

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2007AP001182-LV

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TERRELL J.,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
CHILDREN'S DIVISION, WAIVING JURISDICTION,
THE HONORABLE DAVID BOROWSKI, PRESIDING

RESPONDENT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is resolved by reference to well-settled law; therefore, the appellant does not recommend either oral argument or publication.

STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion in waiving Children's Court jurisdiction where the court found that the seriousness of the offense outweighed all other factors but where the seriousness of the offense as to Terrell is extremely mitigated (i.e. it does not stand out as against all the other factors).

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

In waiving Terrell the trial court used the statutory criteria as a guide. The most important factors were the utter lack of parenting that Terrell received as a young child and the seriousness of the offense. The trial court focused heavily on the seriousness of the offense and found that this one factor outweighed all others. However, before one factor may outweigh all the others it must truly stand out. Here, the overall offense was certainly demoralizing for anyone in the community. However, Terrell's personal involvement was greatly mitigated by the fact that he was himself a child statutorily incapable of consenting to sexual contact and, further, he was following the horrible example of an adult man who was on the scene. For these reasons the trial court abused its

discretion in waiving jurisdiction over Terrell.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The respondent-appellant, Terrell J. ("Terrell") was named in a delinquency petition filed in the Milwaukee County Circuit Court alleging that Terrell, who was fifteen years old at the time, was a party to two counts first degree sexual assault of a child (one count as a primary actor and a second count alleging that he assisted another). The State filed a petition seeking waiver of the Children's Court jurisdiction.

The court conducted a series of hearings on the petition. Ultimately, on May 8, 2007, the Children's Court waived jurisdiction.

Terrell petitioned for leave to appeal the non-final order waiving jurisdiction and the Court of Appeals granted that petition.

II. FACTUAL BACKGROUND

The delinquency petition alleged in great detail events that took place on September 4, 2006 in Milwaukee. Generally the petition alleged that a twelve year-old girl was at the home of a friend. That friend suggested that the girl "suck up one of her boys" and the girl agreed. Also present in the home, at various times, were numerous teenage boys (including Terrell) and an adult man. The girl eventually wound up in the basement of the home where each of the boys took turns sexually assaulting her mostly by acts of penis-to-mouth intercourse. At one point the adult male began

having penis-to-vagina intercourse with the girl. The petition alleges that while this was happening Terrell was standing by assisting the adult. There was no allegation that the girl was ever physically forced or otherwise coerced into participating.

As part of the waiver proceedings the trial court appointed Joan Nuttal, Ph.D., to conduct a psychological evaluation on Terrell. The parties stipulated to the admission of Dr. Nuttal's report. Dr. Nuttal found that Terrell had a verbal I.Q. of 79. Historically, Dr. Nuttal found that Terrell had a less than desirable home life. According to the report:

Terrell describes a history of residing with his mother, siblings, and grandfather. The family lived in Milwaukee, then Chicago and back again, the moves prompted when mother needed to escape drug dealers to whom she owed money . . . Terrell often panhandled money for food or would steal. Terrell claims his mother did use drugs in front of him sometimes, but not usually. He claims she would tell him to steal and sometimes beat him for no reason he could understand. The last time this happened, he was in fifth grade because he just ran away after that.

Dr. Nuttal recommended that Terrell not be waived into adult court.

Also of significance was the fact that Dr. Nuttal believed that Terrell may suffer from a neurological disorder that impaired his ability to function. Consequently, the court order that a neurological examination be done on Terrell.

After several false starts, an examination was ultimately conducted on Terrell but the doctors were unable to identify any neurological impairment.

The court, in rendering its decision, recognized the deficiencies in Terrell's home life. The trial judge said that the,

"[H]istory of his family, which, frankly, is a rather tragic, unfortunate, really inexcusable history from the standpoints of parents or lack of parents; the history of the juvenile's transiency; the issue of problems with his mother . . . alleged drug dealing of his mother." (R:050807-7, 8)

However, the court also noted that Dr. Nuttal found that Terrell had a, "High risk of failure and chronicity of problems and also high risk for continued delinquency." (R:050807-12)

Based on Dr. Nuttal's examination and the neurological examination the court found that Terrell did not have a significant mental illness or a significant developmental disability." (R:050807-13)

The real crux of the court's reasoning dealt with the court's interpretation of the seriousness of the offense and the perceived reaction of the community if Terrell were not waived. The court said, "[T]he seriousness of this offense really cannot be overestimated . . . the seriousness of the offense for the entire community." (R:050807-22, 23). According to the judge this offense was, "[I]n the top two or three of the most large scale offenses that are offense, frankly, to the spirit of the community, to the City of Milwaukee, Milwaukee County, and the public at large." *Id.*

Consequently, the court concluded that, "I'm finding it's contrary to the best interest of the public and contrary to the best interest of the juvenile to keep this matter in juvenile jurisdiction." (R:050807-26)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN WAIVING JURISDICTION.

