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Case No. 2017AP1416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING A MOTION FOR POSTCONVICTION
RELIEF, ENTERED IN THE CIRCUIT COURT FOR FOND
DU LAC COUNTY, THE HONORABLE ROBERT J. WIRTZ,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Matthew C. Hinkle forfeit his claims that the circuit court lacked adult-court competency over his case, did not properly waive him into adult court, and that his trial counsel was ineffective for not raising these claims by either failing to contemporaneously object or by entering his no contest and *Alford* pleas?

The circuit court did not address this issue.

This Court should answer yes.

2. Did the circuit court have adult-court competency over Hinkle's case under Wis. Stat. § 938.183(1)(b) because the Milwaukee County Circuit Court had previously waived Hinkle into adult court, and thus, no waiver proceedings under Wis. Stat. § 938.18 were necessary?

The circuit court answered yes.

This Court should answer yes.

3. Has Hinkle failed to prove that his trial counsel was ineffective for not arguing that the circuit court did not have adult-court competency?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate if this Court overlooks Hinkle's forfeitures and addresses the meaning of Wis. Stat. § 938.183(1)(b). As far as the State can tell, no case, published or not, has interpreted this statute. A definitive interpretation would be helpful for the circuit courts and practitioners.

INTRODUCTION

When Hinkle was 16 years old, he stole a car in Milwaukee and drove it to Fond du Lac, where he took police on a high-speed chase. In both counties, the State filed delinquency petitions against Hinkle and petitions to waive him into adult court. The Milwaukee County Circuit Court acted first and granted the State's waiver petition. As a result, the Fond du Lac County Circuit Court determined it had original adult-court competency over the charges before it based on Wis. Stat. § 938.183(1)(b). This statute provides for original adult-court competency over a juvenile who has previously been waived into adult court.

Hinkle argues that the Fond du Lac County court improperly exercised adult-court competency over his case. Hinkle contends that Wis. Stat. § 938.183(1)(b) applies only when the juvenile court in the same county has already waived the defendant into adult court. Thus, he argues, the circuit court needed to waive him into adult court under Wis. Stat. § 938.18 to properly have adult-court competency, which it did not do. Hinkle also claims his trial counsel was ineffective for not making these arguments.

This Court should reject these arguments. Hinkle forfeited his claims, either by not objecting to the court's competency determination, by his no contest and *Alford* pleas, or both. Further, the claims fail on the merits. The circuit court correctly interpreted Wis. Stat. § 938.183(1)(b) when it concluded the Milwaukee County waiver gave it original adult-court competency over Hinkle's case. And Hinkle cannot show his counsel was ineffective. Any objection based on his interpretation of section 938.183(1)(b) would have failed and Hinkle can only speculate that he was prejudiced.

STATEMENT OF THE CASE

I. **Wisconsin Stat. 938.183(1)(b) and the use of “competency” and “jurisdiction.”**

The meaning of Wis. Stat. § 938.183(1)(b) is central to the issues in this case. The statute provides that “courts of criminal jurisdiction have exclusive original jurisdiction over” a juvenile whom the State alleges has committed a crime in two circumstances. The first is when the “court assigned to exercise jurisdiction” under Chapters 48 or 938 has previously waived the juvenile into criminal court and the juvenile has been convicted. The second circumstance is when the “court assigned to exercise jurisdiction” under Chapters 48 or 938 has previously waived jurisdiction over the juvenile and the “criminal proceedings on that previous violation are still pending.” The second circumstance is at issue here.

In addition, the juvenile statutes and case law often use the term “jurisdiction” when discussing whether a case is before the criminal court or the juvenile court. But this is really a matter of the circuit court’s competency. As this Court recently explained, “no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.” *State v. Sanders*, 2017 WI App 22, ¶ 12, 375 Wis. 2d 248, 895 N.W.2d 41, *review granted*, 376 Wis. 2d 640, 899 N.W.2d 704. “A circuit court’s ability to exercise its subject matter jurisdiction in individual cases, however, may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction.” *Id.* ¶ 13. A failure to comply with these requirements may affect the circuit court’s competency to proceed. *Id.*

The State uses “competency” in this brief to refer to what the statutes and cases call “jurisdiction” except when directly quoting the statutes and cases.

