COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0510-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JASON M. COLLINS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: VIRGINIA WOLFE, Judge. *Reversed and cause remanded with directions*.

Before Eich, Vergeront and Deininger, JJ.

DEININGER, J. The State appeals an order which dismissed with prejudice a criminal complaint charging Jason Collins with sexual assault of a child and child enticement. The State argues that the trial court erred in concluding that Collins's due process rights were violated when he was charged as

an adult for crimes he allegedly committed prior to his seventeenth birthday. We agree. Accordingly, we reverse the order and remand for further proceedings on the criminal complaint.

BACKGROUND

Collins turned seventeen years of age on August 4, 1997. The State filed a criminal complaint on November 19, 1997, charging him with repeated sexual assault of a child during the period May 1996 through March 1997, and with enticing a child in May 1996. He moved to dismiss the complaint for lack of subject matter jurisdiction and requested a hearing to determine whether the State intentionally delayed filing the charges in order to avoid juvenile court jurisdiction. *Cf.* ***State v. Becker***, 74 Wis.2d 675, 680, 247 N.W.2d 495, 497 (1976).

At the hearing, State witnesses testified to the following chronology. On June 13, 1997, the Sauk County Department of Human Services received a report that an eleven-year-old boy had been sexually assaulted by Collins. Jean Spencer, a social worker employed by the department, was assigned to investigate. Her initial responsibility was to contact the victim and/or his parents to discuss the matter, which she did. On June 25th, she forwarded a report of her conversation with the victim's mother to the Reedsburg Police Department. Spencer testified that she knew the alleged perpetrator, Collins, was a teenager, and that she did not intentionally delay her investigation in order to have him charged as an adult. She also testified that her job title or definition is not "intake worker," rather, she performs initial investigations when reports of child abuse are received by her department. She did not attempt to contact Collins regarding the alleged assaults.

Spencer's supervisor, a "child protective services supervisor," testified that the elapsed time between the department's receipt of the report of suspected child abuse and the completion of its initial investigation and referral to law enforcement was not unusual, and that it was, in fact, "rather quick[]," given departmental workload and other assignments. She explained that when a caregiver is not suspected as a perpetrator, and parents are aware of the alleged abuse and are protecting the child victim, immediate action by the department is not required.

A Reedsburg police investigator testified that he received Spencer's report of the possible sexual assault of a child on June 30th. He immediately made arrangements to interview the victim, who was out of town until July 7th. That interview took place on July 8th. He then attempted to get in touch with Collins's father, but had difficulty doing so because "they were not home." He was finally able to arrange for Collins and his father to be interviewed at the police station on July 25th, after which he completed his investigation by "checking on some background things," drafting his report, and forwarding the juvenile court referral on August 11th, or "a day or so prior to that."

The investigator also testified that he did not delay any aspects of his investigation in order that Collins could be charged as an adult. In fact, the investigator said that when he later learned the matter had been referred for adult criminal prosecution instead of juvenile proceedings, he inquired if the case could proceed in juvenile court because he did not view the allegations as "a real heinous event." On cross-examination, the investigator acknowledged that he may have had enough information following his July 8th interview with the victim to make a juvenile court referral on Collins, and that he was aware of Collins's date of birth. However, he also explained that he rarely makes a referral for prosecution without

attempting to get the accused's version of events, and further that he did not recognize August 4, 1997, as a significant date with respect to how the charges against Collins would be handled.

Tim Green, supervisor of the youth services unit of the Sauk County Human Services Department, testified that his unit received a "juvenile court referral" regarding Collins's alleged assaults from the Reedsburg Police Department on August 11th. Green reviews such court referrals and makes assignments. In reviewing the referral on Collins, he noted that Collins had turned seventeen, so he forwarded it directly to the Sauk County District Attorney's office on August 12th for possible criminal charges.

Other witnesses were called to explain what happened after youth services supervisor Green's referral to the district attorney on August 12th. Because the time period critical to this appeal is that between June 13 and August 4, 1997,[1] we note only that after August 12, delays resulted from lapses in communication between the district attorney's office, the department of human services, and the Reedsburg Police Department regarding what steps were required, and by whom, in order to formally initiate adult criminal proceedings against Collins for the alleged assaults.

The trial court found "that no one has intentionally done anything to delay this case," and concluded that "a lack of awareness of time lines and dates"

[1] Collins does not raise any issues with respect to the delay from August 4th, when he turned seventeen, to November 19th, when criminal charges were filed against him. *Cf.* ***State v. LeQue***, 150 Wis.2d 256, 267, 442 N.W.2d 494, 499 (Ct. App. 1989) (The period of time in dispute in a claim of due process denial based on delays in charging offenses committed as a juvenile is that between the reporting of allegations of criminal behavior and the jurisdictional birthday.).

was chiefly responsible for the delay in filing formal charges against Collins. The court went on to find that the information regarding the offenses came to the attention of "appropriate authorities" while Collins was still a juvenile—"a little less than two months before his seventeenth birthday." It then concluded that Collins could have been processed as a juvenile if "the case had been handled promptly," and that prosecuting Collins in adult criminal court represented a denial of due process. Finally, the court determined that the holding of ***State v. Becker***, 74 Wis.2d 675, 247 N.W.2d 495 (1976), did not apply because "there has been no affirmative showing of manipulating the system," but that Collins had nonetheless been denied "the due process rights which are afforded him under" the juvenile code.

