COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

NOTICE

No. 96-1421

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

MAI X.,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

VERGERONT, J.[1] Mai X., a juvenile, appeals from an order waiving juvenile jurisdiction over her. She contends that the trial court erroneously exercised its discretion in deciding to waive juvenile court jurisdiction and that her trial counsel at the waiver hearing was ineffective. We conclude that the trial court properly exercised its jurisdiction and that trial counsel was not ineffective. We therefore affirm.

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

BACKGROUND

Mai's date of birth is August 15, 1978. The delinquency petition, filed on December 20, 1995, charged her with two counts of party to the crime of operating a motor vehicle without owner's consent, contrary to §§ 939.05 and 943.23(3), STATS.[2] The first count alleged that on November 17, 1995, Officer Woletz of the Onalaska Police Department observed a van run a stop sign, at the same time that another driver flagged Woletz down stating that the van had almost hit his car. The driver of the van was thirteen years old and did not have a driver's license. Officer Woletz was informed from police dispatch that the vehicle had been stolen from the City of La Crosse sometime between November 11 and 12, 1995. Woletz learned from talking to van occupants that the driver and a friend in the twin cities (St. Paul and Minneapolis) had been driving around St. Paul picking up various friends, then driving to Eau Claire, and were now going to La Crosse. Officer Woletz realized that one of the van occupants was Mai and that she was a runaway from Onalaska who had been missing since August 1995. Woletz also discovered that there was a conversation in the van before it was stopped about the van being stolen, and that all the occupants knew prior to being stopped that the van was stolen.

With respect to the second count, the petition alleged that on November 1, 1995, Officer Knopps of the Hudson Police Department was dispatched to a disabled vehicle on an exit ramp off I-94. The vehicle was reported stolen from Winona County, Minnesota. Mai was one of the six passengers in the car. She indicated in a written statement that the vehicle she was in had been stolen on Monday night in Winona, Minnesota, and that they were on their way to the twin cities.

At the hearing on the State's petition for waiver to adult court, the State presented testimony from Wayde Anger, intake worker for La Crosse County, who had met with Mai on two occasions prior to the waiver hearing. He first spoke with her on November 18, 1995, after she was initially detained. At that time he determined that she would be a suitable candidate for home detention and she was released to her parents. He tried to determine whether

[2] Party to a crime includes aiding and abetting the commission of the crime or conspiring with another to commit it. Section 939.05(2)(b) and (c), STATS.

she was willing to consider counseling and attend school. She stated she was not interested in any services. She violated home detention on November 21 and a pickup order was issued. She was detained in the shelter, put back in home detention, and ran away on December 6. She returned home approximately two to four weeks before the waiver hearing, which was held on May 8, 1996. Anger testified that it was his understanding that she returned home voluntarily because her parents were urging her to come home since she was needed at home.

Anger spoke to Mai a second time just before the waiver hearing and explained what services were available to her. She stated that she did not want any services, that she intended to go back to school and become a cosmetologist. The services he mentioned were counseling and school programs.

Mai has no prior delinquency findings and no prior referrals to the department of human services. To Anger's knowledge, she had not received any prior treatment from the juvenile system. She did not have any mental illness or developmental disability to his knowledge. She had not been in school for a year and a half. In Anger's opinion, waiver was appropriate because she had shown no interest in services or in cooperation, and had run away twice from home detention. He testified that once she turned eighteen, she could not be placed in a group home or a foster home; the only out-of-home placement for her would be in a correctional facility. Ordinarily for a first-time offender such as Mai, the department would not consider an out-of-home placement but would try to provide services while the juvenile was on home detention.

Mai's brother testified for the defense. He stated that she had been home for four weeks, that she came back by herself and was helping at home. He felt her attitude had much improved since last fall. He felt she might have told Anger that she did not want services because Anger was a stranger and it was not a custom of their culture to tell strangers about one's goals: that was considered a personal family matter. Her brother also testified that her father had had a stroke in February but Mai did not return until April and that she had not gone to school at all during the year.

According to Anger, Mai's mother told him in November of 1995 that Mai was a good girl when at home but she was truant and continued to runaway. At the waiver hearing, it was reported by Mai's attorney that Mai's mother wanted her home and that her daughter was now doing well. It was reported, through Mai's brother acting as interpreter for his mother, that Mai had sworn to her mother she would not runaway again and Mai's mother wanted her to be able to be at home to help out and did not want her waived into adult court. She did not want her to be in detention any more.[3]

At the conclusion of the hearing, the court determined that Mai should be waived into adult court. The court permitted her to sign a signature bond in the amount of $2,500 and imposed as a condition of the bond that she let her brother know where she is at all times.

After the trial court's determination, Mai moved for a court order determining that her counsel, Attorney Schnell, had been ineffective as defined in ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (1979). The grounds were that at the waiver hearing counsel failed to present evidence regarding personality and suitability of the juvenile system for Mai.

