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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2017AP001416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Circuit Court for Fond du Lac County, the Honorable Robert J. Wirtz, Presiding

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Reverse waiver is not an adequate replacement for a waiver hearing because the burdens and presumptions are different. Furthermore, the existence of reverse waiver shows that the legislature anticipated and approved of the possibility of a juvenile disposition followed by an adult sentence.

The reverse waiver provisions in Wis. Stat. § 970.032(2) and Wis. Stat. § 971.31(13)(a) have a different burden than waiver hearings under Wis. Stat. § 938.18. At a waiver hearing, the burden is on the State, and the presumption is that the juvenile remains in juvenile court. See Wis. Stat. §§ 938.18(2), (4)(b), & (6); *State v. Kleser*, 2010 WI 88 ¶ 79, 328 Wis. 2d 42, 786 N.W.2d 144. At a reverse waiver hearing, the burden is on the defendant, and the presumption is that the juvenile remains in adult court. § 970.032(2), § 971.31(13)(a). Furthermore, if the juvenile fails to prove *any one* of the statutory prongs at a reverse waiver hearing, then the adult court *must* keep the juvenile in adult court "no matter how compelling" the evidence is on the other prongs. *See State v. Kleser*, 2010 WI 88 ¶ 97. It is counsel's understanding in speaking with juvenile law trial attorneys that, in practice, it is extremely difficult to prevail at a reverse waiver hearing. Reverse waiver hearings are not equal to § 938.18 waiver hearings, and reverse waiver provisions are not adequate replacements for Hinkle's denial of a waiver hearing.

Additionally, the very existence of these reverse waiver provisions confirms that having an adult sentence and subsequent juvenile disposition is feasible and was indeed anticipated by the legislature. Regardless of how § 938.183(1)(b) is interpreted, the reverse waiver provisions already allow for the scenario in which a juvenile disposition is ordered after an adult sentence. Thus, the fact that Hinkle's interpretation of § 938.183(1)(b) can also lead to such a scenario should not bar Hinkle's interpretation, as it does not create a groundbreaking effect.

II. If a juvenile disposition is added to an adult sentence, it allows the juvenile to receive additional services under the juvenile order while serving the adult sentence. It also enables juveniles in the Serious Juvenile Offender Program (SJOP) to stay at the juvenile correctional institution past their 18th birthday. If the juvenile disposition outlives the adult sentence, the juvenile would also benefit from a wide range of supportive services in the community, upon release from the adult sentence. The juvenile order terminates when it normally would under § 938.355(4), unless the DOC decides to terminate it earlier.

When a youth has both a juvenile adjudication and an adult conviction with a sentence to prison, Department of Juvenile Corrections (DJC) agents supervise both cases according to the dispositional order and judgment of conviction following administrative codes governing DJC and the Division of Community Corrections. https://doc.wi.gov/PublishingImages/Pages/AboutDOC/JuvenileCorrections/DivisionOfJuvenileCorrections/DJCOverviewServicesBookletMarch2017V2.pdf p. 36. Youth under dual supervision will receive services and programming in DJC until the juvenile order reaches the end of its natural life or is administratively discharged. *Id*. Upon discharge of the juvenile order, the case is then transferred to a Division of Community Corrections agent. *Id*.

Hinkle is not aware of any statute preventing the imposition of an adult court sentence and the subsequent imposition of a juvenile disposition. Indeed, as noted above, the existence of the reverse waiver provisions already creates and anticipates the possibility of having an adult sentence and subsequent juvenile disposition.

What happens to a dual-status juvenile after adjudication is largely determined on a case-by-case basis. The statutes designate the Division of Juvenile Corrections – specifically the Office of Juvenile Review (OJOR) – as the release, transfer, and decision-making authority for juveniles placed in juvenile correctional facilities. Wis. Stat. §§ 301.025, 938.53, 938.533(3), & 938.538(5)(a). See also DOC Administrative Rules 371.03(22), 371.11(1) & (3), 371.14(4)).

The Joint Planning and Review Committee (JPRC) oversees the juvenile and recommends to OJOR when the juvenile may be ready for transfer between institutions, transfer to an adult institution, return to the community, or when he requires a court extension of supervision. DOC 371.03(19), 371.10(3)(d), 371.11, 371.12.

Adding a juvenile disposition to an adult prison sentence would not restrict DOC's ability to move the juvenile to an adult institution, if DOC determines that to be appropriate given the below factors. DOC 371.14 specifically addresses waived youth and original adult court jurisdiction youth. Under 371.14(4), the department may transfer a youth with an adult sentence to an adult correctional institution consistent with the requirements of law and DOC 371.11(3). Under 371.11(3), the department may transfer a youth with an adult conviction only – and a youth with *both an adult conviction and a juvenile commitment* – from a juvenile correctional institution to an adult institution consistent with the requirements of law, and after factoring in the following: (a) the extent to which the youth's conduct in an institution is violent and disruptive; (b) the security needs of the institution; (c) the extent to which the youth is refusing to participate in the treatment programs provided for the youth in the institution; and (d) the maturity of the youth, the extent to which the program needs of the youth can be met in an adult institution and the extent to which the youth may be vulnerable in an older population in an adult institution.

There are numerous benefits to having a juvenile disposition added to an adult sentence. A juvenile disposition that runs with an adult sentence allows for the juvenile to receive more individualized services while he is also serving his adult sentence and/or after he is released from his adult confinement. The juvenile would be able to benefit from these additional services until the juvenile order reaches its normal expiration date.

