

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-3001-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD S. MESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS and ROBERT J. KENNEDY, Judges.
Affirmed.

Before Snyder, P.J., Brown and Anderson, JJ.

BROWN, J. Todd S. Meske was convicted of three counts of sexual assault. He appeals only one of the sexual assault convictions, the circumstances of which occurred when he was a juvenile. He argues that the criminal court had no competency to exercise subject-matter jurisdiction as to that count because the charge would have been within the jurisdiction of the juvenile

court but for the intake worker's failure to act within the mandatory time limits. Specifically, he argues that because a police investigator called the intake worker and gave enough pertinent information to act as a referral to the intake worker, the forty-day time period within which the intake worker must act began at that point, and the intake worker never took action within forty days. Alternatively, when the police investigator sent information by the standard procedure to the intake worker indicating that Meske should be referred as a delinquent, the course of proceedings for executing the juvenile delinquency process began at that time. He asserts, under either scenario, that the criminal court had no jurisdiction to hear the incident which occurred while he was a juvenile.

By asking us to determine whether jurisdiction in the criminal court can be maintained on a charge brought after he became eighteen, Meske is making a procedural due process argument. He is asserting that he must be relieved of his criminal charges because of the failure of the State to follow proper procedures when he was a juvenile. We hold that the issue is controlled by *State v. Montgomery*, 148 Wis.2d 593, 436 N.W.2d 303 (1989). *Montgomery* holds that no procedural due process violation occurs if there is no intent to manipulate the system in order to avoid juvenile court jurisdiction. *See id.* at 595, 436 N.W.2d at 304. Because that is not present here, we affirm.

On August 21, 1993, Gregory Strohm of the City of Delavan Police Department responded to a complaint that Meske had sexually abused a child. As part of his investigation, Strohm interviewed Meske as well as his parents. He advised Meske's parents that Meske should seek counseling and that Charles Mast of juvenile intake would be contacting them to arrange a meeting. Meske was seventeen at the time of the interview. He would not turn eighteen until November 25.

On August 26, Strohm called the district attorney and passed on information pertaining to Meske's alleged sexual assault. On the same day, he also called Mast in order to find out about appropriate counseling for Meske. Strohm explained Meske's conduct to Mast—that Meske had climbed on top of another minor, with both individuals clothed, with his pubic area against the minor's, and then refused to release the minor. Strohm and Mast agreed that Meske's conduct was a concern and Mast recommended that Strohm call Human Services about appropriate counseling. Shortly after his conversation with Mast, Strohm filled out a juvenile referral form and placed it in a basket to be sent to juvenile intake. This was the standard procedure used to refer cases to juvenile intake in Walworth county.

But nothing happened. Apparently uneasy about the inaction, the victim's mother called Strohm to ask why she had not heard anything about the case, and Strohm told her that "sometimes these things take time." Only after the mother called again at a later date did Strohm contact Mast and discover that juvenile intake had not taken any action on the case. Mast testified that he does not recall whether he received a juvenile intake referral form for Meske, and the record is silent as to whether his office received the referral form.

In June 1994, the City of Delavan Police Department received information that Meske, who was now eighteen years old, was involved in a sexual assault of a child. This victim was not the same as the one in the earlier 1993 incident. Meske was charged with six separate criminal violations, two of which stemmed from the 1993 incident. Meske filed a motion to dismiss those charges resulting from the 1993 incident on grounds that the law requires an intake worker to take action on a referral within forty days and the intake worker had failed to abide by this time limit. The motion was denied. Meske was convicted

of one count of sexual assault, stemming from the incident which occurred when he was a juvenile, and two counts relating to the incident which occurred when he was an adult. Meske appeals only the first count and again casts the issue as a question of whether the criminal court had competency to proceed because of what happened with regard to juvenile procedure.

