

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 05, 2007

David R. Schanker
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 No. 2007AP1182

Cir. Ct. No. 2006JV1500

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF TERRELL J.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TERRELL J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Terrell J. appeals from an order waiving juvenile court jurisdiction to adult court. Because we determine from our review of the record that the juvenile court properly considered all of the factors under WIS. STAT. § 938.18(5) (effective May 8, 2006) in its decision to waive juvenile court jurisdiction, we affirm.

BACKGROUND

¶2 On September 6, 2006, Terrell was charged, in juvenile court, with two counts of first-degree sexual assault, as party to a crime, in violation of WIS. STAT. §§ 948.02(1) and 939.05. At the time of the alleged offenses, Terrell was fifteen years old; his date of birth is April 17, 1991. The State filed a petition for waiver of jurisdiction on September 12, 2006. The court held a waiver hearing on January 26, 2007, and rendered its decision at the continued waiver hearing held on May 8, 2007.

¶3 At the waiver hearing, the State requested that the court take judicial notice of the following: the psychological report prepared at the request of both the State and Terrell; Terrell's prior criminal (juvenile) record; and Terrell's juvenile court file.² Terrell had no objection to the State's request. The State rested its case based upon this judicially-noticed evidence, the defense presented no additional witnesses or evidence, and the remainder of the hearing was devoted to argument of the parties. At the conclusion of the argument, the court noted that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Terrell had previously been adjudicated delinquent in 2004 and August 2006, less than one month prior to the incident giving rise to the charges in this case.

the psychological report indicated that Terrell may suffer from a neurological impairment. The court therefore ordered a neurological examination be performed before it would make a determination on whether to waive its jurisdiction over Terrell. It then adjourned the waiver hearing until after it received and had an opportunity to review this neurological report.

¶4 The court reconvened the waiver hearing on May 8, 2007. In its decision, the court determined the criteria for waiver had been met and granted the petition. In so doing, the court analyzed the facts under WIS. STAT. § 938.18(5). Under subsection (a), the court considered the seriousness of the present offenses, as well as Terrell's past history of criminal conduct, and that Terrell had violated his previous probation sentences. The court also considered the psychological report, which indicated that Terrell's IQ was on the "high end of the Borderline range," and that Terrell had had a "rather tragic, unfortunate, really inexcusable history from the standpoint of ... lack of parents ... transiency; the issue of problems with his mother, [including] alleged drug dealing of his mother." Additionally, the court considered the psychologist's discussion of Terrell's prior record (with which the judge was personally familiar as Terrell had been before the same judge previously on other delinquency petitions), and the lack of success during probation (including two sanctions during the first probation and this offense charged less than a month after being sentenced to a second probation). The court reviewed the psychologist's discussion of Terrell's scores on a variety of psychological measurements, noting that the psychologist's only diagnosis was for a conduct disorder. The court noted the psychologist's determinations that Terrell has a "high risk of failure and chronicity of problems," "scores high on both measures that are correlated with continued delinquency" and "also scores high on a scale indicating easy arousal for anger and aggression, alienation from

authority and other characteristics indicating immaturity.” The court also reviewed the results of a neurological examination which concluded that Terrell suffered from no neurological impairment.

¶5 The court went on to consider the remaining factors set forth in WIS. STAT. § 938.18(5), and concluded that, in light of the findings of the psychological report, Terrell’s past record in the juvenile justice system, the seriousness of the crime alleged, and the juvenile resources available (including length of sentence and supervision available in the juvenile justice system, as well as the availability of a Serious Juvenile Offender order³), waiver was appropriate. Terrell appeals from that non-final order. Additional facts are set forth in the discussion section of this opinion as needed.

DISCUSSION

¶6 WISCONSIN STAT. § 938.18 governs the waiver of juvenile court jurisdiction and such waiver is within the sound discretion of the circuit court. *State v. Elmer, J.K., III*, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999), *superseded by statute on other grounds*, WIS. STAT. ch. 938.

