

RECEIVED

11-27-2012

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP393-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORTEZ LORENZO TOLIVER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND A
DECISION AND ORDER DENYING MOTION FOR
POSTCONVICTION RELIEF ENTERED IN RACINE
COUNTY, THE HONORABLE FAYE FLANCHER
PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

JEFFREY O. DAVIS

State Bar No. 1011425

MATTHEW C. VOGEL

State Bar No. 1066227

QUARLES & BRADY LLP

411 E. Wisconsin Avenue, Suite 2350

Milwaukee, WI 53202-4426

Attorneys for Defendant-Appellant

Cortez Lorenzo Toliver

TABLE OF CONTENTS

	Page
I. Because the Trial Court Failed to Find Probable Cause For the Charged Felony During the Preliminary Hearing the Court Lost Jurisdiction to Proceed.....	1
II. Even if the Circuit Court Retained Subject Matter Jurisdiction, It Lost Competency to Exercise that Jurisdiction	8
III. The Current State of the Law Regarding the Effect of Guilty Pleas on the Ability to Appeal Reverse Waiver Denials is Imprudent.....	9
IV. The Circuit Court Failed to Articulate its Reasoning Adequately and Relied upon Incorrect Facts in Sentencing Toliver	10
V. Conclusion.....	17
CERTIFICATION.....	19
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	20
CERTIFICATE OF MAILING PURSUANT TO WIS. STAT. § 809.80(4).....	21

TABLE OF AUTHORITIES

	Page
 CASES	
<i>Green Cty. Dept. of Human Serv. v. H.N.</i> , 162 Wis.2d 635, 469 N.W.2d 845 (1991)	8
<i>Harris v. State</i> , 75 Wis.2d 513, 250 N.W.2d 7 (1977)	11
<i>Mack v. State</i> , 93 Wis.2d 287, 286 N.W.2d 563 (1980)	7
<i>Mueller v. Brown</i> , 105 Wis.2d 171, 313 N.W.2d 790 (1982)	7
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183 (2005)	15
<i>State v. Davis</i> , 2005 WI App 98, 281 Wis.2d 118, 698 N.W.2d 823	16
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis.2d. 535, 678 N.W.2d 197	15
<i>State v. Kleser</i> , 2010 WI 88, 328 Wis.2d 42, 786 N.W.2d 144	4, 6
<i>State v. Krueger</i> , 119 Wis.2d 327, 351 N.W.2d 738 (Ct. App. 1984).....	11
<i>State v. Leitner</i> , 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207	10
<i>State v. Mosley</i> , 201 Wis.2d 36, 547 N.W.2d 806 (Ct. App. 1996).....	11
<i>State v. Riekkoff</i> , 112 Wis.2d 119, 332 N.W.2d 744 (1983)	10
<i>Village of Trempealeau v. Mikrut</i> , 2004 WI 79, 273 Wis.2d 76, 681 N.W.2d 190 (Wis. 2004)	9

STATUTES

Wis. Const. Art. VII Sec. 87
Wis. Stat. § 970.03(1).....3
Wis. Stat. § 970.0326
Wis. Stat. § 970.032(1).....2,3
Wis. Stat. §§ 938.183(1).....4

I. Because the Trial Court Failed to Find Probable Cause For the Charged Felony During the Preliminary Hearing the Court Lost Jurisdiction to Proceed.

In answer to Toliver's reverse waiver challenge, the State invokes waiver: the notion that by agreeing to a guilty plea in adult court, Toliver relinquished any right to challenge whether he was properly convicted and sentenced in that Court. But the state's own brief tacitly acknowledges the flaw in this argument: subject matter jurisdictional defenses cannot be waived. And in this case, the trial court was required to conduct a count-specific probable cause analysis at the outset of the case, and by failing to do so lost subject matter jurisdiction to proceed.

