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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP002328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SHAUN M. SANDERS,

Defendant-Appellant.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE JENNIFER R. DOROW, PRESIDING AND
ORDER DENYING POSTCONVICTION RELIEF ENTERED
IN THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE LEE S. DREYFUS, JR., PRESIDING

By: Craig M. Kuhary
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ARGUMENT

A. THE TRIAL COURT DID NOT HAVE COMPETENCY TO EXERCISE ITS SUBJECT MATTER JURISDICTION OVER SANDERS FOR CRIMINAL OFFENSES ALLEGEDLY OCCURRING BEFORE HIS TENTH BIRTHDAY.

The court, in its order dated October 31, 2016, requested additional briefing on the question of whether the issue raised in the briefing was one affecting the competency of the trial court to act with regard to count one of the information as opposed to its “jurisdiction.” Additionally, if the issue is jurisdictional in nature, the court also requested clarification as to whether Sanders was challenging the circuit court’s subject matter jurisdiction or something different.

Sanders’ has reviewed the decisions cited in the court’s October 31, 2016 order: *State v. Schroeder*, 224 Wis.2d 706, 593 N.W.2d 76 (1999) and *Michael J.L. v. State*, 174 Wis.2d 131, 496 N.W.2d 758. As stated in *Schroeder*, competency refers to the “lesser power” of a court, as conferred by the legislature, to adjudicate the specific case before it. See *Schroeder* at ¶16. The legislature, in the creation of the juvenile and adult criminal justice codes, has not conferred either justice system with specific statutory authority to adjudicate alleged acts that violate state or federal criminal laws

that *predate* the minimum age of subject matter jurisdiction in Wisconsin for the prosecution of crimes committed by juveniles, which was ten years of age at the time the offenses were first allegedly committed in this case. *See* Sec. 938.12(1), Wis. Stats. *See also* Sec. 938.02(3m), Wis. Stats.

The supreme court has held that a circuit court has subject matter jurisdiction to consider and determine *any* type of action (with one possible notable exception which will be addressed further below). *See In re B.J.N.*, 162 Wis.2d 635, 645, 469 N.W.2d 845, 848 (1991). However, when a statutory mandate is not met, like the minimum age for prosecution in this state, that failure alone does not deprive the circuit court of its subject matter jurisdiction. *Id.* at 656, 469 N.W.2d at 853. Instead, the court is deprived of its competency to *exercise* its subject matter jurisdiction. *Id.*

As a result, in this context, Sanders is more accurately challenging the circuit court's competency to exercise its subject matter jurisdiction over any offenses within the charging period in count one that predate his tenth birthday.

B. ALTERNATIVELY, SANDERS CONTENDS THAT THE COURT DID NOT HAVE CRIMINAL SUBJECT MATTER JURISDICTION ON COUNT ONE AS WELL BECAUSE HE WAS NOT CAPABLE, AS A MATTER OF LAW, OF FORMING THE NECESSARY INTENT TO COMMIT A VIOLATION OF A STATE OR FEDERAL CRIMINAL LAW.

As previously argued, the plain meaning of Sections 938.12(1), 938.02, and 938.183, Wis. Stats., all allow for the prosecution of juveniles for violations of state or federal laws *once* they have attained the age of ten years of age or older. Presumably, by setting a distinct age limit (ten years) in the first place, the legislature did not intend the provisions of the justice code to apply to children who had not attained that age regardless of *when* the prosecution was commenced, otherwise it would have included language in either the juvenile justice or criminal codes specifically excepting it.

As a result, Sanders maintains that the legislature has clearly and unequivocally stated that children under the age of ten are simply not capable of forming the necessary intent, or *actus reus*, to commit violations of state or federal criminal law. The legislature, by delineating that minimum age as ten, has expressly determined the limits of juvenile *and* adult court jurisdiction.

The court in *Schroeder*, citing *Mack v. State*, 93 Wis.2d 287, 286 N.W.2d 563 (1980) did identify one instance in which courts have held a defect was “jurisdictional” and therefore non-waivable: when the offense fails “to charge any offense known to law.” *Id.* In this sense, there is no known *offense* in the law for a state or federal crime allegedly committed by a child under the age of ten. Therefore, the circuit court also did not have criminal subject matter jurisdiction over that portion of count one that predates Sanders’ tenth birthday.

CONCLUSION

For the foregoing reasons, Sanders asks this court to find that the circuit court did not have competency to exercise its subject matter jurisdiction on count one. Alternatively, Sanders also maintains that the circuit court did not have criminal subject matter jurisdiction on count one as well because it did not allege an offense known to law.

Dated this 23 day of November, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Document conforms to the rules contained in § 809.50(1) for a petition and memorandum produced with a proportional serif font. The length of this document is 736 words.

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). 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 proper copies of this brief filed with the court and served on all opposing parties.

Dated this 23 day of November, 2016.

/s/ James Walden (1009136) for

Craig M. Kuhary, State Bar No. 1013040

CERTIFICATION OF FILING BY PROCESS SERVER

I certify that on November 23, 2016, this brief was delivered to a process server for same day delivery to the Clerk of the Court of Appeals. I further certify that the brief was correctly addressed.

Dated this 23 day of November, 2016.

/s/ James Walden (1009136) for

Craig M. Kuhary, State Bar No. 1013040