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OF WISCONSIN**

STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT II

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Case No. 2012AP2103-CR

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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 B. TORHORST, PRESIDING

---

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND  
PUBLICATION

The State does not request oral argument because the briefs of the parties are adequate to present the legal theories, authorities and arguments. Publication is not requested because the decision is unlikely to contribute to the development of the law due to the unique facts in this case that are not likely to recur with frequency.

## ARGUMENT

THE RELIEF AFFORDED TO  
PHILIPS WAS APPROPRIATE  
AND PHILLIPS IS NOT  
ENTITLED TO FURTHER RELIEF.

### A. Introduction

Phillips subdivides his arguments under several headings, which the State finds cumbersome and somewhat inconsistent and confusing. The State has organized its response under the single heading above. The State will respond to all of Phillips' arguments in the course of this brief.

Throughout this brief, in order to avoid confusion, the State will refer to the circuit court exercising juvenile jurisdiction as the juvenile court, and it will refer to the circuit court exercising adult criminal jurisdiction as the adult criminal court or the trial court.

Throughout this brief, the State refers to defendant-appellant as Phillips.

### B. The relief afforded to Phillips by the trial court was appropriate and Phillips is not entitled to further relief.

#### 1. Relevant procedural facts.

The relevant procedural facts are not in dispute. Phillips' date of birth is February 18, 1994 (33:2). On March 8, 2010, the State filed a delinquency petition alleging in Count 1 that in the Fall of 2007 or 2008 Phillips committed first degree sexual assault of a child by having sexual intercourse with a person under the age of sixteen (KRA) by use or threat of force or violence contrary to Wis. Stat. § 948.02(1)(c) and alleging in

Count 2 that on March 2, 2010, Phillips committed sexual assault of a child by having sexual contact with a child (SJB) under the age of sixteen (33:2; A-Ap. 1). The delinquency petition also stated that for Count 1, for a defendant who was eighteen or older at the time of the offense, the term of confinement in the prison portion of the bifurcated sentence must be at least 25 years (A-Ap. 1:3). On March 28, 2010 the State also filed a waiver petition in juvenile court seeking waiver of both counts, and following evidentiary hearings, the juvenile court waived jurisdiction on both counts (33:3; 56; 57; 58; A-Ap. 2, 3).

A criminal complaint charging the same two counts was filed in the trial court on April 15, 2010 (1). The criminal complaint also stated that the penalty for Count 1 included a mandatory minimum term of confinement in the prison portion of the bifurcated sentence of at least 25 years (1). In the trial court, Phillips and the State entered into a plea agreement in which Count 1 was amended to second degree sexual assault of a child, a charge that did not carry a mandatory minimum sentence; Phillips pled no contest to amended Count 1 and Count 2; the State agreed to make a global sentence recommendation of fourteen years and Phillips was free to argue sentencing (11; 46). The trial court accepted Phillips' no contest pleas to both counts of second degree sexual assault of a child, adjudicated Phillips guilty on both counts and subsequently sentenced him on both counts (46; 48; 16).

After conviction and sentencing, the trial court properly granted Phillips' postconviction request to vacate both convictions and withdraw his no contest pleas to both counts because the adult criminal court had no jurisdiction over Count 1 which was a non-waivable offense and the pleas to both counts were entered under the misunderstanding that the original charge on Count 1 was subject to a mandatory minimum sentence (11; 30; 31; 32; 33; 53:22, 25-26).

It is undisputed that the waiver order as to Count 1 was not authorized by statute and the trial court therefore never properly acquired jurisdiction for Count 1. Wisconsin Stat. § 938.18(1)(a) permits the juvenile court to waive its jurisdiction if the juvenile is alleged to have violated certain designated offenses (which does not include the offense with which Phillips was charged) on or after the juvenile's fourteenth birthday. Wisconsin Stat. § 938.18(1)(c) permits the juvenile court to waive its jurisdiction if the juvenile is alleged to have violated any state criminal law on or after the juvenile's fifteenth birthday. It is undisputed that Phillips was thirteen at the time of the offense that was the subject of Count 1; therefore it was a non-waivable offense (33:2). It is undisputed that Count 1 was not subject to a mandatory minimum sentence because Wis. Stat. § 939.616(3) provides that the mandatory minimum sentence applies only to a defendant who was eighteen years of age or older at the time of the offense. Phillips was not eighteen at the time of the offense.

