COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1335

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

IN THE INTEREST OF ANTHONY S.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANTHONY S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] In this appeal we hold that § 938.998, STATS., does not impose an affirmative duty on the State to seek the return to Wisconsin of

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

alleged juvenile delinquents in custody in other jurisdictions. Therefore, the State's failure to search for Anthony S. for more than seventeen months after a delinquency petition and a waiver petition were filed is not manipulative intent to bypass the juvenile justice system. We also reject Anthony's challenge to the prosecutive merit of the allegations against him and his claim that the waiver criteria were not established. Therefore, we affirm his waiver into adult court.

¶2 On June 24, 1997, the State filed a delinquency petition and petition for waiver of juvenile court jurisdiction charging Anthony (d/o/b September 12, 1981) with two counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS. Anthony did not appear for the plea hearing on July 17, 1997, and a capias was issued for his apprehension.[2] Anthony's whereabouts were unknown until the Kenosha County Clerk of Courts received a letter dated September 4, 1998, from a counselor at the Illinois Youth Center, a correctional facility. The counselor requested information relating to an open aggravated battery charge or other active prosecutions because a parole plan was being prepared for Anthony. On December 23, 1998, the district attorney forwarded a formal request to the State of Illinois for the return of Anthony to Kenosha county for prosecution on two counts of sexual assault of a child. The plea hearing was finally conducted on January 27, 1999, after Anthony was returned to Kenosha county. At the plea hearing, Anthony entered a plea contesting the waiver petition and a waiver hearing was scheduled.

[2] The State could have elected to proceed with the waiver hearing in Anthony's absence. *See* § 938.18(7), STATS. If that had happened, the burden would then have been on Anthony, after his apprehension, to convince the court of criminal jurisdiction hearing his case that there was good cause for his failure to appear. *See* ***id.***

¶3 Prior to the waiver hearing, Anthony filed a motion to dismiss the charges on the grounds that the authorities in Kenosha county knew where Anthony was at all times after the issuance of the capias. He charged that the only reason the authorities did not seek his return was to manipulate the juvenile justice system so that the juvenile court's only alternative would be to waive Anthony into adult court. The juvenile court denied the motion, holding that the State did not have an obligation to requisition Anthony from Illinois.

¶4 At the waiver hearing, the State elected to establish prosecutive merit within the four corners of the delinquency petition and Anthony contended that the petition was unreliable but failed to present any testimony that his contention had any merit. The juvenile court found that the delinquency petition contained sufficient evidence of reliability and trustworthiness and supported the prosecutive merit of the charges. After testimony from a case worker, the juvenile court found that the statutory criteria for waiver were met. Relying chiefly upon the seriousness of the offenses, Anthony's age and the lack of resources in the juvenile justice system, the court held that it was not in the best interest of the juvenile or the public that the court retain juvenile jurisdiction. Anthony's appeal is a result of those adverse rulings.

¶5 Anthony's primary argument is that the State knew he was being held in an Illinois youth correctional facility and § 938.998, STATS., imposes an affirmative obligation upon the State to seek his return. He charges that the failure of the State to seek his return was unreasonable and the delay in his return was a

violation of his due process rights and intentionally done to manipulate the juvenile justice system.[3]

¶6 Whether § 938.998, STATS., imposes an affirmative duty on the State to search for alleged juvenile offenders who have fled the state is a question of statutory interpretation which we review de novo. *See* ***State v. Dawn M.***, 189 Wis.2d 480, 484, 526 N.W.2d 275, 276 (Ct. App. 1994). If the statute is clear on its face, this court will not look beyond the statute in applying it. *See* ***id***. at 484, 526 N.W.2d at 276-77.

¶7 Section 938.998(2), STATS., is an amendment to the Interstate Compact on Juveniles, § 938.991, STATS., and provides the mechanism for the return of alleged juvenile offenders to Wisconsin from other jurisdictions.