There can be no question that the trial court failed to conduct this threshold inquiry. Specifically, the court failed during Toliver's preliminary hearing to find that probable cause existed to charge Toliver with the *specific* felony of attempted first-degree intentional homicide, (instead only finding probable cause that *some* felony had been committed by him). Indeed, the State admits as much.

(52:11; State’s Br. at 2). Because Toliver was a juvenile (age 16) when charged, Wis. Stat. § 970.032(1)—the statute that gives the adult court exclusive original jurisdiction over juveniles for certain crimes—expressly required that the court find that probable cause of the specific felony of attempted first-degree intentional homicide (or one of the other felonies enumerated under that statute) exists, and that it do so *at the preliminary hearing* stage, for the court to retain subject matter jurisdiction over this case. Because the circuit court did not make this finding, it lost jurisdiction.

The relevant statute provides:

Notwithstanding s. 970.03 [relating to preliminary examinations generally], 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.

(Wis. Stat. § 970.032(1)).

Where the court does not find probable cause of “the violation of which he or she is accused under the

circumstances specified” in the relevant statute, the juvenile “shall”—not “may”—be discharged. When the trial court failed at the preliminary hearing stage to find that Toliver had committed the violation of which he was accused, the court had no discretion to continue proceedings. Rather, it was statutorily required to discharge Toliver, with the case to proceed thereafter, if at all, in juvenile court.

The Supreme Court has emphasized the significance of this statutory requirement and distinguished a hearing brought under it from a standard preliminary examination hearing. A standard preliminary examination hearing under Wis. Stat. § 970.03(1) only requires a finding that probable cause exists that some felony has been committed. In contrast, as explained by the Supreme Court, “under § 970.032(1), the court must determine whether there is probable cause to believe that the juvenile has committed ‘*the* violation’ of which he or she is accused in the criminal complaint. This finding is required not only to protect the juvenile from hasty, improvident, or malicious prosecution,

but also to assure that the criminal court has ‘exclusive original jurisdiction’ of the juvenile by virtue of the juvenile’s probable violation of one of the offenses enumerated in Wis. Stat. §§ 938.183(1)(a), (am), (ar), (b), or (c).” (*State v. Kleser*, 2010 WI 88, ¶ 57, 328 Wis.2d 42, 786 N.W.2d 144, emphasis in original).

Furthermore, “The latter [jurisdictional] purpose is the more important purpose under this statute because ‘[i]f the court does not make *that finding*, the court *shall* order that the juvenile be discharged,’ although proceedings may be brought regarding the juvenile under Chapter 938.” (*Id.*, emphasis in original).

The State acknowledges that both the applicable statute and the Supreme Court in *Kleser* require probable cause as to the specific felony be found at the preliminary hearing stage, and that the circuit court did not do this. The State, however, claims that the trial court could nevertheless remedy this failure after the preliminary hearing and thereby retain jurisdiction.

According to the State, the trial court could retain jurisdiction by (1) finding probable cause that some felony was committed at the preliminary hearing stage, and (2) later finding that probable cause as to the specific felony had been previously found. (State's Br. at 2). The argument runs contrary to the plain meaning of the statutory language. The statute leaves no room for after the fact corrections to the record, effective retroactively, where the court fails to make the expressly required finding. Rather, the statute provides that the court either must (1) find that probable cause of the specific felony exists or (2) discharge the case. Since no such probable cause was found at the preliminary hearing, the case should have never proceeded in adult court. And the error is jurisdictional. Having lost jurisdiction over the case, the trial court also necessarily lacked the power to somehow modify its earlier finding in a way that would now benefit the State.

Where probable cause as to a specific felony *is* found at the preliminary hearing stage, there is no basis for

contradicting that finding after the preliminary hearing stage except at trial. (*State v. Kleser*, 2010 WI 88 at ¶ 66). The corollary – where *no* such probable cause is found – must also preclude the circuit court from making that finding at a later, pre-trial stage. (Of course, this issue should never arise because there can be no later pre-trial stage where no probable cause for the specific felony is found at the preliminary hearing). The State’s suggestion to the contrary is inconsistent with the view of the Supreme Court and nonsensical in the context of a statute that provides for dismissal of a case in the absence of a probable cause finding.

