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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
DAMON MONTEZ WILLIS,	)	8-350 87-1083
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 33047), Richard A. Strickler, Judge.

Defendant appeals his conviction, following a jury trial, for sexual abuse in the second degree. **AFFIRMED.**

Scott Sobel, Des Moines, for the defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Nan Horvat, Assistant County Attorney, for the plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, J.

Defendant Damon Montez Willis appeals his conviction, following a jury trial, of second-degree sexual abuse. Defendant, fourteen years old at the time of his arrest, contends the juvenile court abused its discretion by waiving its jurisdiction over him and allowing him to be tried as an adult. He also contends his inculpatory statement to police should have been suppressed because his prior waiver of counsel was invalid, and the sentencing court failed to exercise its discretion regarding imposition of probation as an alternative to imprisonment.

Rachael Gothard, the juvenile victim of defendant's crime, testified that on the evening of July 25, 1986, she and two female juvenile companions were driving around Des Moines, Iowa, looking for a friend's house, when they asked two male juveniles (defendant Willis and codefendant Nelson) for directions. The two boys offered to show them the location of the house and got into the car. The defendants directed the girls to a certain location and when the car came to a stop, Nelson displayed a knife. Gothard fled from the car, leaving her companions, but Willis ran after her and caught her in a nearby wooded area, where he punched her in the jaw, stripped her clothes off and sexually assaulted her.

After a joint trial with a codefendant,[1] a jury found Willis guilty of second degree sexual abuse. Willis was convicted and sentenced to incarceration for up to twenty-five years.

I.

Willis contends the juvenile court abused its discretion by waiving its jurisdiction over him, thereby allowing him to be prosecuted as an adult. He asserts the court abused its discretion by failing to take into consideration the evidence presented relating to Iowa Code section 232.45(7)(a)(b)(c) when making its determination pursuant to Iowa Code section 232.45(6)(c).

Iowa Code section 232.45(1)-(5) establishes the procedure for the waiver of juvenile court jurisdiction. Section 232.45(6) provides that, following the waiver hearing, jurisdiction may be waived if the following criteria are met:

(a) The child is fourteen or older;

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1. Codefendant Edward Eugene Nelson, 17 at the time of trial, was convicted of willful injury and assault resulting in bodily injury. The Iowa Court of Appeals reversed these convictions, due to the trial court's failure to inform Nelson's parents of their right to confer with him prior to his waiver of counsel. See State v. Nelson, No. 8-68, (Aug. 24, 1988). Nelson's application for further review was granted by the Supreme Court on November 4, 1988.

(b) the court finds probable cause to believe the child has committed a delinquent act; and
(c) the court determines the state has established that there are not reasonable prospects for rehabilitating the child in the event the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction would be in the best interest of the child or the community.

In making the determinations under subsection (c), section 232.45(7) of the juvenile code provides:

> In making the determination required by [subsection c], the factors which the court shall consider include but are not limited to the following:
> a. The nature of the alleged delinquent act and the circumstance under which it was committed.
> b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.
> c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

The waiver statute vests discretion in the juvenile court in ruling on the waiver application. Iowa Code § 232.45(6). Our review is de novo to the extent of examining all the evidence to determine whether the court abused that discretion in ordering the waiver. State v. Greiman, 344 N.W.2d 249, 251 (Iowa 1984).

In the instant case, defendant does not challenge provisions (a) and (b) of section 232.45(6), but argues that the court abused its discretion under subsection c in failing to consider available rehabilitation programs. The juvenile court found there were no reasonable prospects for

rehabilitation in the juvenile system, that treatment programs would be available to Willis in the adult system, and that his best interests and also that of the community required waiver of jurisdiction.

Upon our review of the record, we see no reason to overturn the trial court's findings. At the waiver hearing, Ruth Schanke, Youth Services Worker with the Iowa Department of Human Services, testified there were no programs in the state which could provide sufficient, indepth therapy for juvenile sex offenders such as Willis who had exhibited assaultive tendencies. She testified that although one facility in Des Moines did offer residential treatment for juvenile sex offenders, it was extremely difficult to place juveniles there if they had shown assaultive tendencies. She also stated that, in her opinion, the State Training School (Eldora) was inadequate to meet defendant's needs.