> All provisions and procedures of s. 938.991 (5) and (6) shall be construed to apply to any juvenile charged with being a delinquent by reason of a violation of any criminal law. Any juvenile, charged with being a delinquent by reason of violating any criminal law shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in such case shall be filed in a court of competent jurisdiction in the requesting state where the violation of criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition described in s. 938.991 (5) shall be forwarded by the judge of the court in which the petition has been filed.

[3] In the juvenile court, Anthony elected not to present any evidence—either by affidavit or live testimony—and rely solely upon argument. During argument before the juvenile court, Anthony's counsel made numerous factual assertions but did not attempt to substantiate those assertions. These unsubstantiated factual assertions are repeated in Anthony's brief. We, of course, cannot consider any unsubstantiated factual assertion. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313, 311 N.W.2d 600, 603 (1981) (assertions of fact that are not part of the record cannot be considered on appeal).

Section 938.998(2). The reference to two subsections of § 938.991, STATS., are to the subsections establishing procedures for the return of an adjudicated juvenile offender who has escaped from institutional custody or absconded from extended supervision. These subsections include provisions for the court-ordered return of a juvenile offender who objects to his or her return and the voluntary return of a juvenile offender.

¶8 This statute is unambiguous. There is nothing in this statute requiring the State to actively seek the immediate return of an alleged juvenile offender it knows to be in custody in another jurisdiction. In fact, there is no requirement that the State ever seek the return of an alleged juvenile offender from another jurisdiction. The statute does no more than establish procedures for the return of an alleged juvenile offender.

¶9 Given the lack of a legislative mandate, Anthony contends that the duty to seek the return of an alleged juvenile offender to Wisconsin arises from the State's obligation to protect a juvenile's due process and equal protection rights. This argument is without merit. He looks to the Uniform Criminal Extradition Act, § 976.03, STATS., and the Agreement on Detainers, § 976.05, STATS., for support of this contention. He focuses on the time limits that are found in § 976.05.[4] He argues that because time limits in which to commence a trial in juvenile court are not present in § 938.998, STATS., juveniles are being denied due process and equal protection because they are not being afforded protection of the time limits adults have under § 976.05.

[4] If a prisoner is involuntarily returned to this state on a detainer, a trial must be started within 120 days, § 976.05(4)(c), STATS., and if the person voluntarily returns on a detainer, a trial must start within 180 days, § 976.05(3)(a).

¶10 Anthony conveniently overlooks the numerous time limits found in the Juvenile Justice Code.[5] His argument fails to take into consideration that these strict time limits are established for the protection of a juvenile's due process rights. *See* ***Green County Dep't of Human Servs. v. H.N.***, 162 Wis.2d 635, 646, 469 N.W.2d 845, 849 (1991). The failure to adhere to these time limits causes a court to lose its competency to proceed and the dismissal of the delinquency petition. *See* ***Waukesha County v. Darlene R.***, 201 Wis.2d 633, 640, 549 N.W.2d 489, 492 (Ct. App. 1996). Since a juvenile's due process rights are jealously guarded in the Juvenile Justice Code by strict time limits, the lack of time limits in § 938.998, STATS., does not impose a duty to seek the return of a juvenile.[6]

¶11 Finally, we consider Anthony's argument that the State intentionally delayed in seeking his return to Wisconsin to avoid juvenile jurisdiction. When the State intentionally delays prosecution to avoid juvenile jurisdiction, a due process violation occurs which requires dismissal of the criminal complaint in adult court. *See* ***State v. Montgomery***, 148 Wis.2d 593, 595, 436 N.W.2d 303, 304 (1989). The burden of proof to show lack of manipulative intent is on the State. *See* ***id***. at 603, 436 N.W.2d at 307. Once the State has established a prima facie case that the delay was not motivated by an intent to manipulate the system, it is incumbent upon the defendant to bring forth some facts in support of his or her claim. *See* ***State v. Velez***, 224 Wis.2d 1, 15, 589 N.W.2d 9, 16 (1999). Absent

[5] For example, after a petition is filed alleging that a juvenile has committed a delinquent act, a plea hearing must be conducted within thirty days. *See* § 938.30(1), STATS. And, if the petition is contested, the fact-finding hearing must be conducted within another twenty or thirty days, depending on whether the juvenile is in secure custody. *See* § 938.30(7).

