**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 24, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1806-FT

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

**In the Interest of:
PAUL P., a person under the age of 18:**

STATE OF WISCONSIN,

Petitioner,

v.

PAUL P.,

Respondent.

APPEAL from orders of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

EICH, C.J.[1] Paul P. appeals from a dispositional order adjudicating him delinquent by reason of his commission of a battery, and from an order denying his motions for postadjudication relief.[2] He claims that: (1) the

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

[2] This is an expedited appeal under RULE 809.17, STATS.

juvenile court lost competency to proceed with the case because the trial did not take place within twenty days of the plea hearing; and (2) he is entitled to a new trial because his trial counsel failed to request that the jurors be individually polled after their verdict.

We reject both arguments and affirm the orders.

I. Competency to Proceed

On June 13, 1995, Paul P. was taken into detention for a battery offense and other charges not pertinent to this discussion. The next day he appeared with his attorney for a detention hearing, after which he was placed in secure detention. He appeared in court again the following day, June 15, at which time the juvenile petition was filed and the court, continuing his detention, set the plea hearing for June 21, 1995. On that date, Paul P. and his attorney appeared and requested a jury trial. He was continued in secure detention.

Under the applicable statute, § 48.30(7), STATS., a fact-finding hearing is to be held within twenty days of the plea hearing. In this instance, the twenty-day period would expire on July 11, 1995. On June 28, the court held a "status conference," at which time Paul P.'s attorney informed the court that he was "willing to waive the time limits to ensure that [counsel] can complete [his] investigat[ion] if that's necessary." In response, the court continued the "status" hearing to July 5, informing counsel that if the investigation was completed earlier, the hearing "can be scheduled at an earlier time."

At the continued status hearing on July 5, Paul P., through counsel, acknowledged that he had "waived the time limits last week," and the court set the jury trial for August 8.

On July 27, the district attorney requested a brief postponement due to the absence of its primary investigator, and the trial was continued to August 21. On August 7, all parties stipulated to Paul P.'s transfer to nonsecure

detention pending the trial. The jury was selected on August 21, and the case went to trial on August 23.

On appeal, Paul P. argues that he never validly waived the twenty-day time limit of § 48.30(7), STATS. He maintains that he was never personally questioned by the court as to the waiver and he contends that this is inadequate because, under ***In Interest of R.H.***, 147 Wis.2d 22, 38-39, 433 N.W.2d 16, 23 (Ct. App. 1988), *aff'd*, 150 Wis.2d 432, 441 N.W.2d 233 (1989), a juvenile's "silence" is not a consent to a continuance when a hearing is set beyond the statutory time limit. We do not believe ***R.H.*** compels the result Paul P. seeks.

The State argued in ***R.H.*** that the juvenile consented to a continuance of a dispositional hearing in a CHIPS case, which was required by § 48.30(6), STATS., to be held within thirty days from the plea hearing, by remaining silent when the hearing was set beyond that time. ***Id***. at 38, 433 N.W.2d at 23. We said that because, under § 48.315, continuances in juvenile court may be "granted only `on the record' for good cause," the State's argument must fail because it had made "no such showing in this case." ***Id***. at 39, 433 N.W.2d at 23.

R.H. is inapposite, for this is not a "consent-by-silence" case. Paul P. was anything but silent. Through his counsel, he affirmatively—and on the record—waived the applicable time limit. The trial court specifically found that Paul P. validly waived his right to a hearing within twenty days of the plea, and he has not persuaded us that that finding was in error.[3]

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[3] Paul P. argues, alternatively, that the court's finding is not entitled to any weight on appeal because "[t]he trial judge was not an impartial trier of fact," but rather made the finding solely to cover up its own "failure[s]" and "mischaracteriz[ation]" of the testimony. He offers no citation to the record—or to any applicable legal authority—that would permit us to evaluate such claims. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (court of appeals need not consider arguments unsupported by citations to authority or references to the record).

