

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2011AP001890**

State of Wisconsin,

Plaintiff-Respondent,

v.

Kawanis Trotter,

Defendant-Appellant.

**On appeal from a judgment of the Kenosha County
Circuit Court, The Honorable Wilbur Warren, III,
presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I. Whether the trial court erroneously exercised its discretion in retaining jurisdiction over Trotter?

Answered by the trial court: No.

II. Whether the court erred in denying the appellant's motion for a juvenile court disposition on the amended charge to which he pleaded guilty (felony murder).

Answered by the trial court: No.

Summary of the Arguments

I. **The trial court erroneously exercised its discretion in retaining jurisdiction.** In deciding whether to retain jurisdiction, the trial court is required to consider, among several other factors, the seriousness of the juvenile's offense. Where, as here, several actors are involved in the commission of an offense, this by necessity requires the court to consider

the juvenile's individual culpability in the commission of the overall offense. The only evidence presented against Trotter was his confession. In this confession, Trotter explained that the burglary was Daniel's idea (the co-actor), and that he (Trotter) thought he was going to steal a gaming console. Once inside, though, and without help from Trotter, Daniel unexpectedly bludgeoned Walker to death. Thus, Trotter's role in the predicate offense of first degree intentional homicide was extremely mitigated.

The trial court erroneously exercised its discretion in retaining jurisdiction because it never considered Trotter's individual culpability in the homicide. Rather, the court generically considered the overall seriousness of the offense without ever differentiating Trotter's individual role in the offense.

II. The trial court erroneously exercised its discretion in denying Trotter a juvenile court disposition once he was convicted of the lesser offense. Trotter was originally charged with first degree intentional homicide, contrary to Sec. 940.01, Stats. This is the charge that provided for original jurisdiction in adult court. However, the State ultimately amended the charge to felony murder, contrary to Sec. 940.03, Stats. Felony murder is not a charge for which there is original jurisdiction over children in adult court. Thus,

before sentencing Trotter in adult court, the trial court was obligated to consider the factors that the children's court would have considered on a waiver petition if the charges were originally filed in children's court.

The judge denied the request for a juvenile court disposition and, in so doing, properly considered the statutory factors. The court erroneously exercised its discretion, though, because the judge misinterpreted one of the statutory factors. Sec. 938.18(5)(d), Stats., requires the court to consider, "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." This factor plainly reflects considerations of judicial economy; that is, the desirability of requiring the witnesses to testify in only one trial, and the desirability of the sentencing judge being conversant in the facts of each codefendant's case.

In denying Trotter's request for a juvenile disposition, though, the court noted that the codefendant, Roddee Daniel, received a life sentence, and from this consideration and others the judge concluded that it would be inappropriate to permit Trotter a juvenile court disposition.

This was an erroneous exercise of discretion because this subsection, by no means, demands uniformity of

sentencing between similarly situated defendants.

Statement of the Case

I. Procedural History

The defendant-appellant, Kawanis Trotter (hereinafter “Trotter”), was named in a criminal complaint filed in the Kenosha County Circuit Court charging him with one count of first degree intentional homicide, and with one count of burglary while armed with a dangerous weapon. (R:1) The charges arose out of an incident that occurred in Kenosha on September 14, 2008. At the time of the charges, Trotter was fourteen years old.

Following a preliminary hearing, the court found probable cause to believe that Trotter committed the offense which provided for original jurisdiction in the adult court (first degree intentional homicide).

