

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0303

Cir. Ct. No. 02-JV-002083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF PATRICK L.M.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

PATRICK L.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

¶1 SCHUDSON, J.¹ Patrick L.M., appeals from the nonfinal circuit court order waiving juvenile court jurisdiction under WIS. STAT. § 938.18.² He argues that the juvenile court erroneously exercised discretion in waiving jurisdiction to adult court. This court affirms.

I. BACKGROUND

¶2 In a delinquency petition filed November 1, 2002, the State charged Patrick with five counts of first-degree sexual assault, four of which were as a party to the crime, and one count of kidnapping as a party to the crime. *See* WIS. STAT. §§ 939.05; 940.225(1)(c); 940.31(1)(b). According to the petition, on October 30, 2002, fourteen-year-old Patrick, with his two older brothers and two older cousins, kidnapped and sexually assaulted Cheryl G.

¶3 According to the petition, Cheryl was at a gas station when an eighteen-to-nineteen-year-old man approached her, put something hard against her back, ordered her to keep walking and told her that if she said anything he was going to kill her. Cheryl noticed two other males following them. After walking a couple of blocks, the first man put his arm around Cheryl's neck and began

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The order indicates that the waiver decision was based on “[c]onsideration of the evidence presented on the criteria listed in Wisconsin Statutes 48.18(5).” WISCONSIN STAT. § 48.18, however, was repealed by 1995 Wis. Act 77, §§ 87-99. In its place, the legislature created WIS. STAT. § 938.18(5) as part of Chapter 938, “The Juvenile Justice Code,” *see* 1995 Wis. Act 77, § 629 (effective July 1, 1996). WISCONSIN STAT. § 938.18(5) is substantially the same as the former § 48.18(5). Under the former statute, however, the legislative intent, as part of Chapter 48, “The Children’s Code,” prescribed that the best interests of the child be paramount. *See* WIS. STAT. § 48.01(1)(h) (1993-94). The legislative intent of ch. 938, however, is to “promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of the law and equip juvenile offenders with competencies to live responsibly and productively.” WIS. STAT. § 938.01(2)(a), (b).

choking her; the other two males ran across the street toward them and one yelled: “[B]itch, you are going to do what we tell you. Don’t look at us. You are going to do what we tell you.” Cheryl temporarily broke free, ran down an alley and screamed; however, someone grabbed her and threw her on the ground. Two more males then approached her.

¶4 The five males pulled Cheryl’s hair, took her necklace, tore off her clothes and burned her leather jacket. Then they began taking turns forcing penis to vagina sexual intercourse and mouth to penis oral intercourse while one of them held a knife to Cheryl’s throat, threatening to cut her if she screamed.

¶5 City of Milwaukee Police Officers Rodney Young, Chris Ottaway and Chad Poeppy were dispatched to investigate a sexual assault in progress. Upon arrival, they found the five males sexually assaulting Cheryl while she cried for help and begged for them to stop. When the officers yelled, “police, don’t move,” the males fled on foot and a chase ensued. Officer Poeppy apprehended Patrick, and Cheryl made an on-scene identification stating that she was “strongly positive” that he was one of the males involved in the assault. Patrick told police that he, his two brothers and his two cousins had planned the assault; they had gone out to find a woman and rape her. His account of the assault precisely correlated with Cheryl’s report.

¶6 The State filed a petition for waiver of jurisdiction over Patrick to adult court. At the waiver hearing, Robert Zima, a juvenile probation intake specialist, testified that Patrick was mentally and physically mature for his age. He also stated that although Patrick had been diagnosed with ADHD, he had not been diagnosed with any mental or developmental disability. Mr. Zima testified that the offense Patrick committed was violent, premeditated and willful but that

Patrick had “expressed remorse.” Mr. Zima also noted that Patrick would qualify for the serious juvenile offender program; however, in that program he would most likely remain in custody for only two years and then be on extended supervision for three years. Thus, due to the seriousness and aggravated nature of the offense, Mr. Zima opined that waiver to adult court would serve both Patrick’s and the public’s best interests.

¶7 Patrick’s Pastor, Clifton Joseph, Jr., also testified at the waiver hearing. He characterized Patrick as a “follower” whose mind wanders at times and whose “older siblings have influence on him.” Patrick’s mother testified that Patrick had ADHD and was prescribed Ritalin, but that he was not taking it. She said that although Patrick behaved better when he was on the medication, he could control his behavior when he chose to despite being off it.

¶8 The State recommended waiver because, in its estimation, the juvenile system’s five-year maximum amount of confinement was insufficient. Further, the State argued that the juvenile system could not appropriately handle Patrick because despite his years of therapy, medication, and supportive family, he still chose not to follow “social norms.” Countering the State’s arguments, the defense argued against waiver, stating: “Patrick is salvageable. [He] can and will respond to rehabilitation.”

¶9 Addressing the waiver criteria, the juvenile court found that Patrick: (1) was both mentally and physically mature; (2) had no prior delinquencies or convictions; (3) was diagnosed with ADHD and was being treated for it but was not on his medication at the time the incident occurred; and (4) had potential for responding to future treatment. The court, however, concluded:

To me, this is probably the most serious type of offense, short of a homicide, that you can have. The extent to which it was committed in a violent, aggressive, premeditated, or willful manner; obviously, a very violent offense; obviously, very aggressive. The indications are that it was premeditated and willful. The statements made by [Patrick] indicate to me very violent and aggressive behavior.

