

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1947

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF SHAWN H.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SHAWN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Crawford County:
MICHAEL T. KIRCHMAN, Judge. *Reversed and cause remanded with
directions.*

ROGGENSACK, J.¹ Shawn H. appeals a non-final order waiving
juvenile court jurisdiction over him.² He claims that the circuit court erroneously

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

exercised its discretion by ordering the waiver into adult court when outside-of-the-home placement had never been tried. While the juvenile court was not required to find foster care an appropriate dispositional alternative for Shawn, we agree that the record fails to reflect a factual foundation for the waiver based on the proper statutory criteria, and we therefore reverse the order of the circuit court and remand for further proceedings in the juvenile court.

BACKGROUND

Like so many other juvenile offenders, Shawn H. grew up in a dysfunctional family setting. His father was an alcoholic, and ultimately ended up in prison for holding a loaded gun to his wife's head. Shawn's first contact with the juvenile justice system occurred while his father was in prison. On November 27, 1995, he was referred by law enforcement personnel for a burglary/theft incident. As a result, he was placed on formal supervision for one year, beginning January 24, 1996. On January 12, 1996, Shawn was referred on burglary/damage to property charges which lead to a year's formal supervision, beginning March 25, 1996. And on February 27, 1996, Shawn received a referral for operating a motor vehicle without a valid license and without the owner's consent after he took his mother's car without her permission and she reported it missing. This incident resulted in a third assignment to formal supervision.

Social worker Debra Dickey was in charge of supervising Shawn during this time period, and testified that Shawn was extremely difficult to deal with at first. However, she noted a major improvement in his behavior and school performance after his father returned from prison. She attributed the change in

² This court granted leave to appeal on July 10, 1997.

part to the reduced financial stress caused by the father's return to work and in part to the fact that the father was no longer abusing alcohol and thus able to provide a more stable home environment.

Nonetheless, on February 1, 1997, Shawn and three other juveniles broke into a grocery store and stole beer and cigarettes. This time, the State petitioned to waive fifteen-year-old Shawn into adult court. Shawn challenged the petition, but the juvenile court granted it in order to give Shawn the possibility of a supervised probation. Shawn appeals.

DISCUSSION

Standard of Review.

Whether to waive jurisdiction over a juvenile rests within the discretion of the juvenile court. *J.A.L. v. State*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). When reviewing a discretionary determination, this court examines the record to determine if the circuit court logically interpreted the facts in the record and applied the proper legal standard to them. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (Ct. App. 1995). In considering whether the proper legal standard was applied, no deference is due, because this court's function is to correct legal errors. Therefore, we will review *de novo* whether the juvenile court properly interpreted the factors listed in § 938.18, STATS., before applying them. See *State v. Carter*, 208 Wis.2d 142, 560 N.W.2d 256 (1997) (applying *de novo* review to the legal standard used in a sentencing context).

Waiver of Juvenile Court Jurisdiction.

“The transfer of [a] juvenile to the adult criminal process is a grave step.” *D.H. v. State*, 76 Wis.2d 286, 292, 251 N.W.2d 196, 200 (1977). The

juvenile court may waive its jurisdiction over a minor charged with a criminal offense only when “the court determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the juvenile³ or of the public to hear the case.” Section 938.18(6), STATS. In making its determination, the court shall consider the following criteria:

(a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile 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 juvenile’s motives and attitudes, the juvenile’s physical and mental maturity, the juvenile’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 juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.

(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.

Section 938.18(5).

³ Under Wisconsin’s old juvenile code, “[t]he best interests of the child [was] always [to] be of paramount consideration.” Section 48.01(2), STATS., 1993-94. However, that directive has been deleted from the revised statutes, placing consideration of the public interest on an equal footing with concern over the juvenile’s welfare. *See* 1995 Wis. Act 77, § 629.

When exercising its discretion at a waiver hearing, the juvenile court must consider all of the relevant statutory factors and it must set forth on the record all of its findings before waiver may occur. *State v. C.W.*, 142 Wis.2d 763, 769, 419 N.W.2d 327, 329-30 (Ct. App. 1987).⁴ An application of the statutory factors to this case reveals that Shawn's prior record consisted of adjudications for two robberies and taking his mother's car without permission, none of which involved the infliction of bodily injury or violence; that he was not mentally ill, although he was on medication for depression; that the juvenile court had not previously waived jurisdiction over him; that his father's alcoholism and absence from the home may have been a substantial motivating factor in his behavior; and that he was physically, but perhaps not mentally, mature for his fifteen years. There was also substantial testimony regarding the correspondence between Shawn's father's return and Shawn's improved attitude, indicating to Shawn's social worker that patterns of stress in Shawn's living conditions may have substantially affected his past behaviors.

The juvenile court considered the current offense to be a serious one, largely because it was a repetition of behavior for which Shawn had already been on supervision. In terms of Shawn's potential for responding for future treatment, the State's social worker noted that Shawn had acted on some of her suggestions for improving his behavior and that he had been more cooperative in the months preceding the incident. Shawn and his father had also begun family counseling sessions after the current incident, but it was too early for the court to determine what effect these sessions might have on Shawn's behavior.

⁴ Section 48.15(5) STATS., 1993-94, on which *C.W.* is based, is similar to § 938.18(5), STATS., on which the waiver at issue here is based.

The juvenile court considered the adequacy and the suitability of services available for Shawn within the juvenile justice system. It noted that the juvenile justice system offers secure detention and counseling similar to that used in the adult system, as well as foster care which is not available in the adult system. The court dismissed the foster care alternative, because it reasoned that probation and continuation in the family home would be more appropriate than an out-of-home placement, as there was no showing of truancies or other indications that Shawn's parents were failing to exercise control over him. While this last determination was a proper exercise of the juvenile court's discretion, the mere fact that foster care would be inappropriate for Shawn is insufficient to support the juvenile court's ultimate conclusion that waiver would be in Shawn or the public's best interests. It is the court's duty to examine whether there are any alternatives left within the juvenile justice system which have the potential to treat the offender and protect the public, not to dismiss potentially useful dispositions on the basis that similar alternatives within the adult system might be "more effective from a correctional standpoint."⁵

Thus, the juvenile court's observations that "[o]ne factor that militates against his waiver would be his age. He's fifteen but going to be sixteen later this month;" "we really haven't been as involved in this family as was warranted or necessary," that sanctions, case worker holds, extensions of supervision and counseling should have been tried, but weren't; that the juvenile justice system allows the court to make orders affecting parents which can't be

⁵ It is also unclear from the juvenile court's conclusion that the waiver should be granted because "[o]n balance ... it would be in the best interests of the juvenile, even though not entirely satisfactory and appropriate in my mind," whether the court applied the appropriate burden of proof. The State has the burden of showing that waiver is appropriate by clear and convincing evidence, not a mere preponderance, as a "balance" would imply.

made in the adult system, and that the outcome of Shawn and his father's recent participation in counseling is still unknown, when combined with the lack of violence or personal injury attenuate to Shawn's delinquencies, preclude waiver at this point.

CONCLUSION

While the juvenile court need not order options remaining within the juvenile justice system which it considers inappropriate for the juvenile at issue, it cannot waive jurisdiction until it has weighed the facts of record with all the relevant factors in § 938.18, STATS., and concluded that the State has proved by clear and convincing evidence that the juvenile should be waived.

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

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

