COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 10, 1995

NOTICE

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

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

Nos. 95-1617
95-1645

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

In the Interest of Jonathon R. K.,
A Person Under the Age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

Jonathon R. K.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.* APPEAL from an order of the circuit court for Langlade County, JAMES P. JANSEN, Judge. *Affirmed.*

LaROCQUE, J. Jonathon R. K. (d.o.b. 11/4/78), accused of mutilating and hiding the corpse of a murder victim, challenges separate juvenile court jurisdiction waiver orders in Outagamie and Langlade Counties. This court granted leaves to appeal to facilitate the prompt review mandated by ***State ex rel. A.E. v. Circuit Court***, 94 Wis.2d 98, 103, 288 N.W.2d 125, 128 (1980). These appeals were then consolidated on this court's motion based upon the factual and legal issues common to both cases. For the reasons set forth, the orders are affirmed.

OUTAGAMIE COUNTY PETITION

In Outagamie County, sixteen-year-old Jonathon was charged in a delinquency petition with conspiring with others, as party to the crime, to hide or bury a corpse with intent to conceal a crime, in violation of §§ 939.05(2)(c) and 940.11(2), STATS. The charges include a penalty enhancement pursuant to § 939.50(3)(d), STATS., in that the underlying crime was allegedly committed for the benefit of, at the direction of, or in association with a criminal gang, with the specific intent to promote, further or assist in criminal conduct by gang members. The district attorney then petitioned to waive Jonathon to adult criminal court.

According to the allegations in the petition and the evidence at the waiver hearing, a named member of a "local gang" known as the "D-Mac Crew" reported that Jonathon was present as a gang member when it met in Appleton to discuss a plan to kill Jermaine Gray. The ostensible motive to kill Gray was his disrespect toward the gang, his assault upon a member and his failure to repay money for drugs the gang had furnished him to sell. The gang met later in a motel room in early May 1995 and vowed to kill Gray, and "each member had to swear to the idea by putting 'his G' on the agreement." After the vote, Jonathon "stated his reluctance to be involved in the killing," for which he was punched in the face by other gang members and demoted from his position in the group. Several other members then took Gray to Langlade County, where they brutally killed him.

Still later, Jonathon was present when three of the actors bragged about the killing in graphic detail. Those responsible for the murder articulated the need to return to the scene to bury Gray's body, which had been dragged under a porch. After further discussions, Jonathon accompanied the trio on May 10, 1995, to Langlade County where he participated in burning and burying the body.

Jonathon eventually confessed to his attendance at the meeting at which the murder plan was discussed and at the meeting where plans were formed to hide and bury the body. He agreed to accompany the gang to Langlade County to move Gray's body, where they poured gasoline on it, set it on fire and buried it.

Jonathon first challenges the admission of evidence relating to his participation in the mutilation of Gray's body because that activity forms the basis of the other waiver petition filed in Langlade County. Jonathon maintains that consideration of the mutilation evidence in Outagamie County where he was charged only with hiding the body violates the mandate of ***Gibson v. State***, 47 Wis.2d 810, 177 N.W.2d 912 (1970). ***Gibson*** set aside the conviction of a juvenile who entered guilty pleas in adult criminal court in Waukesha County to two counts of robbery, even though the only waiver hearing, held in Milwaukee County, waived the subject as to the robbery that had occurred there. ***Id.*** at 814, 177 N.W.2d at 914. The ***Gibson*** court held that the Waukesha court lacked subject matter jurisdiction over the Waukesha offense absent a valid waiver on that charge. ***Id.***

Gibson has no application here. The Outagamie County Juvenile Court waived Jonathon only as to the delinquency petition in that county. Jonathon cites no authority, nor could he, for the proposition that the Outagamie County court should have ignored the charges filed in Langlade County. To the contrary, the waiver statute, § 48.18, STATS., unquestionably contemplates consideration of the context in which the offense charged occurred, as well as any other evidence bearing upon the subject's suitability for the juvenile system. The claim that the court could not consider his act of mutilation is unwarranted.