Trotter filed a motion to declare Sec. 938.183, Stats.,¹

¹ **1) Juveniles under adult court jurisdiction.** Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following:

* * *

(am) A juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 10th birthday.

unconstitutional for the reason that the presumptive placement of a fourteen year-old child in the adult criminal system is cruel and unusual punishment, contrary to the Eighth Amendment; and, further, that presumptive exclusion of such a child from the juvenile system violates the Due Process Clause and denies the child procedural due process of law. (R:17) The court considered the briefs of the parties, and conducted a hearing into the motion on February 6, 2009. The court denied the motion. (R:111-68) In summing up his decision, the judge said:

I think there is a difference, a significant difference, between dealing with issues of constitutionality and cruel and unusual punishment in a capital sense with the finality that is inherent in that decision and with a process that does not require a death penalty situation because of the rehabilitative nature that can be continued in a life imprisonment situation as opposed to a death penalty situation. I think a significant distinction lies there, and it's a distinction the abrogation of which will have to be left to appellate courts and not to the mind or reasoning of the trial court in this instance. For that reason the court will deny the motion to determine that the statute in question is unconstitutional subject obviously to any appellate review.

(R:111-68)

Trotter also filed a petition for “reverse waiver” pursuant to Sec. 970.032(2), Stats.² (R:5) The court conducted a series

² (2) If the court finds probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction

of hearings on the petition and, ultimately, on May 22, 2009, the court denied the petition. (R:117-47; App. B) The judge stated:

I also note that particularly dealing here with Mr. Trotter, Ms. Santostefano testified that he's had all of the programs that would be beneficial to him already . . . And that shortly before the commission of the violent act of which he is accused, he was in violence programming. So that certainly would not endorse continued programming . . .

(R:117-52)

The judge continued, “[I] don’t believe the petitioners here have met their burden with respect to prong (a) to prove the negative of that, that they would not receive adequate treatment in the adult system.” (R:117-54)

I think to transfer to juvenile court would depreciate the seriousness of the offense. Because of the nature of the offense, the Court heard the preliminary hearing. The manner in which it was committed or said to have been committed by the

under chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

- (a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.
- (b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.
- (c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable.

perpetrators of that offense and the apparent planning that went into it is something, I think, that bears upon just how serious it is. I don't think it can be written off to impulsivity, and it would be unlikely that it would be written off to accident.

(R:117-54) "For the reasons set forth on this record, the Court denies the petition for reverse waiver as it's called, and the court will retain jurisdiction." (R:117-56)

Finally, on May 17, 2010, Trotter reached a plea agreement with the State. The State filed an amended information alleging one count of felony murder; and two counts of burglary while armed. (R:85) Trotter pleaded guilty to the three amended charges, and the matter was set for sentencing.

In the meantime, Trotter filed a motion for a juvenile disposition. (R:90) The State objected, and the prosecutor threatened that if the court were to find that Trotter was eligible for a juvenile court disposition, the State would move to set aside the amended information and the guilty plea. (R:125-8). Ultimately, the court ruled that Trotter's request for a juvenile court disposition did not violate his plea agreement (R:126-4); however, the court also declined to remand the matter for a juvenile court disposition. (R:126-19) In part, the judge reasoned:

It goes without saying that Roddee Daniel received a life sentence, the desirability of this Court to be consistent, to try cases together or as the statute I think says in Sub. (d) here, "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.” I think under these circumstances given the disposition and sentence which Mr. Daniel received, Factor 5 here would certainly militate against juvenile disposition.

(R:126-18, 19)

Thereafter, the court sentenced Trotter on count one to a total sentence of twenty-seven years, bifurcated as twenty years of initial confinement, and seven years of extended supervision. On count two, the court imposed a consecutive sentence of nine years in prison, bifurcated as five years initial confinement and four years of extended supervision. Finally, on count three, the court imposed a consecutive sentence of nine years in prison, bifurcated as five years initial confinement, and four years of extended supervision. (R:126-42 et seq).

Trotter timely filed a notice of intent to pursue postconviction relief. There were no postconviction motions; rather, Trotter filed a notice of appeal.