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

³ WISCONSIN STAT. § 938.538 sets forth Wisconsin’s serious juvenile offender program. Under § 938.538(3), a juvenile adjudicated delinquent of a Class B felony (such as charged in this case) can be placed in a “Type 1 juvenile correctional facility or secured residential care center for children and youth *for not more than three years*.” See sec. 938.538(3)(a)(1) (emphasis added). The court also noted that from its experience, such an institution preferred to have a one-year supervision portion of the sentence available to facilitate client’s cooperation in its programs; accordingly, it was likely that if the court did not waive jurisdiction, Terrell would only be confined in a secured setting for two years.

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.”

Id. (citations omitted).

¶7 The waiver process first requires the juvenile 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 facts of the case in light of 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).⁴ The court does not, however, need to determine that every statutory criterion supports waiver. *See In re B.B.*, 166 Wis. 2d 202, 209, 479 N.W.2d 205 (Ct. App. 1991).

¶8 WISCONSIN STAT. § 938.18(5) (effective May 8, 2006), criteria for waiver, provides in pertinent part:

If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria:

(a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile’s physical and mental maturity, and the juvenile’s pattern of living, prior treatment history, and apparent potential for responding to future treatment.

(am) The prior record of the juvenile, including 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, and the juvenile’s prior offenses.

⁴ When the Legislature passed the Juvenile Justice Code in 1996, WIS. STAT. § 48.18 of the Children’s Code became WIS. STAT. § 938.18(5) of the Juvenile Justice Code.

(b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.

(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.

¶9 In light of these factors, the juvenile court must articulate the reasons meriting waiver to adult court. *See D.H.*, 76 Wis. 2d at 305. A juvenile court may waive jurisdiction to the adult criminal court if it is established, by clear and convincing evidence, that “it is contrary to the best interests of the child or of the public” to retain jurisdiction. WIS. STAT. § 938.18(6) (effective May 8, 2006).⁵

¶10 Terrell argues that the court erroneously exercised its discretion in finding that waiver was appropriate. Terrell first argues that it is not “reasonable for society to expect a child like [him] to have any ability to conform his behavior to law where no one has ever taken the time [to] teach him the difference between

⁵ When the Legislature created WIS. STAT. § 938.18(5) as part of ch. 938, it noted that the intent of ch. 938 is to “promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively.” WIS. STAT. § 938.01(2)(a), (b). Accordingly, unlike the court in *State v. Elmer, J.K., III*, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999), *superseded by statute on other grounds*, WIS. STAT. ch. 938, the juvenile court no longer gives “paramount consideration ... [to] the best interests of the child,” *see id.* at 384, but rather, now must “determine[] on the record that there is clear and convincing evidence that it is *contrary to the best interests of the juvenile or of the public*” to retain jurisdiction. Sec. 938.18(6) (effective May 8, 2006) (emphasis added).

right and wrong,” especially “where the adult example set for him was quite to the contrary.” Second, Terrell argues that due to his upbringing—no father, a mother who only provided an “example of drug abuse, unbridled and unreasonable fits of anger, and a virtual nomadic existence”—he is a “child who fell through the cracks” and that to him, with an incomplete sense of morality (because of his upbringing), the actions by the victim and one of the adult perpetrators “probably led [him] to believe that there was nothing particularly wrong about involving himself” in the sexual assaults. Third, Terrell argues that the court erred in placing too much weight on the seriousness of the crimes “particularly as it relates to the community’s reaction” if the court did not waive its jurisdiction. Fourth, Terrell argues that

[i]t is pretzel logic of the first order to reason that although Terrell is too immature to consent to sexual activity for himself but, on the other hand, if Terrell does decide to have sexual contact with another person who is also too immature to consent that he has now committed a crime that is “as serious as they come,”

especially since he is in the company of an adult whose “example he saw was an abomination.” Finally, Terrell argues that the court should not have focused on the “overall seriousness” of the crime, but rather only on “the seriousness of Terrell’s individual involvement.”

¶11 The State argues that the juvenile court properly considered and analyzed all of the statutory criteria as set forth in WIS. STAT. § 938.18 and correctly held that:

[T]he following “three overriding factors” weighed in favor of waiver to adult court: (1) Terrell’s prior record and lack of success on probation; (2) The serious nature of the offense and the need for a longer term of supervision than the juvenile justice system would allow; and (3) the fact that Terrell does not suffer from a mental impairment.