The court also heard testimony from Ronnie Laden, a juvenile probation officer with the Polk County Juvenile Court, who completed a background investigation on Willis for the court. Although she recommended the juvenile court maintain jurisdiction, she admitted that Willis would not "get enough" treatment at the Eldora facility and was

unable to name any other in-state facility[2] which would provide appropriate treatment. She further indicated her recommendation to the court was not an "educated recommendation" because she felt she needed more time to "get to know" Willis.

The court also received a psychologist's report on Willis into evidence which stated that "[p]ersonality findings" did reflect "serious problems" which were "highly suggestive of serious underlying psychopathology."

We believe the evidence supports a finding that the prospects for Willis' rehabilitation within the juvenile system are slim, and furthermore, that the nature of the act and Willis' prior contacts with the juvenile authorities supports waiver of juvenile court jurisdiction. The record indicates Willis has had approximately seven to eight prior contacts with the juvenile court based upon referrals involving malicious mischief, fifth-degree theft, burglary, second degree

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2. The court denied Willis's request to reverse the waiver decision based upon stipulated written materials regarding a residential treatment program for juvenile sexual offenders in Minnesota. The stipulation indicated that there was not currently a contract for services between the State of Iowa and the Minnesota program, and defendant's counsel was attempting to locate alternative sources of funding. The court considered the materials but found them insufficient for reversal. We see no reason to disturb the court's decision.

robbery and assault to commit sexual abuse, possession of marijuana, and disturbing the peace.

Based upon the record before us, we find no abuse of discretion by the juvenile court in waiving jurisdiction.

II.

Willis next contends the court should have suppressed his confession because his prior waiver of counsel was invalid. He specifically asserts that the State obtained the waiver of counsel without providing his mother an opportunity to confer with him or informing her of her right to do so.

Willis relies upon Iowa Code section 232.11(2) and the Iowa Supreme Court's decision in State v. Walker, 352 N.W.2d 239, 241 (Iowa 1984) in arguing that parents have the right to consult with their detained child in police custody. In Walker, the court considered a seventeen-year-old juvenile's statutory challenge to the validity of his waiver of his right to counsel. Defendant argued the State failed to show the police officers made a good faith effort pursuant to Iowa Code section 232.11(2) to inform defendant's father (1) that he had been taken into custody, (2) of the alleged delinquent act for which he had been taken into custody, (3) his location, and (4) his father's right to visit and confer with him. The supreme court agreed and held that the State did not meet its burden of proving by a preponderance of the evidence

the officers complied with the statute and obtained a valid waiver of counsel prior to his confession. Id. at 243.

We believe that, based upon the facts of this case, Willis' reliance on Walker is misplaced. The operative factual difference here is that Willis, unlike Walker, was fourteen at the time of the proceeding against him. Walker was seventeen. In discussing section 232.11(2), the Walker court stated:

> It is important to note that the statute distinguishes between juveniles less than sixteen years of age and juveniles, like defendant, who are at least sixteen. For children less than sixteen, the statute provides that no waiver of counsel is valid unless accompanied by the written consent of the parent. See In the Interest of J.A.N., 346 N.W.2d at 499 ("The legislature has demanded that painstaking care must be taken to obtain parental consent before questioning a juvenile. The child can be expected to rely on the judgment of the consenting parent."). For the child who is at least sixteen years of age, the statute replaces written parental consent with the requirement that good faith efforts be made to notify the parent, guardian, or custodian and to provide the notified person with four explicit facts about the juvenile's circumstances: (1) "that the child has been taken into custody and" (2) "of the alleged delinquent act for which the child has been taken into custody," (3) "the location of the child, and" (4) "the right of the parent, guardian or custodian to visit and confer with the child." Iowa Code § 232.11(2) (1983).

Walker, 352 N.W.2d at 242 (emphasis added). We agree with the State's position that the notice provision applicable to older juveniles is only intended to apply to the absent parent who is unaware of the juvenile's circumstances, and that the information to be given to contacted parents is

required in order "to impress upon the parent the importance of going to the side of the child and giving the child parental advice." Id.

