

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2004

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. 04-0781
STATE OF WISCONSIN**

Cir. Ct. No. 04JV000004

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF JACOB J.W.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JACOB J.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Jacob J.W., born October 22, 1988, appeals a circuit court order waiving jurisdiction of the juvenile court. He contends the

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.

circuit court erroneously exercised its jurisdiction because the record does not contain clear and convincing evidence that waiver is in the best interests of him or of the public. We disagree and affirm.

¶2 The petition for waiver of juvenile jurisdiction alleged that on November 27, 2003, when Jacob was fifteen years old, he possessed with intent to deliver cocaine base in an amount of more than fifteen grams but less than forty grams, contrary to WIS. STAT. § 961.41(1m)(cm)3, a class D felony. At the hearing the only witness was Sherrick Anderson, the juvenile probation officer who had conducted the investigation accompanying the petition. Following is a summary of his testimony and report.

¶3 Jacob first had contact with the juvenile probation department in October 1998 for “burglary/theft/criminal damage,” and was lectured and released. His next contact was in September 2001 for criminal trespass, and he was again lectured and released. Anderson began working with Jacob in November 2001, when Jacob was adjudicated delinquent for operating a motor vehicle without the owner’s consent; a charge of cocaine possession was dismissed. Jacob was placed on formal supervision for one year beginning January 17, 2002, and individual and family counseling was ordered as well as restitution. In December 2002, Jacob was adjudicated delinquent for possession with intent to deliver THC, and again formal supervision was ordered for one year beginning January 7, 2003. One month later he was charged with robbery with use of force and substantial battery. The substantial battery charge was amended to battery and he was adjudicated delinquent on that charge, with the robbery charge dismissed. This time intensive supervision was ordered with forty-five days of electronic monitoring, along with restitution and individual and family counseling. That was in March 2003. There were also referrals to juvenile probation for truancy.

¶4 Anderson testified that Jacob did not successfully complete the intensive supervision program because he would not go to school, which was the main objective at that time, and the social worker had to continually go looking for him even though Jacob was required to see the social worker on a daily basis. There were “severe truancy” problems as well as behavior problems when Jacob was at school. Jacob’s grade level for 2003-04 was the eighth grade, which Anderson thought was a year behind where he was supposed to be. To Anderson’s knowledge, Jacob had been suspended from school numerous times, but not expelled. Anderson knew of no extracurricular activities or sports that Jacob was involved in. When Jacob was on intensive supervision with Anderson, he was to meet with Anderson on average once a week, but that did not happen because Jacob would not be at school when Anderson went to meet him there. Anderson would then contact Jacob’s mother, who would not know where Jacob was, and Anderson would put out an apprehension request to have him picked up. The record shows a number of apprehension requests that were issued and also shows placement in secure custody as a sanction on at least two occasions. According to Anderson, Jacob did not follow the rules of his supervision, which were to refrain from delinquent behaviors and attend school.

¶5 Anderson described Jacob as average size and average mental maturity for his age. Jacob lived with his mother and, as far as Anderson knew, he had always lived with his mother and never lived on his own. According to Anderson, Jacob liked to associate with individuals who were older than he, eighteen- and nineteen-year-olds who were usually not in school. In Anderson’s opinion, Jacob was living more as an adult than as a juvenile.

¶6 Although counseling services for alcohol and drug abuse and criminal thinking were set up for Jacob, Anderson was told by the counseling center that it tried contacting Jacob several times but got no response.

¶7 In Anderson's opinion, Jacob's response to the services already offered by the juvenile system had not been good and Jacob had not taken advantage of them. Therefore, Anderson recommended that Jacob be waived into adult court.

¶8 In response to Jacob's counsel's questions, Anderson explained that Jacob had not been placed in a correctional facility or other out-of-home placement because Jacob's mother and father were involved in his life, and in this type of situation an effort is made to keep the youth in the community.