II. Factual Background

A. The criminal complaint and preliminary hearing

The criminal complaint alleged that on September 14, 2008, in the City and County of Kenosha, Trotter, who was fourteen years old at the time, and another young man, Roddee Daniel, caused the death of Capri Walker. According

to the complaint, Trotter told police that he and Daniel decided to rob Walker's home because they believed there was a gaming console within the home. Walker was Daniel's next door neighbor. At approximately three a.m., the two armed themselves with a baseball bat and a non-functioning rifle, and then went next door, cut the screen, and gained access to the house through the window. Apparently, Daniel, who had the baseball bat, found Walker sleeping in the basement, and he bludgeoned her to death.³ The two boys then removed a number of items from the house. (R:1)

At the preliminary hearing, the State presented evidence concerning the scene of the homicide; and then it presented evidence of the competing confessions of Daniel and Trotter. Each claimed that the other was the one who bludgeoned Walker to death. (R:129)

B. The reverse waiver hearing

Lisa Louise was the principal at Grant Elementary School where Trotter attended the second and the fifth grade. (R:112-28) Even at that young age, according to Ms. Louise, Trotter had problems with anger and, at one point, she was forced to call police to assist her in controlling Trotter. *Id.*

³ Daniel told police that Trotter was the one who hit Walker with the bat. This dispute was never totally resolved. At his plea hearing, Trotter maintained that he was just the look-out, and that Daniel committed the crime. (R:124-8)

Other educators made similar observations about Trotter. For example, Kim-Marie Fischer, the principal at Bullen Middle School, testified that while at her school Trotter was on academic assistance, and he was in the Upward Bound program. (R:112-41) The school formed an individual education plan for Trotter because there was concern about his ability to learn. (R:112-42) Trotter repeated the sixth grade because of poor academic performance. (R:112-46)

Predicatably, Trotter was also involved in the juvenile justice system. While he was on probation he was supervised by Julie King, who formed the opinion that Trotter was a very much a follower, susceptible to negative influence. (R:112-70)

Trotter called Dr. James Garbarino as an expert witness. Dr. Garbarino is a professor of psychology at Loyola University where he specializes in child development, and he is particularly interested in those children affected by domestic violence. (R:115-47) According to Dr. Garbarino, children affected by violence tend not to think about the future. (R:115-70) Thus, the perceived deterrence in handling serious juvenile cases⁴ in the adult system does not accomplish what is

⁴ At a retention hearing, the court is obligated to consider the seriousness of the offense; however, the Supreme Court has held that the seriousness of the offense must be determined solely on the evidence presented at the preliminary hearing. Here, the testimony at the preliminary hearing was, essentially, in accord with the criminal complaint. Because the thrust of Trotter's argument on appeal does not depend much upon the seriousness of the offense, the facts of the underlying offense will not be repeated here.

intended. (R:115-81) In fact, it may even be counterproductive. Studies show that recidivism is higher in juveniles placed in an adult system. (R:115-77)

The Wisconsin juvenile system is able to house juvenile offenders until they are twenty-five years old. (R:115-139) On the other hand, there are programs in place in the adult system to assist offenders who are under the age of sixteen. (R:115-199)

Argument

I. The court erroneously exercised its discretion in retaining jurisdiction over Trotter because the court apparently considered inadmissible hearsay concerning the seriousness of the offense.

In deciding whether to retain jurisdiction, the trial court is required to consider, among several other factors, the seriousness of the juvenile's offense. Where, as here, several actors are involved in the commission of an offense, this by necessity requires the court to consider the juvenile's individual culpability in the commission of the overall offense. The only evidence presented against Trotter was his confession. In this confession, Trotter explained that the burglary was Daniel's idea, and that he (Trotter) thought he was going to steal a gaming console. Once inside, though, and

without help from Trotter, Daniel unexpectedly bludgeoned Walker to death. Thus, Trotter's role in the predicate offense of first degree intentional homicide was extremely mitigated.

The trial court erroneously exercised its discretion in retaining jurisdiction because it never considered Trotter's individual culpability in the homicide. Rather, the court generically considered the overall seriousness of the offense with ever differentiating Trotter's individual role in the offense.

A. Standard of appellate review

Whether to retain jurisdiction over a juvenile charged with first degree intentional homicide is a matter that is left to the discretion of the trial court. Thus, on appeal, the decision of the trial court is reviewed for an erroneous exercise of that discretion.

A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. (internal citation omitted) We will not reverse a trial court's discretionary act if the record reflects that discretion was in fact exercised and there was a reasonable basis for the court's determination. (internal citation omitted) When reviewing a trial court's exercise of discretion, we will look for reasons to sustain the decision.

State v. Verhagen, 198 Wis. 2d 177, 191 (Wis. Ct. App. 1995)

B. The standards and procedure for retaining jurisdiction

Sec. 970.032(2), Stats., provides:

(2) If the court finds probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable.

Recently, in *State v. Kleser*, 2010 WI 88, P84 (Wis. 2010), the Wisconsin Supreme Court explained at some length the procedure that must be followed in the case of a so-called reverse waiver hearing. In sum, the court held that the seriousness of the offense is a relevant consideration in determining whether to retain jurisdiction. However, the court noted, the all evidence concerning the seriousness of the offense must be presented at the preliminary hearing held

pursuant to Sec. 970.032(1), Stats.,⁵ not at the reverse waiver hearing. At the preliminary hearing the defendant is permitted to present evidence that would mitigate the seriousness of his involvement in the offense, but he is not permitted to present a defense (i.e. evidence that would contradict probable cause). Thus, the seriousness of the offense is determined solely upon the evidence presented at the preliminary hearing.

Significantly, in *Kleser*, the court emphasized that the evidence presented at the preliminary hearing must be admissible under the Wisconsin Rules of Evidence. The court explained:

Wisconsin Stat. § 972.11(1) also provides that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." Nothing in Wis. Stat. § 970.032(2) manifestly requires a different construction. Against this background, the court of appeals correctly held that "[w]here a statute does not specifically **[**80]** authorize hearsay, it is generally prohibited." *Kleser*, 2009 WI App 43, 316 Wis. 2d 825, P46, 768 N.W.2d 230 (citing Wis. Stat. § 908.02). The rules of evidence, including the general prohibition on hearsay, apply to reverse waiver hearings.

⁵ (1) Notwithstanding s. 970.03, if a preliminary examination is held regarding a juvenile who is subject to the original jurisdiction of the court of criminal jurisdiction under s. 938.183 (1), the court shall first determine whether there is probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b), or (c), whichever is applicable. If the court does not make that finding, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

Kleser, 2010 WI 88, P89 (Wis. 2010).

C. Under the admissible evidence presented at the preliminary hearing, Trotter's involvement in the homicide was extremely mitigated and, therefore, it was an erroneous exercise of discretion for the court to retain jurisdiction.

It is probably best to simply cut to the chase. The centerpiece of this issue is not whether Trotter can receive adequate treatment in the adult system. The crux of the issue is whether Trotter's involvement in the offense was egregious enough to justify keeping a fourteen year-old child in the adult criminal justice system.

As the trial judge touched upon, the offense here involved the brutal murder of a woman who was apparently asleep in her bed. This is the very stuff of nightmares. The motive for the murder is unclear. Daniel and Trotter were in the home for the purpose of committing what would have been-- but for the homicide-- a fairly garden-variety burglary, which had as its motive a fairly juvenile desire: to steal a gaming console.

Thus, the exact manner in which the *homicide* was committed is of the utmost importance. It is the homicide that is the predicate offense allowing the circuit court to retain jurisdiction. If it was Trotter who bludgeoned Walker to death,

then the decision is simple. He should stay in the adult system. On the other hand, if Trotter thought he was going into that residence to steal a gaming console and, without any direct input from Trotter, Daniel took it upon himself to kill Walker, then the level of Trotter's culpability is seriously called into question.⁶ In other words, if Trotter set out believing that he was going to commit a burglary, and his co-actor unexpectedly commits a brutal homicide while inside the home, Trotter is legally responsible for the homicide, but his culpability for the homicide is very much mitigated. It may even be mitigated to the point that, given his young age, it is unreasonable for the criminal court to retain jurisdiction.

At the preliminary hearing in this case, the defendants were joined. After establishing the scene of the crime, the State then presented the competing confessions of the Daniel and Trotter. Significantly, though, as to Trotter, evidence of Daniel's confession was inadmissible hearsay. Sec. 971.12(3), Stats., provides that, "The district attorney shall advise the court prior to trial if the district attorney intends to

⁶ Lest there be any misunderstanding, it is not being argued here that Trotter may not be criminally liable for the homicide. Counsel is well-aware of the principles of being a party to the crime, and he is also well aware of the elements of felony murder. Certainly, if one arms himself and then sets out to commit a burglary, he is a party to the crime of any reasonably foreseeable crime that ends up being committed, including the homicide of a occupant of the home. We are speaking here of Trotter's *degree of culpability*, not his legal responsibility for the homicide.

use the statement of a co-defendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.”⁷ Here, the district attorney did not advise the court that he intended to use Daniel’s statement against Trotter and, therefore, the court was not permitted to consider Daniel’s statement against Trotter. Additionally, the State made no attempt to establish a foundation that, as to Trotter, Daniel’s statement fell under some exception to the hearsay rule.⁸

In making his findings at the retention hearing, the trial judge spoke generically about the “seriousness of the offense” without ever attempting to distinguish between the levels of culpability between Daniel and Trotter.

I think to transfer to juvenile court would depreciate the seriousness of the offense. Because of the nature of the offense, the Court heard the preliminary hearing. The manner in which it was committed or said to have been committed by the

⁷ Again, counsel is aware of the fact that severance is usually not an issue until after the preliminary hearing. However, this is not the usual situation. As the *Kleser* court explained, the preliminary hearing in a juvenile original jurisdiction matter is very different from a standard preliminary hearing. The evidence presented at a preliminary hearing in an original jurisdiction case goes not to whether the defendant committed any felony; rather, the evidence must establish probable cause to believe that the defendant committed the predicate offense. Moreover, the evidence must establish the seriousness of the defendant’s involvement in the offense.

⁸ That is, there was no effort to establish that Daniel was unavailable and, therefore, that his confession was admissible against Trotter as a statement against penal interest. See, 908.045(4), Stats. Similarly, since Daniel’s statement was made to a police detective, it was not a statement of a co-conspirator made during the course of and in furtherance of a conspiracy.

perpetrators of that offense and the apparent planning that went into it is something, I think, that bears upon just how serious it is. I don't think it can be written off to impulsivity, and it would be unlikely that it would be written off to accident.

(R:117-54). Plainly, the court never individually considered Trotter's involvement in the offense. The question at the retention hearing was whether the court should retain jurisdiction, individually, over Kawanis Trotter; not whether the court should retain jurisdiction over anyone who played any role-- however mitigated-- in what turned out to be an egregious crime.

The only admissible evidence presented as to Trotter's involvement in the offense was his version of what happened: He thought he was going to sneak into a house to steal a game console. Unexpectedly, Roddee Daniel bludgeoned the occupant of the house to death. Plainly, then, as to the homicide, although Trotter is criminally responsible, his culpability for the offense is extremely mitigated.

The court never considered this and, therefore, the court erroneously exercised its discretion in retaining jurisdiction.

II. The trial court erred in denying Trotter's motion for a juvenile disposition.

Prior to sentencing, Trotter moved the court to grant him a juvenile court disposition. The basis for the request was that

he had not been convicted of first degree intentional homicide, which was the charge that granted the adult court original jurisdiction. The offenses of conviction, including felony murder, are not offenses for which there is original jurisdiction in adult court.

