

**STATE OF WISCONSIN
COURT OF APPEALS
District II
Case #2012AP002103-CR
Lower Court Case: #10 CF 527
Related Lower Court Case: #10 JV 107**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff/Respondent,

- v. -

CODY G. PHILLIPS,

Defendant/Appellant.

**ON APPEAL FROM DECISIONS AND ORDERS OF THE RACINE
COUNTY CIRCUIT COURT DATED SEPTEMBER 12, 2012 AND OCTOBER
10, 2012, THE HONORABLE ALLAN TORHORST PRESIDING**

REPLY BRIEF DEFENDANT/APPELLANT

Submitted by:

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ARGUMENT

The state concedes that “*Phillips was entitled to ... the withdrawal of his pleas to both counts and vacation of his convictions on both counts.*” *State’s Brief*, at 4. This concession recognizes that the state impermissibly sought waiver because Cody was younger than the minimum age for waiver, and recognizes that the adult court charge wrongfully alleged a minimum 25 year prison sentence.

I. THE PRIMARY PURPOSE OF THIS APPEAL WAS TO PERMIT CODY TO CHALLENGE THE WAIVER ORDER.

This Court granted Cody’s petition for leave to appeal a non-final order because Cody sought to challenge the juvenile waiver order. As stated in his supporting Memorandum:

The primary purpose of this interlocutory appeal is to secure to Cody the right to challenge the waiver order....

Accordingly, Cody’s request for leave to appeal from the adult trial court’s order is Cody’s best effort to obtain the right to challenge the juvenile court waiver order, a right that he would have had but for his counsel’s ineffectiveness.

II. THE STATE SEEKS TO DENY REVIEW OF THE WAIVER ORDER DESPITE ADMITTED ERRORS IN THE JUVENILE PROCEEDINGS.

While the state did not oppose Cody’s appeal, it argues against *any* review of the waiver proceedings. The state’s approach would ignore the

errors in the juvenile proceedings, and end up with prosecution of both charges in adult court. Had there been *no* error, the most the state could have obtained (and only if the waiver petition is deemed divisible) would have been waiver on one count and retention in juvenile court of the other. The state's solution to its errors here is tantamount to a shrug.

A. The Parties Agree On Certain Basic Principles.

The crux of the state's argument is found on Page 13 of its brief:

- Cody did not challenge prosecutive merit in the juvenile court proceedings;
- the trial court did not address whether the juvenile court would have waived jurisdiction on Count 2 if the state had not also sought waiver on Count 1;
- the trial court did not find harmless error, but simply remedied errors over which it had jurisdiction; and
- the trial court rightfully refused to look behind the facially valid waiver order on Count 2.

Cody agrees with each of these points. He did not challenge prosecutive merit because his lawyer failed to see the problem. The trial court could not decide the merits of the juvenile court's review of the waiver proceedings, nor properly determine harmless error, because those decisions are properly made by the juvenile court. The trial court should not have looked behind the waiver order, which is why it should have remanded the case to the juvenile court for that consideration.

B. Cody Properly Sought Relief.

The state first claims, “*Phillips never asked the adult criminal court to relinquish its jurisdiction over Count 2 to the juvenile court under Vairin M.*” *State’s Brief*, at 10, citing *In the Interest of Vairin M.*, 255 Wis. 2d 137, 157, 647 N.W.2d 208, 217 (2002). This is untrue. Cody’s Motion for Reconsideration [R:34, ¶34-¶47] requests just such a remand:

(¶45) *[Vairin] requires first that the new factor not be known to the juvenile court; obviously, neither of these errors was raised before the post-conviction motion was filed. Second, the new factor must be highly relevant to the criteria for waiver. ... the fact that the more serious of the two counts was not even a properly waived offense makes it obvious that this prong is met. Finally, the new factor must likely have affected the juvenile court’s determination....*

(¶47) *Instead of itself evaluating the impact of the new factors on the waiver (which it is prohibited from doing), this Court should have followed Vairin and remanded to the juvenile court for further proceedings.*

Clearly, remand consistent with *Vairin* was sought.

