



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 21, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2021AP1335

State of Wisconsin v. A.G. (L. C. No. 2021JV34)

Before Gill, J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Aaron² appeals from an order granting the State's petition for waiver of juvenile court jurisdiction. Based upon our review of the briefs and record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree with Aaron that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² For ease of reading, we refer to the appellant in this confidential appeal using a pseudonym, rather than his initials.

the circuit court erroneously exercised its discretion by granting the State's waiver petition because the court failed to consider Aaron's suitability for placement in the serious juvenile offender program, as required by WIS. STAT. § 938.18(5)(c). We therefore reverse the order waiving juvenile court jurisdiction, and we remand for further proceedings consistent with this summary disposition order.

On April 7, 2021, the State filed a delinquency petition charging Aaron with two counts: first-degree sexual assault of a child (contact with a child under age thirteen) and physical abuse of a child (intentionally causing bodily harm). The petition alleged that, in December 2020, when Aaron was sixteen years old, he inserted a knife into a four-year-old child's anus, which hurt the child and caused bleeding.

On the same day that the delinquency petition was filed, the State filed a petition for waiver of juvenile court jurisdiction. A contested waiver hearing took place on June 23, 2021. The only witness to testify at the hearing was Jason Halbach, a juvenile court case worker employed by the Brown County Department of Health and Human Services. Halbach recommended that Aaron remain in juvenile court. The circuit court disagreed, however, and granted the State's waiver petition. We granted Aaron's petition for leave to appeal that nonfinal order. *See* WIS. STAT. RULE 809.50(3).

The decision to waive juvenile court jurisdiction under WIS. STAT. § 938.18 is committed to the circuit court's discretion. *State v. Tyler T.*, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192. The court shall enter an order waiving juvenile court jurisdiction if there is clear and convincing evidence that "it is contrary to the best interests of the juvenile or of the public" for the case to be heard in juvenile court. Sec. 938.18(6). The court "shall base its decision"

regarding waiver on the criteria enumerated in subsec. (5) of the statute. Sec. 938.18(5). We have previously held that, when making its decision as to waiver, a court must consider *all* of the criteria in § 938.18(5) and must make findings on the record related to those criteria. *See State v. C.W.*, 142 Wis. 2d 763, 768, 419 N.W.2d 327 (Ct. App. 1987) (applying a previous version of the waiver statute); *see also State v. A.O.*, No. 2016AP2186, unpublished slip op. ¶22 (WI App Aug. 22, 2017) (stating that, when addressing a petition for waiver of juvenile court jurisdiction, a court “must exercise its discretion, considering each of the criteria laid out in WIS. STAT. § 938.18(5)”).³

Aaron argues that, in this case, the circuit court erroneously exercised its discretion by failing to consider all of the criteria set forth in WIS. STAT. § 938.18(5). In particular, Aaron cites § 938.18(5)(c), which requires a court to consider

[t]he 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 [WIS. STAT. §] 938.538 or the adult intensive sanctions program under [WIS. STAT. §] 301.048.*

(Emphasis added.)

In addressing this factor, the circuit court observed that Aaron was almost seventeen years old. The court also noted that Halbach had testified that a “Type 2 placement would require 9 months to a year.” The court therefore expressed concern that there would “simply not [be] enough time available in the juvenile justice system to meet [Aaron’s] treatment needs if he

³ An unpublished opinion authored by a single judge and issued on or after July 1, 2009, may be cited as persuasive authority. WIS. STAT. RULE 809.23(3)(b).

[was] in fact adjudicated or convicted of the charged offense.” The court did not, however, address Aaron’s suitability for placement in the serious juvenile offender program under WIS. STAT. § 938.538.

Aaron asserts that he is statutorily eligible for the serious juvenile offender program because he is over the age of fourteen and was accused of committing first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1). *See* WIS. STAT. § 938.34(4h)(a). Aaron further asserts that the serious juvenile offender program “is designed to allow longer term supervision of juveniles adjudicated of serious offenses; it allows the [Department of Corrections] to consider release to the community only after a youth has participated for at least two years.” *See* WIS. STAT. § 938.538(5)(a). Aaron also notes that a youth cannot be discharged from the serious juvenile offender program until he or she has completed at least three years in the program. *See* § 938.538(5)(b). Aaron therefore suggests that he would have been able to benefit from the program after turning eighteen, contrary to the circuit court’s rationale that there would not have been enough time in the juvenile justice system to meet his treatment needs if he was adjudicated delinquent of the charged offense. The State does not dispute that Aaron would have been able to benefit from the serious juvenile offender program after turning eighteen.

We agree with Aaron that the circuit court erroneously exercised its discretion by failing to consider his suitability for placement in the serious juvenile offender program, as required by WIS. STAT. § 938.18(5)(c). Notably, this court recently addressed the same issue, under nearly identical factual circumstances, in *State v. M.C.*, No. 2021AP301, unpublished slip op. (WI App Aug. 11, 2021). In that case, the State filed a delinquency petition charging sixteen-year-old M.C. with first-degree sexual assault of a child. *Id.*, ¶2. The State also filed a petition for waiver of juvenile court jurisdiction, which the circuit court granted. *Id.* In doing so, however, the

court “failed to state in its ruling or give any other indication that it considered the suitability of M.C. for the serious juvenile offender program.” *Id.*, ¶4. We concluded that the court had erroneously exercised its discretion in that regard because a court is required to consider all of the criteria set forth in § 938.18(5) when making its decision whether to waive juvenile court jurisdiction. *See M.C.*, No. 2021AP301, ¶5.

Here, as in *M.C.*, the record indicates that Aaron was statutorily eligible for the serious juvenile offender program at the time of the waiver hearing, but despite his eligibility, the circuit court failed to consider his suitability for placement in that program on the record when deciding whether to waive juvenile court jurisdiction. Under these circumstances, like the *M.C.* court, we conclude that the circuit court erroneously exercised its discretion. We further observe that, in its respondent’s brief, the State wholly fails to address Aaron’s argument that the court erred by failing to consider his suitability for placement in the serious juvenile offender program. We therefore deem the State to have conceded Aaron’s argument that the court erroneously exercised its discretion in that regard. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments may be deemed conceded).

Accordingly, we reverse the circuit court’s order granting the State’s petition to waive juvenile court jurisdiction. We remand for the court to reconsider the State’s petition, taking into account Aaron’s suitability for placement in the serious juvenile offender program, along with all of the other criteria set forth in WIS. STAT. § 938.18(5).

Upon the foregoing,

IT IS ORDERED that the order is summarily reversed and the cause is remanded for further proceedings consistent with this summary disposition order. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals