COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2645

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 4

IN THE INTEREST OF KENTAE R.J.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENTAE R. J.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Reversed and cause remanded with directions.*

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. Kentae R.J. appeals from an order extending his supervision with the Division of Youth Services for one year and continuing his placement at Ethan Allen School for Boys. Kentae argues that his due process rights were violated because the petition for extension failed to provide adequate notice, a court report was not filed, and

the court did not give his counsel any opportunity to argue. Kentae also argues that the order extending his disposition was improper because the court failed to impose the least restrictive alternative and failed to make the required findings. We conclude that Kentae has waived his due process objections because he failed to timely object to any of the alleged deficiencies at the extension hearing. We also conclude that the court did not erroneously exercise its discretion in extending Kentae's disposition for one year. We do conclude, however, that the order did not include the findings required by statute. We therefore reverse and remand so that the trial court can make findings consistent with the requirements of §§ 48.355 and 48.365, STATS.

BACKGROUND

A delinquency petition was filed against Kentae on November 27, 1995, alleging that he committed a battery at his high school. On January 22, 1996, Kentae pleaded no contest, and the court adjudicated him delinquent. At the February 29, 1996 dispositional hearing, the social worker assigned to the case recommended that Kentae participate in several community-based programs. The State disagreed with the social worker's recommendation, requesting placement at Ethan Allen School for Boys (EAS) instead. The court placed Kentae with the Division of Youth Services for ninety days, designating EAS as the reception center.

On April 10, 1996, the State filed a petition for a one-year extension of the dispositional order. At the May 14, 1996 extension hearing, Angela Hodges, a social worker at EAS, was the only person to testify. She stated that upon arriving at EAS, Kentae was immediately placed in an Alcohol and Other Drug Abuse (AODA) program, where he did pretty well but pushed a lot of limits. Kentae also received confinement hours due to rule violations. Hodges supported an extension so that Kentae could participate in further treatment. She believed that he could benefit from psychotherapy

dealing with his aggressive behaviors, his family situation, family criminality and family dynamics. She also felt that he would benefit from a five-week anger replacement training program and a survival group that deals with issues of abuse, self-esteem, self-identity and victim impact. She believed that Kentae could benefit from six more months at EAS, or in the alternative, three additional months at EAS and another three months of aftercare supervision in the community.

The court extended Kentae's dispositional order, stating:

> I'm going to extend supervision for a year. But, it's with the hope and the understanding and the strong recommendation to Youth Corrections that they do transition you back into the community, get you into that SPRITE class at the end of May and transition you back.
>
> I am satisfied with what they've reported that there are services that you do need and you will benefit from.
>
> It was my intention and is my intention that the 90 days is the period of time that essentially you're physically there. I was not as satisfied when you were in court before in terms of whether after that 90 days these aftercare services would be needed. I think they are needed. I think you will benefit from it.

Kentae appeals from the court's order.

DUE PROCESS

Kentae argues that he was deprived of his due process right to a fair hearing. First, he argues that the State's petition did not provide him with sufficient notice of the specific issues he needed to address at the extension hearing. But Kentae failed to object to the sufficiency of the petition before the trial court, and we generally will not review an issue raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). We have applied the waiver rule to delinquency proceedings. *See* ***In re Shawn B.N.***, 173 Wis.2d 343, 360, 497 N.W.2d 141, 147 (Ct. App. 1992). The due process right of notice is also subject to waiver. *See* ***D.H.***

Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972); *cf.* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis.2d 600, 605-06, 288 N.W.2d 852, 854 (1980); ***State ex rel. Weisskopf v. Byrne Bros. Co.***, 185 Wis. 237, 238-39, 201 N.W. 372, 372 (1924). Because Kentae made no objection to the sufficiency of the notice, he acquiesced to any inadequacy that the petition may have contained.

Kentae argues that a due process notice problem "raises a question of such fundamental significance that it should not be lost due to a failure to object." Kentae cites ***In re B.J.N.***, 162 Wis.2d 635, 469 N.W.2d 845 (1991), in support of this proposition. In ***B.J.N.***, the court concluded that "a court's loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived," and therefore a failure to observe the mandatory time provisions of Chapter 48, STATS., will cause a court to lose its competence. ***B.J.N.***, 162 Wis.2d at 657, 469 N.W.2d at 854.

In ***B.J.N.***, the issue was not whether time limits were of "such fundamental significance" that they could not be waived due to failure to object. Rather, the issue was whether the time limit within which an extension hearing must be conducted under § 48.365(6), STATS., could be waived. ***B.J.N.*** does not address the waiver issues present in this case, and therefore it is not relevant to our discussion.

Kentae argues that a letter he wrote to the trial court on April 18, 1996 sufficiently raised his objection to the sufficiency of the petition. His letter stated:

> Dear Judge Northrup,
>
> Today I received some mail from Madison that said I was going to get my time extended another year. I don't think that[']s fair at all. My J.O.R.P. pe[r]son said that I requested more supervision and I did not request that. I said I think I could benefit from some groups after I could get out of here. I don't know why you want to extend my time[;] I am doing my best in Ethan Allen. I haven[']t been to security and I'm doing good in all my classes. I think my J.O.R.P. person misunderstood me at court and []now I'm going to get another year up here for nothing. I was told

> that I was going to get out May 29th and if I wanted more help I had to take care of that on my own. I don't deserve to get extended another year just because I said that I could ben[e]fit from some groups.
>
> P.S. could you please write me back as soon as possible and expl[ai]n to me what exactly do you mean.
>
> Kentae J[.]

We do not believe that this letter objects to the sufficiency of the notice. Rather, Kentae writes that he does not think an extension is fair and disputes the veracity of some of the information contained in the petition. Because the letter did not put the court on notice that Kentae objected to the sufficiency of the petition, the letter is not sufficient to preserve this issue for appeal. "The purpose of the rule requiring that the grounds for objection be stated on the record is to afford the opposing party and the trial court an opportunity to correct the error and to afford appellate review of the grounds for the objection." ***Air Wisconsin, Inc. v. North Cent. Airlines, Inc.***, 98 Wis.2d 301, 311, 296 N.W.2d 749, 753 (1980). Kentae's letter did not put the court on notice that he was objecting to the adequacy of the petition; therefore, the letter was inadequate.

Kentae next argues that a court report was not filed as required by § 48.365(2g)(a), STATS. The State claims that Kentae has waived this issue or, in the alternative, that a report it filed with the court at the start of the extension hearing qualified as a court report under § 48.365(2g)(a). Again, we conclude that Kentae has waived this issue by failing to raise a timely objection.

Kentae contends that he objected to the absence of a court report at the hearing. After the court pronounced its decision, which comprised of more than two full transcript pages, Kentae's counsel stated: "Your Honor, for the record, I would like to object to your ruling. I don't think the hearing has followed the statutory requirements that the person or agency shall file with the Court a written report…."

The court overruled this objection as untimely, and we agree. "An objection is not timely if it is made after the time when the error could have been corrected." ***State v. Davis***, 66 Wis.2d 636, 658, 225 N.W.2d 505, 515 (1975). Furthermore, a party cannot wait until after receiving an unfavorable ruling to make an objection that could have been raised during the course of the proceeding. *See* ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 458, 523 N.W.2d 274, 281 (Ct. App. 1994); ***Collier v. State***, 30 Wis.2d 101, 105, 140 N.W.2d 252, 254 (1966). Kentae waited until after the court's ruling to object to the absence of a court report, and therefore his objection was too late.

Kentae argues that § 48.365(2g)(a), STATS., requires only that the court report be filed "at the hearing," and therefore he had no grounds to object to the absence of a report prior to the hearing. At issue, however, is not whether Kentae needed to object to the absence of a court report before the hearing, but whether he could wait until after the court had rendered its decision to make his objection. Kentae could have inquired as to the availability of a court report at the onset of the hearing, allowing the court to address the situation before hearing testimony and rendering its decision. Yet Kentae waited to make his objection until after the social worker testified and the court decided to extend the dispositional order. It would have been contrary to the promotion of judicial economy for the trial court to sustain Kentae's objection after taking the time to hear testimony and make its decision when Kentae could have objected earlier.

Kentae argues that the court issued its ruling after the testimony of the only witness, and therefore he was deprived of any realistic timely opportunity to object to the absence of a court report. The record belies this claim. The transcript for the extension hearing is twenty-five pages long. Kentae did not attempt to object to the absence of a court report until the twentieth page, after the court had already rendered its decision. Kentae had ample opportunity to enter a timely objection, yet failed to do so.

Finally, Kentae argues that the trial court erred by not allowing his counsel to make any argument. He contends that he had a right to argue because § 48.365(2m)(a), STATS., provides that "[a]ny party may present evidence" at the extension hearing and because ***In re B.S.***, 162 Wis.2d 378, 401-02, 469 N.W.2d 860, 869-70 (Ct. App. 1991), held that a child is entitled to present witnesses and cross-examine adverse witnesses at juvenile sanctions hearings. But Kentae did cross-examine the one witness who testified and declined the opportunity to testify on his own behalf.

Kentae argues that he had a right to argue to the trial court independent of his right to testify and cross-examine witnesses. Without deciding the merits of whether Kentae indeed had a right to argue before the court, we conclude that he has waived the issue by not raising it before the trial court. After the social worker finished testifying, the trial court asked Kentae, "Is there anything in addition that you wanted to add or say?" Kentae indicated that he did not, and his counsel did not add or argue anything at that time. The court then extended Kentae's dispositional order for one year.

It was the duty of Kentae's counsel to act as his advocate at this hearing. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." SCR Chapter 20 Preamble (Law. Co-op. 1996). When the court asked Kentae if he had anything to add, Kentae's counsel had the opportunity to make, or attempt to make, any argument regarding Kentae's views on the State's petition. Yet counsel never attempted to make any argument regarding the State's proposed extension. Because Kentae's counsel did not assert her client's position at the hearing, she waived the opportunity to argue on appeal that she had the right to offer such argument before the trial court.

LEAST RESTRICTIVE ALTERNATIVE

Kentae argues that the court's one-year extension was not the least restrictive alternative it could have imposed, contrary to the requirements of § 48.355(1), STATS. This section provides in relevant part:

> In any order under s. 48.34 or 48.345 the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the child's well-being which are the least restrictive of the rights of the parent or child and which assure the care, treatment or rehabilitation of the child and the family, consistent with the protection of the public.

Kentae bases his argument primarily on three factors. First, he notes that at his original dispositional hearing, the court only ordered a ninety-day placement because it did not believe a year's placement in corrections was appropriate or necessary. Second, Kentae points out that during the original dispositional hearing, the court indicated that if he did not ask for an extension, he would be off supervision in ninety days. Third, Kentae asserts that the social worker who testified at the extension hearing suggested that he could benefit from approximately six more months in the institution, or in the alternative three months at EAS and an additional three months of aftercare supervision, and therefore two less restrictive alternatives were available.

The decision to extend a dispositional order is within the discretion of the trial court. ***In re R.E.H.***, 101 Wis.2d 647, 653, 305 N.W.2d 162, 166 (Ct. App. 1981). In reviewing the court's exercise of discretion, our task is generally limited to determining whether the decision reasonably derives from an application of the relevant legal standards to the facts of record. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Upon our review of the record, we conclude that the court properly exercised its discretion. First, under § 48.355(1), STATS., it is not the sole objective of the court to decide on a disposition that is the least restrictive of the rights of the child. The court also must also choose a placement that assures the care, treatment and rehabilitation of the child, consistent with the protection of the public. Therefore, the fact that the disposition might not have been the least restrictive alternative does not mean that it was contrary to the statutory requirements.

Second, the trial court's comments during the original dispositional hearing must be read in their proper context. The court did state that it did not believe a year's placement in corrections was necessary and that Kentae would be off supervision in ninety days if he did not ask for an extension. But it also indicated that it would "entertain the matter being brought back before the three months is up, so that supervision can be continued" if corrections identified programs from which Kentae could benefit and if Kentae demonstrated that he wanted to benefit and take part in these services. The petition to extend the dispositional order indicated that Judith Heine of EAS believed that Kentae could benefit from additional services beyond those that were implemented during his ninety day placement by the court. And at the extension hearing, the EAS social worker testified that she believed Kentae could benefit from additional services and programs that the institution could offer. This information provided legitimate grounds for the court to extend the order.

Third, although we acknowledge the social worker testified that Kentae would benefit from six months of additional time at the institution, Kentae has also shown resistance to receiving the services and treatment offered to him in the past. It is not unrealistic to believe that Kentae might show resistance to the services offered to him during a six month extension at the institution. By extending the order for one year, the court assured that Kentae would receive the care, treatment and rehabilitation that he

needs. And if sufficient treatment was provided prior to the expiration of the one year period, Kentae or the Department of Health and Social Services could have requested a change in placement under § 48.357, STATS. The court did not erroneously exercise its discretion by extending the dispositional order for one year.

ADEQUACY OF FINDINGS AND ORDER

Kentae argues that the order extending his disposition failed to meet the requirements of §§ 48.355 and 48.365, STATS. Specifically, Kentae argues that the court failed to make a finding that social services made "reasonable efforts" to return him to his home, as required by § 48.365(2m), and that the written court order failed to contain the information required by § 48.355(2)(b).

The order extending Kentae's placement for one year provides in relevant part:

> Based on all the records, files and proceedings in the above entitled matter, the court finds as follows:
>
> The delinquency finding of Kentae is affirmed and the above named child is continued under supervision with the SDHSS, Division of Youth Services for a period of 1 year until midnight May 13, 1997. Placement is continued at Ethan Allen School for Boys.
>
> Aftercare shall be provided by the Division of Youth Services.

A court may extend a dispositional order only after compliance with § 48.365, STATS., which includes a requirement that the court issue an order under § 48.355, STATS. *See* § 48.365(2m)(a), STATS. Section 48.355(2)(b) provides that the court order "shall be in writing and shall contain" certain specific information. In addition, § 48.355(2)(a) provides that "[i]n addition to the order, the judge shall make written findings of fact and conclusions of law based on the evidence presented to the judge to support the disposition ordered." The § 48.355(2) requirements that the

dispositional order be in writing and contain certain information are mandatory, not directory. ***In re F.T.***, 150 Wis.2d 216, 227, 441 N.W.2d 322, 326 (Ct. App. 1989).

The State concedes that "the written order is not as detailed as it could be regarding factual findings and specific findings of the reasonable efforts of social services." We conclude that the trial court also did not make the written findings of fact and conclusions of law required by § 48.355(2)(a), STATS.

As a general matter, when a trial court has made inadequate findings, we may either look to an available memorandum decision for findings and conclusions; review the record anew and affirm if a preponderance of the evidence clearly supports the decision; reverse if the decision not so supported; or remand for further findings and conclusions. *See* ***In re Termination of Parental Rights to T.R.M.***, 100 Wis.2d 681, 688, 303 N.W.2d 581, 583 (1981). Both Kentae and the State suggest that we remand the matter so that the court may amend its order to include the required findings and the appropriate information. We will do so.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* Rule 809.23(1)(b)(4), STATS.