The judge denied the request and, in so doing, properly considered the statutory factors. The court erroneously exercised its discretion, though, because the judge misinterpreted one of the statutory factors. Sec. 938.18(5)(d), Stats., requires the court to consider, “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.” This factor plainly reflects considerations of judicial economy; that is, the desirability of requiring the witnesses to testify in only one trial, and the desirability of the sentencing judge being conversant in the facts of each co-defendant’s case.

In denying Trotter’s request for a juvenile disposition, though, the court noted that the co-defendant, Roddee Daniel, received a life sentence, and from this consideration and others the judge concluded that it would be inappropriate to permit Trotter a juvenile court disposition.

This was an erroneous exercise of discretion because

this subsection, by no means, demands uniformity of sentencing between similarly situated defendants.

A. Standard of Appellate Review

Even though a juvenile may be properly charged in adult court where he is alleged to have violated Sec. 940.01, Stats. (first degree intentional homicide); if he is ultimately convicted of a lesser offense, the adult court may at that point waive its jurisdiction, and remand the matter to children's court for a juvenile disposition. This decision, however, rests within the trial court's discretion. Therefore, on appeal from an order denying the defendant's motion for a juvenile disposition, the appellate court may not reverse unless the appellant demonstrates that there was an erroneous exercise of discretion. *State v. Dominic E.W.*, 218 Wis. 2d 52, 56, 579 N.W.2d 282 (Ct. App. 1998).

B. The Law

Sec. 938.183(1m)(c)2, Stats., provides that the court may remand for a juvenile court disposition when:

2. Except as provided in subd. 3., the court of criminal jurisdiction finds that the juvenile has committed a lesser offense or a joined offense that is a violation of s. 940.20 (1) or (2m) or 946.43 under the circumstances described in sub. (1) (a), that is an attempt to

violate s. 940.01 under the circumstances described in sub. (1) (am), that is a violation of s. 940.02 or 940.05 under the circumstances described in sub. (1) (am), or that is an offense for which the court assigned to exercise jurisdiction under this chapter and ch. 48 may waive its jurisdiction over the juvenile under s. 938.18 and the court of criminal jurisdiction, after considering the criteria specified in s. 938.18 (5), determines that the juvenile has proved by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to adjudge the juvenile to be delinquent and impose a disposition specified in s. 938.34.

In *State v. Ely*, 234 Wis. 2d 149 (Wis. Ct. App. 1999), after first noting that an earlier, but substantially similar, version of this statute was ambiguous⁹, the Court of Appeals explained that the statute:

must be interpreted to mean that the only juveniles eligible for a juvenile disposition under the statute are those whose ultimate convictions are to lesser offenses than the original charge, and these lesser offenses, had they been charged originally, would have been brought in the juvenile court rather than the adult court.

Here, the charge to which Trotter ultimately pleaded guilty was felony murder, contrary to Sec. 940.03, Stats. Felony murder is not an offense for which there is original adult jurisdiction under Sec. 938.183(1), Stats. Thus, once convicted of the lesser offense of felony murder, Trotter was

⁹ An understatement if there ever were one

eligible for a juvenile court disposition.

In deciding whether to grant a juvenile court disposition, the court is obligated to consider the factors set forth in Sec. 938.18(5), Stats. Before we consider those factors, it is critical to point out that these are the waiver of jurisdiction factors that the children's court must consider. They are very different than the factors that the adult court considers in determining whether to retain jurisdiction over an offense originally charged in adult court. 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. The trial court erroneously exercised its discretion in denying Trotter a juvenile court disposition.

In denying Trotter's motion for a juvenile disposition, the trial court dutifully ran through the statutory factors, appropriately exercising discretion, until the judge came to the final criterion in subsection (d), which instructs the court to consider the desirability of trial and disposition of the entire offense in one court if the juvenile was associated with other persons. On this point, the judge said:

It goes without saying that Roddee Daniel received a life sentence, the desirability of this Court to be consistent, to try cases together or as the statute I think says in Sub. (d) here, "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." I think under these circumstances given the disposition and sentence which Mr. Daniel received, Factor 5 here would certainly militate

against juvenile disposition.