His argument that the juvenile court erred by not, *sua sponte*, "tak[ing] some steps to ascertain [his own] knowing and voluntary assent" to the continuance suffers the same fate, for he has offered no authority in support of such a proposition. *See* ***State v. Pettit***,

II. Jury Polling

Paul P. next argues that he is entitled to a new trial "by reason of trial counsel's failure to request individual polling of the jury." And while he does not discuss the standards governing a claim of ineffective assistance of counsel—indeed he has not even seen fit to number the pages of his brief—we assume that is the essence of his argument.

When the jury returned its verdict finding Paul P. guilty of the charged offense, the court inquired of the panel: "Ladies and gentlemen, ... if these are the verdicts of each of you, would you please raise your right hands? Okay, you can lower them. The record should show that all 12 jurors did raise their right hand[s]." The court then asked the prosecutor and Paul P.'s counsel whether there was "[a]ny reason to poll the jury," to which each responded "No, your honor." Then, as the court prepared to dismiss the jurors, the prosecutor stated that he had just "read a case ... that the defendant personally has to waive the right to poll the jury" and "would just elicit that from the jury at this point." The court responded that it did not believe that was an accurate statement of the law and dismissed the jury.

Citing ***State v. Jackson***, 188 Wis.2d 537, 542, 525 N.W.2d 165, 167 (Ct. App. 1994), Paul P. argues that because he did not understand that he had a right to poll the jury, his counsel's waiver of the poll should be disregarded and the jury's verdict reversed. We disagree.

In ***Jackson***, we held that when a defendant is represented by counsel at the time the verdict is entered, the trial court need not ascertain that he or she waived the right to poll the jury. ***Jackson***, 188 Wis.2d at 541-42, 525 N.W.2d at 167. Paul P. points to language immediately preceding that holding where we noted that the defendant in ***Jackson*** failed to allege "that he did not understand his right to poll the jury or that he disagreed with counsel's waiver"; he asserts that language should apply here because he had "given statements ... as to his lack of understanding and the failure of his counsel to explain to him the significance of the polling issue." He does not refer us to any place in the

(..continued)
171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

record where such a statement appears, however, and, as we have noted above, factual assertions by attorneys which are not reflected by the record cannot be considered by the court. ***Dane County v. McManus***, 55 Wis.2d 413, 425-26, 198 N.W.2d 667, 674 (1972).[4]

Even so, there is nothing in ***Jackson*** to indicate that the dictum to which Paul P. refers was intended as a holding that a waiver by counsel will be held null and void anytime the defendant says he did not understand his right to poll the jury. Indeed, we concluded our discussion of the issue by stating: "Jackson was represented by counsel when the verdict was entered, and the decision to assert or waive certain rights, including whether to poll the jury, was delegated to that counsel. Thus no constitutional right was implicated and reversal is not warranted." ***Id.*** at 542-43, 525 N.W.2d at 168 (citations omitted).

In a later case, ***State v. Yang***, 201 Wis.2d 721, 740-41, 549 N.W.2d 769, 776-77 (Ct. App. 1996), we referred to that language for our conclusion that ***Jackson*** "hold[s] that the decision whether to request an individual polling is one delegated to counsel," and that counsel's failure to request a poll is not, ipso facto, deficient performance. We held that when the jury was instructed its verdict had to be unanimous and all the jurors raised their hands in affirmance of the verdict in response to the court's questions, there was no indication that the jury's verdict was not unanimous, and the trial court could properly deny the defendant's request for a hearing in support of his postconviction motion claiming that counsel was ineffective for failing to request an individual poll.

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[4] In the "factual" portion of his brief, Paul P. asserts that, at the postadjudication motion hearing, he "took the stand and reiterated and adopted the allegations of his Affidavit, incorporated in the Motion itself ... wherein he stated that he did not understand and was never informed by his counsel that he ... never had his right to poll the jury explained to him, and did not understand what was going on when the jury came back with its verdict ...." While he does provide a record citation for the affidavit, he offers none for the testimony upon which he relies.

Id. at 741-42, 549 N.W.2d at 777. We see no merit in Paul P.'s argument that his counsel's failure to request an individual poll entitles him to a new trial.

By the Court.—Orders affirmed.

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