II. Hinkle's crimes and the circuit court proceedings.

Hinkle stole a car in Milwaukee and drove it to Fond du Lac. (R. 2:2–4.) When he got there, Hinkle led police on a high-speed chase after they tried to arrest him. (R. 2:2–4.) Hinkle hit other cars and eventually crashed the one he had stolen. (R. 2:2–3.) He then fled police on foot; they eventually caught him with the help of a police dog. (R. 2:3.) Hinkle was 16 years old at the time. (R. 2:1.)

The State filed delinquency petitions against Hinkle in both Milwaukee and Fond du Lac Counties. (R. 57, Exs. 3, 6.) The State also filed petitions in each county to waive Hinkle into adult court. (R. 57, Exs. 4, 7.) In addition, the State charged Hinkle in Fond du Lac County with one count of fleeing a traffic officer and three counts of hit and run. (R. 2.) The circuit court had original adult-court competency over these charges. (R. 2.) *See* Wis. Stat. § 938.17.

The Milwaukee County Circuit Court waived Hinkle into adult court. (R. 57, Ex. 5.) The State refiled the charges against him there in a criminal complaint. (R. 61:2.)

The Fond du Lac County Circuit Court concluded that as a result of the Milwaukee County waiver and the filing of the charges in criminal court there, that the charges against Hinkle would be moved to adult court pursuant to Wis. Stat. § 938.183(1)(b). (R. 61:2–3; 64.)¹ The court reasoned that

¹ Document 64 is not numbered. In addition, the court held hearings on this issue over two consecutive days. (R. 61; 64.) It adjourned the first hearing so the State could obtain proof that the criminal charges had been filed in Milwaukee County. (R. 64:6–7.) The State's recitation of the facts combines the events of the two hearings.

since the Milwaukee County juvenile court had waived its competency over Hinkle's violations there, the criminal proceedings on those violations were now "pending" in Milwaukee County. (R. 61:2-3; 64:2-3.) It further explained:

And the Court certainly is aware of reference in the Bench Book once waived always waived, and that's section 938.183(1)(b). It indicates that if a juvenile has been waived into adult court and convicted, then he is forever deemed waived for criminal proceedings. The second half of subsection (b) talks about if the juvenile is before the Court on a potential criminal proceedings, and he has previously been waived in another court and that matter is pending, then he is deemed to be subject to the original jurisdiction of the criminal court.

(R. 64:3.)

Hinkle's attorney told the court she agreed with the court's reading of the statute. (R. 64:5.) And when the court asked her if Hinkle was contesting the court's determination, counsel said, "[W]e are not really taking a position on it. It's my understanding that it's pretty much automatic, but he is not agreeing to the waiver and such." (R. 61:3.)

The circuit court then issued an order waiving juvenile jurisdiction. (R. 57, Ex. 8.) The court checked a box on the form next to a statement that says, "The petition for waiver was not contested. The juvenile's decision to not contest is a knowing, intelligent, and voluntary decision." (R. 57, Ex. 8.)

The State filed an amended information. (R. 10.) It contained the four traffic charges from the complaint, seven counts of second-degree recklessly endangering safety, one count of taking and operating a vehicle without the owner's consent, three counts of obstructing an officer, and three counts of criminal damage to property. (R. 10.)

Hinkle and the State reached an agreement for Hinkle to plead to two counts of criminal damage to property and one count each of fleeing an officer, hit and run, second-degree recklessly endangering safety, operating without consent, and obstructing. (R. 81:5.) The remaining counts were dismissed and read in. (R. 81:5–6.) Hinkle entered no contest pleas to all the charges except the operating without consent charge, to which he entered an *Alford* plea. (R. 81:20–21.)

III. Postconviction proceedings.

Hinkle filed a postconviction motion seeking to withdraw his pleas and to transfer the non-traffic charges to juvenile court. (R. 59.) He argued that the non-traffic charges were never properly in adult court. (R. 59:6–11.) Specifically, he claimed that the court’s order waiving the charges was improper because the court never held a waiver hearing or followed the procedures in Wis. Stat. § 938.18. (R. 59:6–8.) Hinkle also maintained that the court did not have original adult-court competency under Wis. Stat. § 938.183(1)(b). He argued the statute required that previous waiver of juvenile competency had to happen in the same county for the circuit court to have original criminal competency over the new charges. (R. 59:8–12.) Thus, he claimed, the Milwaukee County waiver was insufficient to give Fond du Lac County original adult-court competency. (R. 59:8–12.) Hinkle also argued that his trial counsel was ineffective for not making these arguments. (R. 59:12–13.)

