COURT OF APPEALS DECISION DATED AND FILED

January 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1524

Cir. Ct. No. 2011JV49

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

IN THE INTEREST OF MERCEDES S., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MERCEDES S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du lac County: DALE L. ENGLISH, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Mercedes S. argues that the circuit court erroneously exercised its discretion by ordering fifty days of secure detention as a sanction for her repeated violations of a juvenile delinquency dispositional order. Before the sanctions hearing in question, Mercedes had already spent eighty-three days in secure detention, pursuant to the same dispositional order and prior sanctions. She argues, in essence, that, given that eighty-three days of secure detention had not coerced compliance, the court failed to adequately explain why more secure detention would coerce better compliance. We conclude that the court properly exercised its discretion when it determined that in view of Mercedes' past behavior, secure detention was the appropriate sanction for each violation, to demonstrate to Mercedes that "if she doesn't follow the rules, there are consequences." We affirm.

¶2 Mercedes' conduct has brought her into frequent contact with the juvenile justice system, with a number of formal and informal delinquency dispositions extending back to 2007. The delinquency adjudication underlying the sanctions motions in question resulted when in April 2011 Mercedes cut off the electronic monitoring bracelet she had been ordered to wear under an earlier dispositional order. In July 2011, Mercedes pled no contest to the charge of criminal damage to property for destroying the bracelet. At the August 2011 dispositional hearing, the court ordered thirty days of secure detention, one year of formal supervision with placement at home, restitution for the $500 cost of the bracelet, and supervised work or community service. The dispositional order also included various rules of conduct, such as compliance with household rules,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

attendance at school, not using illegal drugs or alcohol, wearing an electronic monitoring program bracelet, and seeking employment.

¶3 Mercedes completed the thirty days of secure detention but after her release almost immediately began violating the rules of the dispositional order, triggering lots of "out of range" notifications with the monitoring bracelet, staying out after curfew, and missing school. In October, in response to the State's motion for sanctions, the court ordered Mercedes placed in secure detention for another forty days and also ordered and stayed an additional ten days of secure detention, automatically applicable upon any additional rule violations after release. The court explained its reasoning:

> [B]y case law the purpose of sanctions is remedial, to encourage the juvenile to comply with the rules. What I'm hearing is that Mercedes just doesn't comply with the rules. And I think mom said that last time as well. That there's some issues with her following the rules….
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> So I do think there's got to be some remedial component. But she's already sat 30 days as a result of the disposition here. And then she gets out and it's alleged that she was violating right from the first instance.
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> So, I think what I am going to do is, I'm going to impose 40 days in secure to commence immediately and then I'll stay the remaining ten days for her first violation of the rules. So there's some remedial component. She's serving more than she served on the dispositional order. So I wanted to go a step up from that and yet there's a remedial portion to it.
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> And if Mercedes continues to do what she wants to do, then she can keep sitting in secure. I mean, that's the way it's going to be. She doesn't call the shots.

¶4 Unfortunately, upon release from those forty days of secure detention, Mercedes almost immediately triggered the ten additional days of detention. And she continued in that pattern after her release from the additional

detention, testing positive for marijuana use twice, purposely missing appointments with her social worker, and skipping school. The State filed four new motions for sanctions relating to these latest violations, seeking in total fifty days of secure detention as a sanction.

¶5 At the hearing on these new sanctions motions, Mercedes' counsel argued that imposing more secure detention was punitive and served no remedial purpose. She stated that "the vast majority of studies find that incarceration is no more effective than probation or alternative sanctions in reducing the criminality of an adjudicated youth" and that some "studies suggest that correctional placements actually exacerbates criminality." Instead of secure detention, she argued, Mercedes should be ordered to participate in individual counseling. The State responded that various efforts had been made to engage Mercedes and her family in therapy, but the family did not follow up on those referrals. Furthermore, the State pointed out, though Mercedes did successfully complete anger management training, during group discussion at the end of the course she stated the skills she learned in the course would not be useful to her in her life.