C. The State’s Claim That Cody Failed To Seek Prompt Relief Is No Basis For Denying Remand.

Next, the state claims that Cody’s motion “*was not brought promptly.....*” *State’s Brief*, at 10. The motion for remand was brought promptly upon the defense discovering the state’s gross error. Is the state really asking that this Court deny review of waiver proceedings because Cody’s attorneys failed to discovery the *state’s* error quickly enough?

Furthermore, the “promptness” requirement exists for interlocutory appeals (14 days); the entire purpose of the *Vairin* holding was to establish a remedy when that time period had elapsed before a new factor was discovered.

D. The State’s Claim That Cody Abandoned His Ineffective Assistance Of Counsel Claim Is False.

Amazingly, the state further claims (Footnote 1, *State’s Brief* at 11) that Cody abandoned his ineffective assistance of counsel claim. But Cody had challenged his criminal court *and* juvenile court attorney’s representation. Once the convictions and pleas were vacated, it was no longer necessary to pursue adult criminal court relief - Cody had obtained appropriate relief *as to adult court*.

However, Cody certainly never abandoned his ineffectiveness claim with regard to his juvenile attorney; this claim is properly heard by the juvenile court, not the adult court, where the challenged representation occurred. And, the state concedes that a serious error occurred, writing: “*the assistant public defender ... failed to recognize that Phillips was not eligible to be waived on Count 1....*” *State’s Brief*, at 4. It is not that Cody abandoned his claim of faulty representation; rather, the state has conceded it. Cody has continually asked for the opportunity to prove that his juvenile counsel’s ineffective representation caused him harm; his request for remand to juvenile court is to obtain relief from the waiver proceedings that were conducted in error. The state vigorously opposes any forum to consider that harm.

It is ludicrous for the state to assert that Cody abandoned his efforts when this appeal was taken for that purpose, and when the state seeks to prevent any court from hearing the impact of the errors it caused.

E. The State’s Assertion That The Facts Would Be The Same At A New Waiver Hearing Is Not Persuasive.

Almost in passing, the state claims that “*the facts underlying Count 1 would still have been presented to the juvenile court....*” State’s Brief, at 11, indicating presumably that the error is therefore harmless. However, the state does not address Cody’s contentions in his Initial Brief: first, that had count 1 *not* been an allegation in the waiver petition, in order to be introduced the state would have been required to **prove** the allegations by **evidence** instead of having allegations be deemed true for purposes of the hearing; and second, that he would have the benefit of **discovery** as to Count 1’s allegations and thus been able to attack such allegations as well.

It is a general proposition of appellate procedure that when a party fails to address an argument advanced by its opponent, such argument may be deemed established. *See, e.g.: Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979):

“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.” State ex rel. Blank v. Gramling, 219 Wis. 196, 199, 262 N.W. 614 (1935).

The state asks this Court to take its word that the Count 1 factual allegations would have been proven had the waiver hearing occurred with only Count 2 alleged, therefore the error was harmless. However, the state did not present any **evidence** to support its Count 1 claims. Specifically:

- The state called no witnesses regarding Count 1.
- Thus, no cross-examination of the state’s witnesses ever

occurred.

- Cody was not permitted to contest these allegations (though he hotly disputes them).
- Cody was not accorded discovery of the Count 1 facts prior to the waiver hearing.

This Court cannot assume that the state could have established that the facts underlying Count 1 are those, and only those, that it alleged in the delinquency petition.

Cody's point is that because the state wrongfully sought waiver, the allegations were deemed true and insulated from attack. Now the state wants to continue this insulation. The State wants this Court to assume on appeal that these facts remain true – despite no proof in this regard, proof that is required when accusations are outside the waiver petition. The state thus continues to seek the benefit of prosecutive merit when it fails to exist.

In reality, we do not know what the sworn testimony would have been. We do not know what evidence would be convincing and what would not. We do not know the witness' testimony. Perhaps most importantly, we cannot assume that there is only the state's side to the story. It is presumptuous for the state to assert that "the facts" would be the same whether Cody is legally permitted to dispute them or not.