Toliver is not claiming that the circuit court never had jurisdiction over his case. But it cannot be disputed that the effect under Wis. Stat. § 970.032 of the trial court's failure to establish probable cause for the violation charged was, as the Supreme Court has noted, to “lose jurisdiction.” (*State v. Kleser*, 2010 WI 88 at ¶ 62).

The Wisconsin Constitution provides, “Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state...” (Wis. Const. Art. VII Sec. 8). Generally, “No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.” (*Mueller v. Brown*, 105 Wis.2d 171, 176, 313 N.W.2d 790 (1982). “Criminal subject matter jurisdiction is defined as the power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment in a court of a judicial proceeding. The power is one conferred by law. A court has subject matter jurisdiction where it has been authorized to hear and determine the primary object of the action.” (*Mack v. State*, 93 Wis.2d 287, 294, 286 N.W.2d 563 (1980), citations omitted).

Here, the trial court's subject matter jurisdiction was initially limited to hearing and determining whether specific probable cause existed; when it did not do so at the preliminary hearing, subject matter jurisdiction was lost.

Consequently, Toliver's reverse waiver argument was not only not subject to waiver, but the propriety of its grant is in essence proven by the lack of jurisdiction: indisputably, the case against him could not proceed in adult court.

II. Even if the Circuit Court Retained Subject Matter Jurisdiction, It Lost Competency to Exercise that Jurisdiction.

Competency concerns a court's power to adjudicate the specific case before it. (*Green Cty. Dept. of Human Serv. v. H.N.*, 162 Wis.2d 635, 656, 469 N.W.2d 845, 853 (1991)). Although distinct, the terms "subject matter jurisdiction" and "competency" have frequently been used interchangeably; both go directly to a court's "loss of power" over a matter, *id.* at 656, and the loss of either has similar consequences for purposes of waiver. (*Id.* at 654).

A court can lose competency to exercise subject matter jurisdiction by not complying with the statute conferring that competency. "[T]he failure to comply with any statutory mandate... prevents [a circuit court] from adjudicating the specific case before it." (*Id.* at 656).

While challenges to a circuit court's competency may be deemed waived if not raised in the circuit court, this court has inherent authority to overlook a waiver in appropriate cases or grant it discretionary review. (*Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 30, 273 Wis.2d 76, 681 N.W.2d 190 (Wis. 2004)).

Here, the circuit court failed to comply with a statutory mandate by making no specific probable cause determination. If it did not thereby lose its subject matter jurisdiction, it at a minimum lost its competency to continue hearing the case. The importance of specific probable cause under this statute has already been discussed, and justifies a second look from this court regardless of whether objection to the court's competency might be deemed to have been waived.

III. The Current State of the Law Regarding the Effect of Guilty Pleas on the Ability to Appeal Reverse Waiver Denials is Imprudent.

While the trial court's failure to conduct a probable cause analysis caused it to lose subject matter jurisdiction

over Toliver and/or competency to hear his case, Toliver's reverse waiver argument should not be subjected to waiver in any event. That is because the guilty plea waiver rule is a rule of judicial administration and not of power. (*State v. Riekkoff*, 112 Wis.2d 119, 124, 332 N.W.2d 744 (1983)). Waiver rules may be ignored if a case presents an important, recurring issue. (*State v. Leitner*, 2001 WI App 172, ¶ 42, 247 Wis. 2d 195, 633 N.W.2d 207). Toliver suggests that the waiver rule is imprudent both generally in the context of a juvenile's reverse waiver appeal and specifically as to the case at hand given the dramatically different treatment of juveniles tried in adult court versus those tried in juvenile court. And in light of the facts of this case and for the reasons set forth in his initial brief, reverse waiver should have been granted.

IV. The Circuit Court Failed to Articulate its Reasoning Adequately and Relied upon Incorrect Facts in Sentencing Toliver.