Unfortunately, at the time of the waiver proceedings in juvenile court, the entry and acceptance of the no contest pleas on both counts, and the adjudication of guilt and sentencing on both counts in the trial court, the prosecutor, the assistant public defender who represented Phillips in juvenile court, retained counsel who represented Phillips in the trial court, the juvenile court judge and the trial court judge all failed to recognize that Phillips was not eligible to be waived as to Count 1 and he was not subject to a mandatory minimum sentence on Count 1. These errors were recognized for the first time by postconviction counsel.

Phillips was entitled to the remedy he received in the trial court, which was withdrawal of his pleas to both counts and vacation of his convictions on both counts.

2. The trial court properly declined to remand Count 1 to the juvenile court.

As to Count 1, however, Phillips claims that the trial court should also have remanded the case to the juvenile court because even though Phillips was eighteen at the time of the postconviction proceedings, the juvenile court could exercise jurisdiction because the delinquency petition was filed when Phillips was still under seventeen years of age. The 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. Count 1 involved a non-waivable offense that never should have been entertained by the trial court and over which the trial court had no jurisdiction. Once the jurisdictional defect was brought to the trial court's attention, the trial court properly remedied the situation by vacating the judgment of conviction. Because the trial court had no jurisdiction over the Count 1 offense, there was no longer any case before it and therefore nothing for it to remand.

Moreover, remand to the juvenile court of the offense charged in Count 1 would serve no purpose. The juvenile court could not hold a new waiver hearing on Count 1 and waive jurisdiction over Count 1, because the waiver statutes do not permit Phillips to be waived for that offense which was committed before he was fourteen years old. Phillips does not contend that the juvenile court could impose any disposition on the original delinquency petition after Phillips had already reached the age of eighteen at the time of the postconviction proceedings.

Phillips relies on *State v. Aufderhaar*, 2005 WI 108, ¶ 28, 283 Wis. 2d 336, 700 N.W.2d 4, in which the Wisconsin Supreme Court held that because personal jurisdiction never attached, the juvenile court could not waive Aufderhaar into adult criminal court, and the adult criminal court did not acquire personal jurisdiction over him, and should have dismissed the criminal action in the



trial court. The supreme court held that remand to the juvenile court in that situation was appropriate because the delinquency petition was filed before Aufderhaar turned seventeen. The supreme court explained that upon remand, if sufficient service was made for the juvenile court to acquire jurisdiction, the juvenile court would have available the statutory option to again waive the charge into the adult trial court, or to dismiss the delinquency petition.

In contrast, in Phillips' case, on remand a new waiver order would not be an option because the statutes do not allow the charge of sexual assault committed when Phillips was under fourteen years old to be waived into adult court.

Contrary to Phillips' implicit assumption, *Aufderhaar* does not hold that in every situation where a waiver order was invalid, the trial court must remand to the juvenile court. In *Aufderhaar*, the defendant asked the supreme court to order that all proceedings in both the adult and juvenile court be dismissed with prejudice. The State requested remand to the juvenile court as an alternative to defendant's proposed remedy. The supreme court rejected dismissal with prejudice. Thus, *Aufderhaar* stands only for the proposition that dismissal of all proceedings with prejudice is not required and that the trial court may remand to the juvenile court when the meaningful option of a new waiver order is available. In Phillips' case, that option is not available and remand would serve no purpose.

