COURT OF APPEALS
DECISION
DATED AND RELEASED

May 13, 1997

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.

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No. 97-0264-FT

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

IN THE INTEREST OF ANTWON C.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANTWON C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

FINE, J. Antwon C. appeals from an order adjudicating him delinquent on two counts of second-degree sexual assault. *See* § 48.12, STATS.

(1993–94).[1] He contends that the trial court lost competency to proceed because his trial was not held within the thirty days of his plea hearing as mandated by § 48.30(7), STATS. (1993–94).[2] We affirm.

A petition alleging the delinquency of Antwon C. was filed on February 9, 1996, and he entered a denial at a plea hearing held on February 27, 1996. Adjournments that are not at issue in this appeal resulted in a trial date set for June 18, 1996.[3] On June 18, 1996, the prosecutor requested an adjournment because she was not yet ready to proceed:

> Judge, we are here today on a petition dated February 9th, 1996, alleging two counts of first degree sexual assault of a child. What I would request, Judge, is an adjournment for the following reason. I'm covering this case for another DA in my office, and she had plans and wrote a letter to meet with the mother of the victim and -- the two victims last Friday afternoon.[4] The letter was sent to the mother. The mother appeared today and said she's willing to proceed and to have the victims come in and testify, and we could do that, if the Court so orders. However, nobody's

[1] The provisions of Chapter 48, STATS., pertinent to this appeal were repealed and re-created in revised form as "The Juvenile Justice Code," Chapter 938, STATS. 1995 Wis. Act 77 and 1995 Wis. Act 352, both of which, with some exceptions, "first appl[y] to violations committed on" July 1, 1996. 1995 Wis. Act 77 §§ 9300, 9400; 1995 Wis. Act 352 § 136. The acts underlying the trial court's finding that Antwon C. was delinquent were alleged to have occurred between July 1, 1995, and August 31, 1995.

[2] Section 48.30(7), STATS. (1993-94), provided:

> If the citation or the petition is contested, the court shall set a date for the fact-finding hearing which allows reasonable time for the parties to prepare but is no more than 20 days from the plea hearing for a child who is held in secure custody and no more than 30 days from the plea hearing for a child who is not held in secure custody.

[3] Antwon C. does not contend on this appeal that any of those adjournments were improper.

[4] The prosecutor assigned to the case later told the trial court that she was at a "professional conference."

> had an opportunity to interview the children, because the mother told us she did not get the letter.
>
> Further, the mother has a bench warrant out for her arrest for four counts of child neglect, and I believe that the officer who is not on the case today is going to be running her through intake on that. We have a motion filed by the defense, and then we would have the jury trial, but I would really ask the Court to please adjourn the matter so we would have an opportunity to interview the victims.

Antwon C.'s lawyer objected, and the trial court asked the prosecutor why the victims, who were then five and four years old, were not in court. The prosecutor responded:

> The victim -- The mother can get the victim, and we can send the police officers. The victims are little children. One victim was born in 1989, and one was born in 1991, so she didn't bring them down, but she is here. If the Court wants to proceed, we can send the police officer to the house, and he can come back with the victims.

When the trial court asked the prosecutor whether she was familiar with the case, the prosecutor said that she "could familiarize myself with the case enough to try the case" but that she was seeking the adjournment because she would need "some time" to prepare the victims for trial. The trial court granted the adjournment for the following reasons:

> Based upon the fact that the victims are of a tender age and the Court recognizes that it's important that there be a good relationship between the prosecutor and the victim in the trial, and you're more or less at this moment substituting for the other district attorney.

The trial was adjourned to July 15, 1996, when the prosecutor requested another adjournment because although the victims and their mother appeared in court that morning and had spoken with the prosecutor, they had disappeared. The trial court replied: "Okay. Well, we can't proceed, either, because we have an in-custody

case which takes precedence over this case today." Without objection by Antwon C.'s lawyer, the trial was set for August 8, 1996.