¶6 Since Mercedes essentially conceded the violations,[2] the only issue was which sanctions to order in response to the violations. The court rejected Mercedes' argument that ordering secure detention for each violation would amount to punishment.

> [I]t's always been my understanding that the sanctions statute was remedial and was intended to coerce the child to comply with the rules….

[2] Mercedes also challenged whether the two dirty urinalyses should count as two separate incidents because they were only fifteen days apart, but the court rejected that argument and Mercedes does not renew it.

> ….
>
> Mercedes has to understand that she makes decisions. She's accountable. And if she doesn't follow the rules, there are consequences…. She was given a chance last time to conform her behavior …. She didn't do that.

The court ordered the fifty days of secure detention as a sanction for Mercedes' violations of her dispositional order. Mercedes appeals.

¶7 On review of a circuit court's discretionary decision regarding a juvenile delinquency dispositional order, we simply review the reasonableness of the circuit court's exercise of discretion.[3] ***State v. Cesar G.***, 2004 WI 61, ¶42, 272 Wis. 2d 22, 682 N.W.2d 1. If the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach," we affirm. ***Id.***

¶8 As Mercedes concedes, "the court has the power to impose secure detention" for violations of dispositional orders. The State's motions were authorized by WIS. STAT. § 938.355(6) which identifies sanctions available "as a consequence for any incident in which the juvenile" violates one or more conditions of a dispositional order. Sec. 938.355(6)(d). The first category of sanctions includes "placement" in detention "for not more than 10 days" for each incident. Sec. 938.355(6)(d)1.; *see also* ***State v. Ellis H.***, 2004 WI App 123, ¶¶22, 25, 274 Wis. 2d 703, 684 N.W.2d 157 (explaining that a separate "incident"

[3] Before the circuit court, Mercedes characterized her challenge as a "due process" challenge, asserting that the imposition of additional secure detention was a violation of her due process rights because it could serve no purpose but punishment. On appeal, she no longer relies on due process rights as a basis for her challenge but simply argues that the court erroneously exercised its discretion. We do not address her abandoned due process argument.

occurs when a juvenile faces a "fork in the road" and chooses to "invade a different interest).[4]

¶9 Despite this statutory authority for the secure detention sanctions, Mercedes asserts that imposing fifty days of secure detention as a consequence for her latest violations of the dispositional order was a misuse of discretion because the court "did not consider any other options" and "had a preconceived policy" to always impose secure detention automatically. As evidence of this alleged "preconceived policy," she quotes the circuit court's admonition that failure to follow the rules means "you're going to sit in secure." As legal authority, she relies upon ***State v. B.S.***, 162 Wis. 2d 378, 469 N.W.2d 860 (Ct. App. 1991) and ***State v. Ogden***, 199 Wis. 2d 566, 544 N.W.2d 574 (1996).

¶10 No case law supports Mercedes' argument that the sanction the court imposed here was a misuse of discretion. The court of appeals in ***B.S.*** upheld the statute authorizing secure detention as a sanction for violation of juvenile dispositional orders against a facial due process challenge. ***B.S***., 162 Wis. 2d at 403-04 (upholding earlier version of law that became WIS. STAT. § 938.355(6)). This decision reversed the judgments below, so the court had no opportunity to consider the constitutionality of the statute's application to any particular set of circumstances. *See* ***B.S.***, 162 Wis. 2d at 385-86. Moreover, while Mercedes emphasizes the statement in ***B.S.*** that "a juvenile judge can misuse secure

[4] Consistent with the statute and ***State v. Ellis H.***, 2004 WI App 123, ¶22, 274 Wis. 2d 703, 684 N.W.2d 157, the State here sought and the court imposed a sanction of ten days of secure detention for each dirty urinalysis and ten days of secure detention for Mercedes' decision to avoid her scheduled appointments with the social worker. Additionally, it appears that the motion concerning Mercedes' truancy concerned multiple "incidents," as the court imposed twenty days of secure detention, in total, as sanctions for those violations.

detention (or any other sanction) by applying it so unreasonably as to convert it to punishment," the court later in that same passage emphasized that "[w]hen the principal purpose [of a governmental action] is nonpunitive, the fact that a punitive motive may also be present does not make the action punishment." *See **id.*** at 396 & n.7 (quoting ***State v. Killebrew***, 115 Wis. 2d 243, 251, 340 N.W.2d 470 (1983), *superseded by statute on other grounds as stated in* ***State v. Fonder***, 162 Wis. 2d 591, 595-96, 469 N.W.2d 922 (Ct. App. 1991)). In short, ***B.S.*** just states the applicable law; it offers no real support for Mercedes' challenge.