During the postconviction proceedings, the State indicated its belief that because Phillips has reached the age of eighteen and is subject to adult criminal court jurisdiction, it would be able to file a new criminal complaint charging Phillips with sexual assault based on the facts underlying Count 1, which occurred when he was under fourteen years of age (32; 53:3). The trial court did not address the propriety of filing a new complaint in the adult criminal court, but stated only that the State would

have to decide what it wanted to do on Count 1. The trial court indicated that because the court had vacated the conviction and because it never had proper jurisdiction over Count 1, there was no longer anything before it on that case (33:3; 38:2-3; 53:8, 10). The State has not filed a new criminal complaint at this point. The trial court issued a stay of all trial court proceedings pending the instant appeal (54:6-7).

The State believes that it could properly file a new criminal complaint charging Phillips with sexual assault based on the facts underlying Count 1 which occurred when he was under fourteen years old, and the adult criminal court would have jurisdiction over that charge. 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, 442 N.W.2d 494 (Ct. App. 1989). A criminal defendant, however, has a due process right not to be deprived of the potential benefits of juvenile court jurisdiction by deliberate state manipulation intended to avoid juvenile court jurisdiction. *State v. Becker*, 74 Wis. 2d 675, 677, 247 N.W.2d 495 (1976); *LeQue*, 150 Wis. 2d at 267. Only intentional manipulation by the State designed to avoid juvenile jurisdiction constitutes a due process violation that requires dismissal of a criminal complaint in adult court; prosecutorial negligence absent manipulative intent to avoid juvenile jurisdiction does not constitute a due process violation. *State v. Montgomery*, 148 Wis. 2d 593, 595, 436 N.W.2d 303 (1989); *LeQue*, 150 Wis. 2d at 268.

If the State were to file a new criminal complaint charging Phillips with sexual assault based on the facts underlying Count 1, Phillips would be entitled to file a motion to dismiss on due process grounds. If Phillips' motion alleged sufficient facts making a prima facie showing of manipulative intent to avoid juvenile jurisdiction, he would be entitled to an evidentiary hearing

at which the State would bear the burden of proving it did not have manipulative intent. If the State met its burden of proof, the motion to dismiss would have to be denied; if the State could not meet its burden of proof, the motion to dismiss would have to be granted. *State v. Velez*, 224 Wis. 2d 1, 13-18, 589 N.W.2d 9 (1999).

In the *Becker/LeQue/Montgomery* line of due process cases, proceedings were initiated in the adult criminal court after the defendant had reached the age at which the juvenile court no longer had jurisdiction; proceedings had never been filed in the juvenile court. In Phillips' case, a juvenile delinquency petition was originally filed. That factual distinction, however, does not impact the due process analysis. The *Becker/LeQue/Montgomery*, due process analysis would still be applicable if a new criminal complaint were filed in the adult criminal court.

Phillips received the remedy to which he was entitled when the trial court allowed Phillips to withdraw his no contest pleas and vacated his criminal convictions. The trial court properly declined to remand Count 1 to the juvenile court to proceed on the previously filed delinquency petition, because by the time of the postconviction proceedings, Phillips was eighteen, under the facts of this case, the juvenile court could not have issued a new waiver order on the non-waivable offense, and no dispositional options were available for the now-adult Phillips.

This court stated in *LeQue* that the purpose of the juvenile code is to provide a program of rehabilitative treatment designed for children charged with crime. *LeQue*, 150 Wis. 2d at 267. As the court further explained:

Individuals who are charged as children have the needs of children, and are, presumably, receptive to treatment designed for children. However, individuals who are charged as adults, regardless of when the criminal act was committed, no longer will

benefit from treatment which is designed to benefit children. Such individuals have adult interests and needs.

*Id.*

For all of these reasons, remand of Count 1 to the juvenile court was not required in this case.