The circuit court held a hearing on Hinkle’s motion. (R. 85.) Trial counsel testified that she did not challenge the transfer of the charges into adult court based on the Milwaukee County waiver because she did not think it was a valid argument. (R. 85:5–6.) Counsel said she had read the

statute and consulted with the appellate office of the State Public Defender in reaching this decision. (R. 85:9, 12–13.) She also testified that she would not have challenged the waiver order because “the ultimate resolution would be that he would be in adult court.” (R. 85:9.)

Hinkle testified that his attorney told him that “since I was waived in Milwaukee County, that it was automatic. I was automatically waived in Fond du Lac County.” (R. 85:15.) He said he would not have accepted the plea bargain if he had known that the non-traffic offenses were not properly in adult court. (R. 85:15.)

The circuit court rejected Hinkle’s interpretation of Wis. Stat. § 938.183(1)(b) and denied his motion. (R. 69; 85:29–31.) He appeals.

STANDARD OF REVIEW

Hinkle’s argument about the application of Wis. Stat. §§ 938.18 and 938.183(1)(b) involves statutory interpretation, a question of law this Court reviews de novo. *State v. Buchanan*, 2013 WI 31, ¶ 12, 346 Wis. 2d 735, 828 N.W.2d 847.

Claims of ineffective assistance of counsel are mixed questions of law and fact. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court’s findings of fact will not be disturbed unless they are clearly erroneous. *Id.* The ultimate issue of whether counsel was ineffective based on these facts is subject to de novo review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

ARGUMENT

- I. **Hinkle forfeited his direct challenges to the circuit court’s competency determination by not objecting and all his claims by entering his pleas.**
 - A. **A defendant forfeits non-jurisdictional claims by not making a contemporaneous objection in the circuit court and by entering no contest and *Alford* pleas.**

To preserve a claim for appellate review, a party must raise it in the circuit court. *State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619. This includes challenges to the circuit court’s competency. *Sanders*, 375 Wis. 2d 248, ¶ 14. An objection must be contemporaneous to the error alleged. *See State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. It also must state the specific grounds it is based on. *Nelis*, 300 Wis. 2d 415, ¶ 31. Claims not so preserved are forfeited, and this Court is not required to address them. *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 27, 338 Wis. 2d 114, 808 N.W.2d 155.

In addition, “a guilty, no contest, or *Alford* plea ‘waives all nonjurisdictional defects, including constitutional claims[.]’” *State v. Bembenek*, 2006 WI App 198, ¶ 16, 296 Wis. 2d 422, 724 N.W.2d 685 (footnote omitted); *see also State v. Kelty*, 2006 WI 101, ¶ 18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886) (noting that waiver effected by guilty plea is more properly termed a forfeiture). This is because a guilty plea is a break in the chain of events that preceded it in the criminal process. *Tollet v. Henderson*, 411 U.S. 258, 267 (1973). When a defendant has admitted guilt in court, he cannot raise claims that his constitutional rights were violated before the plea. He can attack only the voluntary and intelligent nature of the plea. *Id.*

B. Hinkle's claims are all forfeited.

This Court should conclude that Hinkle's claims are barred by the contemporaneous objection rule, the guilty-plea-forfeiture rule, or both.

Hinkle's claim that the circuit court incorrectly determined it had original adult court competency under Wis. Stat. § 938.183(1)(b) is forfeited. Hinkle never objected when the court determined it had original competency over the charges. In fact, his counsel agreed with the court's interpretation of the statute and said it was her "understanding that it's pretty much automatic." (R. 61:3.) Hinkle's complaints after his pleas and now on appeal that the court erred come too late.

Hinkle's related argument that he needed to be waived into adult court under Wis. Stat. § 938.18 is also forfeited by his failure to object. Hinkle did not argue that he was improperly waived until after his conviction. If Hinkle thought the court erred, he needed to tell the court as soon as he learned of the supposed mistake. But all Hinkle did was tell the court that he was not agreeing to a waiver. (R. 61:3.) This was not an objection to a supposedly improper waiver decision or to the later-completed written order waiving him into adult court.