The trial court ordered the charges against Collins dismissed with prejudice. The State moved the court to reconsider, which it declined to do. The State appeals.[2]

ANALYSIS

Whether the due process rights of a criminal defendant have been violated is a question of "constitutional fact" which we review de novo. *See* ***State v. Lohmeier***, 205 Wis.2d 183, 191-92, 556 N.W.2d 90, 93 (1996). In our review, however, we will not disturb a trial court's findings regarding evidentiary or historical facts unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984). Thus, "constitutional facts" are not actually facts in

[2] *See* § 974.05(1)(a), STATS., which permits the State to appeal any "[f]inal order or judgment adverse to the state … if … not prohibited by constitutional protections against double jeopardy."

themselves, but are questions which require the "'application of constitutional principles to the facts as found.'" *See* ***id***. (citation omitted).

The State's argument on appeal is very straightforward: The trial court found that the State had not intentionally delayed charging Collins in order to avoid juvenile jurisdiction, and thus Collins suffered no denial of due process requiring dismissal of the criminal complaint. *Cf.* ***State v. Montgomery***, 148 Wis.2d 593, 595, 436 N.W.2d 303, 304 (1989). We agree. The supreme court in ***Montgomery*** emphasized that a negligent failure to bring charges promptly is not a violation of due process, and that there are no grounds "for dismissal of a criminal complaint charging an offense committed by an adult while a juvenile if the State shows there was no manipulative intent." ***Id.*** at 603, 436 N.W.2d at 307. Here, the trial court expressly found "that no one has intentionally done anything to delay this case," and there were thus no grounds for a dismissal of the charges. *See also* ***State v. LeQue***, 150 Wis.2d 256, 267, 442 N.W.2d 494, 499 (Ct. App. 1989).

In response, Collins does not claim that the trial court clearly erred when it found that the State had not intentionally manipulated or delayed the investigation of the allegations against him in order to deprive him of juvenile court jurisdiction. Rather, he points to the provisions of § 938.24, STATS.,[3] and

[3] Section 938.24, STATS., provides, in relevant part, as follows:

> (1) …[I]nformation indicating that a juvenile should be referred to the court as delinquent … shall be referred to the intake worker, who shall conduct an intake inquiry on behalf of the court to determine whether the available facts establish prima facie jurisdiction and to determine the best interests of the juvenile and of the public with regard to any action to be taken.
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> ….

(continued)

argues that a failure to comply with the statutory time period within which a juvenile court intake worker must request the district attorney to file a delinquency petition empowers the court to order dismissal of the criminal charges. *See* § 938.315(3), STATS., (court may dismiss delinquency petition for State's failure to comply with a time limit specified in ch. 938).

We note first that, as the State correctly argues, § 938.315, STATS., on its face, applies only to the dismissal of delinquency petitions under ch. 938, not to complaints filed against persons subject to adult criminal prosecution. But, as we discuss below, there is a more fundamental flaw in Collins's argument. Thus, we need not consider whether, as Collins maintains, an absurdity would result if a trial court were precluded from dismissing a criminal complaint as a sanction for violating the time limitation of § 938.24(5), STATS., even though the court could have terminated delinquency proceedings, grounded on the same criminal allegations, as a sanction for the time limit violation.

In short, the record does not support Collins's assertion that § 938.24(5), STATS., was not complied with. That subsection requires an "intake worker" to request that a juvenile delinquency petition be filed, or to otherwise dispose of the case, "within 40 days or sooner of receipt of referral information." ***Id***. Here, the juvenile court "intake worker" did not receive a juvenile court referral until August 11, 1997, some seven days after Collins turned seventeen.

Section 938.02(3), STATS., defines the term "[c]ourt intake worker" as "any person designated to provide intake services under s. 938.067." The latter

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> (5) The intake worker shall request that a petition be filed, enter into a deferred prosecution agreement or close the case within 40 days or sooner of receipt of referral information….

statute, in turn, sets forth the duties of "intake workers," which include receiving referral information, conducting intake inquiries, and making "recommendations as to whether a petition should be filed." *See* § 938.067(6), STATS. In counties other than Milwaukee County, the county board of supervisors must designate either the county's department of social or human services, or the circuit court, to employ persons to serve as intake workers, one of whom "shall be designated as chief worker and shall supervise other workers." *See* § 938.06(2)(a) and (3), STATS. In Sauk County, it appears that intake services are provided by the department of human services, and that Tim Green, supervisor of the youth services unit, was the "chief intake worker" in the summer of 1997. He testified that he received "a juvenile court referral regarding [the allegations against Collins] on August 11 … [a]nd part of what I do is to review referrals that come in in terms of making assignments."