In the case at bar, the evidence showed that on July 26, 1986, at approximately 8:39 a.m. Officer Barb Dennis read a "Juvenile Waiver and Parental Consent" form to defendant Willis and his mother. Officer Dennis testified that defendant Willis and his mother then had the opportunity to read the form. In fact, Officer Dennis stated that Patricia Willis followed and read a blank form as the officer read it aloud. Defendant Willis then indicated to Officer Dennis that he had completed the ninth grade, understood his Miranda rights and knowingly and voluntarily would waive said rights and talk with the police officer. Defendant Willis signed the form at 8:39 a.m. and his mother signed it shortly thereafter, thus allowing her son to be interviewed by Officer Dennis. Based upon these facts, we fail to find that Willis' rights were violated pursuant to section 232.11.

We similarly fail to find that Willis' rights were violated pursuant to Iowa Code section 232.45(9). That section also sets forth factors the court may consider when determining the admissibility of a juvenile offender's statements in adult criminal court. Section 232.45(9) provides, in pertinent part:

232.45. Waiver hearing and waiver of jurisdiction

> 9. If the court waives jurisdiction, statements made by the child after being taken into custody and prior to intake are admissible as evidence in chief against the child in subsequent criminal proceedings provided that the statements were made with the advice of the child's counsel or after waiver of the child's right to counsel and provided that the court finds the child had voluntarily waived the right to remain silent. Other statements made by a child are admissible as evidence in chief provided that the court finds the statements were voluntary. In making its determination, the court may consider any factors it finds relevant and shall consider the following factors:
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> a. Opportunity for the child to consult with a parent, guardian, custodian, lawyer or other adult.
>
> b. The age of the child.
>
> c. The child's level of education.
>
> d. The child's level of intelligence.
>
> e. Whether the child was advised of the child's constitutional rights.
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> f. Length of time the child was held in shelter care or detention before making the statement in question.
>
> g. The nature of the questioning which elicited the statement.
>
> h. Whether physical punishment such as deprivation of food or sleep was used upon the child during the shelter care, detention, or questioning.
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> Statements made by the child during intake or at a waiver hearing held pursuant to this section are not admissible as evidence in chief against the child in subsequent criminal proceedings over the child's objection in any event.

At trial, Willis' mother gave conflicting testimony as to when she requested to speak to her son subsequent to his arrest. She testified she had been to the police station twice on the morning of the interrogation; from 1:00 to 4:00 a.m. and then again at 8:00-8:30 a.m. She initially testified she asked to see Willis during her first visit but denied this on cross-examination, stating instead that

she had first requested to see him later that morning. During redirect examination, she changed her testimony again, and stated she was denied the opportunity to see or speak to her son during her initial visit (1:00-4:00 a.m.).

Police Officer Barbara Dennis testified at the suppression hearing that neither Willis' mother nor Willis himself had requested the opportunity to talk with each other before the waiver proceedings, and Willis' mother only asked to do so after the confession was made. She further testified she did not think it was necessary to provide them with an opportunity to talk, as neither of them had requested to do so.

As the trial court noted, the court may consider the factors listed under section 232.45(9) under the totality of circumstances, and no one factor is dispositive of the issue. Although the evidence is unclear as to whether Willis' mother in fact requested to see her son, we are convinced, based upon our consideration of the factors in section 232.45(9)(a)-(h) that Willis understood his Miranda rights and knowingly and voluntarily waived them.

III.

Willis further contends the sentencing court erred by imposing a sentence of imprisonment without considering the provisions of Iowa Code section 232.8(3). That statute provides that when a juvenile has been convicted as an

adult for a crime, the sentencing court may impose a deferred judgment and probation even if those sentencing options would be unavailable for an adult convicted of the same crime. Willis contends the record indicates the sentencing court was unaware of its discretion to impose probation. The State responds that the sentencing court expressly considered and rejected the option of probation under section 232.8(3).

We agree with the State. The record clearly indicates the court was well aware of its option to grant Willis probation and declined to do so. We see no merit to this claim.

Defendant's conviction of sexual abuse in the second degree is hereby affirmed.

AFFIRMED.