In addition, Hinkle's arguments that the circuit court erred in applying Wis. Stat. §§ 938.18 and 938.183(1)(b) are barred by his no contest and *Alford* pleas. The guilty-plea-forfeiture rule applies to errors in juvenile waiver proceedings. *See State v. Kraemer*, 156 Wis. 2d 761, 764–65, 457 N.W.2d 562 (Ct. App. 1990). And again, because Hinkle's asserted errors relate to competency, not jurisdiction, they are subject to forfeiture, both generally and under the guilty-plea-forfeiture rule. *See Sanders*, 375 Wis. 2d 248, ¶ 14; *Bembenek*, 296 Wis. 2d 422, ¶ 16.

This Court should also conclude that Hinkle's pleas forfeited his ineffective assistance claims. Hinkle argues that his counsel should have filed a motion to dismiss the charges for lack of competency and objected to the order waiving him into adult court. (Hinkle's Br. 16.) These claims should be barred by Hinkle's pleas because the errors he alleges did not affect whether his pleas were knowing, voluntary, or intelligent.

Although this court has described ineffective assistance claims as an exception to the guilty-plea-forfeiture rule, *see State v. Milanese*, 2006 WI App 259, ¶ 13, 297 Wis. 2d 684, 727 N.W.2d 94, this exception should apply only to claims that directly implicate the validity of the defendant's pleas. Making ineffective assistance claims a blanket exception to the rule would erode it. All a defendant would need to do is label a claim as one of ineffective assistance to obtain review after a guilty plea. To preserve the integrity of the guilty-plea-forfeiture rule, counsel's errors, unless they directly affect a defendant's plea, should be considered forfeited.

While no published decision in Wisconsin has accepted this rationale, other jurisdictions have.² This Court should

² *See United States v. Torres*, 129 F.3d 710, 715-16 (2d Cir. 1997); *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992); *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992); *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983); *United States v. Hartsfield*, 160 F. Supp. 3d 1315, 1318 (M.D. Fla. 2016); *Vasquez v. Parrott*, 397 F. Supp. 2d 452, 463 (S.D.N.Y. 2005); *Jens v. Endicott*, No. 07-CV-617, 2009 WL 357919, at *3 (E.D. Wis. Feb. 12, 2009); *State v. Schlemmer*, 58 N.E.3d 573, 577 (Ohio Ct. App. 2016); *Mincewicz v. Commissioner of Correction*, 129 A.3d 791, 796 (Conn App. Ct. 2015); *People v. Stovall*, 284 P. 3d 151, 154 (Colo. App. 2012), *as modified on denial of reh'g* (June 21, 2012); *People v. Lugg*, 108 A.D.3d 1074, 1075 (N.Y. App. Div. 2013); *Pine v. State*, 788 S.W.2d 794, 795 (Mo. Ct. App. 1990); *Whetsell v. State*, 277 S.E.2d 891, 892 (S.C. 1981).

adopt the reasoning of these courts and extend the rationale underlying the guilty-plea-forfeiture rule to ineffective assistance claims that do not relate to the pleas' validity.

Hinkle argues that he was entitled to correct advice in deciding whether to accept the plea offer and counsel failed to provide it when she incorrectly told him waiver was automatic based on the Milwaukee County waiver. (Hinkle's Br. 16.) He contends that he was prejudiced because had counsel convinced the court to send the charges back to juvenile court, he would have never entered pleas to adult charges. (Hinkle's Br. 16.)

While this argument appears to tie counsel's actions to Hinkle's pleas, it should not escape the guilty-plea-forfeiture rule. Hinkle's real complaint is that counsel did not argue that the circuit court did not have adult-court competency under Wis. Stat. § 938.183(1)(b). This is something counsel would have needed to argue before Hinkle's pleas. Speculating about different results had counsel objected is not a way around the guilty-plea-forfeiture rule. The rule bars all claims that do not directly affect the knowing, voluntary, and intelligent nature of the pleas, or their "fairness and propriety." *Kraemer*, 156 Wis. 2d at 767. Here, Hinkle makes no claim that he did not understand the charges or the rights he was giving up when he entered his pleas. Hinkle's valid pleas should bar all his claims, including ineffective assistance of counsel.

Forfeiture is a rule of judicial administration that this Court has the discretion to overlook. *See State v. Kaczmariski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702; *State v. Riekkoff*, 112 Wis. 2d 119, 124, 332 N.W.2d 744 (1983). The State addresses the merits of Hinkle's claims in the next sections.