The State argues that Meske has the issue wrongly framed. It contends that the facts and circumstances before us can be resolved by following *Montgomery*. There, an intake worker referred the case to the prosecutor prior to Montgomery's eighteenth birthday, but due to the prosecutor's negligence, Montgomery was not charged until after he turned eighteen. See *Montgomery*, 148 Wis.2d at 596, 436 N.W.2d at 304. The supreme court concluded that only an intentional delay by the State to avoid juvenile jurisdiction would be a due process violation requiring dismissal. See *id.* at 595, 436 N.W.2d at 304. The State argues here that the fact that the intake worker somehow failed to act on the officer's phone call or failed to receive the juvenile intake referral form from the police investigator is similar to the act of a prosecutor who negligently failed to charge an individual as a juvenile before that person turns eighteen. As such, while it is true that Meske was not able to enjoy the fruit of an error-free juvenile process, the adult court nonetheless still had the competency to act on Meske's preadult charges. The State sees this case as just another example of a negligent failure to complete the juvenile process before bringing a criminal charge.

Meske contends that *Montgomery* does not apply. His argument is that in *Montgomery*, the issue was not whether the *juvenile intake procedures* were followed but whether the State's *failure to bring the charge* while the defendant was still under the umbrella of juvenile jurisdiction was a due process violation. In the present case, the question is not the substantial delay in charging

Meske; it is the State's failure to follow the juvenile intake procedures that is at issue.

We are convinced, however, that this is a *Montgomery* case. Meske is asking us to hold that the adult court lacks subject matter jurisdiction to hear the 1993 allegations because of the juvenile authority's failure to follow the time limits of the juvenile court system. But *Montgomery* teaches us that only the juvenile court has the power to sanction the State for failing to follow the time limits of the juvenile system. That authority is found in § 48.25, STATS. However, we are long past the juvenile court's jurisdiction. This action was commenced when Meske was an adult. Thus, as stated in *Montgomery*, it is the "date of commencing the action rather than the date of the alleged criminal act which determines whether there is juvenile jurisdiction." *Montgomery*, 148 Wis.2d at 601, 436 N.W.2d at 306 (quoted source omitted). Since Meske was eighteen at the time of the complaint, the juvenile court no longer had jurisdiction over the matter.

It follows then, that if the juvenile court no longer has jurisdiction to enact a sanction for failing to follow the time limits established in the juvenile code, the next question is what sanction may be pursued in the criminal court for the same kind of failure? *Montgomery* provides the answer. The answer is a due process evidentiary hearing before the criminal court. *See id.* at 604, 436 N.W.2d at 307-08. The issue is "whether jurisdiction in a criminal court can be maintained on a charge brought after the juvenile becomes eighteen." *Id.* at 604, 436 N.W.2d at 307. But the issue is limited to determining whether the filing in criminal court was for the purpose of manipulating the system in order to avoid juvenile court jurisdiction. *See id.* In other words, if the lack of proper process was due to the State's negligence, there is no due process violation. Instead, the lack of due

process must be found to have been an intentional exercise on the part of the State before a sanction is allowed.

It might be argued that if such is the case, then if a prosecutor discovers that the intake worker either neglected to report a case out or negligently reported a case out after the forty-day limit, the prosecutor could simply wait until the juvenile was eighteen, file in adult court and assert that failure to follow the juvenile procedure was simply a question of negligence. Thereby, the argument goes, the prosecutor could avoid the sanction of dismissal with prejudice in the juvenile court and gain adult court jurisdiction at the same time.

The argument is a nonstarter because the very act of waiting until the juvenile was eighteen would be manipulating the system. The State has twenty days to file a petition in the juvenile court after intake refers the case to the district attorney. The district attorney cannot sit on the case because of some error in the process. The district attorney either has to file within the twenty days and run the risk that the case will be dismissed with prejudice if a motion is so made by the juvenile or has to forget prosecuting altogether. If the prosecutor waits until the juvenile becomes an adult and files in criminal court, the prosecutor is inviting dismissal. Thus, the argument that reliance by us upon *Montgomery* to decide this case would allow prosecutors to make an “end run” around the juvenile code’s mandatory time limits is without sound basis. We are convinced that *Montgomery* applies. The failure by the intake worker to act after the telephone call or the bureaucratic mix-up which resulted in the intake worker not getting the report was not a violation of due process. We affirm.

By the Court.—Judgment and order affirmed.

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