Next, Jonathon argues that the court erred by considering the district attorney's reference to Jonathon's alleged violations of a "cooperation agreement." Jonathon had reportedly agreed to tell the truth regarding the incident in return for the Outagamie County district attorney's agreement not to recommend a prison term in adult court. At the waiver hearing, the prosecution contended that Jonathon had violated his agreement by giving conflicting statements to different police agencies.

This claim of error is rejected for a number of reasons. The agreement is not part of the record. More importantly, counsel concedes that he made no objection to the prosecutor's references to the agreement as a tactical matter; he used it to show the court Jonathon's spirit of cooperation. That tactic was largely successful. Although Jonathon does not directly challenge the prosecutor's contention that he gave conflicting information to the police, and

there was no precise ruling by the court, the court inferred that Jonathon's conduct was essentially cooperative and consistent with the agreement.

Jonathon tries to use the cooperation evidence to argue that the court mistakenly concluded that the adult criminal court could be bound by the State's agreement not to request a prison sentence. So mistaken, Jonathon suggests, the juvenile court thereby ignored the established legal principle that sentencing courts are not bound by prosecutors' sentencing recommendations. Although not expressly argued, Jonathon's argument implies that the waiver was thereby based upon the false premise that Jonathon would of necessity receive a lenient sentence in the criminal court.

The record does not support the argument. The court indicated that it was "not convinced one way or the other" that Jonathon had violated the agreement. Further, the court gave no indication that the agreement, Jonathon's performance relative to it, or the likely sentence had any bearing on its waiver decision. Finally, absent some evidence to the contrary, this court will assume that judges are aware of the law. This court takes notice of this particular judge's service as the Outagamie County district attorney prior to his current status, suggesting he was aware of the law regarding the criminal court's sentencing prerogative.

Finally, Jonathon suggests the court abused its discretion by

> giving undue weight to the nature of the offense, undue weight to media publicity surrounding the same, and failure to give due weight to this juvenile's lack of [a] prior juvenile record, his history of emotional disturbance, learning disability, lack of school progress, and insufficient weight to the adequacy and suitability of extending juvenile court jurisdiction under Sec. 48.366(1), Wis. Stats.

The juvenile court retains discretion as to the weight it affords each of the statutory criteria under § 48.18(5), STATS. ***In re J.A.L.***, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991).

Without unnecessarily detailing the record this court has reviewed, it is apparent the juvenile court acted within the bounds of its discretion when it found the offense "very serious." It accurately noted that Jonathon "fully participated" in hiding the corpse. The court acknowledged that Jonathon was "substantially cooperative with the police" and that his prior juvenile record "is relatively minor." The court expressly referred to the fact that Jonathon had a limited involvement in the planning of the murder, withdrew from the plan and was punished for it. The court then concluded, however, that Jonathon chose to become involved again in the matter despite knowledge of a heinous murder. The court expressed concern that the juvenile system lacked the same controls that exist in the adult system to assure severance of Jonathon's future ties with the gang. The court referred to Jonathon's gradual and steady elevation into more dangerous and threatening behaviors.

There is no basis to hold that the court was influenced by media publicity or that it did not adequately consider the facts favorable to retention of juvenile jurisdiction. The court also entered a written waiver order in which it found that it reviewed each of the relevant factors, concluding that waiver was in the best interests of the child and/or the public.[1] The Outagamie County waiver order was a proper exercise of discretion.

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[1] The order states that the court considered the following factors:

Personality and Prior Record of the Child:

Whether the child is mentally ill.
Whether the child is developmentally disabled.
Whether the child has been previously found delinquent.
Whether these delinquent acts involved the infliction of serious bodily injury.
The child's motives for the acts.
The child's attitude.
The child's physical maturity.
The child's mental maturity.
The child's pattern of living.
The child's prior offenses.
The child's history of responding to previous treatment.
The child's potential for responding to future treatment.