(R:126-18, 19).

It is apparent that the judge interpreted this factor to mean that since the co-defendant received a life sentence, it would be unfair to allow Trotter a juvenile court disposition. This is an erroneous exercise of discretion for several reasons: (1) the factor in question pertains to the efficiency of resolving the co-defendants cases in one court, it does not call for uniformity of sentencing; (2) Wisconsin law requires an individualized approach to sentencing; and, (3) the fact that Roddee Daniel was convicted of first degree intentional homicide, and sentenced to life in prison, represents the State's belief that Daniel was, in fact, the one who bludgeoned the victim and, therefore, it mitigates the weight of Trotter's culpability for the murder.

Firstly, the language Sec. 938.18(5)(d), Stats. is clear that this is a procedural consideration. It is not an admonition for the judge to seek uniformity of sentencing between defendants. That is, the statute reads, "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." The object of this subsection is to promote judicial efficiency. It is "desirable" that the witnesses only be required to testify at

one trial. It is desirable that the judge who sentences each of the co-defendants be familiar with the facts of *both cases*. By no means, though, does the subsection suggest that if one defendant receives a lengthy sentence in adult court, that it would be unfair to allow the other defendant a juvenile court disposition.

Here, at the time Trotter was sentenced, Daniel had already been sentenced. Thus, there was no possibility that the witnesses would be required to testify in two separate trials. Moreover, the trial judge who sentenced Trotter was also the judge who sentenced Daniel and, therefore, the sentencing judge was already familiar with both cases.

Thus, subsection (d) is virtually inapplicable to the situation presented by this case. By no means does the statute require uniformity of sentencing.

Nonetheless, it is apparent from the judge's remarks that the court believed that since Daniel received a life sentence, it would be inappropriate or unfair to permit Trotter a juvenile court disposition. This is not an appropriate consideration. As the court stated in *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998), Wisconsin law does not require that defendants convicted of similar crimes receive equal or similar sentences. On the contrary, sentencing in Wisconsin is characterized by an individualized evaluation of defendants.

See id.

Moreover, the fact that Daniel was sentenced to life in prison is a strong indication that it was, in fact, Daniel who bludgeoned the victim to death.¹⁰ As such, Trotter's role in the offense is dramatically mitigated. There was no evidence that either of the defendants planned ahead of time to kill the homeowner. Rather, it appears that this was an unplanned, spur-of-the-moment decision by Daniel. Although this does not mitigate Trotter's legal responsibility for the felony murder, it substantially mitigates his degree of culpability.

Therefore, the fact that Daniel was convicted of first degree intentional homicide in adult court makes it more appropriate that Trotter's case be resolved in children's court. The situation was just as Trotter told the police: He made an immature decision to assist Daniel in burglarizing his neighbor's home. Trotter played no active role in the homicide.

Conclusion

For these reasons it is respectfully requested that the court reverse the trial court's order retaining adult court

¹⁰ Recall that, at the time of the reverse waiver hearing, evidence was presented that each of the defendants was claiming that the other did the killing. Thus, at that time, it was somewhat unclear as to who the killer was.

jurisdiction over Trotter's charges.

Dated at Milwaukee, Wisconsin, this _____ day of
January, 2012.

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Certification as to Length and E-Filing

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 5922 words.

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Dated this _____ day of _____, 2012:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2011AP001890**

State of Wisconsin,

Plaintiff-Respondent,

v.

Kawanis Trotter,

Defendant-Appellant.

Defendant-Appellant's Appendix

- A. Record on Appeal
- B. Excerpt of R:117 (Court's decision retaining jurisdiction)
- C. Excerpt of R:129 (Court's decision denying juvenile disposition)
- D. Order Retaining Jurisdiction

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit

court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 this ____ day of January, 2012.

Jeffrey W. Jensen