

Reverse Waiver: Can We Win?

State Public Defender Conference

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Materials will be posted on SPD
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Can we win?

- The burden is on the defendant
- The criteria are unattainable
- The evidence is unavailable
- The court has no discretion
- The statute is really automatic transfer

What is reverse waiver?

- Applies to original jurisdiction cases
938.183
- Procedure occurs after preliminary hearing
- Court must decide whether to retain jurisdiction in adult criminal court

What offenses are included under 938.183?

- Battery or Assault by Prisoner committed by juveniles previously found delinquent
- Intentional homicide and Reckless homicide including attempted homicide for juveniles age 10 and over
- All joined offenses
- Prior waiver of jurisdiction
- Prior original jurisdiction case

Not eligible of reverse waiver

- 17 year old defendants in criminal cases
- Offenses originating in juvenile court that were waived under 938.18
- But, compare 970.035 for cases where there is no probable cause at prelim for a juvenile age that was waived if under 15

Reverse waiver procedure

- Preliminary hearing required to determine probable cause
- PC must exist that child committed an original jurisdiction offense
- Court must determine whether to retain jurisdiction under 970.032

Constitutional challenges

- 970.032 is not a violation of substantive due process or equal protection. *State v. Martin*, 191 Wis. 2d 646 (1995)
- Are there renewed challenges? See *Roper v. Simmons*, 543 US 551 (2005)

Criteria for reverse waiver under 970.032(2)

- If convicted child could not receive adequate treatment in criminal justice system
- Transferring jurisdiction would not depreciate the seriousness of the offense
- Retaining jurisdiction is not necessary to deter the child or other children from committing the alleged violation

Special procedure in Milwaukee County

- Juvenile court judges are assigned to handle the reverse waiver decision

What is a win?

- The court transfers jurisdiction to juvenile court
- The court finds no probable cause at preliminary hearing
- Negotiated issuance of non-original jurisdiction charge
- Negotiated plea to lesser charge and lesser penalty
- Trial results in conviction of lesser offense
- Trial results in acquittal

Bail for original jurisdiction cases

- Children subject to arrest and detention in jail, but ...
- Children under 15 must be held in a juvenile secure detention facility
- Child is subject to pre-trial release and bail under Ch 969 Wis. Stats.

Pre-charging agreements

- Charging conferences: does your county use them?
- Choice of offense will determine the place of jurisdiction
- You must know juvenile dispositions to negotiate for juvenile jurisdiction

Pre-trial Publicity

- Confidentiality is not sufficient liberty interest to prevent disclosure of child's identity before the reverse waiver hearing, *State v. Hazen*, 198 Wis. 2nd 554 (1995)
- Prepare a media image of the client
- Apply for restrictions on disclosure of confidential records

Discovery before reverse waiver

- Does 971.23 to 971.25 apply prior to reverse waiver?
- Does 938.293 apply in original jurisdiction cases?
- Due process forms basis for disclosure of information relevant to issues for determination. We have the burden of proof.

What records do you need?

- Police reports and records
- Juvenile court records
- Records of Dept. of Human Services, Child Welfare or supervising agency
- Department of Corrections
- School records
- Other records that form the basis for evaluation and expert opinion concerning criteria

Procedure

- Bifurcation of preliminary hearing and reverse waiver hearing
- Magistrate may not be the same at reverse waiver
- Burden of proof is on child to demonstrate statutory factors. *State v. Verhagen*, 198 Wis. 2d 177 (1995).

Do the Rules of Evidence apply?

- Rules of evidence apply in criminal proceedings
- 911.01 (2) and (4) and 972.1(1) do not make an exception for reverse waiver hearings
- But rules of evidence do not apply to similar juvenile proceedings under 938.299(4) (b), i.e. waiver hearings
- Should you object to hearsay?
- Expert witnesses can rely on facts that are not admissible as evidence under 970.03

Waiver Criteria

938.18(5)

- Personality of the juvenile, maturity, pattern of living, prior treatment and potential for future treatment
- Juvenile's motives and attitudes
- Prior record of juvenile
- Adequacy and suitability of treatment within juvenile justice system
- Seriousness of offense

Types of evidence

How do we meet the criteria?

- Expert witnesses
 - State v. Dominic E.W., 218 Wis. 2d 579 (1998)
 - Psychological evaluation and testing
 - Suitability of treatment in adult facilities
 - Suitability of treatment in juvenile facilities
 - Research on effective treatment of violent juvenile offenders
 - Research on juvenile brain development

Role of lay witnesses

- Family members
- Law enforcement officers
- Probation officers, social workers, Bureau of Child Welfare
- Correctional facility staff
- SPD investigators and client services
- Other fact witnesses

Does the State have the right to examine the child defendant?

- No statutory right under 970.032
- No corresponding right before waiver hearing
- 971.14 permits competency examination
- 971.16 permits examination upon NGI plea
- *State v. Davis*, 2002 WI 75 allows examination when defendant offers Richard AP evidence based on interview of client
- Interference with 5th Amendment rights
- Defendant has burden of proof
- Practical implications that exam will encourage prosecutorial abuse

What happens after conviction in adult court?

- Adult penalties apply
- Juvenile disposition is still possible when:
Convicted of lesser offense not subject to waiver OR lesser offense subject to waiver if defendant can meet waiver criteria
- Transfer to adult prison possible at age 17

Procedure for Appeal

- Must be appealed before guilty plea or will be waived
- Procedure for permissive appeal 809.50
- Need for immediate review is presumed, as in *State ex rel A. E. v. Green Lake County*, 94 Wis. 2d 98 (1980)