COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 6, 1996

No. 96-1940

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

In the Matter of George D.M.,
A Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

GEORGE D.M.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

BROWN, J. George D.M. appeals from an order waiving him from juvenile court to adult court claiming that the juvenile court's decision is without a reasonable basis and does not reflect his best interests. In particular, he describes the racist graffiti which he affixed to the outside of a church, many of whose members are presumably African-American, as a

"juvenile prank" rather than a blatant criminal act. He questions the necessity for waiver. We agree with the State, however, that the offense is serious and has a significant impact upon the community. As well, George's history of delinquent activity augers for a conclusion that the services so far provided to him have not and will not resolve his antisocial activity. We affirm.

The incident underlying the petition took place on or about October 26, 1995, when George was seventeen. The waiver hearing took place on May 21, 1996, one month before his eighteenth birthday. George had been involved in the juvenile justice system since at least 1993, and he has had a constant and continuing record of offenses since. These offenses were battery, retail theft, carrying a concealed weapon, truancy, three instances of burglary, hitting a teacher at his high school and another burglary and battery. He has a history of being unable to control his anger and has problems dealing with his self-worth. He had been expelled from school. He was not mentally ill or developmentally disabled.

Against this background came the charge that was focused upon in the petition. The petition charged that he admitted spray painting a "black church on Hine Avenue, next to Butler Middle School." He thought it would be "funny" to spray paint racial slurs on the church as a prank for Halloween and personally spray painted graffiti which included "KKK" several times, "Nigger" and "Devil's Night." He knew that this was a "black church" and singled it out for that reason. Other racial slurs spray painted on the building,

apparently by George's accomplice, included "Jigs go home," "Die, nigger, die" and "Burn in hell coons."

In deciding for waiver, the juvenile court considered George's significant juvenile record, his being unable to control his anger and his problems in dealing with his self-worth. The juvenile court noted that George had two separate placements at the Child and Adolescent Treatment Center. The juvenile court also considered that George had been arrested for disorderly conduct less than two weeks prior to the waiver hearing, which charge was also waived to adult court because he had reached his seventeenth birthday.

The juvenile court determined that despite the juvenile services available to him, George continued to be involved in criminal activities. The court also noted that his pattern of living, including his residing in a very crowded apartment, probably led to high frustration levels. The court also concluded that the decision to spray paint the black church was not a spur of the moment decision that might signify a badly thought out prank. Rather, it was premeditated; George "knew the race of the people that went to the particular church."

The juvenile court concluded that George had failed to learn from his past experiences to understand the consequences of his actions upon others. The spray painting act was a significant crime because it had such a strong impact in the community. The court reasoned that although the offense was technically a property crime, it was clearly directed against the persons who attend the church, and thus affected not just the church but its membership and

the community in general. The juvenile court thought that George needed motivation to change his behavior and believed that waiver to the adult system might alert George of the necessity to undertake the proper motivation. The juvenile court also opined that the services which still could be made available in the juvenile system were minimal at best, considering George's age and his past failures to gain from juvenile counseling. For all of these reasons, the court granted the waiver.

George claims that the juvenile court erred in its findings on several of the waiver criteria. For example, he defines his action as a "signature juvenile prank." He claims that he is emotionally immature, that he was a follower of his accomplice in this instance and that there is a lack of any evidence that his actions are an expression of his own feelings as tilting toward the view that this was nothing more than a juvenile prank.

The word "prank" can have many connotations. But the term "juvenile prank" has a certain connotation. In this court's opinion, it is a mildly mischievous act that bears more the mark of immaturity than one of intention. Here, the juvenile court determined that George singled out the church because of race and spray painted racial slurs. It was not the product of a spur of the moment decision that exemplifies so many pranks of young people but was rather something well thought out in advance. No one will ever know for sure whether George really believed in the epithets he was spray painting unless he admits to those feelings. The best the juvenile court can go on is the facts at hand. Certainly, an inference can be drawn that George's actions were

purposeful and with intent to announce his hatred of African-Americans. Certainly, it is as reasonable to infer this as to infer that he did not really mean it. The juvenile court had the duty and responsibility to decide which inference to draw. The juvenile court did its job and there is no misuse of discretion here.

George also argues that his juvenile history only lists two delinquencies, not six, and therefore, the juvenile court's finding that his delinquency activity "continues to go on" ignores the fact that juvenile court intervention prevented any delinquency activity for nearly two years until this incident. Here, George is playing fast and loose with the criteria that a judge may consider in determining waiver. The juvenile court may consider the whole of a juvenile's record; it is not limited to considering those offenses which resulted in a finding of delinquency. Section 48.18(5), STATS. *See also* ***J.A.L. v. State***, 162 Wis.2d 940, 973, 471 N.W.2d 493, 506-07 (1991). The fact of the matter is that George was in continuous trouble from 1993 on, and no lack of an official finding of delinquency can deny that fact. The judge duly noted and considered George's past actions.[1]

Apart from complaining about the factfinding made by the juvenile court, George also takes issue with the juvenile court's conclusion that his treatment needs could best be met in the adult court system. He faults the

[1] George also argues that the trial court erred in finding that he was not mentally ill. However, we determine that this finding is not clearly erroneous. He argues that his mental condition cannot serve as a basis for waiver to adult court. But nowhere in the juvenile court's decision is there an indication that George's lack of mental illness is a reason *to* waive. Besides, while mental illness is something a juvenile court must consider in determining whether to waive, the finding that a juvenile is mentally ill does not mean that there cannot be a waiver. *See* ***J.A.L. v. State,*** 162 Wis.2d 940, 968-70, 471 N.W.2d 493, 504-05 (1991).

juvenile court for not making "findings as to what services or treatment would be available" or on what basis it believed that a longer term of supervision other than one year was necessary. He objects to being "thrown to the wolves" in the adult system rather than being retained in the "safer juvenile system" because even the juvenile court acknowledged his emotional immaturity. He wonders if it is in his best interests to subject him to the dangers inherent in the adult system after publication of his "hate crime" is made known, presumably to other inmates in the adult system. Finally, George points out that a social worker advised the court that the juvenile court would be the best place for him.

We will not belabor the issue. The point to be made here is that for three years, from 1993 to 1996, the juvenile system has been unable to stem the tide of George's behavior in acting out against society. Since he was on the verge of being eighteen years old and since he faced adult sanctions for a separate offense anyway, it was within the juvenile court's discretion to determine that the adult system would give authorities the capability of long-term supervision over George in the hope that his antisocial behavior will finally be brought under control. That is what the juvenile court determined and the record supports the decision.

By the Court. – Order affirmed.

This case will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.