and facilities that are available?

A Yes, I am.

Q Are you familiar with those services or facilities available outside of this county?

A To some degree, yes, I am. Just through contact with the case manager.

Q Do you know of any that--any facilities in the state that address the type of behavior that is alleged in this type of case in the juvenile justice system?

A Yes.

Q Could you identify one for us?

A One of the institutions we use for criminal-type behavior, one of them would be Norris. That's a possibility.

Q And can you just briefly describe what they offer at this facility?

A They offer weekly and daily counseling as well as group and individual counseling. Schooling is on the premises of the facility. It's a nonsecure facility and is an open campus as far as there is no lock downs or any of that type of a nature on that facility.

Q And did you specifically consider that as an option in this case?

A Every option of our department was considered, with the end result being this waiver hearing.

Q Is this investigation based on your consideration of those facilities or by other people in your department?

....

A The decision was made by myself and my supervisor in making the decision on what facility or what route we would take in this investigation.

Q Did you make a specific decision that the Norris center was not appropriate for Michael [R.] if he was proved to be found guilty of this allegation?

A Our decision was that any facility at this point would not be appropriate and the fact that we felt, with his alleged involvement with the gang activity and the importance of that gang activity, that any facility would not be appropriate at this time but yet waiver would be the most appropriate decision.

Q Are there any facilities that you are aware of that address the type of behavior that's alleged in this case?

A I do have familiarity with other facilities although they basically would be the same as I have mentioned earlier in the Norris situation.

Q For instance, are you familiar with any programs at the Rawhide facility?

A Yes, I am.

Q Can you briefly describe what they offer there?

A Personally my experience, I've not had physical contact or had visited Rawhide, so I cannot give an expert opinion on what Rawhide would offer. That would be more an opinion of our liaison that works with that facility.

Q Are you familiar with a facility or program that's called Tomorrow's Children?

A Um-hum. I am familiar with that facility.

Q Do you know where that's located?

A I don't know the exact city it is located in. I never visited the facility.

Q Do you know if it's located near Waupaca, Wisconsin?

A Once again, I have no knowledge of that, where that is located.

Q Do you know what kind of programs are offered at that facility?

A Basically the same as well as others, I believe. There's some AODA program as well at that facility.

Q What are-- Does your recommendation, is it based on any perceived need that Michael [R.] needs any counseling regarding alcohol or other drug use?

A To my knowledge, I have no--in my investigation I found no need for that, although it could be an underlying factor. In speaking with--with his family as well as the school, most of the instances were gang drawings and gang-related activity but no AODA-type issues were brought of a significant matter.

Q Can you just specify exactly what it is that you think Michael needs, what your recommendation is based on?

A Well, the recommendation was-- My supervisor and I went through all the options and concluded that waiver at this point would be appropriate in the fact that we were--our belief is that he could not be duly served by the juvenile justice system at this point.

The State also called Kathleen Lichtfuss, a supervisor assigned to the Adolescent Services Center of the Rock County Human Services Department. She testified that on two recent dates when she was assigned to bring Michael and other juveniles in and out of court proceedings, she heard

and observed Michael describing his role in the hitting and kicking of the victim to other juveniles in a boastful manner.

Michael called his stepmother as a witness. She described Michael as very bright and "a good guy," although she and his father had the typical problems with him. She testified that they had transferred Michael from one high school to another because they felt he was or might be involved in a gang, probably the Gangster Disciples, at the first high school. She also testified concerning Michael's daily activities, her contacts with school personnel, the discipline she and his father imposed when he ran away, and their efforts to improve his school performance.

The trial court found the petition had prosecutive merit. It acknowledged that Michael's age and lack of a significant prior record militated against a waiver of juvenile court jurisdiction. However, it also pointed to the evidence of gang involvement and its relation to Michael's motivation, while noting that the extent of Michael's current gang involvement was not known from the record. The court considered the alleged conduct to be egregious, the offense to be serious, and Michael's alleged role in the beating to be somewhat greater than that of the other juveniles involved. The court stated that it was putting particular emphasis on the circumstances and nature of the offense.

The court concluded that in view of the alleged conduct and the alleged gang activity, the facilities in the juvenile system were not adequate for his treatment or for the protection of the public. It found clear and convincing evidence that it would be contrary to the best interest of the juvenile and the public to hear the case in juvenile court.

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).² Section 48.18(6), STATS., provides that

² 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:

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). *Id.* 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

(...continued)

- (a) The personality and prior record of the child, including whether the child is mentally ill or developmentally disabled, 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.

