COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1804

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

IN THE INTEREST OF BRADY B.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRADY B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

BROWN, J. Brady B., a teenaged juvenile, appeals from a finding of delinquency for second-degree sexual assault of a female teenaged juvenile. The sole issue raised is whether he was denied equal protection of the law when he was prosecuted while the female who willingly participated in the sexual acts was not. Although this issue is raised for the first time on appeal,

Brady asserts that we should relieve him of the waiver rule because no factual issues need resolution, both parties have briefed the issue and it is in the best interests of justice to do so. For the reasons hereafter stated, we hold Brady to waiver and affirm on that basis.

The facts giving rise to the charge are not important to the analysis and therefore will not be recited. Suffice it to say that the acts were consensual on the part of both Brady and the female and that the female also participated in consensual sexual acts with other boys, sometimes of her own initiative.

Brady contends that he was subject to delinquency proceedings, but the female was not. He argues that the prosecutor's office engaged in selective prosecution. He cites ***L.K. v. B.B.,*** 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983), where the supreme court wrote that an appellate court may consider a constitutional issue raised for the first time on appeal if "it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution." ***Id.*** (quoted source omitted). Brady then argues that the "interests of justice" factor is met in this case because the issue "goes to the very power of the State as it addresses the State's power to charge and prosecute and whether the State misused its power in this case." He also asserts that the remaining prongs are satisfied because there are no facts in dispute and both parties have had the opportunity to brief the issue.

Contrary to Brady's assertions, none of the prongs have been met to our satisfaction. First of all, there are facts which could have and should have been brought before the juvenile court if this issue was going to be properly tested. To make a case for selective prosecution, it must be shown that a persistent pattern of prosecutorial behavior is present. *See* ***State v. Johnson,*** 74 Wis.2d 169, 174-

75, 246 N.W.2d 503, 507 (1976). As the State points out, Brady has shown no pattern. Second, there must be a showing that prosecutorial discretion was not exercised in a reasonable manner. In support of that prong, there should have been evidence concerning what discretion, if any, was employed by the district attorney with regard to charging the female juvenile. Such a record was not made.

Second, the State has not really had an adequate opportunity to brief this issue the way it would like. The State, for example, has submitted materials that were not part of the record on appeal but are attached to the State's appendix. Those documents purport to show that the female juvenile *was* prosecuted for three sexual incidents concerning other boys in the same group home. The State asserts that inadvertence was the reason why it did not also bring a fourth charge encompassing the incident with Brady. Obviously, this court cannot consider documents that are not part of the record on appeal or the arguments emanating from those documents. But the fact that the State felt obliged to include fugitive documents in this appeal is support for our opinion that the State has not had the opportunity to properly brief the issue raised in this case.

Finally, just because the issue raised is a constitutional one does not mean that it meets the "interests of justice" prong. In our view, we must be convinced that justice has miscarried. We must be satisfied that our confidence in the outcome is undermined by the state of the record as it comes to this court. Here, Brady makes no argument about how justice has been denied except to say that he raises a constitutional issue. The argument is not sufficient.

This court acknowledges that waiver is a rule of administration and that we may, in our discretion, relieve a party from its invocation. But if we are going to entertain the possibility of "reversing" a trial court without the trial court

having had the benefit of deciding the issue in the first instance, we want to be sure it is the only conscionable thing to do. Even had the issue been one of law rather than one which needed factfinding, we still would have needed more to convince us that relief from the waiver rule was appropriate.

By the Court.—Order affirmed.

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