- II. **Hinkle was not entitled to withdraw his pleas because original adult court competency was proper under Wis. Stat. § 938.183(1)(b) and no waiver proceeding under Wis. Stat. § 938.18 was necessary.**
 - A. **The circuit court properly determined that it had original adult court competency over Hinkle.**
 - 1. **The plain language of Wis. Stat. § 938.183(1)(b) demonstrates that the court had original adult-court competency.**

Whether Wis. Stat. § 938.183(1)(b) gave the circuit court original adult-court competency over Hinkle’s case is a matter of statutory construction. Statutory construction begins with the statute’s language, and if the language is unambiguous, a court applies the plain language to the facts of the case. *See State v. Hemp*, 2014 WI 129, ¶ 13, 359 Wis. 2d 320, 856 N.W.2d 811. Statutory language is examined in the context it is used. *Id.* Language is given its common, ordinary, and accepted meaning, though technical or specifically defined words are given their technical or defined meanings. *State v. Hanson*, 2012 WI 4, ¶ 16, 338 Wis. 2d 243, 808 N.W.2d 390.

Further, “words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature’s purpose.” *Hemp*, 359 Wis. 2d 320, ¶ 13 (quoting *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811). Courts favor an interpretation that fulfills the statute’s purpose. *Hanson*, 338 Wis.2d 243, ¶ 17. Context and purpose are important in discerning the plain meaning of the statute. *Id.*

Section 938.183(1)(b) provides:

(1) JUVENILES UNDER ADULT COURT JURISDICTION. Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following:

...

(b) A juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation following waiver of jurisdiction under s. 48.18, 1993 stats., or s. 938.18 by the court assigned to exercise jurisdiction under this chapter and ch. 48 or if the court assigned to exercise jurisdiction under this chapter and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending.

The circuit court correctly determined that the Milwaukee County court's waiver of Hinkle into adult court gave it original adult-court competency over Hinkle's Fond du Lac County case. The statute's plain language gives courts criminal, adult-court competency over charges against juveniles in two situations. The first is where a juvenile has previously been waived into adult court by a juvenile court and convicted of a crime. The second is when a juvenile court has waived a juvenile into adult court and those criminal proceedings are still pending.

The second situation applies here, and the Fond du Lac County Circuit Court properly had original adult-court competency over Hinkle's crimes. A juvenile court in Milwaukee County waived Hinkle into adult court. That court was "the court assigned to exercise jurisdiction under" chapter 938 within the meaning of Wis. Stat. § 938.183(1)(b). The State then filed criminal charges against Hinkle, which meant those charges were "pending." Because the charges

were “still pending” in Milwaukee County, the Fond du Lac County Circuit Court, a “court[] of criminal jurisdiction” under Wis. Stat. § 938.183(1), had “exclusive original jurisdiction” over the violations alleged in Fond du Lac County. The statute’s plain language gave the circuit court adult-court competency over Hinkle’s crimes.

2. Hinkle’s interpretation of Wis. Stat. § 938.183(1)(b) is contrary to the legislature’s intent.

Hinkle argues that the Fond du Lac County Circuit Court did not have original adult-court competency over him because the previous waiver of competency was in Milwaukee County. (Hinkle’s Br. 13–15.) Specifically, he interprets Wis. Stat. § 938.183(1)(b) to require that the previous waiver occur in the same county for the adult court to have original competency over subsequent crimes. (Hinkle’s Br. 13–15.)

To reach this conclusion, Hinkle points to Wis. Stat. § 938.183(1)(b)’s language “the court assigned to exercise jurisdiction under this chapter.” (Hinkle’s Br. 13.) Hinkle relies on the dictionary definitions of “assign” and “exercise.” (Hinkle’s Br. 13.) He also notes that in other parts of Chapter 938, when using the phrase “court assigned to exercise jurisdiction,” the legislature preceded the phrase with “a court,” “any court,” “any other court,” and “each court.” (Hinkle’s Br. 13–15.) According to Hinkle, this means that the use of “the court assigned to exercise jurisdiction” in section 938.183(1)(b) must mean the court in the county where the offenses occurred. (Hinkle’s Br. 13–15.)

This Court should reject Hinkle’s argument. His interpretation is contrary to Wis. Stat. § 938.183’s intent to grant original adult-court competency in certain cases. That intent is plain from Wis. Stat. § 938.183’s language,

particularly that of subsections (1)(b) and (1)(c). Both of these subsections show that the legislature intended that once a juvenile is in adult court for one offense, the adult court will have original competency over all subsequent offenses that the juvenile commits.