The State further argues that the juvenile court correctly determined that “the adequacy and suitability of services available for treatment of [Terrell] and protection of the public” supported a waiver into adult criminal court. Finally, the State argues that the court did not erroneously exercise its discretion when it found “that the serious nature of the offense outweigh[ed] other factors when the other factors may suggest that waiver is not warranted,” citing *B.B.*, 166 Wis. 2d at 209-10.

¶12 We address Terrell’s first three arguments together. In reaching its decision, the juvenile court conducted a considered analysis of the facts of this case under the appropriate statutory factors. Before doing so, the court recognized the need for a neurological examination to address concerns set forth in the psychological report prepared for the waiver hearing, and therefore ordered it completed before rendering its decision. Only after receipt of this neurological report did the court then proceed to make its determination on whether to waive its jurisdiction.

¶13 In its decision, the juvenile court first noted that it had reviewed the transcript of the January hearing to refamiliarize itself with the evidence and arguments of the parties. It then considered the psychological report and the delinquency petition. The court then placed on the record the findings and conclusions of the neurological examinations that Terrell suffered from no neurological impairments.

¶14 The juvenile court addressed the statutory requirements of WIS. STAT. § 938.18. The court affirmed its finding made at the January 2007 waiver hearing that prosecutorial merit existed. *See* WIS. STAT. § 938.18(4)(a). Based upon this finding, the court then proceeded to analyze the facts under the factors

set forth in WIS. STAT. § 938.18(5). Under subsection (a), the court focused its inquiry on Terrell. The court noted that Terrell presents like many juveniles his age before this court and that he was physically and mentally mature. The court noted the lack of appropriate or even adequate parental caregiving over the majority of his life, but also noted that Terrell had had access to “services” as well. It noted that Terrell had a previous record, and that while none of the offenses involved bodily injury, Terrell had accumulated a number of sanctions while on probation for these offenses, including being charged with Class B felonies less than a month after being put on probation for a second time. Finally, the court confirmed that it had not previously waived jurisdiction.

¶15 In its analysis under WIS. STAT. § 938.18(b), the court discussed the seriousness of the crime (in degree, just below homicide), Terrell’s role (alleged to be more severe than others involved), and the premeditation involved in Terrell’s actions (allegedly waiting in line and watching other’s commit the crime, and holding the legs of the victim to facilitate her rape by another). The court discusses the impact of the crime on the community and that at the time of the hearing, over ten other juvenile and adult perpetrators had already been adjudicated.⁶ The court then goes on to assess, under subsection (c), the adequacy and suitability of facilities. The court notes that suitable facilities are available in both the juvenile and adult system, but that the length of sentence available under the juvenile system is very limited due to Terrell’s age, even under the serious juvenile offender program. *See* note 3, *supra*. Based upon its analysis of the factors under § 938.18(5), the court concluded that the State had proven by clear

⁶ These other perpetrators had been adjudicated both in adult court and in juvenile court; accordingly, the consideration set forth in WIS. STAT. § 938.18(5)(d) is inapplicable in this case.

and convincing evidence that waiver was appropriate. Based on our review of the record, we determine that the court appropriately considered the factors under WIS. STAT. § 938.18 and that the court properly exercised its discretion in waiving Terrell into adult court.

¶16 We briefly address Terrell’s fourth and fifth arguments. His fourth argument is that it is illogical that while he “is too immature to consent to sexual activity for himself ... if Terrell does decide to have sexual contact with another person who is also too immature to consent that he has now committed a crime.” While this may seem like “pretzel logic,” it is for the Legislature, and not this court, to change the law. Terrell’s final argument is that the court should consider only Terrell’s individual role in the alleged crimes, not the seriousness of the crimes in their totality. This interpretation is contrary to the party to a crime statute, which states, in pertinent part:

(1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if the person:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime....

WIS. STAT. § 939.05(1)-(2) (emphasis added).

By the Court.—Order affirmed.

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

