COURT OF APPEALS
DECISION
DATED AND RELEASED

August 13, 1997

NOTICE

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.

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No. 96-2750-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EESI VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. Eesi Vang appeals his conviction of armed burglary. Vang argues that the State intentionally manipulated the criminal investigation so as to delay prosecution until after his eighteenth birthday. Alternatively, Vang claims that the information supporting the search warrant was stale, and therefore the trial court erred when it denied Vang's motion to suppress

the warrant. We conclude that the State did not intentionally delay Vang's prosecution and that there was sufficient probable cause to support the search warrant. We affirm.

On August 22, 1994, a number of firearms were stolen from a sports shop in Winnebago county. Detective Al Kilian of the Winnebago County Sheriff's Department was assigned to investigate the crime. Evidence collected at the location of the break-in included fingerprints, along with hair and blood samples. In October 1994, Kilian first received information implicating Vang in the robbery; in December 1994, a juvenile who actively participated in the robbery also implicated Vang. Kilian knew that Vang was a juvenile and that he turned eighteen on March 27, 1995. However, Kilian was unable to locate Vang. In August 1995, Kilian obtained a search warrant authorizing a search of Vang's person to obtain fingerprints, hair samples and blood samples since these had been found at the scene and an informant reported that Vang had cut himself on a window. After locating Vang with the assistance of Juneau county authorities and Vang's brother, Kilian executed the warrant. Vang confessed and the samples were sent to the crime lab. The results linked Vang to the crime and the State charged him with armed burglary on September 19, 1995, approximately one year after the crime.

First, we consider Vang's argument that the State intentionally delayed prosecuting him 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. Absent 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. Whether the circuit court had jurisdiction over a particular criminal complaint, however, is a question of law reviewed de novo. *See* ***LeQue,*** 150 Wis.2d at 262, 442 N.W.2d at 497.

The trial court found that the State did not intentionally manipulate the investigation so as to avoid juvenile jurisdiction. Vang disputes this finding, asserting that given the facts of this case, the only reasonable conclusion a dispassionate observer can reach is that Kilian intentionally delayed his investigation so that Vang would be charged as an adult. Vang points out that in December 1994, an accomplice implicated Vang, thereby corroborating information Kilian received earlier. Further, by December 1994, Kilian was aware that Vang would turn eighteen the following March. Additionally, Kilian had probable addresses for Vang in Juneau county. Vang points out that Kilian did nothing from that December until the following August, almost eight months later, other than attempt to identify the parties through fingerprints. Vang submits that Kilian could have and should have followed up on the addresses given to him. Vang contends that Kilian should have located Vang and arrested him before he turned eighteen.

Vang asks us to disbelieve Kilian's explanation for why nothing of substance was done for eight months. He points to Kilian's testimony that the delay was due to his not being able to locate Vang. But Vang then observes that when Kilian finally went to the Juneau county authorities it took less than one day to find Vang. Vang wonders why Kilian needed eight months to find Vang when he could have easily located him in December. Vang suggests that Kilian's reason

for the delay is pretextual and that the real reason for the delay was to wait until Vang was eighteen.

But Kilian said more in his testimony than Vang gives him credit for. Kilian wanted to link Vang to the robbery through physical evidence before arresting him and going to the district attorney. During the eight-month period, Kilian contacted two police agencies for help in not only locating Vang, which Vang contends was unnecessary, but also for any records of Vang's fingerprints, a point that Vang does not address. Thus, the time lag was not simply a question of locating Vang; it was also a question of obtaining records relating to Vang which would help seal the investigation. The trial court found Kilian's explanation to be credible and we hold that the finding is not clearly erroneous. Kilian wanted to obtain physical evidence concerning Vang, and the eight-month period was, at least in part, used to try to garner that evidence.

There is no law we know of that requires a police officer to send a report to a prosecutor even if the officer believes the investigation is incomplete. Nor is there any law requiring the officer to expedite his or her investigation. Accordingly, since Kilian testified that one of the reasons for the eight-month lag was to try to get more evidence, and because the trial court believed Kilian, and because the finding is not clearly erroneous, Vang's claim fails.

Next, we consider the issue of whether the search warrant was supported by probable cause. Our discussion of this issue is guided by the principle that appellate review of an affidavit's sufficiency to support a search warrant is limited. *See* ***State v. Reed***, 156 Wis.2d 546, 554, 457 N.W.2d 494, 497 (Ct. App. 1990). Accordingly, we pay great deference to the determination made by the issuing entity. *See* ***id.***

Vang contends that the search warrant lacked probable cause because the information contained within the affidavit in support of the search warrant was approximately eight months old, and therefore stale. We reject Vang's contention that probable cause is lacking because it is based on a misunderstanding of stale probable cause.

Stale probable cause is "'probable cause that would have justified a warrant at some earlier moment that has already passed by the time the warrant is sought.'" ***State v. Moley***, 171 Wis.2d 207, 213, 490 N.W.2d 764, 766 (Ct. App. 1992) (quoted source omitted). Timeliness is not determined by measuring the passage of time between the occurrence of the facts relied upon and the issuance of the warrant. *See* ***State v. Ehnet***, 160 Wis.2d 464, 469, 466 N.W.2d 237, 239 (Ct. App. 1991). There is no dispositive significance in the mere fact that "'information offered to demonstrate probable cause may be called stale, in the sense that it concerns events that occurred well before the date of the application for the warrant.'" ***Moley***, 171 Wis.2d at 213, 490 N.W.2d at 766 (quoted source omitted). Instead, timeliness "depends upon the nature of the underlying circumstances and concepts." ***Ehnet***, 160 Wis.2d at 469, 466 N.W.2d at 239. Although it is an ad hoc test, an important factor to consider in drawing the line between stale and fresh probable cause is the nature of what is being sought in the search warrant. *See* ***id.*** at 469-70, 466 N.W.2d at 239.

Admittedly, the 1994 information Kilian received is old. But as ***Moley*** and ***Ehnet*** clearly state, old information is not dispositive in deciding the issue of stale probable cause. Instead, we must look at the evidence sought by the search warrant. In this case, the search warrant was for Vang's blood samples, hair samples and fingerprints. A fingerprint, blood sample or hair sample does not change over time. Stated another way, the march of time does not break the

evidentiary link between these pieces of evidence and the crime under investigation. Consequently, we conclude that the trial court's finding that probable cause existed at the time the warrant was issued is not clearly erroneous.

By the Court.—Judgment affirmed.

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