COURT OF APPEALS
DECISION
DATED AND RELEASED

January 24, 1996

No. 95-2081

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

In the Interest of Joshua W.,
A Child Under the Age of 18 Years:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOSHUA W.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Kenosha County: MARY K. WAGNER-MALLOY, Judge. *Affirmed.*

BROWN, J. Joshua W. appeals from an order adjudging him delinquent and transferring him to the custody of the Department of Health and Social Services. Joshua contends that his plea hearing was defective, that the trial court's failure to hold trial within twenty days of arraignment violated § 48.30(7), STATS., and that the trial court was required to obtain a

written dispositional order despite his waiver. We hold that the plea hearing was not defective and that the delay was reasonable. We further hold that Joshua is judicially estopped from asserting trial court error in waiving the need for a written dispositional order since it did so on Joshua's motion.

Joshua was charged with three counts of endangering safety with a dangerous weapon and one count of obstructing an officer. The charges arose from a drive-by shooting (Joshua drove a car while two others fired a shotgun at three young pedestrians) and from Joshua's subsequent statements to police.

The matter was scheduled for jury trial on April 17, 1995. On that day, the trial court judge was unable to conduct the trial due to illness. The attorneys involved consulted with the court as to rescheduling, but the earliest date at which all parties could appear was July 10. The trial judge indicated that she was amenable to an earlier date, should the changing schedules of the attorneys permit.

Joshua subsequently filed a motion to dismiss on May 23, based on § 48.30(7), STATS., which requires that the fact-finding hearing be held within twenty days of arraignment when a juvenile is in secure custody. The trial court denied the motion and moved the trial date ahead to June 26.

On June 16, the matter came before the trial court for entry of guilty pleas and disposition. Joshua pleaded guilty to one count of endangering safety with a dangerous weapon as a party to the crime, in violation of §§ 941.20(3)(a) and 939.05, STATS., and one count of obstructing an officer, in

violation of § 946.41, STATS. After the plea discussion, he waived his right to a final dispositional report, and the trial court entered an order adjudging him delinquent and placing him at the Lincoln Hills School for eighteen months under supervision of the state Department of Health and Social Services.

Joshua now appeals from that order. He first contends that the plea colloquy was insufficient because the trial court failed to clearly distinguish among the charges when asking for Joshua's plea. In particular, Joshua asserts that the trial court confused the counts, referring to the obstructing charge as "count one" when it was in fact "count four." We find no basis for this claim in the record. The disputed portion of the plea discussion is as follows:

> THE COURT: How do you plead to one count of party to the crime of endangering safety by use of a dangerous weapon?
>
> [Joshua W.]: Guilty.
>
> THE COURT: You understand that that's a felony offense?
>
> [Joshua W.]: Yes.
>
> THE COURT: And what—How do you plead to the one count of obstructing?
>
> [Joshua W.]: Guilty.

Joshua pleaded guilty to each of the two charges, with no confusion whatsoever apparent to this court. The reference to the counts did not refer in any way to the numbers of the counts. The totality of the record reveals that the plea acceptance discussion which followed was sufficient under the requirements of ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and § 971.08, STATS. The

appellate review of a plea hearing should not focus on the "ritualistic litany" of formal elements, but rather on whether the defendant received real notice of the nature of the charge. ***Bangert***, 131 Wis.2d at 282-83, 389 N.W.2d at 30 (quoted source omitted). In this case, we are fully satisfied that Joshua understood his pleas and their consequences.

Joshua next contends that the delay of the trial from April 17 to July 10 was in violation of § 48.30(7), STATS., and that the trial court lost jurisdiction over him as a result. Section 48.30(7) provides that in a contested delinquency proceeding where the juvenile is in secure custody, the fact-finding hearing must be held within twenty days of the plea hearing. He claims that the trial court erred because this scheduled delay allowed more than twenty days to elapse past his arraignment on April 6. Under § 48.315(2), STATS., however, the court may grant a continuance upon a showing of good cause in open court, although only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the public interest.

On April 17, the trial judge indicated that she was ill and unable to proceed with trial. Joshua does not contest whether the judge's illness was good cause for the delay, but he argues that the delay was longer than necessary. He contends that the trial court should have sought out other judges who could preside that same day or earlier than July 10.

The record nonetheless reveals that the trial court made a reasonable attempt to schedule trial as soon as possible. Joshua's attorney, a codefendant's attorney and the assistant district attorney all had scheduling

conflicts which prevented them from appearing at dates offered by the trial court. The trial court's calendar also prevented the assignment of dates acceptable to the attorneys. Moreover, the trial judge indicated that if the parties could arrange an earlier date because of changes in their schedules, as did in fact happen, she was amenable to such a change. Finally, the record shows that the trial judge explained how prior to July 10, "no one else is available."

At the hearing on the motion to dismiss, the same trial judge clarified that no other judges had been available. She further reiterated her desire to reschedule the trial, now set for June 26, should changing circumstances permit. We thus conclude that there was no error because the delay was not unnecessarily long in light of the conflicting schedules of the participants and the trial court made reasonable efforts to minimize the delay.

Joshua's third contention is that the trial court erred by not requiring a written dispositional report. Under § 48.33(1), STATS., a report is required, and § 48.33(3) requires that this report be in writing when, as in Joshua's case, the juvenile will be transferred to the custody of a secured facility.

There is no question that a written report was not submitted here. But it was, in fact, upon Joshua's motion that the requirement was waived by the trial court. And as a result, the doctrine of judicial estoppel prevents Joshua from now asserting error. Judicial estoppel prohibits a party from asserting in litigation a position that is contrary to, or inconsistent with, a position asserted

previously in the litigation by that party. ***Godfrey Co. v. Lopardo,*** 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991). It is contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error and then obtain reversal because of the error. *See* ***State v. Gove,*** 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989). We thus conclude that the trial court may not be reversed on this issue.

By the Court.—Order affirmed.

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