Accordingly, the state's claim – that the "facts" alleged in support of Count 1 would have been admitted in support of waiver on Count 2 – bolsters Cody's request for remand. By seemingly agreeing that waiver on Count 2 is dependent in part on the allegations in Count 1, the state effectively ties Count 2 proceedings to Count 1 "facts." Remand will permit the juvenile court to review the impact of Count 1 on Count 2, and to determine whether the Count

1 allegations are true, partially true, or substantially false. The record to date contains no evidentiary facts; it only contains allegations in the petition that Cody could not dispute. Thus, the adult court, even if correct in determining that the waiver order was facially valid, erred by failing to recognize that a substantial and genuine issue regarding the factual basis for waiver existed that could only be resolved by remand.

III. IF WAIVER ON COUNT 1 WAS INVALID, JURISDICTION REMAINS IN JUVENILE COURT.

The state argues that “[t]he trial court properly declined to remand the case to the juvenile court because, as to count 1, there was no case for the trial court to remand.” *State’s Brief* at 5. It argues that this jurisdictional defect was remedied by the vacating of the judgment of conviction.

Logically, however, if the criminal court never obtained jurisdiction, then necessarily the juvenile court never relinquished jurisdiction. Jurisdiction does not evaporate. Jurisdiction begins in juvenile court when a delinquency petition is filed and remains there until/unless waiver is granted. Here, if the waiver order never transferred jurisdiction over Count 1, *at least* that count¹ remained (and still remains!) in juvenile court.

Both sides agree that the criminal court could not modify, correct, vacate or otherwise act upon the waiver order itself. *Vairin, supra*. That being the case, the criminal court’s belief that it never acquired jurisdiction leaves

¹ Cody position is the waiver petition must be treated as a whole, thus *if* the trial court failed to obtain jurisdiction of Count 1, as the state argues, then it necessarily failed to obtain jurisdiction of the entire proceedings. However, here Cody considers jurisdiction of the counts as though they are separate, for purposes of addressing the state’s arguments.

in place the order waiving Cody on Count 1. The juvenile court waiver states “*It’s your case*” to the criminal court, which now replies “*no it’s not.*”

The criminal court could not directly correct the error; it could only refuse to act further. This Court could declare the waiver order defective and vacate it (at least as to Count 1). Or, it can hold that the adult court erred when it refused to remand the case to the juvenile court so that the juvenile court may correct the error. One way or the other, there exists a defective waiver order that needs to be corrected.

Once corrected, there remains the delinquency petition, which asserts that the juvenile court has exclusive jurisdiction over Cody. Section 938.12(2) provides:

If a petition alleging that a juvenile is delinquent is filed before the juvenile is 17 years of age, but the juvenile becomes 17 years of age before admitting the facts of the petition at the plea hearing or if the juvenile denies the facts, before an adjudication, the court retains jurisdiction over the case.

In juvenile court, Cody may assert a basis for dismissal of the proceedings. The juvenile court may find appropriate grounds for dismissal, or may not. It may hold a fact-finding hearing and enter an adjudication if the state proves the case, §938.34(1). The juvenile court cannot order services because Cody is over age 18, yet the adjudication is significant (a juvenile adjudication implicates the sex offender registry under federal law and affects one’s ability to enter military service, for example).

The state pretends that the juvenile court proceedings somehow disappeared, even though it concedes the waiver did not occur. They did not.

The juvenile court has exclusive jurisdiction. The state fails to assert how the juvenile court *no longer* has exclusive jurisdiction, since adult jurisdiction clearly was not obtained via waiver proceedings. Because juvenile court has exclusive and continuing jurisdiction, and may adjudicate or dismiss this matter, remand is appropriate.

IV. THE STATE'S CLAIM THAT IT CAN FILE A NEW CRIMINAL ACTION AS TO COUNT 1 HAS NO BASIS IN LAW.

The state expends considerable effort arguing it could re-file Count 1 in adult court. Such filing is improper. First, permitting the state to correct the error of impermissibly seeking waiver with direct filing in adult court makes a mockery of our justice system, providing the exact thing the defect obtained and was not permitted by law. Second, as set forth above, if the waiver order is deemed *not* to have transferred jurisdiction to adult court, jurisdiction remains in juvenile court. Attempting to proceed in adult court would be inconsistent with the juvenile court's retention of *exclusive* jurisdiction, and there is no legal basis for dual jurisdiction.