If this court declines to find that the circuit court lacked subject matter jurisdiction or competency following

the preliminary hearing, and further declines to find that reverse waiver should have been granted, then the circuit court's sentence of Toliver was nevertheless an erroneous exercise of its discretion.

This court could find an abuse of discretion by the circuit court in applying a sentence because the circuit court failed to state on the record the material factors which influenced its decision, gave too much weight to one factor in the face of other contravening considerations, or relied on irrelevant or immaterial factors. (*State v. Krueger*, 119 Wis.2d 327, 351 N.W.2d 738 (Ct. App. 1984), citing *Harris v. State*, 75 Wis.2d 513, 518, 250 N.W.2d 7, 10 (1977)).

In sentencing Toliver, the circuit court relied upon incorrect facts in applying one of the three required sentencing factors that must be applied in sentencing a defendant enumerated in *State v. Mosley*, 201 Wis.2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996), failed to consider with anything more than conclusory generalizations at least

one other such factor, and applied the third factor in a questionable manner.

First, while the circuit court indicated during sentencing that it was considering the gravity of the offense, its recitation of the relevant facts of the case, essential in assessing this factor, meaningfully misstates the circumstances under which the crime was committed.

The circuit court describes a vivid crime scene, one that would speak both to the gravity of the offense and to the character of the defendant—but for the fact that the scene described by the court did not exist on the record before it. In particular, the court describes a situation where the victim “left all of the money on the table and he ran. You could have stopped it right there. Yeah, you still would have been in trouble, you still would have been in trouble, but you had to get up, you had to chase after him.” (67:37). This purported crime scene, where Toliver forgoes a chance to recover his gambling losses for an opportunity

to chase and shoot the victim, is as graphic as it is misleading.

The criminal complaint shows a meaningfully different situation than that relied upon by the circuit court during sentencing, notwithstanding what the State suggests. (State's Br. at 20). Rather than the victim leaving money on the table where Toliver could have easily grabbed it and been on his way, the complaint shows the victim fleeing with the money at issue and Toliver chasing him. (1:2).

The circuit court's apparent confusion of the facts surrounding the shooting is not harmless error. Instead, it speaks directly to the motivations of Toliver in pursuing the victim. Notwithstanding the State's implication to the contrary, the circuit court's creation of a critical fact in assessing the gravity of the offense renders its treatment of this factor fundamentally unsound.

Second, the circuit court must have considered the character of the offender. For the reasons set forth in Toliver's initial brief (Toliver's Br. at 23) and because of

the mischaracterization of facts described above, Toliver continues to assert that the circuit court's assessment of the facts relevant to this analysis, while mentioned at length by that court, were inadequate and not supported by the facts at hand.

Finally, the circuit court must have considered the protection of the public. As evidenced by the cursory treatment of this point in the State's brief, the extent of the circuit court's finding on this factor is essentially limited to the conclusory platitudes cited by the State: "[I]t is my duty to protect the community from you; to protect other people such as Mr. Gorman from your reckless behavior." (67:36; State's Br. at 20). The court surely did not address this factor with sufficient depth to be considered adequate under existing law, having provided no substantive analysis, nothing that would inform the defendant or the public as to how the prescribed punishment would further the protection of the public.

Virtually every court intends to “protect the community” and to protect others from “reckless behavior” when sentencing someone who committed the offenses to which Toliver pleaded guilty. To note this without meaningful elaboration does nothing to establish why the particular sentence was appropriate for Toliver.

The State argues that the circuit court adequately considered all three *Mosley* factors. To the contrary, by citing an inaccurate account of the facts before it and merely listing the essential factors it must consider in sentencing while doing little to assess the interplay between these factors and the facts of this case, the court failed, “by reference to the relevant facts and factors, [to] explain how the sentence’s component parts promote the sentencing objective.” (*State v. Gallion*, 2004 WI 42, ¶ 46, 270 Wis.2d 535, 678 N.W.2d 197).