Thus, Collins is simply wrong in claiming that the forty-day juvenile court intake inquiry time limitation commenced running on June 13, 1997, when a report of suspected child abuse was received at the department of human services. Jean Spencer, the social worker who was assigned to investigate the reported sexual abuse of the eleven-year-old victim, was supervised by a "child protective services supervisor" in the department. The testimony of Spencer and her supervisor makes clear that Spencer was performing the activities required under § 48.981, STATS., (entitled "**Abused or neglected children.**"), not those required under § 938.24, STATS., ("**Receipt of jurisdictional information; intake inquiry.**").

The child abuse and neglect statute requires, generally, that certain persons must report suspected child abuse to a county department of social or human services, which must then assign a worker to determine "if the child

[victim] is in need of protection or services." *See* § 48.981(3)(c), STATS. The statute focuses on meeting the possible needs of the child victim for protection, which requires an evaluation of whether a caregiver is involved and whether parents are adequately protecting the child, or are in need of services. There is no requirement that a child protection investigator notify or interview the alleged perpetrator, especially if he or she is a noncaregiver, nor must the investigator refer the perpetrator for prosecution. The department's investigation must be completed within sixty days. *See* § 48.981(3)(c)4.

The "Child Protection Assessment Summary" Spencer prepared and forwarded to the Reedsburg Police Department also demonstrates that she discharged child protective duties, which focus primarily on the victim, and that she was not providing juvenile court intake services, which focus primarily on the alleged delinquent. Thus, had Collins remained subject to juvenile court jurisdiction, the forty-day juvenile court intake inquiry time limitation would not have commenced running until August 11, 1997, the date on which the juvenile court referral information was provided by the Reedsburg Police Department to Tim Green, an "intake worker" within the meaning of ch. 938, STATS.[4]

[4] Collins asserts in his statement of "Facts" that "[t]he [June 13th] referral to the department is a referral to juvenile intake." The State gives perhaps unwitting support to Collins's claim when it refers in its brief to social worker Jean Spencer as a "[j]uvenile intake worker," although the State also, and we believe correctly, refers to Spencer as a "Child Protective Services worker."

Collins also maintains that the trial court "correctly found that the intake worker had violated the time limits of sec. 938.24, Stats." The trial court stated in its bench decision on Collins's motion to dismiss that "[t]he 40 days after the referral to the Department of Human Services would have occurred July 23." We are not convinced, however, that this necessarily constituted a finding that "the intake worker had violated the time limits" of § 938.24(5), STATS. The court made no further reference to the issue, and instead, rested its decision on what it concluded was a violation of Collins's due process rights because "appropriate authorities" were aware of the allegations and of Collins's age and they could have had the charges "processed under the juvenile system had the case been handled promptly."

(continued)

Collins's remaining arguments are also largely premised on a conclusion that a statutory time limit was violated by the State. He maintains that the holding of ***State v. Montgomery***, 148 Wis.2d 593, 436 N.W.2d 303 (1989), should be deemed inapplicable when the State has failed to adhere, either intentionally or negligently, to the time requirements of ch. 938, STATS. As we have discussed above, the major premise of this argument fails because the record does not support a conclusion that the forty-day time limitation in § 938.24(5), STATS., was violated.

Finally, Collins asserts that, on the facts of this case, we must find a due process violation because the State has not shown any valid reasons for the delay in charging him until after his seventeenth birthday. Again, we disagree. The State is under no such burden. Under the holdings in ***Montgomery*** and ***Becker***, the State's only burden is to show that it did not intentionally delay or manipulate the charging in an effort to avoid juvenile jurisdiction. The State has met that burden in this case.

Moreover, the most significant "delay" in charging Collins, at least with respect to the relevant time period before August 4, 1997, occurred during the month of July, while Reedsburg police were investigating the charges. The investigator testified that he had difficulty arranging for an interview with Collins and his father, which did not occur until July 25th, and that thereafter, he completed his investigation by performing such tasks as "background checks …

If the trial court's remark on which Collins relies was indeed a finding that the initial receipt by the child protection unit of the Sauk County Department of Human Services constituted a "referral to juvenile intake" for purposes of § 938.24, STATS., it was clearly erroneous as it is contrary to the great weight and clear preponderance of the evidence adduced at the hearing. *Cf.* § 805.17(2), STATS.; ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989).

traffic or any criminal history in the computer system, check with any other possible witnesses who can corroborate any … information I had received … drafting of the report, proofreading the report, and printing, copying, and disseminating the report." While the State and its agents may not intentionally delay an investigation and the subsequent charging in order to avoid juvenile jurisdiction, police are not required to rush or truncate an investigation simply to meet the jurisdictional deadline. In ***LeQue***, 150 Wis.2d at 269-71, 442 N.W.2d at 500-01, we reviewed similar facts (alleged past sexual abuse of a child by a juvenile perpetrator, inability by police to quickly schedule interviews, police awareness of the perpetrator's age), and we recognized the importance of thoroughness and deliberation in investigating the charges in question. We concluded in ***LeQue*** that "[t]he law does not require that the procedure be hastened—only that it not be intentionally delayed." ***Id***. at 271, 442 N.W.2d at 500.

CONCLUSION

For the reasons discussed above, we reverse the order dismissing the criminal complaint and remand for further proceedings on the complaint.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.