A. The appellate standard of review

The decision 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 such a discretionary determination, the appellate court must examine 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). No deference is due in considering whether the proper legal standard was applied, because it is the appellate court's function to correct legal errors. Therefore, the appellate court will review *de novo* whether the juvenile court properly interpreted § 938.18 STATS., when making its waiver determination. See *State v. Carter*, 208 Wis. 2d 142, 560 N.W.2d 256 (1997).

B. The criteria for 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 juvenile or of the public to hear the case." Sec. 938.18(6), STATS.

Sec. 938.18(5), STATS, provides:

(5) **Criteria for waiver.** If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria:

(a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment.

(am) The prior record of the juvenile, including 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, and the juvenile's prior offenses.

(b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner.

(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.

C. Application of the criteria

It his bench decision the trial judge used the criteria of Sec. 938.18(6), STATS. as a guide. The court commented at some length on Terrell's childhood and home life. No reasonable person could consider Terrell's childhood and expect that at the age of fifteen he could possibly have developed any sense of morality or

socialization. Terrell appears to have been a child who fell through the cracks. He had a mother in the biological sense only and there does not appear to have been a father in the picture at all. Terrell may have been better off had his mother not been in the picture either. She provided no guidance other than an adult example of drug abuse, unbridled and unreasonable fits of anger, and a virtual nomadic existence.

Terrell's case truly presents a philosophical question: Is it reasonable for society to expect a child like Terrell to have any ability to conform his behavior to law where no one has ever taken the time to teach him the difference between right and wrong? Even worse, it is reasonable where the adult example set for him was quite to the contrary?

This is an extremely important consideration in Terrell's case because the evil of the crime alleged here, sexual assault of a child, is apparent only to those with a developed sense of morality and the ability to envision the negative consequences of such behavior. The crime of sexual assault of a child is wrong because we, as a society, have determined that children of a certain age are incapable of grasping the serious consequences of sexual intercourse. This type of crime, though, is in stark contrast to a crime such as battery or homicide where almost anyone would understand as wrong.

To a person such as Terrell, then, with an incomplete sense of morality, the girl's willingness to perform the acts and the adult male's willingness to participate probably led Terrell to believe that there was nothing particularly wrong about involving himself.

D. The seriousness of the offense

Despite recognizing that Terrell was never properly raised the court seemed incapable of seeing past the seriousness of the offense—particularly as it relates to the community's reaction if Terrell were not waived. Plainly this one statutory factor outweighed all others in the court's determination.

If one statutory factor is to outweigh all of the other relevant factors the court is bound to consider in a waiver decision, that factor must stand out clearly as more crucial to the best interests of the child or to the public than any of the others. And further, the circuit court must articulate its reasoning on the record in this regard. To do otherwise, constitutes an erroneous exercise of its discretion. *State v. C.W.*, 142 Wis. 2d 763, 769, 419 N.W.2d 327, 329-30 (Ct. App. 1987).

The fact that an adult male appears to have been orchestrating this entire sordid episode, in combination with the sheer number of boys involved, casts a disturbing pall over the entire case. The trial court characterized the alleged crime "as serious as they come." (R:050807-18). This characterization though, as it relates to Terrell, is a gross over-reaction and is entirely unwarranted. Under the circumstances it would have been a miracle had Terrell not participated. Due to inadequate parenting he was, at best, only partially socialized. Due to his age he was statutorily unable to consent to sexual activity for himself and the one adult example he saw seemed to encourage him to have sex with the girl.

Firstly, at the time the events occurred Terrell was, himself, statutorily unable to consent to sexual activity because he was fifteen

years old. *See*, Sec. 948.02(2), STATS. It is pretzel logic of the first order to reason that although Terrell is too immature to consent to sexual activity for himself but, on the other hand, if Terrell does decide to have sexual contact with another person who is also too immature to consent that he has now committed a crime that is "as serious as they come." Terrell was older but still generally in the same age cohort as the girl (he was about four years older). There is no allegation in the petition that force of any kind was used against the girl to perform the sexual acts.

Moreover, it is no small matter that as this crime was being committed Terrell was in the company of a forty year-old man. Terrell had no parenting of any kind and, undoubtedly, he had at best a partially formed moral compass to guide him. On this particular day the adult example he saw was an abomination. Under these circumstances how is Terrell to be blamed? He is not old enough to consent to sexual activity and the one adult present appears to be encouraging the young men to participate. Is Terrell expected to have worked a miracle in order to avoid having this crime characterized as one that is "as serious as it gets"?

Although the totality of the offense is quite disturbing, the court must not focus on the overall seriousness; rather, it is the seriousness of Terrell's individual involvement that must be considered. When that is done here it is obvious that the seriousness of the offense does not outweigh all the other statutory factors that call out for the case to remain in the Children's Court.

CONCLUSION

For these reasons it is respectfully requested that the court of appeals reverse the order the trial court waiving the jurisdiction of the Children's Court.

Dated at Milwaukee, Wisconsin this ____ day of _____,
2007.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2418 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this ____ day of _____, 2007:

Jeffrey W. Jensen

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APPENDIX CERTIFICATION

- A. Dr. Nuttal report
- B. The findings and determination of the trial court

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so

reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this ____ day of _____, 2007

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