¶11 ***Ogden*** is likewise no help. It stands for the unsurprising proposition "that a judge's predispositions must never be so specific or rigid so as to ignore the particular circumstances of the individual offender upon whom he or she is passing judgment." ***Ogden***, 199 Wis. 2d at 573. The circuit court in ***Ogden*** misused its discretion under that standard when it denied, *without individual consideration*, the defendant's request for day-release privileges during her thirty-day jail sentence, to care for her child, so that the father of the child could keep his job. ***Id.*** The only justification the court offered was that "certain procedures and policies that have to be established as to allow some uniformity" and that the court simply "[did] not allow" release privileges for "normal" child care. ***Id.*** at 572. The appellate court noted that such reasoning was "mechanistic" and remanded for consideration of the particular facts underlying this particular family situation. ***Id.***

¶12 In stark contrast, the court's statements at Mercedes' sanctions hearing, including the statements quoted in her brief, demonstrate careful attention to Mercedes' particular case, including her entire juvenile history and her individual propensity to insistently disregard the conditions and rules of her disposition. In view of Mercedes' delinquency, and her continuous violations of her dispositional order, secure detention was a reasonable, appropriate choice of

sanction. It cannot be forgotten, after all, that the underlying dispositional order concerned a charge for criminal destruction of a court-ordered electronic monitoring bracelet.

¶13 To some extent, Mercedes seems to challenge the general wisdom and efficacy of secure detention in juvenile proceedings. For instance, she asserts that studies have demonstrated "that secure detention exposes juveniles to deviant peers and increases their risk of recidivism." *See, e.g.,* JAMES AUSTIN ET AL., ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 2-3 (U.S. Dep't of Justice Report Sept. 2005). One of the express goals, however, of the 1995 reforms of our juvenile justice system was to abolish the former juvenile justice regime under which the court had to select the "least restrictive means necessary for rehabilitation," an approach found to impose "unreasonable constraints on the court's ability to create an effective plan of services and treatment for the child…." JUVENILE JUSTICE STUDY COMM., JUVENILE JUSTICE: A WISCONSIN BLUEPRINT FOR CHANGE 5 (Report of the Juvenile Justice Study Committee January 1995) (quoting the Juvenile Justice Task Force of 1987).

¶14 When it created the new juvenile justice code, WIS. STAT. ch. 938, the legislature eliminated the "least restrictive means" approach, declaring instead that all of the following purposes are "equally important": protecting citizens from crime, holding juvenile offenders accountable, providing individualized assessment and due process to juveniles, diverting juveniles from the justice system "when consistent with the protection of the public," responding to juveniles' needs for care and treatment, and ensuring victim and witness rights. WIS. STAT. § 938.01(2)(a)-(g). Thus, in considering the sanctions motions in Mercedes' case, the court's obligation was to choose sanctions reasonably

calculated to coerce Mercedes to follow the rules and to act consistent with the competing, equally important purposes of ch. 938.

¶15 We find no fault with the court's exercise of discretion here. Such determinations are no simple matter, and this was a far cry from the "mechanistic" determination in ***Ogden***. Instead, here the record shows that Mercedes' individual circumstances formed the express foundation for the court's view that secure detention was the appropriate sanction. As the State asserts, "[Mercedes'] own stubbornness cannot convert the court's legitimate efforts into an abusive or punitive practice." If secure detention is a negative experience for Mercedes, as the court suggested, "maybe she shouldn't smoke marijuana and she should show up at school."

By the Court.—Order affirmed.

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