Failure to comply with the time limit established by § 48.30(7), STATS. (1993–94), divests the trial court with competency to hear the case. ***J.R. v. State***, 152 Wis.2d 598, 603–604, 449 N.W.2d 52, 54 (Ct. App. 1989). Continuances, however, were permitted by § 48.315, STATS. (1993–94), which provided:

> **(1)** The following time periods shall be excluded in computing time requirements within this chapter:
>
> (a) Any period of delay resulting from other legal actions concerning the child, including an examination under s. 48.295 or a hearing related to the child's mental condition, prehearing motions, waiver motions and hearings on other matters.
>
> (b) Any period of delay resulting from a continuance granted at the request of or with the consent of the child and counsel.
>
> (c) Any period of delay caused by the disqualification of a judge.
>
> (d) Any period of delay resulting from a continuance granted at the request of the representative of the public under s. 48.09 if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that the evidence will be available at the later date, or to allow him or her additional time to prepare the case and additional time is justified because of the exceptional circumstances of the case.
>
> (e) Any period of delay resulting from the imposition of a consent decree.
>
> (f) Any period of delay resulting from the absence or unavailability of the child.
>
> (fm) Any period of delay resulting from the inability of the court to provide the child with notice of an extension

> hearing under s. 48.365 due to the child having run away or otherwise having made himself or herself unavailable to receive that notice.
>
> (g) A reasonable period of delay when the child is joined in a hearing with another child as to whom the time for a hearing has not expired under this section if there is good cause for not hearing the cases separately.
>
> **(1m)** Subsection (1)(a), (d), (e) and (g) does not apply to proceedings under s. 48.375(7).
>
> **(2)** A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

Application of these statutes is a legal issue that we analyze *de novo*. ***J.R.***, 152 Wis.2d at 603, 449 N.W.2d at 54.

Section 48.315(1)(d), STATS. (1993–94), excludes from applicable time periods "a continuance granted at the request of the representative of the public ... if the continuance is granted because of the unavailability of evidence material to the case when he or she has exercised due diligence to obtain the evidence." The evidence to prosecute this case on June 18, 1996, was not "unavailab[le]"; the prosecutor sought the adjournment because the district attorney's office permitted the prosecutor handling the case to attend a conference and had thrown in a substitute prosecutor who believed that she was, essentially, not prepared to try the case—although she told the trial court that she would try the case if pressed. This is not "due diligence." *Cf.* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 468, 326 N.W.2d 727, 731 (1982) ("[E]xcusable neglect as 'that neglect which might have been the act of a reasonably prudent person under the same circumstances'" and is 'not synonymous with neglect, carelessness or inattentiveness.'") (quoted source omitted). The twenty-seven days from June 18,

1996 to July 15, 1997, the next scheduled trial date, cannot be excluded from the thirty-day period mandated by § 48.30(7), STATS. (1993–94).

On July 15, 1997, the trial court granted yet another adjournment, this time because the witnesses necessary for the trial had disappeared unexpectedly, and because the trial court had a case that was entitled to preference because the person being tried was in custody. These are legitimate reasons for an adjournment. First, as we have seen, § 48.315(1)(d), STATS. (1993–94), specifically recognizes that "unavailability of evidence material to the case" justifies an adjournment when the prosecutor "has exercised due diligence." The record, as summarized above, reveals "due diligence" with respect to the July 15, 1996, trial date. Second, court congestion is also a legitimate reason for an adjournment—namely, "good cause" under § 48.315(2), STATS. (1993–94). ***J.R.***, 152 Wis.2d at 606–607, 449 N.W.2d at 55–56. Although Antwon C. contends on this appeal that the trial court did not make an adequate record in connection with the nature of the congestion or the unavailability of another judge to take the case on a "spin off" basis, the trial court's statement at the time was not challenged by Antwon C.'s lawyer and, therefore, there was no necessity to make that record. Absent any evidence in the record to the contrary, we take the trial court's assessment of its calendar at face value. *Cf.* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991) (trial court's legal conclusion will be upheld on appeal if supported by record although trial court did not make specific findings supporting that conclusion).

Excluding from the thirty days established by § 48.30(7), STATS. (1993–94), the period resulting from the adjournment granted on July 15, 1996, as

authorized by § 48.315(1)(d) and § 48.315(2), STATS. (1993–94), the August 8, 1996, trial was held timely.[5]

By the Court.—Order affirmed.

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

[5] We thus do not address the State's contention that § 938.315(3), STATS. (1995–96), which provides that a juvenile's failure to object to an adjournment "waives the time limit," applies to this case by virtue of Wis. Act 77 § 9310(10). *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").