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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

**SUPPLEMENTAL BRIEF OF
PLAINTIFF-RESPONDENT**

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The State of Wisconsin, Plaintiff-Respondent, submits this supplemental brief, pursuant to this Court's May 10, 2018, order.

ARGUMENT

I. The provisions of Wis. Stat. §§ 970.032(2) and 971.31(13)(a) do not change the State's positions in this case, and Hinkle has forfeited any claim that the circuit court violated these statutes.

This Court has asked the parties to address the effect of the reverse waiver provisions in Wis. Stat. §§ 970.032(2) and 971.31(13)(a) on their positions. (Order at 1.) Neither of these statutes change the State's positions that Hinkle has forfeited appellate review of his claims, and that original adult-court competency over Hinkle was proper under Wis. Stat. § 938.183(1)(b). In addition, any claim that Hinkle might make that the circuit court violated these statutes is forfeited by his failure to seek relief under the statutes or object to the court's failure to follow them. Any such claim is also forfeited by his no-contest and *Alford* pleas.

Hinkle's claim on appeal is that original adult-court competency over him based on a previous waiver into adult court was improper because that waiver happened in a different county. (Hinkle's Br. 10–15.) He also argues that his trial counsel was ineffective for not raising this claim. (Hinkle's Br. 15–16.) The State has asserted that Hinkle forfeited these claims by not objecting to the court's decision that it had original competency and by entering no-contest and *Alford* pleas. (State's Br. 8–11.) In addition, the State has argued that Hinkle's statutory interpretation argument underlying his claims is wrong, and his counsel was not ineffective. (State's Br. 12–20.) The State sees nothing in Wis. Stat. §§ 970.032(2) or 971.31(13)(a) that would lead it to change those positions.

Hinkle could have sought reverse waivers of the non-traffic charges against him under Wis. Stat. §§ 970.032(2) and 971.31(13)(a).¹ Hinkle was entitled to invoke these statutes and request a hearing at which he could try to prove that, despite the court's having original adult-court competency over the charges, the cases should be resolved in juvenile court. *See State v. Kleser*, 2010 WI 88, ¶ 67, 328 Wis. 2d 42, 786 N.W.2d 144. Hinkle would have needed to prove, by a preponderance of the evidence, the factors listed in sections 970.032(2)(a)–(c) and 971.31(13)(a)1.–3. *Id.*

But Hinkle never requested a reverse waiver hearing, and he thus forfeited his right to one. Whether to grant a reverse waiver is a matter for the circuit court's discretion. *See Kleser*, 328 Wis. 2d 42, ¶ 37. This Court will not find an erroneous exercise of discretion when the defendant failed to ask the circuit court to exercise its discretion. *See State v. Gollon*, 115 Wis. 2d 592, 604, 340 N.W.2d 912, (Ct. App. 1983).

Hinkle also never complained to the circuit court that it failed to follow either statute. Any claim making that argument would be forfeited on that basis as well. *See State v. Sanders*, 2017 WI App 22, ¶ 12, 375 Wis. 2d 248, 895 N.W.2d 41, *aff'd*, 2018 WI 51, __ Wis. 2d __, __ N.W.2d __ (challenges to the circuit court's competency must be raised in circuit court, or they are forfeited).

Finally, any claim that the circuit court violated Wis. Stat. §§ 970.032(2) or 971.31(13)(a) is also forfeited by Hinkle's no-contest and *Alford* pleas. *See State v. Bembenek*, 2006 WI App 198, ¶ 16, 296 Wis. 2d 422, 724 N.W.2d 685.

¹ The circuit court had original and exclusive adult-court competency over the traffic charges under Wis. Stat. § 938.17.

This Court should thus conclude that Hinkle not only forfeited the claims raised in his original brief, but also any claim that the circuit court violated sections 970.032(2) and 971.31(13)(a).

II. The statutory provisions addressing the effect of an adult-court criminal disposition and a subsequent delinquency disposition and the effect of the statutes concerning termination of juvenile court orders

A. The effect of a juvenile’s having both a criminal conviction and a juvenile disposition

This Court has asked the parties to address which statutes “address the effect of both an adult criminal court disposition involving incarceration in a correctional institution (for juveniles 15 years of age and older) and a subsequent juvenile court disposition of delinquency[.]” (Order at 1.)

There are several statutes and administrative rules that address where the Department of Corrections is authorized to house juveniles ordered into its custody. The State is unsure if these statutes and rules are responsive to what the Court has asked, but it will summarize them briefly.

Wisconsin Stat. § 302.18(7) says that, except as provided in Wis. Stat. § 973.013(3m), DOC is required to keep a person under 15 years old who has been given a prison sentence in a juvenile correctional facility or secured residential care center. The statute authorizes DOC to transfer the person to an adult institution after he turns 15 years old, with the exception of the prison authorized by Wis. Stat. § 301.16(1n)—the Wisconsin Secure Program Facility.

