COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1407

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF HEATHER M. M., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HEATHER M. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, J.[1] Heather M. appeals from an order adjudicating her delinquent. She claims that the trial court erred in concluding that it lacked the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

power to enter a consent decree pursuant to WIS. STAT. § 938.21(7) (1999-2000). We conclude that this statute permits a trial court to enter a consent decree, as defined in WIS. STAT. § 938.32(1). We therefore reverse and remand to permit the trial court to exercise its discretion as to whether to enter a § 938.21 consent decree.

¶2 Michael Selck, a sergeant with the Lake Mills Police Department filed a petition in juvenile court alleging that Heather M. was delinquent because she had committed disorderly conduct, contrary to WIS. STAT. § 947.01. Heather moved the court to issue a consent decree, pursuant to WIS. STAT. § 938.21(7), which reads:

> If the judge or juvenile court commissioner determines that the best interests of the juvenile and the public are served, he or she may enter a consent decree under s. 938.32 or order the petition dismissed and refer the matter to the intake worker for deferred prosecution in accordance with s. 938.245.

After reviewing § 938.21(7), the trial court considered WIS. STAT. § 938.245, which reads in pertinent part:

> **Deferred Prosecution. (1)** The intake worker may enter into a written deferred prosecution agreement with all parties as provided in this section if the intake worker has determined that neither the interests of the juvenile nor of the public require filing of a petition for circumstances relating to s. 938.12, 938.125, 938.13 or 938.14. Deferred prosecution shall be available only if the facts persuade the intake worker that the jurisdiction of the court, if sought, would exist and upon consent of the juvenile, parent, guardian and legal custodian.
>
> ….
>
> (6) A deferred prosecution agreement arising out of an alleged delinquent act is terminated if the district attorney files a delinquency petition within 20 days after receipt of notice of the deferred prosecution agreement

> under s. 938.24 (5). In such case statements made to the intake worker during the intake inquiry are inadmissible.

¶3 The trial court concluded that because a consent order must be agreed to by persons other than a judge, judges do not have the power to enter a consent decree. We disagree. We agree with Heather M. that the language of WIS. STAT. § 938.21(7) plainly authorizes the juvenile court to "order the petition dismissed and refer the matter to the intake worker for deferred prosecution in accordance with s. 938.245." This language is not ambiguous.

¶4 The State argues that we must read WIS. STAT. § 938.21(7) in the context of the WIS. STAT. § 938.245, and similar statutes within ch. 938, and that we should consider the purpose and history of ch. 938. And we would do so, were we to conclude that § 938.21(7) is ambiguous. But we see no ambiguity in that statute. It plainly gives authority to the trial court to order the petition dismissed. When a statute is plain on its face, we are not to go further to determine its meaning. ***Teague v. Bad River Band of Chippewa Indians***, 2000 WI 79, ¶17, 236 Wis. 2d 384, 612 N.W.2d 709. And the supreme court has considered § 938.21(7) and concluded: "Similarly, in accord with WIS. STAT. § 938.21(7), a judge or juvenile court commissioner has the discretion to dismiss a petition and refer a juvenile's case to a social worker for deferred prosecution, if it is in 'the best interests of the juvenile and the public.'" ***State v. Hezzie R.***, 219 Wis. 2d 848, 874, 580 N.W.2d 660 (1998).

¶5 The State would have us ignore both the plain meaning of WIS. STAT. § 938.21(7) and the supreme court's opinion that the statute gives a judge discretion to dismiss a petition. We are bound by prior decisions of the supreme court. ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App.

1979). We will not conclude that § 938.21(7) fails to give authority to a trial court when the supreme court has said that it does.

¶6 Whether a district attorney may terminate a judge-entered WIS. STAT. § 938.21(7) deferred prosecution agreement is an issue we do not reach. In the context of this case, there has been no judicial decision to dismiss Sergeant Selck's petition. The facts necessary to decide whether the judge or the district attorney would prevail, were they to take conflicting actions, are not before us.

¶7 The State asserts that if we interpret WIS. STAT. § 938.21(7) to give a juvenile court judge power to dismiss a petition, this interpretation would violate the doctrine of separation of powers. But that doctrine is more elastic than the State envisions. In ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998), the court explained that the majority of governmental powers lie within the "great borderlands" of shared authority:

> In attempting to delineate the powers of our tripartite government, we need not seek a "strict, complete, absolute, scientific division of functions between the three branches of government. The separation of powers doctrine states the principle of shared, rather than completely separated powers. The doctrine envisions a government of separate branches sharing certain powers." "In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power."

Id. (citations omitted).

¶8 And in ***Racine County v. Skow*****,** 138 Wis. 2d 483, 493-95, 406 N.W.2d 372 (1997), the court determined that a judge assigned to exercise jurisdiction under The Children's Code has the power to require a county human services department to prepare a comprehensive report on foster care placements.

An order requiring the report did not violate the separation of powers doctrine. ***Id.*** at 493. The court reasoned that the judge and social services department shared powers because the applicable statute envisioned a cooperative effort between the court and the county social services department. ***Id.*** at 495.

¶9 The same is true of the relationship between the court and the district attorney when considering the duties assigned to each by WIS. STAT. §§ 938.21(7) and 938.245(6). Regardless of whether the judge or the district attorney holds the high card when the case is finished, neither executive nor judicial branch powers unduly burden or substantially interfere with the other branch's exercise of its power. While differences might exist between the branches as to the best disposition in a juvenile case, that is no different than the differences which exist when a judge grants or denies a State's motion in a criminal case, or sentences a defendant more or less harshly than the State would prefer. The power to use a consent decree in juvenile cases is a power shared by the executive and judicial branches. We conclude that our interpretation of § 938.21(7) does not violate the separation of powers doctrine.

¶10 The State raises the issue of double jeopardy at the end of its brief by asking: "If the matter were sent for a Deferred Prosecution Agreement, could the matter ever revert to prosecution since, in fact, it had already been tried to conclusion?" We will not answer this hypothetical question. Issues raised but not argued are waived. *See* ***Reiman Assocs., Inc., v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). If the State has concluded that consent decrees subject a juvenile to double jeopardy, the State has cited no authority to support its conclusion. The State has therefore waived this issue. We therefore reverse the trial court's order adjudicating Heather M. delinquent, and

remand to allow the trial court to exercise its discretion to dismiss or refuse to dismiss Sergeant Selck's petition as § 939.21(7) provides.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.