Under subsection (1)(b), a criminal court has original competency over violations committed by a juvenile if the juvenile had been previously waived into adult court and either convicted in those proceedings or the proceedings are still pending. Under subsection (1)(c), a criminal court has original competency over violations committed by a juvenile if the juvenile previously committed an offense over which the adult court had original competency, and the juvenile has either been convicted or those proceedings are still pending. The plain language of these subsections demonstrates that the legislature intended to ensure that once a juvenile is placed into adult court, all subsequent offenses involving the juvenile will also be in adult court. Or as the circuit court put it, “once waived always waived.” (R. 64:3.)

The history of Chapter 938 confirms this interpretation of the statute’s plain language. *See State v. Moreno-Acosta*, 2014 WI App 122, ¶ 14, 359 Wis. 2d 233, 857 N.W.2d 908 (courts may consult legislative history to confirm statute’s plain meaning). Chapter 938 arose from the recommendations of the Juvenile Justice Study Committee, which the legislature created in 1994 in response to rising juvenile crime. *State v. Kleser*, 2010 WI 88, ¶ 40, 328 Wis. 2d 42, 786 N.W.2d 144. The committee’s report, *Juvenile Justice: A Wisconsin Blueprint for Change*, 7, 14–15 (January, 1995), described the provisions that became Wis. Stat. § 938.183(1)(b) and (1)(c) as recommending that the legislature “[g]rant original court

jurisdiction based on ‘once waived, always waived.’” The committee specifically explained that it “believes that once adult court jurisdiction has been exercised regarding a juvenile, subsequent violations should not require new waiver hearings.” *Id.* at 14–15. This refutes Hinkle’s argument that a new waiver proceeding is necessary if an already-waived juvenile commits a crime in a new county.

This Court should also reject Hinkle’s statutory-language arguments. He notes that in other parts of Chapter 938, the legislature used the phrases “any court,” “any other court,” and “a court” to modify “assigned to exercise jurisdiction under this chapter.” (Hinkle’s Br. 13–14.) Hinkle asserts that the legislature could have used one of these modifiers in Wis. Stat. § 938.183(1)(b) if it had meant that a previous waiver in any juvenile court was sufficient to establish original adult court competency. (Hinkle’s Br. 13–14.)

Hinkle’s argument ignores the context of these phrases. The statutes he points to, Wis. Stat. §§ 938.35(1)(b), 938.396(2g)(gm), 938.396(2m)(b)1, and 938.396(4), all address when juvenile courts may consider dispositions and records from a different court’s juvenile proceedings. In those situations, it makes sense to distinguish the juvenile court that entered the disposition or generated the records from a different juvenile court that might consider the disposition or records in the future.

Hinkle also points to the use of “each court assigned to exercise jurisdiction under chs. . . . 938” in Wis. Stat. § 51.14(2). (Hinkle’s Br. 14–15.) The State does not entirely understand Hinkle’s argument. But the use of “each” in section 51.14(2) is easily explained. The statute requires juvenile courts to have a mental health review officer. In context, it makes sense for the legislature to say that each court must have one.

Additionally, Hinkle’s argument ignores the definition of “Court” in Wis. Stat. § 938.02(2m):

“Court,” when used without further qualification, means the court assigned to exercise jurisdiction under this chapter and ch. 48 or, when used with reference to a juvenile who is subject to s. 938.183, a court of criminal jurisdiction or, when used with reference to a juvenile who is subject to s. 938.17 (2), a municipal court.

Section 938.183(1)(b) uses the same language from part of this definition—“the court assigned to exercise jurisdiction under this chapter.” Thus, section 938.183(1)(b) does not qualify the use of “court.” In contrast, “any,” “any other,” and “a” are all qualifiers, which, as the State has explained, are used to distinguish juvenile courts generating records and dispositions from other juvenile courts that might consider them later. The qualified usages of “court” that Hinkle points to distinguish between the courts presiding over juvenile matters throughout the State. The unqualified usage of “court” in Wis. Stat. § 938.183(1)(b) does not. Thus, the unqualified definition of “court” means any juvenile court in the State, not one in a specific county.

