COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1345

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

IN THE INTEREST OF THOMAS B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed in part; reversed in part and cause remanded.*

ANDERSON, J. Thomas B. appeals from a dispositional order in which he was adjudicated delinquent on one count of disorderly conduct in violation of § 947.01, STATS., and one count of carrying a concealed weapon contrary to § 941.23, STATS. Thomas contends the juvenile court erred in denying

his Juvenile's Motion to Dismiss Based on Right to Juvenile Jury Trials. Thomas also challenges the sufficiency of the evidence to support his adjudication for carrying a concealed weapon, two straight-edged razor blades. Because we are bound by precedent which has already held that juveniles do not have a state or federal constitutional right to a jury trial, we affirm the denial of the motion to dismiss. However, we reverse the concealed weapon adjudication because the State failed to set forth facts demonstrating Thomas used or intended to use the razor blades in a threatening manner. Accordingly, we remand for a new dispositional hearing on the remaining count of disorderly conduct.

According to the petition, on July 11, 1996, Sheboygan police received a report that there were juveniles walking across the tops of cars on South 15th Street. When approached by an officer, Thomas denied walking across a car, but stated he had been tapping the vehicle with his hand.

On July 15, 1996, Dawn Yancey reported that "while she was inside of her apartment with the windows open she overheard a boy standing below the window telling other boys 'Oh, that's the car I walked over the other night.'" Yancey's vehicle had been damaged while parked on South 15th Street on July 11th.

On July 18, 1996, Thomas was brought to police headquarters. Prior to a pat-down, Thomas was asked if he was in possession of anything the officer should be aware of. Thomas stated that he had two razor blades in his back pocket, a single-edged blade and a double-edged blade, which he carried because people were out to get him and he was afraid.

In August, the delinquency petition was filed alleging one count of disorderly conduct for walking across the tops of cars and one count of carrying a

concealed weapon for possessing the two razor blades. At the initial appearance, Thomas denied the allegations and filed a Juvenile's Motion to Dismiss Based on Right to Juvenile Jury Trials contesting his constitutional right to a jury trial. The motion was denied.

Subsequently, Thomas filed a motion to suppress statements made to the police because he was not properly advised of his ***Miranda***[1] rights prior to making any statements. The juvenile court found that no violation of ***Miranda*** occurred in regard to Thomas' unsolicited admission that he had walked on Yancey's car, but the court suppressed the statements taken on July 18, 1996, regarding the razor blades. The case was then tried to the bench. At the close of evidence, Thomas argued that the State had not met its burden of proof on the concealed weapon charge. The court found Thomas delinquent on both counts. He now appeals.

Thomas first argues that the trial court violated his right to due process by refusing to allow a jury trial.[2] Thomas puts forth a compelling argument that the new Juvenile Justice Code has so dramatically changed the focus and intent of juvenile cases that we should overrule previous case law renouncing a juvenile's state or federal constitutional right to a jury trial. This we cannot do. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 255-56 (1997) (only the supreme court has the power to overrule, modify or withdraw

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] The State argues that Thomas raises for the first time on appeal his argument that he was denied due process of law by the trial court's refusal to allow a jury trial. We disagree. In his motion to dismiss, Thomas alleged that "the court lack[ed] jurisdiction over [Thomas] because the statute [Thomas] is alleged to have violated is unconstitutionally overbroad and it denies equal protection, thereby denying the juvenile due process of law." We find this sufficient to preserve the issue for appeal. Accordingly, we address his argument on the merits.

language from published opinions). Both the United States Supreme Court and the Wisconsin Supreme Court have determined that juveniles do not have a state or federal constitutional right to a jury trial. *See* ***McKeiver v. Penn***, 403 U.S. 528, 545 (1971); ***N.E. v. DHSS***, 122 Wis.2d 198, 201, 203-04, 361 N.W.2d 693, 695-96 (1985). We affirm the juvenile court's denial of Thomas' motion to dismiss.

Thomas next argues that the evidence was insufficient for a delinquency adjudication on the concealed weapon count. The standards governing appellate review of the sufficiency of evidence to support a conviction are well established. "[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We employ these standards regardless of whether the trial evidence was direct or circumstantial. *See* ***id.*** at 503, 451 N.W.2d at 756.

Thomas was adjudicated delinquent for carrying two razor blades in his back pocket in violation of § 941.23, STATS. Section 941.23 provides: "Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor." A "dangerous weapon" is defined as: "any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." Section 939.22(10), STATS.

The evidence in support of Thomas' delinquency adjudication is insufficient to support the concealed weapon charge. The record establishes that

Thomas had two razor blades in his pocket at the time of his arrest on July 18, 1996. His statements as to his fear for his safety were ordered suppressed. Accordingly, there was no evidence that the manner in which Thomas "used or intended to use[]" the razor blades was calculated or likely to produce death or great bodily harm. We conclude that both elements must be established; mere possession without more is insufficient to prove concealment of a weapon.[3] Accordingly, we reverse the concealed weapon adjudication and remand for a new dispositional hearing on the remaining count of disorderly conduct.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

[3] Our conclusion is similar to that adopted by courts of other jurisdictions construing similar statutes. In Florida, it has been held that where a common household item, which is not specifically listed in the concealed weapons statute as a weapon, is used in a threatening manner, it can become a concealed weapon for the statute's purposes. *See* ***Robinson v. State***, 547 So.2d 321, 323 (Fla. Dist. Ct. App. 1989) (razor blade is common household item which is not a concealed weapon unless it is used in a threatening manner so that it might be considered deadly); *see also* ***State v. Tremblay***, 642 So.2d 64, 66-67 (Fla. Dist. Ct. App. 1994) (absent evidence that ice pick was used in threatening manner, the ice pick cannot qualify as a concealed weapon); ***Anderson v. State***, 614 A.2d 963, 968-69 (Md. 1992) (an instrument which is not per se a dangerous or deadly weapon, is such a weapon when there is an intent to carry the instrument for its use as a weapon, i.e., carrying utility knife with intent to display the knife in the belief that the display will deter aggressors, without any intent to inflict bodily injury).

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