At the ***Machner*** hearing, Lewis W. Stamps, Ph.D. testified that he had conducted a clinical behavioral observation and mental status examination of Mai and administered the Minnesota Multiphasic Personality Inventory. In his opinion, the results of the examination were that Mai exhibited a behavioral pattern of submissiveness, modesty and yielding. Appropriate treatment for this behavioral pattern would include counseling and therapy. In Dr. Stamps' opinion, services available in the juvenile system, particularly a treatment regime with formal supervision, would be appropriate. In his opinion, her behavior was that of an adolescent rather than an adult, she was immature, and treatment for her in the juvenile system would be better than treatment in the adult system.

[3] Apparently after Mai returned home in April of 1996, she was picked up for the earlier violations of in-home detention and was placed in the juvenile detention facility.

Attorney Schnell also testified at the ***Machner*** hearing. She stated that she did not speak with Mai's mother prior to the waiver hearing to verify Anger's version of his conversation with her; this was the result of time constraints, not strategy. She did not speak to any experts regarding Mai's motives and attitudes because of time constraints. She did not consider asking for a continuance because she did not think the court would grant the petition waiver and because "there is a lot of pressure in the system to move cases through." Her decision not to consult an expert was not a strategic decision.

At the conclusion of the ***Machner*** hearing, the court found that Attorney Schnell's performance was not deficient, and if it were, there was no resulting prejudice to Mai.

DISCUSSION

Court's Decision on Waiver

Section 48.18(5), STATS., provides that if prosecutive merit is found, the judge shall base the decision whether to waive jurisdiction on the criteria stated in para. (a) through (d).[4] Section 48.18(6) provides that after considering

[4] 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.

the criteria under subsec. (5), the judge will state his or her finding with respect to the criteria and if the judge determines that it is established by clear and convincing evidence that it would be contrary to the best interests of the child or the public to hear the case, the judge shall enter an order waiving jurisdiction.

Waiver of jurisdiction under § 48.18, STATS., is within the discretion of the juvenile court. ***In re J.A.L.***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). The court has discretion as to the weight it affords each of the criteria under § 48.18(5). ***Id.*** We look to the record to see whether discretion was exercised, and if it has been, we look for reasons to sustain the court's decision. ***Id.*** at 961, 471 N.W.2d at 501. We will reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for its determination, or the court does not state relevant facts or reasons motivating the decision.

Mai's counsel did not object to the prosecutive merit before the trial court but on appeal argues the petition lacked prosecutive merit. The trial court found there was prosecutive merit. Because prosecutive merit is one of the factors the court must consider under § 418.18(5)(b), STATS., in determining whether to grant the State's waiver petition, we will review the trial court's determination on prosecutive merit.

(..continued)

> (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.

In order to be the basis for a finding of prosecutive merit, the petition must contain adequate and detailed information of the juvenile's alleged violation of state criminal law and have demonstrable guarantees of trustworthiness. ***In re P.A.K.***, 119 Wis.2d 871, 887, 350 N.W.2d 677, 685 (1984). Hearsay evidence may be considered if it has demonstrable guarantees of trustworthiness. ***Id.*** at 885, 350 N.W.2d at 685. Prosecutive merit involves the same standard as probable cause in the preliminary hearing stage in an adult criminal proceeding--a reasonable probability that the alleged crime has been committed and that the juvenile has probably committed it. ***Id.*** at 884, 350 N.W.2d at 684.

Mai's argument on prosecutive merit is that the petition does not allege that Mai participated in either the theft or the operation of either of the vehicles. Mai was charged with being a party to the crime of operating a motor vehicle without the owner's consent. With respect to the November 1 incident, Mai's statement indicated that she knew that the vehicle had been stolen, as did the other passengers in that vehicle; she nevertheless was riding in the vehicle. With respect to the November 17 incident, the officer reported that in talking to the passengers, which included Mai, he learned there was a conversation in the van before it was stopped about the van being stolen and that all the occupants knew prior to the van being stopped that it was stolen. Both vehicles were crossing state lines and driving between cities.

Mai does not challenge the reliability of the officers' reports upon which the petition was based. Information based on personal observations of police officers made while acting in their official capacity is ordinarily considered trustworthy. *See* ***P.A.K***, 119 Wis.2d at 888, 350 N.W.2d at 686. She also does not challenge the written statement attributed to her. We conclude the petition contains sufficiently detailed and reliable information to establish that there was probable cause to believe that Mai conspired with or aided another juvenile in operating both vehicles without the consent of the owners of the vehicles.

In applying the other § 48.18(5), STATS., waiver factors, the trial court acknowledged that there were certain factors that favored retaining jurisdiction in the trial court--Mai's lack of previous delinquency findings, lack of prior treatment in the juvenile system, and the absence of an infliction of serious bodily harm in the crimes charged. However, the court also considered

the fact that Mai ran away from home before November of 1995, was truant from school for "a year and a half, almost two years," and twice ran away from home detention. The court recognized that Mai had recently returned home, appeared to be doing well, and that this indicated a potential for her positively responding to future treatment. However, in view of the short period of time until her eighteenth birthday--less than four months--the court was doubtful that would be a sufficient time to alter Mai's behavior.

