

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 24, 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.

No. 95-1911

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF FRANKIE G.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

FRANKIE G.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
ROBERT C. CANNON, Reserve Judge. *Affirmed.*

SCHUDSON, J.¹ Frankie G. appeals from the non-final trial court order waiving its jurisdiction under § 48.18, STATS.² He argues that a new

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

² By an order filed July 17, 1995, this court granted Frankie G.'s petition for leave to appeal from the non-final order of the juvenile court.

waiver hearing is required because the trial court failed to make a finding of prosecutive merit before considering the statutory waiver criteria, and because the trial court failed to consider all the required criteria and make sufficient specific findings. This court affirms.

On May 12, 1995, the State filed a petition for waiver of jurisdiction with respect to two charges of armed robbery. Frankie G. contested the petition and the trial court held a waiver hearing on June 29, 1995.

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:

(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.

Pat Wichman, a Milwaukee County juvenile probation officer, was the only witness for the State at the waiver hearing. She testified that Frankie G. was seventeen and one-half years old, and she addressed at least five criteria under § 48.18(5)(a), STATS. Wichman summarized Frankie G.'s extensive prior record, noted that the juvenile court previously had waived its jurisdiction over Frankie G. on an armed robbery in 1994, and stated that: she was not aware of any basis for believing that Frankie G. was mentally ill or developmentally disabled; “[h]e leads the lifestyle of a mature person”; he had fathered a child; he had been out of school for some years; and that he had no behavioral problems that could only be addressed in the juvenile system. Recommending waiver, Wichman also addressed criteria under §§ 48.18(5)(b) and (c):

My opinion is that he should be waived to the adult court based on the following. He appears to commit offenses in a very premeditated, aggressive, willing manner. These offenses are repetitive. Various different efforts have been attempted to rehabilitate this person in a juvenile system including regular probation, New Concepts, special schooling, referral to residential treatment at Carmelite, and he did have the benefit of aftercare at St. Charles upon his release from Lincoln Hills, and these efforts have failed.

Frankie G. also testified and, among other things, confirmed that he was scheduled to be sentenced later that day for offenses on which he previously had been waived—two counts of armed robbery and one count of

armed burglary involving “[b]reaking into a home and confronting people and taking their property at gunpoint.”

Granting waiver, the trial court stated:

[T]he court accepts the facts in the petition for the waiver hearing as the findings of this court, and the court further finds that because of the age of the juvenile that there are no suitable facilities to take care of him in the juvenile system, and the court is just touching on the various sentences here, that the crimes that have been committed have been crimes of aggressiveness and violence, burglary, and the carrying of the – and possession of the guns and the court is of the opinion that these are very, very serious charges and for those reasons, together with all of the other facts incorporated in paragraphs 1 through paragraphs 18 inclusive, the courts [sic] accepts those facts as the findings of this court.

The first ten paragraphs of the petition for waiver of jurisdiction, incorporated as the trial court's findings, correspond to much of Wichman's testimony about Frankie G.'s history and circumstances. They state that Frankie G.: (1) will be eighteen on December 25, 1995; (2) has prior referrals to the juvenile system on “at least” eight delinquency matters; (3) has previous delinquency adjudications for receiving stolen property, burglary, operating auto without owner's consent, retail theft, and possession of short-barreled shotgun; (4) has been on probation; (5) has been placed in detention and residential treatment; (6) has been committed to a secure juvenile correctional facility; (7) is not mentally ill; (8) is not developmentally disabled; (9) has motives and attitudes similar to those of defendants in criminal court; and (10) is physically and mentally mature.

The next six paragraphs of the waiver petition relate to the prosecutive merit, violent and premeditated nature of the alleged armed robberies, and the inadequacy of time and resources remaining in the juvenile justice system to address Frankie G.'s needs and protect the public. The last two

paragraphs of the waiver petition note the previous waiver and the resulting case pending in the adult criminal court.

On appeal, Frankie G. first contends that a new waiver hearing is required because the trial court failed to find prosecutive merit, as required by § 48.18(4), STATS., prior to determining waiver. Section 48.18(4), STATS., provides: “The judge shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive its jurisdiction.” Here, it is undisputed that the prosecutor neglected to request, and the trial court neglected to find prosecutive merit prior to taking testimony. Immediately following the testimony, however, the prosecutor brought this inadvertent omission to the trial court's attention, and the trial court then found prosecutive merit. The defense never objected to proceeding with the testimony, and never challenged or objected to the finding of prosecutive merit. Clearly, Frankie G. waived the issue he now attempts to raise.

Frankie G. next argues that the trial court failed to consider all the criteria under § 48.18(5), and failed to set forth specific findings as required by *In re C.W.*, 142 Wis.2d 763, 419 N.W.2d 327 (Ct. App. 1987). Section 48.18(5), STATS., requires that “the judge, after taking relevant testimony ... and considering other relevant evidence, shall base its decision whether to waive jurisdiction” on the criteria specified in the statute. Failure to consider all the statutory waiver criteria and failure to make findings as to these criteria is an erroneous exercise of discretion. *In re C.W.*, 142 Wis.2d 763, 768, 419 N.W.2d 327, 329 (Ct. App. 1987). Certainly there can be cases in which some of the criteria have no relevance. Accordingly, there may be cases in which no testimony is offered on some of the criteria. Logically, therefore, the mandate of § 48.18(5) does not mean that a judge “shall” base the waiver decision on criteria that were not addressed by testimony. As this court previously concluded in *In re C.W.*, however, the mandate does require explicit findings reflecting consideration of all required criteria on which evidence was offered:

[W]here evidence is properly before the juvenile court with respect to each of the criteria set forth in sec. 48.18(5), Stats., the court is required under sec. 48.18(6),³ to consider

³ Section 48.18(6), STATS., provides:

each of these criteria and set forth in the record specific findings with respect to the criteria.

Id. at 769, 419 N.W.2d at 330.

Here, Ms. Wichman testified regarding Frankie G.'s personality and prior record, lack of mental illness or developmental disability, previous waiver, prior treatment history and apparent potential for responding to future treatment, the seriousness of the offense, the availability of facilities and services for treatment of Frankie G. within the juvenile system, and protection of the public. The trial court's comments, in combination with the findings drawn from the incorporated paragraphs of the waiver petition, corresponded to all the criteria Wichman addressed. The defense did not object to the trial court's method of incorporating those findings, and did not request the trial court to provide any further specification of its findings.

As we recently reiterated:

“Waiver of jurisdiction under sec. 48.18, Stats., is within the sound discretion of the juvenile court.”
We will uphold a discretionary determination if the

(..continued)

After considering the criteria under sub. (5), the judge shall state his or her finding with respect to the criteria on the record, 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 and referring the matter to the district attorney for appropriate criminal proceedings in the circuit court, and the circuit court thereafter has exclusive jurisdiction. In the absence of evidence to the contrary, the judge shall presume that it would be contrary to the best interests of the child and of the public to hear the case if the child is alleged to have violated any state criminal law on or after the child's 16th birthday and if the court has waived its jurisdiction over the child for a previous violation.

record reflects that the juvenile court exercised its discretion and there was a reasonable basis for its decision.

In re B.B., 166 Wis.2d 202, 207, 479 N.W.2d 205, 206-207 (Ct. App. 1991) (citation omitted). Although it would have been preferable for the trial court to articulate its findings rather than incorporate the paragraphs from the waiver petition, this court concludes that there was a reasonable basis for the trial court's waiver decision, and that the trial court satisfied the requirements of § 48.18(6), STATS., and *In re C.W.*

By the Court. – Order affirmed.

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