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.

Michael acknowledges that the trial court did exercise its discretion. However, he maintains that it erred in weighing and assessing the evidence in several ways. First, Michael argues that Seibert's testimony as to the adequacy and suitability of facilities was conclusory and did not demonstrate that he had evaluated specific facilities.

The adequacy and suitability of facilities and services in the juvenile system to treat the child and protect the public is one of the criteria listed in § 48.18(5), STATS. However, the statute does not require that the State submit evidence on each of the criteria listed in the statute. *In re G.B.K.*, 126 Wis.2d 253, 256, 376 N.W.2d 385, 388 (Ct. App. 1985). Nor does the statute require the State to prove there are no adequate alternatives to waiver in the juvenile system. *Id.* Rather, the statute requires that when evidence is presented as to a particular criterion, the court consider that criterion and make a finding concerning that criterion. *In re C.W.*, 142 Wis.2d 763, 769, 419 N.W.2d 327, 330 (Ct. App. 1987). The trial court met this requirement. It considered the testimony presented on the adequacy and suitability of the facilities and services in the juvenile system and made a finding that they were not adequate to treat Michael or protect the public given the nature of the alleged offense and the alleged related gang activity. This finding is supported by Seibert's testimony. The finding has a reasonable basis in the record, which is all that is required of the court's findings. *In re J.A.L.*, 162 Wis.2d at 961, 471 N.W.2d at 501. Michael did not present any testimony that disputed Seibert's testimony.³

Michael contends that the trial court relied on its own information, rather than the record, in finding that the juvenile facilities were not suitable. He bases this argument on this statement of the trial court, made after it summarized the testimony:

³ We do not suggest that Michael must present evidence of particular facilities that are adequate to treat him and protect the public. But if he does not, and if the State presents evidence that the facilities are inadequate, it is not a misuse of the court's discretion to find that the facilities are inadequate.

I'm familiar with the facilities available in the juvenile system for treatment, and I simply do not feel that at this point, because of the kind of conduct and the fact that we are dealing with alleged gang activity, that's the kind of thing that can be treated in the juvenile system. This is going to have to be dealt with at the local level.

We do not agree with Michael that this statement demonstrates that the court relied on "secret information" thereby violating Michael's right to fundamental fairness. Rather, we interpret this statement as the court expressing agreement with Seibert's opinion on the inadequacy of the juvenile facilities and services based on the court's knowledge of those facilities and services. We see nothing improper in this statement.

Michael also argues that the record did not establish a reasonable basis for the court's conclusion that Michael was not likely to respond to a disposition within the juvenile system. More specifically, he argues that the court did not consider the entire record as it relates to Michael's potential for responding to treatment, but instead relied on the court's concern over gang activity in the community generally.

A juvenile's "prior treatment history and apparent potential for responding to future treatment" are factors the court must consider if evidence on these factors is presented. Section 48.18(5)(a), STATS. There was no evidence of any prior or current treatment needs of Michael for mental illness, developmental disabilities, drug or alcohol problems, or emotional problems.

Michael apparently considers evidence of disruptive and uncooperative conduct in school and the prior incident of running away as indicating a need for "treatment," and argues that the evidence of those incidents does not show that Michael has not responded to "treatment," that is, to the discipline imposed on him because of those incidents. We think this prior conduct and discipline is more appropriately described as Michael's "prior record," rather than as "treatment history." The court must consider evidence of a juvenile's prior record if it is presented. Section 48.18(5)(a), STATS. But whichever way this prior conduct and discipline is categorized, the court did

consider this evidence and found that "there really isn't much of a juvenile record." The court recognized that this militated against a waiver.

However, the court assigned greater weight to the circumstances and nature of the offense: the egregiousness of the alleged conduct and the gang-related aspect. 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. *In re G.B.K.*, 126 Wis.2d at 256, 376 N.W.2d at 388. It is not an erroneous exercise of discretion for the court to give heavy weight to the severity of the offense. *Id.* at 260, 376 N.W.2d at 389.

We do not agree with Michael that the trial court based its conclusion on generalities about gang involvement rather than the record. There was a reasonable basis in the record for the court to find that Michael had been involved with a gang and that his alleged conduct in the offense was related to, or motivated by, involvement with a gang. It was not improper for the court to comment on the seriousness of the problem of gang activity in the community in considering the weight to assign to the nature and circumstances of the offense.

We conclude there was a reasonable basis in the record for the court's determination to waive juvenile jurisdiction, and that the court did not misuse its discretion in doing so.

By the Court. – Order affirmed.

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