¶9 After hearing the evidence, the court decided the criteria for waiver had been met and granted the petition. In making its decision, the court summarized and commented on the evidence that it considered significant. It considered the charge of possession with intent to deliver cocaine to be a serious one. It referred to Jacob's three prior adjudications, noting that this was Jacob's second drug offense and that he had been previously convicted of an offense involving violence. It commented on Jacob's refusal to attend counseling sessions and to meet with his probation officer, the apprehension requests, and the sanctions imposed. The court also considered Anderson's testimony on the reason Jacob was not placed out of his home—that his family was involved and trying to assist him. With respect to Jacob's lifestyle, the court noted the testimony that Jacob was affiliating himself with eighteen- and nineteen-year-olds and people who were not in school, and the court observed that Jacob did not feel he had a responsibility to go to school or to follow the rules of his supervision.

DISCUSSION

¶10 WISCONSIN STAT. § 938.18(5) provides that the court shall base the decision whether to waive jurisdiction on the criteria stated in paras. (a) through (d).² Section 938.18(6) provides:

After considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record, and, if the court determines that it is established by clear

² WISCONSIN STAT. § 938.18(5) provides:

(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.

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

¶11 Waiver of jurisdiction under WIS. STAT. § 938.18 is within the discretion of the juvenile court. *State v. Elmer J.K.*, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999). The court has discretion as to the weight it affords each of the criteria under § 938.18(5). *Id.* at 384. We look to the record to ascertain whether discretion was exercised, and if it has been, we look for reasons to sustain the court's decision. *Id.* at 383. We will reverse a juvenile court's waiver determination if and only if the record does not reflect a reasonable basis for its determination, or the court does not state relevant facts or reasons motivating the decision. *Id.* The court need not resolve all the statutory criteria against the juvenile to order waiver. *See G.B.K. v. State*, 126 Wis. 2d 253, 256, 376 N.W.2d 385 (Ct. App. 1985).

¶12 Jacob argues on appeal that, given his young age, it is reasonable to infer that he has not been bringing drugs into Beloit, but instead has been taken advantage of by adults who are. Placing him on adult probation, in the county jail, or in prison, he asserts, will make him vulnerable to further adult manipulation and will make it more likely, not less, that he will establish an adult criminal lifestyle and way of thinking. Given his age, he continues, there are more than two years for treatment in the juvenile system, and options in the juvenile system would better meet his needs, as well as better protecting the public by preventing continued development of criminal behavior.

¶13 Jacob's argument may have some merit, but it does not show that the juvenile court erroneously exercised its discretion based on the record before it. The adequacy and suitability of facilities and services in the juvenile system to

treat the child and protect the public is one of the criteria listed in WIS. STAT. § 938.18(5)(c). However, the statute does not require that the State submit evidence on each of the criteria listed in the statute. *G.B.K.*, 126 Wis. 2d at 256. Nor does the statute require the State to prove there are no adequate alternatives to waiver in the juvenile system. *Id.* Rather, the statute requires that when evidence is presented on a particular criterion, the court consider that criterion and make a finding concerning it. *Id.*

¶14 There was no evidence before the court that there was an available option in the juvenile system that would address Jacob’s needs as well as protect the public. It is evident from the evidence that was presented that neither Jacob’s parents nor intensive supervision by a probation officer could control Jacob’s delinquent behavior. Placement in a secure juvenile correctional facility may have been able to control his behavior, meet his needs, and protect the public, but there was no evidence of that, beyond Anderson’s testimony explaining why no out-of-home placement had been considered in the past. The State was not obligated to present evidence on the lack of alternatives in the juvenile system and Jacob did not present evidence of the existence of appropriate and effective alternatives. The court fulfilled its responsibility to consider the evidence that was presented.

¶15 As for the other criteria under WIS. STAT. § 938.18(5), we are satisfied that the court considered those criteria relevant to the evidence presented. The court also explained its decision with reference to the relevant evidence and there was a reasonable basis in the record for its decision.

By the Court.—Order affirmed.

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