3. The trial court properly declined to remand Count 2 to the juvenile court.

The waiver order on Count 2 was valid because Phillips was over fourteen years old when that offense occurred, and therefore the trial court properly acquired jurisdiction on that offense. Nonetheless, the trial court properly allowed Phillips to withdraw his no contest plea and vacated his conviction on Count 2. Although the waiver order was jurisdictionally valid as to Count 2, when the plea agreement was entered and the plea was accepted, it was based on a global plea agreement to a reduced charge on Count 1 designed to avoid a mandatory minimum sentence that everyone erroneously believed was applicable to the original charge in Count 1. The mutual misunderstanding of the penalty and the mutual misunderstanding of the benefits of the global plea agreement justified the trial court in allowing Phillips to withdraw his plea and vacating the conviction on Count 2. (33; 38; 53:26).

By allowing Phillips to withdraw his no contest plea and vacating the conviction on Count 2, over which the trial court had acquired jurisdiction pursuant to a facially valid waiver order, the trial court placed Phillips back in the position he was in prior to entry of the plea agreement. Phillips was now in a position to negotiate a new plea agreement or invoke his right to a trial on Count 2. This provided him with all of the relief to which he was entitled on Count 2.

The trial court properly declined to remand Count 2 to the juvenile court. Unlike Count 1, the waiver order as to Count 2 was facially and jurisdictionally valid, and based on that waiver order the trial court properly acquired jurisdiction over Count 2. There was no basis for the trial court to go behind that facially valid order and speculate that the juvenile court might not have waived jurisdiction over Count 2 if the waiver petition had not included Count 1. Indeed, the Wisconsin Supreme Court has expressly stated that the criminal court may not reconsider the juvenile court's waiver decision. *In re Vairin M.*, 2002 WI 96, ¶ 42, 255 Wis.2d 137, 647 N.W.2d 208.

If a juvenile has compelling new grounds bearing on waiver, he may promptly file a motion with the adult criminal court asking the court to relinquish its jurisdiction by transferring the matter to the juvenile court. The juvenile must allege a new factor that was not in existence or overlooked by all the parties, highly relevant to the criteria for waiver and likely would have affected the juvenile court's determination that it would be contrary to the interests of the juvenile or of the public for the juvenile court to hear the case. If the juvenile makes such a showing in his motion, the adult criminal court may conduct a hearing and if it finds good cause it may relinquish jurisdiction by transferring jurisdiction to the juvenile court. The juvenile may then file a motion for reconsideration of the waiver order in the juvenile court, which will have regained exclusive jurisdiction of the case. This is an extraordinary remedy that should be strictly limited to compelling new factors. *Vairin M.*, 255 Wis. 2d 137, ¶¶ 54-56.

Phillips never asked the adult criminal court to relinquish its jurisdiction over Count 2 to the juvenile court under *Vairin M.* Even if Phillips' request for remand in the trial court could be generously construed as a *Vairin M.* motion, Phillips failed to meet the requirements. His motion was not brought promptly after the adult criminal court obtained jurisdiction over Count

2, but was brought only after conviction and sentencing in the adult criminal court.<sup>1</sup>

More importantly, he failed to show a new factor relating to Count 2 that is highly relevant to the criteria for waiver and likely would have affected the juvenile court's waiver determination as to Count 2. At most, he showed that he could not have been waived on Count 1. But the facts underlying Count 1 would still have been presented to the juvenile court as part of Phillips' personality and personal history. *See* Wis. Stat. § 938.18(5). Thus, Phillips failed to show a new factor likely to have affected the juvenile court's waiver decision on Count 2 sufficient to justify the trial court in relinquishing its jurisdiction.

For all of these reasons, the trial court afforded Phillips all the relief to which he was entitled by allowing him to withdraw his no contest plea and vacating his conviction on Count 2. The trial court properly declined to grant Phillips' additional request that it remand Count 2 to the juvenile court.

4. Phillips' additional arguments lack merit.

Phillips asserts that the trial court lacked authority to vacate, affirm or modify the waiver order issued by the juvenile court. This is a non-issue. The trial court did not vacate, affirm or modify the waiver order issued by the juvenile court. As the trial court explained, it did nothing more than grant Phillips' request to allow him to withdraw his no contest pleas and vacate his convictions on both counts. It did not rule on whether the juvenile court should have elected to waive jurisdiction (53:9, 16-19).