This is set against a backdrop of clear directive from the U.S. Supreme Court that “juvenile offenders cannot with reliability be classified among the worst offenders.” (*Roper*

v. Simmons, 543 U.S. 551, 569, 125 S.Ct. 1183 (2005)).

The State claims that “Toliver’s repeated emphasis on his age is misplaced.” (State’s Br. at 21). It cites *State v. Davis*, 2005 WI App 98, 281 Wis.2d 118, 698 N.W.2d 823, for the proposition that a trial court need not consider a defendant’s age, and may give the defendant’s age any weight it wishes if it chooses to consider it.

Despite *Davis*, the U.S. Supreme Court in *Roper*, which was decided the same year as *Davis*, suggested that a defendant’s age was critical in determining the appropriate punishment for a crime. Although *Roper* was considering the permissibility of capital punishment for juveniles, the logic of its findings extends to this one. Here, Toliver was sentenced to consecutive sentences and to the maximum and near-maximum sentences for the two counts. *Roper* suggests that the sentencing of a juvenile must take into account the “diminished culpability of juveniles.” (*Roper v. Simmons*, 543 U.S. at 571). In contrast, the circuit court

made clear that it did not consider Toliver's age a mitigating factor. (67:36).

The circuit court had the opportunity to modify Toliver's sentence at the post-conviction stage but declined its opportunity to do so. For the reasons set forth above and in Toliver's initial brief, it should not have declined that opportunity.

V. Conclusion.

For these reasons, as well as the reasons set forth in Toliver's initial brief, Toliver respectfully requests that this court remand the case for discharge for lack of subject matter jurisdiction and/or competency, or that it remand for reconsideration of the reverse waiver request and for modification of Toliver's sentence.

Dated this 27th day of November, 2012.

Respectfully submitted,

JEFFREY O. DAVIS
State Bar No. 1011425
MATTHEW C. VOGEL
State Bar No. 1066227

/s/ Matthew C. Vogel
QUARLES & BRADY LLP
411 East Wisconsin Avenue,
Suite 2350
Milwaukee, Wisconsin 53202-4426
(414) 277-5000
jeffrey.davis@quarles.com
matthew.vogel@quarles.com

*Attorneys for Defendant-Appellant
Cortez Lorenzo Toliver*

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sections 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,865 words.

Dated this 27th day of November 2012.

Signed:

/s/ Matthew C. Vogel

Matthew C. Vogel

State Bar No. 1066227

Quarles & Brady LLP

411 E. Wisconsin Avenue,

Suite 2350

Milwaukee, WI 53202-4426

Attorney for Defendant-

Appellant Cortez Lorenzo

Toliver

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of November, 2012.

Signed:

/s/ Matthew C. Vogel
Matthew C. Vogel
State Bar No. 1066227
Quarles & Brady LLP
411 E. Wisconsin Avenue,
Suite 2350
Milwaukee, WI 53202-4426

*Attorney for Defendant-
Appellant Cortez Lorenzo
Toliver*

**CERTIFICATE OF MAILING PURSUANT TO
WIS. STAT. § 809.80(4)**

I hereby certify that on November 27, 2012, I caused the Reply Brief of Defendant-Appellant Cortez Lorenzo Toliver to be deposited in the United States mail for delivery by first-class mail, postage prepaid to:

Clerk of Courts Wisconsin Court of Appeals 110 East Main Street, Suite 215 P.O. Box 1688 Madison, WI 53701-1688	Katherine D. Lloyd Assistant Attorney General Wisconsin Department of Justice P.O. Box 7857 Madison, WI 53707-7857
--	---

Dated this 27th day of November, 2012.

By: /s/ Matthew C. Vogel
Matthew C. Vogel
State Bar No. 1066227
Quarles & Brady LLP
411 E. Wisconsin Avenue,
Suite 2350
Milwaukee, WI 53202-4426

*Attorney for Defendant-
Appellant Cortez Lorenzo
Toliver*

QB\18669475.5