Finally, this Court should reject Hinkle’s argument that the dictionary definitions of “assign” and “exercise” support his interpretation of the statute. He contends that the most natural reading of “the court assigned to exercise jurisdiction” is the juvenile court of the county. (Hinkle’s Br. 13.) This is so because “[t]he court that handles a case and performs the duties associated with it is based on the county in which the offense occurred.” (Hinkle’s Br. 13.)

Hinkle is wrong. As argued, if anything, the unqualified definition of court incorporated into Wis. Stat. § 938.183(1)(b) means any juvenile court in the State. Further, “assigned” and “exercise” are found in all the

statutes Hinkle points to, but he does not explain why those words should have a different meaning in section 938.183(1)(b). Finally, the venue statutes, not the ones governing competency, determine which county's court handles a case. *See* Wis. Stat. §§ 938.185, 971.19. Venue “sets the particular judicial district in which a criminal charge is to be filed and in which it will be tried.” *State v. Anderson*, 2005 WI 54, ¶ 27, 280 Wis. 2d 104, 695 N.W.2d 731 (citation omitted). “Venue is to be distinguished from ‘jurisdiction,’ which refers to the authority or power of the court to take action on a particular charge.” *Id.* This Court should reject Hinkle’s interpretation of section 938.183(1)(b).

B. No waiver proceeding under Wis. Stat. § 938.18 was necessary because the circuit court had original adult court jurisdiction.

Hinkle next complains that the circuit court’s order waiving him into adult court was issued in error. (Hinkle’s Br. 11–12.) He notes that the order incorrectly states that he did not contest waiver. (Hinkle’s Br. 11.) And, he argues, the court never actually held a waiver hearing. (Hinkle’s Br. 12.)

None of these arguments should matter. As explained, the circuit court had original adult-court competency over Hinkle because of the waiver in Milwaukee County. The court thus did not need to conduct its own Wis. Stat. § 938.18 waiver hearing. It also did not need to enter an order waiving Hinkle into adult court. The order thus was a nullity, and any error on it is of no consequence. *See State v. Nieves*, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363 (error that does not affect party’s substantial rights is harmless).

III. Hinkle has not shown that his attorney was ineffective for failing to object to the circuit court’s exercise of original competency or to the lack of a waiver into adult court.

Finally, this Court should reject Hinkle’s claim that his attorney should have objected to the circuit court’s conclusion it had original competency and its failure to hold a waiver hearing.

To prove ineffective assistance of counsel, Hinkle must establish both that trial counsel’s performance was deficient and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*

To satisfy the prejudice prong, the defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. To establish prejudice when a defendant alleges that counsel’s deficiencies led him to plead guilty or no contest, the defendant must show that “there is a reasonable probability that, but for the counsel’s errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Hinkle’s claim fails on both prongs. To show deficient performance, Hinkle has to prove that his counsel could have successfully objected to the circuit court’s determination that it had original adult-court competency and its failure to hold a waiver hearing. This, in turn, depends on Hinkle’s interpretation of Wis. Stat. § 938.183(1)(b) being correct. As the State has shown, Hinkle’s interpretation is wrong.

Counsel is not deficient for not making an objection that would have failed. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

Further, if the State is wrong and Hinkle's interpretation of the statute is correct, his ineffective assistance claim still fails. At the time counsel did not object, there was no case law definitively interpreting Wis. Stat. § 938.183(1)(b). Whether a previous waiver had to come from the same county or a waiver from a different county was sufficient was, at best, an unresolved issue. An attorney is not deficient for failing to raise an argument premised on an unsettled legal question. *See State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232.

Hinkle also cannot show prejudice. He asserts that he would not have accepted the State's plea bargain had counsel told him that the charges were not properly in adult court. (Hinkle's Br. 16.) Hinkle does not develop this assertion in any way, so this Court may reject it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Presumably, Hinkle thinks he was prejudiced because the charges remained in adult court and he was unable to get a juvenile disposition. But even had counsel successfully convinced the circuit court that it lacked original adult court competency, the State could have still sought to proceed on its petition to waive Hinkle into adult court under Wis. Stat. § 938.18. Thus, Hinkle still could have faced adult charges and accepted the State's plea bargain. But Hinkle does not acknowledge this possibility. His assertion of prejudice is thus completely speculative and insufficient to sustain his burden. *See Erickson*, 227 Wis. 2d at 774.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's judgment of conviction and order denying Hinkle's motion for postconviction relief.

Dated December 21, 2017.

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 5,462 words.

AARON R. O'NEIL
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 21st day of December, 2017.

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