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<sup>1</sup> Although Phillips originally alleged his juvenile court attorney and trial court attorney were both ineffective for failing to perceive the jurisdictional defect in the waiver of Count 1, he abandoned that motion after the State agreed that Phillips should be allowed to withdraw his pleas and his convictions on both counts should be vacated (53:26). Thus, Phillips never proved there is a reasonable probability that but for counsels' errors, the juvenile court would not have waived jurisdiction on Count 2.

The trial court properly determined that it had to vacate the conviction for Count 1 because it did not have subject matter jurisdiction over that non-waivable offense. A court can and should determine a question of jurisdiction whenever it comes to the court's attention, regardless of whether it was previously raised by the parties. *See State v. Annala*, 168 Wis. 2d 453, 460, 484 N.W.2d 138 (1992).

As to Count 2, the trial court did not affirm the waiver order. It simply exercised the jurisdiction it had acquired pursuant to the facially, jurisdictionally valid waiver order.

Phillips asserts that the trial court erred by concluding that the juvenile court could not exercise jurisdiction because Phillips was now eighteen. Under *Aufderhaar*, the trial court could have remanded to the juvenile court because the delinquency petition was filed before Phillips aged out of juvenile jurisdiction. But the trial court was not required to remand under the facts of this case, which are materially different from *Aufderhaar*, as the State discussed above.

Phillips claims the trial court erred as a matter of law by treating the waiver order as divisible. Phillips is wrong. Under the juvenile code, the juvenile court has authority to waive its exclusive jurisdiction over the juvenile as to certain offenses, depending upon the offense and the age of the juvenile at the time of the offense. As to any criminal offense, waiver depends upon both the offense alleged and the juvenile's age at the time of offense. *See* Wis. Stat. §§ 938.18 and 938.183. A juvenile court can not waive jurisdiction of the "person" of the juvenile distinct from the offense charged or distinct from the juvenile's age at the time of that offense. The fact that the State alleged both counts in a single delinquency petition, and filed one waiver petition for both offenses, was simply a matter of efficiency. The juvenile court ordered waiver as to each count alleged. The waiver order as to Count 1 was facially, jurisdictionally void because Count 1 was a non-waivable

offense due to Phillips age at the time of the offense. The waiver order as to Count 2 was facially, jurisdictionally valid based on the offense charged and Phillips' age at the time of that offense.

The offenses in Count 1 and Count 2 are separate. 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.

Phillips claims the error was far from harmless. This is a non-issue. The trial court did not find any error harmless. It remedied the errors over which it had jurisdiction: it vacated Phillips criminal convictions on both Count 1 and Count 2.

Phillips appears to be claiming "the error" is that the juvenile court's decision to waive its jurisdiction on Count 2 was tainted because it was influenced by the fact that the State also sought waiver on Count 1. In the juvenile court, he chose to forgo any challenge to prosecutive merit on both counts (56:6). The trial court did not address the question of whether the juvenile court would have waived jurisdiction on Count 2 if the State had not also sought waiver on Count 1, nor should it have attempted to address that question. The facially, jurisdictionally valid waiver order as to Count 2 gave the trial court jurisdiction over Phillips for that offense, and the trial court rightfully refused to look behind that facially valid order.

To the extent Phillips is asking this court to vacate the waiver order, that request is inappropriate. The only orders before this court for review are the trial court's order allowing plea withdrawal, vacating the criminal convictions on both counts and declining to remand either count to the juvenile court and the order denying the motion for reconsideration. The juvenile court's waiver order is not before this court for review.



Phillips' challenges to the trial court's refusal to remand to the juvenile court are without merit and should be rejected by this court.

### CONCLUSION

Based on the record and the legal theories and authorities provided herein, the State asks this court to affirm the orders entered in the trial court below.

Dated this 23rd day of July, 2013

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,880 words.

Dated this 23rd day of July, 2013.

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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of July, 2013.

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