Type and Seriousness of Offense:

LANGLADE COUNTY PETITION

In Langlade County, Jonathon was charged with one count of mutilating a corpse and a second count of hiding it. He argues that the charges violate double jeopardy principles because "when viewed in totality with a contemporaneous delinquency petition containing similar allegations filed in Outagamie County and based upon the same set of facts" the charges are multiplicitous. In a related argument, Jonathon also contends that the charge of hiding or burying a corpse under subsec. (2) of § 940.11, STATS., is a lesser included offense of the charge of mutilating a corpse under subsec. (1), and that the court erred by finding prosecutive merit on both grounds.[2] This court addresses the second contention first.

(..continued)
Whether this crime was against persons.
Whether this crime was against property.
Whether this crime was violent or aggressive.
Whether this crime was wilful or premeditated.

Adequacy and Suitability of Juvenile System (Where Applicable, Mental Health System):

Whether there are services or facilities that can:

·treat the child.
·protect the public.

Other Co-Actors:

Whether there are other individuals associated with this child who will be charged with a crime in a circuit court with criminal jurisdiction that makes it more desirable for trial and disposition of this case in one court.

[2] Section 940.11, STATS., provides:

Mutilating or hiding a corpse. (1) Whoever mutilates, disfigures or dismembers a corpse, with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime, is guilty of a Class C felony.
(2) Whoever hides or buries a corpse, with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime, is guilty of a Class D felony.
(3) A person may not be subject to prosecution under both this section and s.

The double jeopardy clause embodies three protections: prosecution of the same offense after acquittal, prosecution of the same offense after conviction and multiple punishments for the same offense. ***Brown v. Ohio***, 432 U.S. 161, 165 (1977). It is the third protection that Jonathon seeks here. When the same act violates two statutes, the test to determine double jeopardy is whether there are two offenses or one; that is, whether each offense requires proof of a fact that the other does not. ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). In this case, each subsection of the statute undeniably requires proof of a fact that the other does not. The mere fact that the legislature has imposed a lesser felony penalty for burying a corpse than for mutilating it does not alter the test or the result.

Further, Jonathon cites no authority for the proposition the double jeopardy attaches at this stage where no trial and no acquittal or conviction has occurred. It is well established that the prohibition against double jeopardy is not triggered until "jeopardy attaches" in the proceedings. ***State v. Comstock***, 168 Wis.2d 915, 937, 485 N.W.2d 354, 362 (1992). Section 972.07, STATS., provides that "jeopardy attaches (1) when a witness is sworn in a trial to the court without a jury, and (2) when the selection of the jury has been completed and the jury sworn in a jury trial. ***Comstock***, 168 Wis.2d at 937, 485 N.W.2d 362. Because jeopardy has not yet attached, Jonathon's challenge relating to "similar allegations" being filed in both Outagamie and Langlade Counties is premature.

Jonathon's other dispute with the Langlade County charges is also rejected. There is no basis to assert multiplicity or double jeopardy with regard to charging a mutilation of a corpse under subsec. (1) and hiding a corpse under subsec. (2) of § 940.11, STATS. The latter is not an included crime because each subsection requires proof of an element that the other does not. *See* § 939.66(1), STATS. (an included crime is one that does not require proof of any fact in addition to those that must be proved for the crime charged); *see also* ***State v. Rabe***, 96 Wis.2d 48, 63, 291 N.W.2d 809, 816 (1980) (the test uniformly used in Wisconsin to determine multiplicity is the additional fact test, which examines whether each count requires proof of an additional fact that the other count or counts do not). The charges in Langlade County are not multiplicitious.

(..continued)

946.47 for his or her acts regarding the same corpse.