The court also considered what sanctions would be available should Mai not comply with a juvenile court order. If Mai did not comply before her eighteenth birthday, the court noted, it had certain sanctions available such as putting her in secured detention and giving her community service hours. The court heard testimony and was aware that the order for supervision could be extended for a year past Mai's eighteenth birthday, but the court also knew that after Mai's eighteenth birthday, it could not sanction her by keeping her in a detention facility if she violated her supervision order. This was an important factor to the court in view of Mai having twice run from nonsecure detention. The court did not consider that an out-of-home placement was warranted.

The court determined that Mai was leading a mature lifestyle because she had avoided school for almost two years and had lived, apparently adequately, away from home for periods of time.

Finally, the court considered the charged offenses to be serious because they were felonies that involved keeping an important possession of another away from that person for a long period of time. The court also took into account that, on both charges, Mai was with a group of juveniles acting together without regard for the safety of others.

We conclude that the trial court addressed each of the factors pertinent to waiver with sufficient specificity and there was a reasonable basis in the record for the trial court's evaluation of each of the factors. The court need not resolve all the statutory criteria against the juvenile to order waiver. *See* ***In re C.W.***, 142 Wis.2d 763, 768-69, 419 N.W.2d 327, 329-30 (Ct. App. 1987). As we have noted, the weight to give each factor is within the trial court's discretion. ***In re J.A.L.***, 162 Wis.2d at 960, 471 N.W.2d at 501. It is not an

erroneous exercise of discretion for the court to give heavy weight to the seriousness of the offense and the short period of time left in the juvenile justice system. *See* ***In re G.B.K.***, 126 Wis.2d 253, 260, 376 N.W.2d 385, 389 (Ct. App. 1985).

Mai points to the trial court's statement that her pattern of behavior was for "7-1/2 years," and argues that it was a finding of fact that has no basis in the record. We are convinced that is either a misstatement by the trial court or a typographical error. Elsewhere in the trial court's lengthy decision explaining its reasoning, the court made clear that it understood that the pattern of being truant had being going on for "a year and a half, almost two years."

Mai argues that it was inappropriate for the court to consider the sanctions available for failure to comply with a juvenile court order. We do not agree. Given the fact that Mai had twice run from nonsecure detention and had demonstrated a change in attitude and behavior for only a few weeks, the court could reasonably conclude that, once the pressure of the waiver hearing was over, Mai might not comply with the supervision order.

Mai also asserts that the record is inadequate to support the trial court's conclusion that she was living a mature lifestyle. While another decision maker might have evaluated that factor differently based on this record, there was sufficient basis in the record to support the trial court's conclusion, and we cannot say the trial court's evaluation of the record was unreasonable. The same is true with respect to the seriousness of the offense, which Mai asserts was overstated by the trial court. The trial court recognized that the offenses did not involve bodily harm but considered them to be "aggressive and willful acts" because they were felonies, occurred on two occasions within three weeks, and demonstrated a lack of concern for the rights and safety of others. This is a reasonable conclusion based on the record.

Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, Mai must show that her attorney's performance was deficient and that the deficient performance prejudiced her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. ***Id.*** at 689. In addition, Mai must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694; ***State v. Sanchez***, ___ Wis.2d ___, 548 N.W.2d 69, 76 (1996). Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's findings of fact will not be disturbed unless clearly erroneous. ***Id.*** at 634, 369 N.W.2d at 714. However, the determination of whether counsel's performance was deficient and whether the client was prejudiced are questions of law, which we review de novo. ***Id.***

In denying the claim of ineffective assistance of counsel, the trial court stated that both through Anger and Mai's brother, there was sufficient evidence at the waiver hearing about Mai's attitudes and motives. The court noted that its primary reasons for deciding on waiver were the seriousness of the charges and the inability of the juvenile system to address the situation within the short period of time left. The court stated that Dr. Stamps' testimony concerning Mai benefiting from counseling did not "add anything new to the mix," because the fact remained that the time left to supervise her in the juvenile system, including the one-year extension of the order, was not sufficient to address her behavior. The court concluded that there was no deficient performance and no prejudice.

We do not decide whether there was deficient performance because we conclude there was no prejudice. As the trial court pointed out, Dr. Stamps' testimony on Mai's need for counseling and the potential benefit of counseling does not respond to the court's concern with the limited amount of time remaining for Mai in the juvenile system and the limited sanctions available should she violate a supervision order after her eighteenth birthday. Nor does his testimony address the nature of the offenses, which the court considered serious. As we have already held, the trial court did not erroneously exercise its discretion in determining that Mai should be waived to adult court.

Mai has not met her burden of demonstrating that there is a reasonable possibility that the result would have been different had Dr. Stamps' testimony been presented at the waiver hearing.

By the Court.—Order affirmed.

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