This Court should additionally reject the state's arguments:

1. The state cites *LeQue* for authority to file a new prosecution in this matter, because:

The adult criminal court has subject matter jurisdiction to hear and determine any charges brought against an adult defendant, even if the defendant was a juvenile at the time of the offense and even if the offense was one for which the juvenile could not have been waived into adult court. State v. LeQue, 150 Wis.2d 256, 258, 265

State's Brief, at 7.

2. *LeQue* and its progeny consistently ask why the state failed to file charges in juvenile court, holding that if the state intended to avoid juvenile jurisdiction, filing charges in adult court is improper.
3. Here, **the state filed charges in juvenile court**. There is no reason to determine whether the state intentionally avoided juvenile court jurisdiction, it did not. The problem in *LeQue* and progeny is that juvenile jurisdiction does not exist; the problem here (the *state's* problem) is that it does.
4. Here, the state seeks to file charges **a second time**. It already filed these charges in juvenile court! Now it wants to file again – in adult court- only because it impermissibly sought and obtained waiver the first go-round. There is no basis whatsoever to do so.
5. Unlike *LeQue*, where no intentional error was committed by the state, Cody's situation has precisely such error – the state deliberately and erroneously sought waiver on Count 1.
6. It is improper for an adult court to hear and determine a case that was properly charged in juvenile court and which would have stayed in juvenile court but for the state's error in seeking waiver.
7. In *LeQue*, there was *never* juvenile court jurisdiction. In this case the opposite holds. *There was never adult jurisdiction*. But the state is attempting to create it, out of thin air.
8. Two things are worthy of note. First, the state's proposal to file a new complaint gives the state the exact result that by statute was not permitted when Count 1 was filed in juvenile court. How is it possibly just to let the state charge Cody as an adult

now, because the state's error in seeking waiver was discovered after he turned 17? This punishes Cody for the state's error, while giving the state an option that it legally did not have at the outset, and which it sought by virtue of the error it created. Such an outcome is beyond absurd.

V. THE STATE FAILED TO REFUTE CODY'S CLAIM THAT THE WAIVER ORDER CANNOT BE TREATED DIVISIBLY.

The state states as a truism that the *“trial court properly treated the waiver order as to each offense separately and distinctly, notwithstanding that they were both issued on the same piece of paper.”* State's Brief, at 13. This conclusory statement, made without citation to authority, fails to respond to Cody's points:

- that the waiver statute speaks of *“the matter”* in the singular, requiring that if *“the matter”* lacks prosecutive merit, it must be denied. §938.18(4)(a).
- that §938.18(6) speaks of *“the case”* in the singular instead of approaching things on an offense-by-offense basis.
- that §938.18(4) contains the unambiguous direction when prosecutive merit is not found: *“the court **shall** deny the petition for waiver.”*
- that the statutes do not reference offense-by-offense consideration unlike language used for preliminary hearings.
- that §970.03(10) and §970.035 similarly appear to preclude an offense-by-offense consideration for juveniles following waiver.

- that any ambiguity should be resolved in Cody's favor.

As stated previously, "*Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.*" *Charolais Breeding Ranches, Ltd., supra.* Accordingly, this Court should confirm that the entire waiver order was defective because Count 1 was not properly subject to a finding of prosecutive merit.

CONCLUSION

For the reasons stated above, this Court should vacate the waiver order and remand to juvenile court for further proceedings.

Dated this 3rd day of September, 2013.

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CERTIFICATION

I, Deborah J. Stahl, attorney for Defendant/Appellant, certify that this Reply Brief was produced using the following font in compliance with §809.19(8)(b):

- ☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.
- ☐ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 point and maximum of 60 characters per full line of body text. The length of the Combined Statement of the Case and Statement of Facts, Argument and Conclusion, including all footnotes, is 2,997 words.

Dated this 3rd day of September, 2013.

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CERTIFICATION OF E-FILING

I, Deborah J. Stahl, attorney for Defendant/Appellant, certify that in compliance with Rule 809.19(12), I have submitted an electronic copy of this Brief which complies with the requirements of §809.19(12). I further certify that this Electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this Certification has been served with the paper copies of this Brief filed with the Court and served on opposing counsel.

Dated this 3rd day of September, 2013.

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