COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1269-FT **Cir. Ct. No. 2006JV711**

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

IN THE INTEREST OF ALEX R. R., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALEX R. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed*.

¶1 ANDERSON, P.J.[1] After denying a charge of misdemeanor theft, Alex R.R. was scheduled for trial in juvenile court. Thirty minutes before that trial was set to begin, Alex's attorney was notified that the prosecution wanted to amend the charges from theft to receiving stolen property. Alex's attorney objected to this last minute amendment, arguing that all pretrial preparations were directed toward a defense of theft and that receiving stolen property has different elements that the attorney was not prepared for. The trial judge amended the delinquency petition to the charge of receiving stolen property but granted an extension of the trial to give the defense adequate time to prepare for the amended charge. Approximately three weeks later, the trial was held. At the conclusion of the trial, the judge determined that the facts presented proved that Alex had committed theft rather than receiving stolen property. Therefore, the judge found Alex delinquent of the charge of theft. Alex appeals, claiming that the posttrial amendment was in violation of due process. We agree with Alex and reverse.

¶2 Trial judges are given discretion to amend a delinquency petition after hearing a plea "if the amendment is not prejudicial to the juvenile." WIS. STAT. § 938.263(2). Indeed, one purpose of the juvenile justice system is to prevent prejudice by promoting fair hearings and due process. WIS. STAT. § 938.01(2)(d). The United States Supreme Court has determined that in juvenile proceedings "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." ***In re Gault***, 387 U.S. 1, 33 (1967). Wisconsin has followed these same due process requirements for juvenile

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

proceedings. ***State v. Tawanna H.***, 223 Wis. 2d 572, 576, 590 N.W.2d 276 (Ct. App. 1998). Therefore, a trial court's sua sponte posttrial amendment will violate due process under most circumstances. In this case, the trial court did not inform Alex of the charges against him until after all of the evidence had already been presented. Thus, Alex did not have the opportunity to prepare a defense. These facts alone give rise to a due process violation.

¶3 However, the State correctly points out an exception to the notice requirement in circumstances where a petition is amended to add an included crime. *See* WIS. STAT. § 939.66. These amendments are not prejudicial. An included crime is a crime that does not require proof of any facts beyond those that must be proved for the crime that has already been charged. Sec. 939.66(1). Thus, to constitute a lesser-included crime, it must be "utterly impossible" to commit the greater offense without committing the lesser offense. ***State v. Carrington***, 134 Wis. 2d 260, 274, 397 N.W.2d 484 (1986). For instance, theft is a lesser-included crime of robbery because the two crimes are identical except that robbery includes an additional element of violence or a threat of violence. *See* ***Moore v. State***, 55 Wis. 2d 1, 6, 197 N.W.2d 820 (1972). In contrast, in ***Tawanna H.***, a juvenile case, the trial court's amendment after hearing all testimony was deemed prejudicial and in violation of due process. ***Tawanna H.***, 223 Wis. 2d at 573. There, the defendant was initially charged with battery but the trial judge amended the charge sua sponte to disorderly conduct. ***Id.*** We reversed, holding disorderly conduct was not an included crime of battery. *See* ***id.*** at 580. We noted that a lack of notice might have had an effect upon various decisions such as which witnesses to call, strategies of cross-examination and which objections to make. ***Id.***

¶4 Under this standard, theft cannot be considered an included crime of receiving stolen property. The State contends that the credibility of the juvenile is the only factor that separates the two offenses. However, an examination of the elements of each crime shows that this is not true. Theft has been committed if a defendant (1) intentionally retains another's movable property, (2) without the owner's consent, (3) knowing that there was no consent from the owner, (4) with intent to permanently deprive the owner of possession. ***State v. McGuire***, 204 Wis. 2d 372, 378, 556 N.W.2d 111 (Ct. App. 1996) (citing WIS. STAT. § 943.20(1)(a)). Receiving stolen property, on the other hand, is committed by a defendant who "intentionally receives or conceals stolen property." WIS. STAT. § 943.34(1). These crimes differ in that theft involves the initial taking of another person's property. However, a person who receives stolen property is receiving property that has already been taken. Furthermore, theft requires that a defendant have intent to permanently deprive a rightful owner. No such requirement exists for receiving stolen property.[2] Because of these differences, an attorney who has prepared a defense for receiving stolen property would not be sufficiently prepared to defend a client against charges of theft.[3]

¶5 In addition to claiming that theft is an included offense of receiving stolen property, the State further contends that the appeal should be dismissed for failure to preserve an appeal. It is true that Alex's attorney did not object at the

[2] This court is not attempting to discern all of the differences between theft and receiving stolen property. It is sufficient to say that there are different elements between the two crimes and, as a result, theft is not an included crime of receiving stolen property.

[3] The State also argues that the defense was sufficiently prepared for charges of theft because theft was the charge on the date the trial was initially scheduled for. Even assuming that the defense was sufficiently prepared, Alex did not have an opportunity to present a defense against theft charges—if Alex's trial was based on charges of theft, there may have been different objections, witnesses and strategies.

time of the judge's sua sponte amendment. However, if the record demonstrates that either a controversy has not been completely tried or justice has not been carried out, the court of appeals has the discretion to reverse a trial court's decision regardless of whether the proper objection has been made. WIS. STAT. § 752.35. Under the circumstances of this case, Alex's attorney did not waive the right to appeal when he failed to object to the judge's amended charge. The circumstances under which the trial judge amended the petition were exceptional in that the trial judge amended the delinquency petition sua sponte after all the evidence had been presented. Justice cannot be carried out under circumstances such as this where a defendant is not properly made aware of the alleged crimes.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.