

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 1998

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. 97-3505

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE INTEREST OF JAMES M.C.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMES M.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County:
JOHN P. HOFFMANN, Judge. *Affirmed.*

ROGGENSACK, J.¹ James M.C. appeals a non-final order waiving him into adult court to face charges of burglary, theft, and criminal damage to

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

property. He claims that the juvenile court abused its discretion when it waived jurisdiction without properly considering the adequacy and suitability of alternative services available to him in the juvenile justice system. We conclude that the court properly weighed the facts of record with the factors in § 938.18(5), STATS., taking into account the protection of the public and James's best interest. Therefore, we affirm.

BACKGROUND

On August 22, 1997, the State filed a ch. 938 petition alleging that James M.C. was delinquent and was under the age of seventeen. The State charged James with three counts of burglary contrary to § 943.10(1)(a), STATS., three counts of theft contrary to § 943.20(1)(a), STATS., and one count of criminal damage to property contrary to § 943.01(1), STATS. On August 29, 1997, the State filed a petition for waiver into adult court in this matter.

On October 9, 1997, the State filed another delinquency petition against James charging him with one count of burglary and one count of theft. The State filed a petition for waiver in this matter as well. The allegations in the August 22nd and October 9th delinquency petitions contained a number of common threads. Both involved night-time forcible entries into local businesses during which safes were removed from the premises, taken to a rural area and opened, and then dumped in local lakes or rivers. All the burglaries were planned well in advance and executed with a level of skill unusual for a juvenile. Most of the burglaries involved two others, James's cousin and another girl. In both the August 29th and October 9th waiver petitions, the State alleged that James should be waived into adult court on the basis of the counts set forth in the delinquency

petitions and because he had been referred again for further criminal activity involving other burglaries, which had not yet been charged.

At James's waiver hearing on October 20, 1997, the circuit court heard testimony from Michael Phelan, a juvenile court intake worker for the Waupaca County Department of Health and Human Services, and from Laura J.R., James's mother. They testified about James's personality and background, including that he had been raised by his single-parent mother, had not seen his father since he was five years old, regularly attended high school where he maintained a B/C average, did not use drugs or alcohol, and that his cousin, who had criminal problems in the past, had been involved in most of the burglaries. Phelan also testified that James had not been adjudicated delinquent in the past, but that he then had four delinquency petitions pending against him, which involved burglary, theft, criminal damage to property, and theft of weapons.

The court also heard testimony about the type and seriousness of the offenses. Although all the crimes were against property, all were willful and premeditated in nature. Furthermore, Phelan testified that based on the seriousness of the offenses and the amount of restitution owing, more than one year would be necessary to supervise James, and the programs offered through a juvenile disposition would not be suitable.

After hearing the testimony and considering the criteria set forth in § 938.18(5), STATS., the circuit court entered an order waiving James into adult court. The court based its decision on the willful and premeditated nature of the crimes, the prosecutive merit of each case, James's personal characteristics, and the juvenile court system's inability to meet James's rehabilitative needs. The court found that it would be contrary to the public interest, and to James's interest,

to have the matter remain in the juvenile court's jurisdiction. This appeal followed.

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, 902 (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(5), 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.

“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

juvenile² 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), STATS.

² 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 for 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).³ James argues that the court failed to make any specific findings concerning the adequacy and suitability of facilities within the juvenile system as required by § 938.18(5)(c), STATS. We disagree.

The circuit court heard testimony concerning potential treatment from both Phelan and Laura J.R. Phelan testified about possible juvenile court placements for James; however, based on the seriousness of the offenses and the \$3,263.91 James owed in restitution, he concluded that a juvenile court placement was not in James's or the public's best interest because a period of more than one year would be necessary to adequately supervise James and to make the victims whole. Laura told the court that she thought her son should be put through the scared straight program, and he should be forced to pay restitution.

After hearing the testimony presented at the waiver hearing, the court determined on the record that it would be in James's and the public's best interests to waive the jurisdiction of the juvenile court. Section 938.18(6), STATS. Specifically, the court concluded:

I quite frankly think because of these alleged offenses it really would indicate some criminal thinking that is going to need some extensive treatment. And because of the potential of the amount of restitution that the court would believe that there's not significant, there's not enough time left within the juvenile court system for the juvenile court to adequately address this case and that the legislative intent would not be met in that the juvenile would not be

³ Section 48.18(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.

directly accountable for his acts, and I'm not convinced that the citizens would be adequately protected from juvenile crime.

The court properly addressed § 938.18(5)(c) in concluding that juvenile court treatment was not adequate given the amount of restitution and seriousness of the crimes. Furthermore, the court took into account the express legislative intent for the juvenile court system, reasoning that under the revised juvenile code, the public should be afforded protection from serious juvenile crime. It also found that James needed more resources than would be available in the juvenile court system to pay restitution and to develop the ability to live responsibly and productively. Section 938.01(2), STATS. Therefore, in deciding to waive juvenile court jurisdiction, the court properly applied the relevant statutory sections to the facts presented. It did not erroneously exercise its discretion by waiving jurisdiction over James.

CONCLUSION

The circuit court considered testimony concerning potential treatment for James in the juvenile justice system; however, it concluded that the treatment available there was not adequate and suitable under the circumstances. The court properly weighed the facts of record with the relevant factors in § 938.18(5), STATS., taking into account the protection of the public and James's best interest, and concluded that the State proved by clear and convincing evidence that James should be waived. We affirm that determination.

By the Court.—Order affirmed.

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