[6] Anthony's equal protection argument is easily disposed of since "juveniles are not a suspect class for purposes of an equal protection analysis." ***State v. Hezzie R.***, 219 Wis.2d 849, 895, 580 N.W.2d 660, 677 (1998), *cert. denied sub nom.* ***Ryan D.L. v. Wisconsin***, 119 S. Ct. 1051 (1999).

manipulative intent by the State, the mere passage of time does not protect a defendant from the loss of juvenile court jurisdiction. *See* ***State v. LeQue***, 150 Wis.2d 256, 267, 442 N.W.2d 494, 499 (Ct. App. 1989). The trial court's findings of fact will not be disturbed unless clearly erroneous. *See* § 805.17(2), STATS.

¶12 Anthony failed to produce any evidence to refute the State's showing that it did not know his whereabouts until the Kenosha County Clerk of Courts received a letter dated September 4, 1998, from a social worker at an Illinois youth correctional facility. Anthony cannot find relief by relying only upon argument and unsubstantiated facts; he has the burden to produce some evidence showing manipulative intent. *See* ***Velez***, 224 Wis.2d at 16, 589 N.W.2d at 16.

¶13 We have already determined that § 938.998, STATS., imposes no duty on the State to seek the return of juvenile offenders held in other jurisdictions. Therefore, the State could not have engaged in intentional acts to manipulate the system because it did not violate any statutory duty. We also find no manipulative intent in the three-month delay between the date the district attorney first learned Anthony was being held in an Illinois youth correctional facility and the date the requisition request was forwarded to Illinois. Anthony had already turned seventeen years old by the time the State learned of his whereabouts and it is not reasonable to conclude that the three-month delay was intended to guarantee waiver of jurisdiction. We affirm the juvenile court's ruling that the delay in conducting the waiver hearing was not the result of manipulative intent.

¶14 We now turn our attention to Anthony's challenge to his waiver into the adult criminal court. Anthony objects to the juvenile court's finding that there

was prosecutive merit and that the waiver criteria weighed in favor of transferring him to adult jurisdiction.

¶15 The decision whether to waive juvenile jurisdiction in a given case is one which is committed to the sound discretion of the juvenile court. *See* ***D.H. v. State***, 76 Wis.2d 286, 302-03, 251 N.W.2d 196, 205 (1977). Discretion contemplates a process of reasoning depending on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. *See* ***id***. at 310, 251 N.W.2d at 208-09. A juvenile court may waive jurisdiction to the adult criminal court where it is established by clear and convincing evidence that it would be contrary to the best interests of the child or the public to retain jurisdiction. *See* § 938.18(6), STATS.[7]

¶16 The first step in the waiver process is for the court to determine if the matter has prosecutive merit. *See* § 938.18(4)(a), STATS. If prosecutive merit is found, the court must exercise its discretion in applying the § 938.18(5) factors. After considering those factors, the juvenile court must provide a statement of the relevant facts and the reasons motivating waiver. *See* ***D.H.***, 76 Wis.2d at 305, 251 N.W.2d at 206. Not all of the factors need be resolved against the juvenile, but the trial court must show that it examined the relevant factors. *See* ***id***. at 310, 251

[7] In reviewing the juvenile court's exercise of discretion, we note that the prior ch. 48, STATS., legislative intent, "[t]he best interests of the child shall always be of paramount consideration," *see* § 48.01(2), STATS., 1993-94, is no longer applicable in ch. 938, STATS., proceedings. The legislative intent of ch. 938 is to "promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively." Section 938.01(2), STATS. The legislative purpose of the Juvenile Justice Code is, inter alia, to protect citizens from juvenile crime and to hold juvenile offenders directly accountable for their acts. *See* § 938.01(2)(a), (b).