Wisconsin Stat. § 973.013(3m) says that DOC shall place persons under 16 years old who have been sentenced to prison in a juvenile correctional facility or a secure residential care center for children and youth. The statute authorizes DOC to deviate from this requirement if it determines placement in an adult institution is appropriate. The statute also prohibits DOC from placing anyone under 18 years old in WSPF. This statute, though, appears to apply only to indeterminate sentences. *See* Wis. Stat. § 973.013(1).

Wisconsin Stat. § 938.183(3) says that DOC may place a juvenile subject to a criminal penalty in a state prison once he turns 17 years old. Like the other statutes, section 938.183(3) prohibits placement in WSPF until the person turns 18 years old.

In addition, two related sections of the administrative code address DOC's authority to place juveniles. Wisconsin Admin. Code. § DOC 371.11(3) provides that DOC may transfer a youth with an adult conviction or both an adult conviction and a juvenile commitment from a type one secure correctional facility to an adult institution "consistent with the requirements of law." The rule then lists factors for DOC to consider in deciding whether to transfer the juvenile. Wis. Admin. Code § DOC 371.11(3)(a)–(d).

Wisconsin Admin. Code § DOC 371.14 addresses juveniles given adult sentences after being waived into adult court or when the court had original adult-court competency over the charges. Under subsection four of this rule, DOC "may transfer a youth to an adult correctional institution consistent with the requirements of law and s. DOC 371.11(3)."

These somewhat contradictory statutes and rules address where DOC can place a juvenile in its custody. The State has not found any statutes that address other matters

related to the scenario the court has posited. But the general statutes and rules governing prisons and juvenile dispositions might provide some guidance.

If a juvenile is convicted of a criminal offense in adult court and sentenced to prison, he would be placed in the custody of DOC to serve that sentence. *See* Wis. Stat. § 301.03(2). DOC would calculate the juvenile's sentence structure the same way it calculates all criminal sentences under Wis. Admin. Code § DOC chapter 302. *See* Wis. Admin. Code. § DOC 371.14(2).

If a court were to subsequently find a juvenile to be delinquent, a number of dispositions are possible. *See* Wis. Stat. § 938.34. Some of these dispositions involve DOC, others do not. For example, a court can place a juvenile under community supervision with DOC. Wis. Stat. § 938.34(2)(a). It can also place the juvenile in the serious juvenile offender program or in a juvenile correctional facility, both of which are run by DOC. Wis. Stat. §§ 938.34(4h) and (4m), 938.538(2). But the court could also order the juvenile supervised by a "suitable adult." Wis. Stat. § 938.34(2). Or the court can order placement in, among other places, the juvenile's home, a foster home, a group home, or a county-run juvenile detention facility. Wis. Stat. §§ 938.34(3)(a), (c), (cm), (f). None of these would involve DOC.

If the subsequent juvenile disposition does not involve DOC, and the juvenile is already serving a prison sentence, then presumably the prison sentence would control, and the juvenile would remain in DOC's custody. The State has found no statute or regulation that would allow for the juvenile to be released to complete a juvenile disposition that does not involve DOC while he is also serving a prison sentence.

If the subsequent juvenile disposition places the juvenile in DOC's custody, though, then DOC could presumably carry out the disposition along with the prison sentence. The State, though, has not found any statutes or regulations that dictate how DOC must simultaneously execute the disposition and the prison sentence. The State notes, though, that DOC follows many of the same administrative rules for juveniles admitted to its custody regardless of whether they are there on a criminal sentence or a juvenile disposition. For example, DOC largely follows the same rules for case planning for juveniles in both categories. *See* Wis. Admin. Code. § DOC 371.14(3).

B. The statutes addressing termination of a juvenile disposition after the juvenile's 18th birthday

This Court has also asked the parties to “address the effect of the statutory provisions relating to termination of juvenile court orders if a juvenile is incarcerated pursuant to an adult criminal court disposition, beyond the ages of 18 or 25, for example.” (Order at 1.)

Wisconsin Stat. § 938.355(4)(b) addresses the termination of juvenile disposition orders that could extend past the juvenile's 18th birthday. These orders involve juveniles whom the court has placed in the serious juvenile offenders program pursuant to Wis. Stat. § 938.34(4)(h). If the court finds the juvenile delinquent for committing an act that would be burglary under Wis. Stat. § 943.10(2) or a Class B or C felony, the order terminates five years after it is issued. Wis. Stat. § 938.355(4)(b). If the court finds the juvenile delinquent for an act that would be a Class A felony, the order terminates when the juvenile turns 25 years old. Wis. Stat. § 938.355(4)(b). As noted, a juvenile in the serious juvenile offenders program is in DOC custody. *See* Wis. Stat. § 938.538(2).

