COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1321

Cir. Ct. Nos. 2015JV293
2015JV310

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

IN THE INTEREST OF C.M., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

C.M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] C.M. challenges his waiver into adult court on the grounds that the court erroneously exercised its discretion by considering Lincoln Hills School for Boys to be categorically unsuitable for placement of juveniles and that C.M. would be safer in the adult system. We affirm as the court's comments regarding Lincoln Hills were not the determining factor in its waiver decision.

BACKGROUND

¶2 C.M. was charged in juvenile court with one count of first-degree sexual assault of an eleven-year-old child, under WIS. STAT. § 948.02(1)(e); one count of repeated sexual assault of that child, under WIS. STAT. § 948.025(1)(a); and one count of child enticement, under WIS. STAT. § 948.07(1). C.M. was also charged with one count of physical abuse, under WIS. STAT. § 948.03(2)(b); one count of misdemeanor battery, under WIS. STAT. § 940.19(1); and one count of disorderly conduct, under WIS. STAT. § 947.01(1), based on an altercation with a different child. The State sought waiver into adult court. At the time of the waiver hearing, C.M. was two months shy of his seventeenth birthday. The court, following testimony, reviewed each of the criteria for waiver under WIS. STAT. § 938.18(5), emphasizing that the child assaulted was a fifth grader and that the sexual assault was "premeditated" and "intentional." The court expressed concern that C.M. tried to make sure that his victim did not report her assault to anyone. The court concluded that the State had met its burden to prove that waiver into

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

adult court was appropriate based on "the best interests of the juvenile or of the public." Sec. 938.18(6). C.M. appeals.[2]

DISCUSSION

¶3 WISCONSIN STAT. § 938.18 governs the process by which a juvenile may be waived into adult court. A court first determines if the delinquency petition has prosecutive merit. Sec. 938.18(4). C.M. does not challenge that prosecutive merit existed. The court then applies the criteria set forth in § 938.18(5) to determine if waiver is appropriate. The weight the court gives each factor is discretionary. ***G.B.K. v. State***, 126 Wis. 2d 253, 259, 376 N.W.2d 385 (Ct. App. 1985). We reverse a waiver determination only where a court erroneously exercises its discretion, and we "look for reasons to sustain the court's decision." ***State v. Tyler T.***, 2012 WI 52, ¶24, 341 Wis. 2d 1, 814 N.W.2d 192.

¶4 During final arguments, the State referenced a "cloud over Lincoln Hills" and cited a "series of articles," mentioning only the dates and title of the articles, in support of its position that Lincoln Hills was not an appropriate placement for C.M. Candy Bowman, a Racine County case manager, testified that it was her understanding that Lincoln Hills was under investigation by the Department of Justice due to allegations of physical and sexual abuse by personnel and that her department has "put somewhat of a moratorium" on utilizing Lincoln Hills. The court, during its oral decision, made reference to the "news reports" and newspaper articles addressed by the State as wells as a report that a Milwaukee County judge called treatment at Lincoln Hills "inhumane."

[2] C.M. petitioned this court for leave to appeal the nonfinal orders, which we granted. *See* WIS. STAT. RULE 809.50(3).

According to the court, Milwaukee County was reportedly "removing their children from that facility." The court commented that it "cannot justify that Lincoln Hills is an appropriate facility at this point in time to provide the treatment for sexual offender violations such as [C.M.] engaged in here." The court noted that "I never thought I would say this. That a 16-year-old would be safer in the adult system than the juvenile justice system."

¶5 C.M. argues the court erroneously exercised its discretion by considering the newspaper articles and the court's own personal out-of-court information regarding Lincoln Hills as a factor in the court's waiver determination. We agree with C.M. that the court erred in considering information regarding Lincoln Hills that was not offered in evidence. Newspaper articles and news reports referencing investigation of Lincoln Hills, a Milwaukee judge's comments set forth in a newspaper article regarding conditions at Lincoln Hills, and the court's personal knowledge were not proper evidence for consideration. Bowman's testimony supports, at best, a finding of concern regarding Lincoln Hills.

¶6 Wendy Petersen, the deputy superintendent for Lincoln Hills and Copper Lake Schools, testified that while an investigation was pending, Lincoln Hills was accepting individuals and had taken affirmative steps to rectify any issues. Petersen explained that Lincoln Hills had a new superintendent and a new administrator to oversee all operations, and it had fully cooperated with the DOJ in their investigation. Lincoln Hills had changed its complaint process and placed certain staff members on administrative leave, and supervisors had gone through specific training to address issues raised by the investigation.

¶7 Petersen testified that all the services provided to juveniles in the past at Lincoln Hills are still available and that its sex offender treatment had not "had any break in … programming services throughout this investigation." There was no evidence or testimony presented to support the court's finding that C.M. would be safer in the adult system than in the juvenile system. Furthermore, Petersen testified that there are juveniles who were waived into adult court currently residing at Lincoln Hills under an adult sentence and will be there until the age of eighteen, and that "approach" has not changed since the investigation began.

¶8 The court's consideration of news articles referenced by the State and the court's personal knowledge of Lincoln Hills from news reports were not facts in evidence. While the court erroneously exercised its discretion in considering that information, we review such a claim under a harmless error analysis. *See* ***J.A.L. v. State***, 162 Wis. 2d 940, 970-71, 471 N.W.2d 493 (1991). We will uphold the waiver "if, excluding the erroneous evidence, the waiver decision is sustainable as a proper discretionary act based on the other facts of the record." ***Id.*** at 974.

¶9 The evidence in the record supports waiver in this case. The court addressed each of the relevant factors enumerated in WIS. STAT. § 938.18(5) and applied them to C.M. In determining that jurisdiction in the adult system was proper, the court placed heavy emphasis on the type and seriousness of the offense, § 938.18(5)(b), and the adequacy and suitability of services available for the treatment of C.M. and the protection of the public, § 938.18(5)(c). A court does not erroneously exercise its discretion when it waives jurisdiction "after giving heavy weight to the severity of the offense and the short period of time left in the juvenile system." ***G.B.K.***, 126 Wis. 2d at 260.

¶10 Pursuant to WIS. STAT. § 938.18(5), the court considered each applicable factor. The court accepted Dr. David Thompson's testimony that C.M. would respond to treatment, and that treatment had to be "in a structured setting with very strict rules and monitoring and supervision." The court was concerned that C.M. had little time left for treatment if he was kept in juvenile court as juvenile jurisdiction over C.M. would end on his eighteenth birthday—fourteen months away. Bowman testified that the time remaining in the juvenile system may not be sufficient to "identify adequate services for [C.M.] to receive appropriate treatment" and to "[provide] an adequate amount of time within the community for supervision to insure that he has in fact made the changes he needs to make in order to ensure community safety."

¶11 The court was clear in its belief that a little more than a year in the juvenile justice system would be neither sufficient to provide treatment to C.M. nor would it protect the community:

> I cannot justify that one year or a little bit more than one year work within a juvenile justice system in the community setting is appropriate both because of the seriousness of the crime and because of the need for treatment here. It's not sufficient sustained treatment. It's not going to be a sufficient supervised treatment in the community. I believe that the treatment has to be provided in a confined setting. Most importantly, that I can't justify a one-year … sentence for the seriousness of this offense.

CONCLUSION

¶12 We conclude that the court's waiver of C.M. into adult court was an appropriate exercise of discretion, and the court's consideration of facts not in evidence was harmless error.

By the Court.—Orders affirmed.

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