Next, Jonathon challenges sufficiency of the evidence to support the waiver decision. The testimony of a school official revealed that Jonathon was referred to the office of the dean at an Appleton middle school "probably 25 times." The incidents sometimes involved violent talk, threats to use guns and frequent reference to killing police officers. He had been suspended from school on occasion. He was in learning disabled classes at school. He was described as average to a little below average academically, and above average in social maturity.

An Appleton High School official described an incident where Jonathon chased a student around the hallways of the school; noted that Jonathon possessed recorded material displaying anger, frustration and a great deal of hostility that caused concern; and was aware that Jonathon participated in group confrontations in the school parking lot that led to violent acts or fights. Jonathon was characterized as of average intellectual functioning, although his ninety-two score on an IQ test placed him in the category of "slow learner," and he was involved with learning disabled classes for many years.

An Appleton police officer who deals with gang and drug issues described the events surrounding Gray's murder. Those activities were summarized earlier herein. He believed the gang's assault on Jonathon was a common ritual among gang members. A special agent of the Wisconsin Department of Justice introduced Jonathon's confession as earlier related. Notably, Jonathon had initially voted "yes" with the rest of the gang to kill Gray.

The Langlade County juvenile supervisor testified that he was familiar with the statutory requirements for waiver pursuant to § 48.18(5), STATS. Although Jonathon was learning disabled, he did not fit the requirement of "developmentally disabled"; he had no information that Jonathon suffers from any mental illness; knew of no prior delinquencies; knew of prior contact with law enforcement for disorderly conduct; had received minimal services through the juvenile court system, having had some alcohol or drug abuse assessment and counseling. He concluded that the juvenile system was inadequate in light of Jonathon's age and the seriousness of the offense. The witness acknowledged that he only spent about an hour and a half conducting his evaluation of Jonathon. He conceded that the child's parents showed concern for him and took an active role in Jonathon's life. He described on

cross-examination the nature of the juvenile system alternatives in considerable detail.

Jonathon's mother, although in the process of moving to Texas to join her husband where his employment took him, described a stable family environment. Her son obeyed the household rules most of the time and engaged in various hobbies. She had been told that his learning problem was related to dyslexia. She described an improvement in his school grades as the result of a home detention program. Jonathon had been hospitalized and treated twice in the past for depression, and she believed him to be emotionally immature for his age. She indicated she was unaware of his gang activities other than her observation that he wore gang "colors" or a bandanna.

Jonathon's father told the court of his fairly good relationship with his son and described the boy as affectionate, considerate and helpful around the house. He confirmed his wife's opinion that Jonathon was emotionally and mentally immature and felt his son was in need of counseling as well as medical and psychiatric help.

In the court's bench decision, it expressed a belief that this was a difficult decision, made so by the absence of a prior juvenile record and the intact family that demonstrated laudable values. The court's decision to waive hinged primarily upon the premeditated, serious and aggressive nature of the crime. The court concluded that there was a need for a longer period of control than is afforded by the juvenile court system. It found that the youth's actions were consistent with a person who was "streetwise." It took note of the considerable lapse of time between the murder and Jonathon's decision to actively participate in concealing it.

Contrary to Jonathon's argument on appeal, the court did not give undue weight to the nature of the offense and media publicity, or fail to give due weight to the lack of a prior record, the history of emotional disturbance, the learning disability and the adequacy and suitability of juvenile facilities and programs.

The weight on justice's scale that each of the statutory factors should receive is uniquely the function of the juvenile judge and not this court. Whether the serious and premeditated nature of the offense coupled with the

child's age outweighs factors weighing in favor of retention of juvenile jurisdiction cannot be reduced to a mathematical formula. Justice Heffernan's oft quoted statement of the appellate standard is relevant here:

> While, as in all discretionary acts of a court, reasonable persons may sometimes differ in the outcome, all that this court need to find to sustain a discretionary act is that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

Loy v. Bunderson, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Using this test, this court concludes that the Langlade County Circuit Court's discretionary decision to waive Jonathon to face disposition in adult criminal court must be sustained.

By the Court. – Orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.