Thus, if a juvenile is serving both a prison sentence and is subject to a disposition placing him in the serious juvenile offenders program, he is in DOC's custody on both orders. How long the juvenile would remain in DOC's custody would presumably depend on the specific terms of the sentence and the disposition. DOC would keep the juvenile in its custody until the sentence or the disposition expires, whichever one ends later.

III. The application of Wis. Stat. § 938.18(5)(am) after a conviction following a waiver of juvenile-court competency

Finally, this Court asked the parties to address when Wis. Stat. § 938.18(5)(am) would apply after a juvenile had been previously waived into adult court. (Order at 2.) The court has also asked if there are situations where a juvenile has been convicted after a previous waiver where Wis. Stat. § 938.183(1)(b) does not apply but section 938.18(5)(am) does. (Order at 2.)

Wisconsin Stat. § 938.18(5)(am) is one of the factors for a court to consider when deciding whether to waive a juvenile into adult court. It directs the court to consider

[t]he prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, and the juvenile's prior offenses.

Wis. Stat. § 938.18(5)(am).

The State understands this Court's concern to be that requiring the court to consider previous waivers and convictions is meaningless given Wis. Stat. § 938.183(1)(b)'s

grant of original adult-court competency based on a previous waiver or conviction.

Wisconsin Stat. § 938.18(5)(am), though, can still apply to situations where the juvenile has been previously waived into adult court. Under Wis. Stat. § 938.183(1)(b), a court has original adult competency over a juvenile who has been previously waived into adult court and was either convicted or the proceedings are still pending. Thus, if the juvenile was acquitted or if the earlier proceedings are no longer pending, the court will not have original adult-court competency in a later-filed case. In those scenarios, “whether the court has previously waived its jurisdiction over the juvenile” remains a valid consideration for determining waiver.

It does not appear, though, that there is a situation where a juvenile has been convicted of a crime following a waiver where Wis. Stat. § 938.183(1)(b) would not apply. If a juvenile has been previously convicted of a crime after a waiver, then original adult-court competency is automatic under section 938.183(1)(b).

But this does not mean that section 938.18(5)(am)’s language telling the court to consider “whether the juvenile has been previously convicted following a waiver of the court’s jurisdiction” has no meaning. The use of “whether” implies “or not.” See Bryan A. Garner, *Garner’s Modern English Usage* 960–61 (4th ed. 2016). So a court, when deciding whether to waive a juvenile who has been previously waived into adult court, can consider whether the juvenile was previously acquitted or there was some result other than a guilty verdict in the earlier proceedings.

Further, the State notes that any incongruity between Wis. Stat. §§ 938.18(5)(am) and 938.183(1)(b) appears to trace back to the enactment of the current juvenile justice

code. When it created the code, the Legislature repealed then-Wis. Stat. § 48.18 (1993–94) and replaced it with section 938.18. *In re Tyler T.*, 2012 WI 52, ¶ 24 n.8, 341 Wis. 2d 1, 814 N.W.2d 192. Section 48.18(5)(a) listed “whether the child has been previously convicted following a waiver of the court’s jurisdiction” as a criterion for courts to consider in making a waiver decision. Thus, it appears that the former section 48.18(5)(a) is the source for the language in the current section 938.18(5)(am).²

But before the creation of the juvenile justice code, there was no counterpart to Wis. Stat. § 938.183(1)(b). Rather, it was a new creation by the Legislature. The statute was created to reflect the Juvenile Justice Study Committee’s recommendation to confer original adult court competency based on the principle of “once waived, always waived.” *Juvenile Justice: A Wisconsin Blueprint for Change*, 14–15 (January, 1995).³ Thus, any conflict between the statutes appears to have been the result of their language being created at different times.

The State, though, reiterates that it believes that Wis. Stat. § 938.18(5)(am)’s language telling the court to consider “whether the juvenile has been previously convicted following a waiver of the court’s jurisdiction” is not made meaningless by Wis. Stat. § 938.183(1)(b). As explained, a court can consider the lack of a conviction in the previous proceedings when deciding whether to waive a juvenile into adult court.

² The Legislature created the current Wis. Stat. § 938.18(5)(am) in 2005 Wisconsin Act 344, § 160. Before that, the language telling the court to consider previous convictions was in Wis. Stat. § 938.18(5)(a). *See* Wis. Stat. § 938.18(5)(a) (2003–04).

³ Available at <https://eric.ed.gov/?id=ED384129>.

CONCLUSION

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

Dated June 11, 2018.

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 2,558 words.

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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 11th day of June, 2018.

AARON R. O'NEIL
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