

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 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. 98-2179

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF ALBERT S.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ALBERT S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County:
CONRAD A. RICHARDS, Judge. *Affirmed.*

HOOVER, J. Albert S. (d.o.b. 11-4-81) appeals a nonfinal order¹ waiving juvenile court jurisdiction. Albert claims that the circuit court

¹ This court granted leave to appeal a nonfinal order on July 28, 1998.

erroneously exercised its discretion by failing to properly consider the relevant criteria under § 938.18(5) and (6), STATS. Because the circuit court properly exercised its discretion, this court affirms the order.

Albert, a seventeen year old who resides with his parents and siblings in Texas, came to St. Croix County, Wisconsin, during the summer of 1998 to stay with his sister and baby-sit for her children. It is alleged that while baby-sitting, Albert fondled and licked his three-year-old niece's vaginal area. Albert's sister confronted him, and he admitted to the contact. A delinquency petition was filed in St. Croix County alleging that Albert had sexual contact with a person who had not attained the age of thirteen years in violation of §§ 948.02(1) and 939.50(3)(b), STATS. The State filed a petition to waive juvenile court jurisdiction. Albert appeals the circuit court's order waiving juvenile court jurisdiction.

Section 938.18(5), STATS., provides that the circuit court must consider the following criteria in making a waiver determination:

- (a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled
- (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
- (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.²

Section 938.18(6), STATS., provides:

After considering the criteria under sub. (5), the court shall state its findings with respect to the criteria on the record, and, if 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 juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction

Albert claims that the circuit court misused its discretion by failing to address on the record (1) the adequacy and suitability of juvenile facilities available for treatment and (2) whether there was clear and convincing evidence that it would be contrary to the best interests of the juvenile or of the public to hear this matter.

Waiver of juvenile jurisdiction under § 938.18, STATS., is within the circuit court's sound discretion. *In re B.B.*, 166 Wis.2d 202, 207, 479 N.W.2d 205, 206 (Ct. App. 1991). This court reviews the circuit court's decision for misuse of discretion. *Id.* at 207, 479 N.W.2d at 207. An appellate court first looks to the record to see whether discretion was in fact exercised. *In re J.A.L.*, 162 Wis.2d 940, 961, 471 N.W.2d 493, 501 (1991). If discretion was exercised, we will look for any reason to sustain the court's discretionary decision. *Id.* We will "reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for the determination or a statement of the relevant facts or reasons motivating the determination is not carefully delineated in the record." *Id.*

² Only factors (a)-(c) are relevant to our analysis, because (d) only applies when the juvenile has committed an offense with a person who will be charged in adult criminal court.

The paramount consideration in determining waiver is the best interests of the child. *In re C.W.*, 142 Wis.2d 763, 767, 419 N.W.2d 327, 328-29 (Ct. App. 1987). The weight to be afforded to each of the factors under § 938.18(5), STATS., is within the court's discretion. See *In re G.B.K.*, 126 Wis.2d 253, 259, 376 N.W.2d 385, 389 (Ct. App. 1985). The circuit court must state its finding with respect to the criteria on the record. *In re J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. If the circuit court determines by clear and convincing evidence that it would be contrary to the best interests of the child or of the public for the juvenile court to hear the case, it must enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate criminal proceedings in criminal court. *Id.*

Here, the circuit court made findings regarding the applicable criteria under § 938.18(5), STATS., and enumerated those findings on the record. First, the court considered Albert's personality and prior record. The court stated that, "I think its conceded by both sides that the prior record, when you apply the factors in 938.18(5), that there is no evidence, whatsoever, of a prior record of this juvenile And there's no evidence that he is mentally ill or developmentally disabled." The court observed that Albert performs adequately in school, there are no indications that he is on the track to pursue a criminal lifestyle, that he has an ingrained family history of sexual abuse, that he is a closed person, and that he is socially immature.

The court next discussed the adequacy and suitability of facilities, services and procedures available in the juvenile system. The court listened to the State's position that, although Albert's potential for responding to future treatment is good, there is not sufficient time left within the juvenile court system to complete treatment to "a degree necessary to protect the public and provide the

assurances that there will not be recidivism.” The court also considered the length of treatment programs available in the juvenile system:

[W]hen you talk about the length of treatment programs, are you aware of the length I believe at Sunburst she indicated, Jane Balow, it was a six-month program that they had an even longer program.

....

... I believe her testimony was it was okay for him to go to Sunburst, there were 16 months available, which was, in her opinion more than sufficient and could definitely be handled.”

Last, the court commented on the seriousness of the offense:

I feel that this is an extremely serious, extremely serious offense. And although, as counsel has pointed out, premeditation may be somewhat hard to establish, there had to be some thought process going into some of these actions, the fact that they allegedly may have occurred on two separate occasions. It is a serious offense against a person, against a very young person, a three-year old

....

As is stated, the weight to be accorded to each of these criteria is discretionary with the trial court. I, once again, get back to the extreme seriousness of this offense, which can justify a waiver order even if all other factors suggest retention in the juvenile justice system. Further, the close proximity to the age of 17.

Focusing on the seriousness of the offense and the short period of time left in the juvenile system, the court decided to waive Albert to adult criminal court. Basing its decision on these factors is not a misuse of discretion. *See In re G.B.K.*, 126 Wis.2d at 260, 376 N.W.2d at 389.

Albert asserts that the court failed to consider the best interests of the child or of the public to hear this case. The record belies this contention. The court concluded that although many factors favored retaining juvenile jurisdiction,

the seriousness of the offense favored waiving Albert into adult court. The court emphasized that its main concern was the seriousness of the offense: “And if he does not receive adequate treatment there are some concerns of protection of the public involved.” The juvenile court has discretion as to the weight it affords to each of the criteria under § 938.18, STATS. *In re J.A.L.*, 162 Wis.2d at 960, 471 N.W.2d at 501. “[A]lthough the juvenile court is directed to give its primary or foremost weight to the child’s interests, it has discretion in weighing all the factors under sec. [938.18(5)], STATS., and in waiving a juvenile into adult court because it is *either* in the juvenile’s or the public’s best interests under sec. [938.18(6)].” *In re B.B.*, 166 Wis.2d at 209, 479 N.W.2d at 207. (Emphasis added.) Waiving Albert into adult court based primarily upon the seriousness of the crime was not an erroneous exercise of discretion as a matter of law. *See id.*

Accordingly, based on the evidence and the applicable law, the circuit court considered and applied the criteria under § 938.18(5), STATS., and reasonably concluded that waiver would be in the best interests of the public.³ Thus, this court concludes that the circuit court did not misuse its discretion by waiving Albert to adult criminal court.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.21(1)(b)4, STATS.

³ Albert also argues that the court abused its discretion by not addressing the standards for burden of proof on the record. The court did not explicitly set forth the standard on the record.