Regarding juveniles incarcerated in a type 1 correctional facility, as long as a juvenile order is in effect (even in conjunction with an adult sentence), OJOR must hold a formal conference at least once every six months. DOC

371.12(1)(a). At these conferences, JPRC members, the youth, and the youth's parents may all attend and be involved in the process. DOC 371.12(1)(a), (2) & (3)(c). Additionally, the institution must conduct a review of a youth's individual case plan every 90 days to determine whether the goals and case plan continue to be appropriate. DOC 371.12(4). The institution must then send a written progress summary to each JPRC member describing the youth's progress toward meeting individual goals and it would include any recommendations for extensions, release or discharge. 371.12(4). All of this can still happen if there is an adult sentence in place in conjunction with the juvenile disposition.

However, if the juvenile *solely* has adult convictions, then the juvenile is not entitled to these formal individualized conferences every 6 months, and the juvenile's parents would not be included in the planning process. DOC 371.12(1)(a). A family and home assessment would also not be prepared and an agent would not be assigned. 371.14(3)(a).

Other types of juvenile dispositions could also be helpful to a juvenile who is serving an adult sentence. For example, the juvenile could be ordered to participate in the victim offender mediation program under § 938.34(5r) or receive vocational training under § 938.34(7)(r).

Another benefit of having a juvenile disposition added to an adult sentence is that it allows the juvenile to stay at a juvenile correctional facility past his 18th birthday if the person is in the Serious Juvenile Offender Program (SJOP) and if the person is doing well and benefitting from the more intensive programming. See § 938.538(3)(a)(1)&(1m); DOC 371.11(3), The general preference is to keep SJO participants at the juvenile correctional facility, rather than an adult institution, past 18 because the participant can benefit from the more intensive programming. Juveniles who committed what would have been Class A offenses can be held in secure custody in a juvenile correctional facility up until their 25th birthday. § 938.538(3)(a)(1m). For juveniles who committed what would have been Class B or C felonies, a juvenile order made before the juvenile's 18th birthday can be in effect for up to 5 years (ie: potentially up until the day before their 23rd birthday). A type I juvenile correctional institution cannot

under any circumstance keep a juvenile past his 18th birthday if he is solely on adult court sentence(s). See § 973.013(3m).

In another scenario, the juvenile disposition could outlive the adult sentence (or the confinement portion thereof). If the juvenile is released from an adult sentence early enough, then the juvenile can benefit from many juvenile dispositions while out in the community, such as aftercare supervision, supervised work programs, placement in a group home, community service work programs, electronic monitoring, intensive supervision, volunteers in probation program, placement in a residential treatment center, counseling, etc… See Wis. Stat. § 938.34.

The juvenile court, in imposing its disposition, would be fully aware of the details of the previously-imposed adult sentence. Keeping the adult sentence in mind, the juvenile court – if it decides to retain juvenile jurisdiction – would tailor the juvenile order to complement the adult sentence and fit the juvenile's specific rehabilitative needs upon his release. The juvenile order could be in effect until the juvenile's 18th birthday, with some exceptions that allow for later termination dates. See Wis. Stat. §§ 938.355(4)(a)-(b) & 938.365(5). For example, if a juvenile is a full-time high school student, then a juvenile order for placement in a group home can last until the juvenile's 19th birthday or until he receives his high school diploma, whichever comes first. § 938.355(4)(am).

If the juvenile is on adult probation, a concurrent juvenile court order would greatly exceed the scope and depth of services the juvenile would get solely on adult probation, depending on the county.

It makes sense that the legislature wanted the prior waiver consideration to be county specific. In deciding whether to waive a juvenile, one of the factors that the juvenile court must consider is the adequacy and suitability of facilities, services and procedures available in the juvenile system. § 938.18(5)(c). This analysis will differ from county to county, because counties are responsible for funding the majority of delinquency-related services that the juvenile receives in the juvenile system. See Wis. Stat. § 301.26.

Different counties have different interests about where they are allocating their resources. Just because one county has decided that it no longer wishes to expend county resources on a particular juvenile, does not mean that the juvenile should be stripped of the right in all other counties to a § 938.18 waiver hearing in which the state carries the burden of clear and convincing evidence, and in which other counties would specifically consider whether they wish to invest their own resources in that juvenile under that standard.

Regarding Part B of Question 2, when a juvenile is incarcerated pursuant to an adult criminal court disposition, the juvenile case continues as it normally would, until it reaches the end of its natural life. Nothing about Wis. Stat. § 938.355 (termination statute) changes simply because an adult sentence is also imposed. DOC has the authority to discharge the juvenile early from their juvenile order if they believe the juvenile has reached his rehabilitation and treatment goals and if the public will be protected, but a juvenile order does not automatically terminate just because an adult sentence is imposed. Wis. Stat. §§ 938.53 & 938.535. If the adult sentence goes past age 25 – the outer limit for any juvenile court order – then the juvenile court order would expire and the person would be in prison solely on the adult case. If the person has been at a juvenile correctional facility past the age of 18 as part of the SJOP, the person would then immediately be transferred to an adult institution as soon as the juvenile order runs out.

III. Relevance of Wis. Stat. § 938.18(5)(am)

Hinkle is not aware of any situation in which a juvenile would have a waiver hearing before the court assigned to exercise jurisdiction under ch. 938, when the juvenile has been previously waived by that same court and subsequently convicted of the crimes in adult court.

Dated this 7th day of June, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 10 pages.

Dated this 7th day day of June, 2018.

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Christina C. Starner

CERTIFICATION 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 context 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 7th day of June, 2018.

_____
Christina C. Starner