The suitability of the facilities, there are two separate things that the Court has to consider here, what is in the best interest of the juvenile and what is in the best interest of the public. The suitability of the facilities, I don't know that I can say that juvenile facilities wouldn't be suitable for this young man. I do know that ADHD treatment could be received in either facility, whether it be adult or juvenile.

....

In weighing [the facts], I would agree with [the defense] that the State has not shown by clear and convincing evidence that it's in [Patrick's] best interest that he go to adult court. The second factor, though, is in the best interest of the public. The Court is going to find that the State has proven by clear and convincing evidence that it is in the best interest of the public that he be sent to adult court, and I will order that he be waived to adult court in this case.

Thus, despite determining that it was not in his best interests, the court waived Patrick to adult court.

II. DISCUSSION

¶10 This court recently summarized the standards of review governing appeals from waivers of juvenile jurisdiction:

Waiver of juvenile jurisdiction under [Wis. STAT. § 938.18] is within the sound discretion of the circuit court. We review the circuit court's decision for misuse of discretion. We first look to the record to see whether discretion was in fact exercised. If discretion was exercised, we will look for any reason to sustain the court's discretionary decision. 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.”

State v. Elmer J.K., III, 224 Wis. 2d 372, 383-84, 591 N.W.2d 176 (Ct. App. 1999) (citations omitted).

¶11 The first step in the waiver process requires the court to determine if the delinquency petition has prosecutive merit. *See* WIS. STAT. § 938.18(4)(a). If prosecutive merit is found, the court must review the factors set forth in § 938.18(5). *See D.H. v. State*, 76 Wis. 2d 286, 305, 251 N.W.2d 196 (1977) (addressing WIS. STAT. § 48.18).

¶12 WISCONSIN STAT. § 938.18(5), provides:

Jurisdiction for criminal proceedings for juveniles 14 or older; waiver hearing.

....

(5) If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on 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 willful 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 the court of criminal jurisdiction.

After considering these factors, the court must articulate the reasons meriting waiver to the criminal court. *See D.H.*, 76 Wis. 2d at 305. A juvenile court may waive jurisdiction to the adult criminal court if the evidence establishes, by clear and convincing evidence, that “it would be contrary to *the best interests of the child or of the public*” to retain jurisdiction. WIS. STAT. § 938.18(6) (emphasis added).

¶13 Patrick first argues that “[i]f indeed, the best interests of the child are to be the paramount consideration, then this case does not present a reasonable basis for the [court’s] decision to waive [jurisdiction.]” He is incorrect. The current Juvenile Justice Code does not direct the juvenile court to give the child’s best interests prevailing consideration over the public’s best interests.³ *See* WIS. STAT. §§ 938.01(2)(a), (b); 938.18(6). The evidence at the waiver hearing

³ Relying on old case law, Patrick argues that “a juvenile court is to regard the best interest of the child as being the paramount consideration.” Additionally, in his reply brief, Patrick cites *State v. Elmer J.K., III*, 224 Wis. 2d 372, 383-84, 591 N.W.2d 176 (Ct. App. 1999) (citing *State v. C.W.*, 142 Wis. 2d 763, 767, 419 N.W.2d 327 (Ct. App. 1987)), a recent case that states, “The paramount consideration in determining waiver is in the best interests of the child.” *Elmer J.K.*, however, drew that standard from a case decided in 1987, prior to the creation of Chapter 938, “The Juvenile Justice Code.” *See* note 2, above. But, as noted, WIS. STAT. § 938.18(6) provides that “if the [juvenile] court determines ... 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....” Thus, the juvenile court has discretion to waive jurisdiction if waiver is in the child’s best interests *or* the public’s best interests.

supports the court's conclusion that, notwithstanding Patrick's best interests, the public's best interests would be best served by waiver of Patrick for these premeditated, aggressive, extremely serious crimes. Consequently, we cannot conclude the juvenile court erred in determining that jurisdiction should be waived.

¶14 Patrick also argues that the juvenile court "erred in not finding [him] developmentally disabled." He is incorrect. Although the court did not specifically find him developmentally disabled, it certainly considered his ADHD diagnosis as part of the developmental disability criterion:

In looking at th[e] criteria, the Court does look at whether the juvenile is mentally ill or developmentally disabled. There has been testimony to indicate that he does suffer from ADHD and that he was not on his medication at the time this incident is alleged to have occurred....

...[T]he treatment history is clear that he was under treatment for ADHD. It was clear that he was under the medications as indicated. I believe it was Tenex and Ritalin, and he clearly was not utilizing those medications at the time [the assault] occurred.

....

Based on the statements that were alleged to have occurred in this case and based on the actions that [Patrick] took, in looking at the fact that he was off of medication, I think [the State] does make a good point in stating that he did have difficulties even when he was on his medication. Obviously, it seemed to be exacerbated when he was off and that's what the teachers stated, but there were problems that occurred when he was on medication.

Clearly, the juvenile court considered Patrick's ADHD diagnosis in rendering its decision.

¶15 In this case, the juvenile court considered the statutory criteria and reasonably assigned great significance to the seriousness of the crime and the

maximum amount of time Patrick could serve in the juvenile system. While its conclusion may have been a close call, the juvenile court's consideration of the testimony, application of the statutory criteria, and reasonable exercise of discretion are evident in the record. Thus, this court concludes that the juvenile court did not erroneously exercise discretion in waiving jurisdiction.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