N.W.2d at 208. The juvenile court shall state its findings and if it determines on the record that it is established by clear and convincing evidence that it would be contrary to the interests of the juvenile or the public to hear the case, it shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate criminal proceedings. *See* § 938.18(6).

¶17 Anthony asserts the juvenile court erred when it permitted the State, over Anthony's objection, to establish prosecutive merit from the petition. Anthony argued that the discrepancies in the petitions and police reports as to dates, times and witnesses required the State to move beyond the four corners of the petition and present testimony to establish prosecutive merit.

¶18 The law in this state is settled, however, that under § 938.18(4), STATS., the trial court may determine prosecutive merit from the documents alone, and that if "the juvenile contends that the information in the petitions is unreliable or that the petitions do not establish probable cause, the juvenile may present testimony at the hearing to demonstrate that his contentions have merit." ***P.A.K. v. State***, 119 Wis.2d 871, 885-86, 350 N.W.2d 677, 685 (1984). In order to be the basis for a finding of prosecutive merit, the petition must contain "adequate and detailed information concerning the juvenile's alleged violation of state criminal law and have demonstrable circumstantial guarantees of trustworthiness." ***Id***. at 886, 350 N.W.2d at 685. Hearsay evidence may be considered if it has demonstrable guarantees of trustworthiness. *See* ***id***. at 885, 350 N.W.2d at 685. Prosecutive merit involves the same standard as probable cause at the preliminary hearing stage in an adult criminal proceeding—a reasonable probability that the alleged crime has been committed and that the juvenile has probably committed it. *See* ***id***. at 884, 350 N.W.2d at 684.

¶19 Anthony is charged with two counts of first-degree sexual assault of a child. There are three elements to this charge: (1) that the defendant had sexual contact with the person named, (2) that the defendant had sexual contact with the person named for the purpose of sexually arousing or gratifying the defendant, and (3) that the person named had not attained the age of thirteen years at the time of the alleged sexual contact. *See* WIS J I—CRIMINAL 2103. The allegations in the petition for the first count establish that Anthony pinned the victim, who was ten years old, to the floor and put his penis on her vagina over her underwear and the victim reported that "white stuff came out." These allegations contain every element of the charge. The allegations in the petition for the second count relate that Anthony pinned the victim, who was ten years old, to a bed and put his penis into her vagina for approximately ten minutes. These allegations contain every element of the charge.

¶20 From our complete review of the petition, we conclude that there is a reasonable probability that on two separate occasions Anthony had sexual contact with a ten-year-old child. Without presenting testimony at the hearing, Anthony's argument that discrepancies in dates, times and witnesses preclude the finding of prosecutive merit is not enough. *See* ***P.A.K.***, 119 Wis.2d at 886, 350 N.W.2d at 685. The discrepancies go to the credibility of the witnesses and not to the reasonable probability that the two acts occurred. We agree with the juvenile court that there was prosecutive merit.

¶21 If prosecutive merit is found, the court must exercise its discretion in applying the § 938.18(5), STATS., factors. Those factors include: the "personality and prior record of the juvenile"; the "type and seriousness of the offense" and its "prosecutive merit"; and the "adequacy and suitability" of juvenile facilities and services "for treatment of the juvenile and protection of the public." ***Id.***

Anthony's complaint is that the social worker based his recommendation for waiver solely on Anthony's age and information obtained from an interview with Anthony.

¶22 We have reviewed both the juvenile court waiver report prepared by the social worker and his testimony at the waiver hearing. The social worker based his recommendation on several factors, including Anthony's use of physical force to perpetrate two sexual assaults; Anthony's age which would prevent adequate time for institutional care and aftercare; Anthony's poor community adjustment, including gang activity; and Anthony's lengthy juvenile record.

¶23 We also reviewed the juvenile court's statement of the reasons why the evidence on the waiver criteria of § 938.18(5), STATS., mandated Anthony's waiver. We affirm because there was an appropriate exercise of discretion; the court logically interpreted the facts in the record and applied the proper legal standard to them. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995).

By the Court.—Order affirmed.

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