COURT OF APPEALS
DECISION
DATED AND RELEASED

December 13, 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. 95-2198-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID C. HERTZBERG,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

SNYDER, J. David C. Hertzberg appeals a juvenile court order waiving him into criminal court. He contends that the waiver hearing was invalid because it was held without his presence and without the presence of counsel. As a second basis to contest the validity of the waiver, David contends that the district attorney failed to present testimony as required by § 48.18(5), STATS. Because we conclude that the juvenile waiver decision was proper, we affirm.

On July 12, 1991, a delinquency petition was filed against David approximately two and one-half weeks before his eighteenth birthday.[1] The petition charged David with theft and attempted theft, both charges stemming from an incident in which David, while accompanied by his father, Charles Hertzberg, took personal papers, a map and a garage door opener from a locked, parked car and attempted to enter a second vehicle.[2]

Concurrent to the filing of the delinquency petition, the State filed a waiver petition. *See* § 48.18, STATS. On July 17, 1991, the juvenile court sent David and Charles a summons for the initial hearing scheduled for August 9, 1991. A copy of this summons was also sent to David's mother, Diane Hertzberg, in Michigan.

On July 29, 1991, the juvenile court received a letter from Diane which stated that David was in her custody in Michigan and would be unable to attend the August 9, 1991, court hearing.[3] Diane suggested that perhaps David's father could attend and asked the court to contact her immediately if David needed a public defender.[4]

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[1] David's date of birth is August 6, 1973.

[2] Charles Hertzberg was charged in criminal court for his part in the crime.

[3] At the time David and his father were arrested, David was placed temporarily in shelter care because Charles was jailed. The social worker who spoke to David at that time told him "how important it was that he follow the appointment that would be set with me, that he stay out of trouble and, you know, follow the rules of the father." Two days before David's intake interview with the social worker, Charles reported that he came home from work one day and David was gone. Charles received a phone call later that evening in which David stated that he had decided to go to Michigan to visit his mother.

[4] In bold type at the top of the summons it stated:

David did not make an appearance at the August 9, 1991, hearing. Based upon the letter the court had received from Diane and its belief that Diane did not "understand the circumstances," the juvenile court rescheduled the initial appearance for August 23, 1991. Notice of the rescheduled hearing was sent to David, Diane and Charles. After David and his parents failed to appear,[5] the juvenile court issued a capias and rescheduled the matter for September 12, 1991.[6] Since David was now eighteen years old, the court directed that the notice of this hearing be sent directly to him.

There was no appearance at the waiver hearing by David, Diane or Charles, nor did counsel appear on David's behalf. The State argued its position for granting the waiver petition and stated, "[I]t's quite clear that David nor his mother had any intention of ever coming back to the State of Wisconsin, particularly since these charges were filed." The social worker also made a

(..continued)

IT IS YOUR RESPONSIBILITY TO CONTACT THE PUBLIC DEFENDERS OFFICE IMMEDIATELY UPON RECEIPT OF THIS NOTICE TO HAVE AN ATTORNEY REPRESENT YOU AT THIS HEARING.

[5] At this hearing, the assistant district attorney reported that she too had received a letter from Diane approximately three weeks prior to the August 9 hearing. In that letter, Diane requested that the district attorney hire an attorney for David and inform the court that Diane and David did not have any intention of appearing for these proceedings because David was in Michigan. The assistant district attorney's reply informed Diane that the district attorney's office did not have any authority to comply with either of these requests. She did provide Diane with the name, address and telephone number of the state public defender's office and the juvenile court clerk.

[6] Because David had reached his eighteenth birthday, the court had only three options under the juvenile code: (1) to dismiss the action with prejudice, (2) to enter into a consent decree or (3) waive its jurisdiction under § 48.18, STATS. *See* § 48.12(2), STATS. The court set the matter for a contested waiver hearing, concluding that under these facts, this was the only warranted option.

statement which highlighted her limited contact with David. Following this, the juvenile court determined that a waiver was in the best interests of David and the community, and ordered the juvenile waiver.

A criminal complaint was issued on October 31, 1991, naming David and Charles as codefendants. On November 1, 1991, the court issued a summons, requiring David's appearance on December 2, 1991. When he failed to appear, a warrant was issued for his arrest. David was arrested on July 11, 1994. After his arrest, he filed motions to dismiss due to an invalid waiver hearing. Following the denial of both motions, David sought permissive leave to appeal the juvenile court's waiver order. Leave to appeal was granted.

David contends that the waiver hearing was invalid because (1) he was not present, (2) he was not represented by counsel and (3) the district attorney failed to present testimony. We take up each argument in turn.

Our inquiry will focus on several sections of the juvenile code: § 48.12, STATS. (juvenile court jurisdiction); § 48.18, STATS. (appropriate procedures for a juvenile waiver hearing); and § 48.27(1), STATS. (procedures for issuing a notice or summons).

Statutory construction involves a question of law, and a reviewing court owes no deference to the trial court's determination. ***State v. Grayson,*** 165 Wis.2d 557, 563, 478 N.W.2d 390, 393 (Ct. App. 1991), *aff'd*, 172 Wis.2d 156, 493 N.W.2d 23 (1992). The construction of the juvenile code and its application to the facts are questions of law. *See* ***Green County Dep't of Human Servs. v. H.N.,*** 162 Wis.2d 635, 645, 469 N.W.2d 845, 848 (1991). When multiple statutes are contained in the same chapter and assist in implementing the chapter's goals and policy, the statutes should be read *in pari materia* and harmonized if possible. ***State v. Amato,*** 126 Wis.2d 212, 216, 376 N.W.2d 75, 77 (Ct. App. 1985).

David first argues that the waiver hearing was invalid because he was not present. David had been charged as a delinquent prior to his eighteenth birthday and was under the jurisdiction of the juvenile court. *See* § 48.12(1), STATS. David and his parents were notified of his initial appearance, as required by § 48.27(1), STATS., which reads in relevant part:

> After a citation is issued or a petition has been filed relating to facts concerning a situation specified under ss. 48.12, 48.125 and 48.13, unless the parties under sub. (3) voluntarily appear, the court may issue a summons requiring the person who has legal custody of the child to appear personally, and, if the court so orders, to bring the child before the court at a time and place stated.

The initial summons that was sent to David and his parents also stated, "In the case of your failure to appear as summoned herein ... the court may proceed to hear testimony in the support of the allegations in the petition." The second notice, again sent to David and both parents, included the statement, "Your failure to appear will result in the issuance of a Capias for your arrest." The third notification, sent to David as an adult, stated that a waiver hearing was scheduled and "[y]our presence is required on the above date and time."

Section 48.18, STATS., prescribes the procedure to be followed for a juvenile waiver hearing. This section does not require that the juvenile be present. When a statute designates the form of conduct, describes its performance and operation, and designates the persons and things to which it refers, there is an inference that all omissions should be understood as exclusions. ***Gottlieb v. City of Milwaukee,*** 90 Wis.2d 86, 95, 279 N.W.2d 479, 483 (Ct. App. 1979).

The Hertzberg family received repeated notification about the various court hearings scheduled. Before the first hearing, Diane stated through her correspondence to the court and the district attorney that she and David had no intention of appearing. Having failed to respond to the court notification, David cannot now claim error because the hearing was held without his presence.

David next argues that the waiver was invalid because he was not represented by counsel. Section 48.18(3)(a), STATS., states in relevant part: "The *child* shall be represented by counsel at the waiver hearing." (Emphasis added.)

There are a number of well-settled rules which must guide our analysis of a statute. Our purpose is to ascertain and give effect to the intent of the legislature. *See* ***State v. Annala,*** 168 Wis.2d 453, 461, 484 N.W.2d 138, 141 (1992). If the meaning of a statute is clear and unambiguous, it is improper to employ extrinsic aids to determine its meaning. ***Id.***

In ***Annala***, the supreme court noted an "unambiguous" distinction between "child" and "adult" in the juvenile code. *See* ***id.*** at 462-63, 484 N.W.2d at 142. According to the court, the plain language of § 48.12(1), STATS., unambiguously applies only to allegations against a *child,* not allegations against an adult. ***Annala***, 168 Wis.2d at 462, 484 N.W.2d at 142. The court also recognized that the juvenile code was enacted to address the unique needs of *children*. ***Id.*** at 462, 484 N.W.2d at 141-42.

Within the statutory definition of the juvenile code, a "child" is a person who is less than eighteen years of age. ***Id.*** at 463, 484 N.W.2d at 142. Section 48.18(3), STATS., requires that the *child* shall be represented by counsel at a juvenile waiver hearing. David was no longer a child. He had passed his eighteenth birthday before the first hearing. David had been given three opportunities to appear as a juvenile and deal with the delinquency petition. By ignoring repeated summons and court dates, David ignored every attempt by the juvenile court to handle the matter. We conclude that David was no longer

afforded the right of this juvenile protection. By his disregard of the summons from the juvenile court, coupled with the fact that he had turned eighteen, David effectively waived his right to counsel at the juvenile waiver hearing.[7]

David also contends that the waiver was invalid because § 48.18, STATS., requires that the district attorney shall present relevant testimony at a waiver hearing. The requirement of relevant testimony is found in § 48.18(5). It 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 ....

This section of the statute requires the district attorney to present relevant testimony to assist the court in making the juvenile waiver determination. Because there was no opposing counsel and David himself did not appear, the court determined that a presentation of testimony under oath was unnecessary.[8]

The court was presented with relevant information at the hearing. The case was summarized for the record, and the court heard a statement from the social worker assigned to David's case concerning her lack of contact with David. The assistant district attorney presented information pertaining to the

[7] We note that § 48.23(1)(a), STATS., does not allow a child to waive the right to counsel at a juvenile waiver hearing. However, this was not applicable to David as he had become an adult.

[8] The assistant district attorney had Officer Hoder of the Brookfield police department present to testify concerning the evidence in support of the delinquent acts, but he did not take the stand.

notification that David and his parents had been given of all three juvenile hearings.

The assistant district attorney informed the court that "the reason David did come to Milwaukee for a short time is that he was in ... similar trouble in a similar situation in Michigan and did ... flee Michigan to come to Wisconsin." In addition, the assistant district attorney stated, "[Because] this juvenile ... has intentionally fled the State of Wisconsin to avoid further proceedings, the [S]tate does not believe that a consent decree would be a viable or appropriate option." The State then requested that the court, on its own motion, waive its jurisdiction on the two-count delinquency petition. *See* § 48.12(2), STATS.

We conclude that any requirement of formal testimony under oath was waived by David's failure to appear, alone or through counsel. It is evident that the juvenile court utilized its only viable option when it waived David into adult court. If there was any error in the process or proceedings, it was brought about by David's total disregard of the juvenile system. "In order to discourage criminal conduct by juvenile offenders, the message that we must convey is that there will be punishment for criminal behavior." ***Annala***, 168 Wis.2d at 472, 484 N.W.2d at 146.

By the Court. – Order affirmed.

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