

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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. 2006AP2909-CR

Cir. Ct. No. 2005CF760

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
DOROTHY L. BAIN, Judge. *Affirmed.*

Before Hoover, P.J., Brunner and Peterson, JJ.

¶1 PER CURIAM. Scott Smith appeals a judgment of conviction for first-degree sexual assault of a child. He argues the State failed to prove its delay in charging him was not an attempt to manipulate the system to avoid juvenile

court jurisdiction. The circuit court found the prosecutor did not charge Smith earlier for other reasons, and its findings are not clearly erroneous. We affirm.

BACKGROUND

¶2 On August 7, 2003, the State filed a delinquency petition against Smith. The petition alleged Smith had sexually assaulted two of his brothers, M.S. and C.S. The petition stated the assaults took place in March and April 2003, when Smith was fifteen years old.

¶3 The delinquency petition was based on police interviews of Smith and his three brothers, M.S., C.S., and D.S., who were eleven, ten, and six years old at the time. In the interviews, the three boys alleged various kinds of sexual touching by Smith, but did not allege any intercourse. Based on the interviews, the officer concluded Smith had in fact had sexual contact with “some of his brothers” and recommended sexual assault counts for Smith’s touching of C.S. and M.S. The officer report did not recommend Smith be charged with assaulting D.S., and the 2003 petition charge Smith with an assault of D.S. Smith was adjudicated delinquent for assaulting M.S. and C.S. and eventually sent to Lincoln Hills.

¶4 Smith turned seventeen years old on February 21, 2005. On September 29, 2005, the State filed criminal charges against him based on the 2003 assaults of D.S. Smith moved to dismiss the complaint, alleging the State violated his due process rights by delaying charging him with assaulting D.S. in order to charge him as an adult.

¶5 At the due process hearing, the State called Assistant District Attorney Theresa Merriwether as its only witness. Merriwether testified she had

drafted the 2003 juvenile petition and decided not to include the alleged assault on D.S. She explained her rationale as follows:

I had fairly detailed information about two assaults that occurred against his two brothers and much more limited information about his other brother, [D.S.].

....

Also, I did not have a time frame.

So I made a decision not to charge that particular assault....

¶6 Merriwether said she learned in January 2005 that Smith had told staff at Lincoln Hills that he had sexual intercourse with D.S. in 2003. Merriwether asked the police to investigate further. The police prepared a report, which was sent to the county department of social services for evaluation. Social services referred the case to the district attorney's office, which received the referral on February 16, 2005, five days before Smith's seventeenth birthday.

¶7 By statute, district attorneys have twenty days after receiving a referral to file a petition or take other action. WIS. STAT. § 938.25(2).¹ Merriwether explained that when her office receives a referral, her secretary opens a new file and marks it for action two days before the deadline. In Smith's case, Merriwether's secretary received the referral and marked it for action by March 6, 2005. Because Merriwether believed no action on the referral was necessary until March 6, she did not review the file until after February 21, when Smith turned seventeen.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶8 When Merriwether reviewed the file and realized filing a juvenile petition would not be possible, she delayed filing a criminal complaint pending a progress update from Smith's social worker. She filed the complaint in September after learning that Smith was not making satisfactory progress at Lincoln Hills. Merriwether stated she had "absolutely not" delayed the charges until after Smith's birthday in order to make Smith subject to adult court jurisdiction.

¶9 Smith introduced evidence, through Merriwether, that police had conducted a series of "stepwise" interviews² with all three victims in October 2003. In the interviews, all three boys, including D.S., stated Smith had forced them to engage in anal intercourse. C.S. and M.S. also recounted incidents involving other sexual touching by Smith. Medical examinations in October 2003 revealed all three boys had a medical condition, encopresis, consistent with anal penetration.

¶10 Merriwether stated that at the time the stepwise interviews took place she was not aware that they had occurred or what their contents were.³ A different assistant district attorney, Patricia Baker, had been present at interviews with the three boys. However, according to Merriwether:

I never had a conversation with [Baker] regarding the stepwise interviews. [Baker] had no knowledge of what

² Merriwether explained that a stepwise interview is "an effort to combine different agencies and create a controlled interview of a child who has been the victim of either sexual assault or physical abuse." A member of the district attorney's office, a social worker, and a police officer were present at the stepwise interviews in this case.

³ In October 2004, Merriwether was advised that the interviews had taken place. At that time, she told the police to keep the tapes of the interviews because she wanted the information "in case [Smith] offends again prior to becoming an adult."

was going on with Scott Smith. She wasn't involved in the prosecution of Scott Smith. She simply sits in on the interview to make sure that all pertinent questions are asked that she feels are necessary for further prosecution and then she leaves.

....

Reports are generally generated by law enforcement and social services from that interview and if new charges are appropriate, they are referred to social services.

¶11 The circuit court concluded the State had not intentionally delayed prosecuting Smith in order to avoid juvenile jurisdiction, and made a number of fact findings closely tracking Merriwether's testimony. Most importantly, the court found Merriwether had not charged Smith with assaulting D.S. in 2003 because she had not known at the time that Smith had had sexual intercourse with D.S., and Merriwether had not charged Smith between February 16 and 21, 2005 because she had not reviewed the referral during that time. The court concluded:

Ms. Merriwether testified credibly that there was no intentional delay in order to have this matter brought into adult court as opposed to juvenile court.

It is quite unfortunate that this matter was not charged in a more timely fashion, such that these matters would have proceeded in juvenile court where the services provided to the defendant would quite possibly be more appropriate than those that may be provided through the adult system....

However, I am unable to find that the delay was intentionally created or that manipulative conduct was engaged in by the District Attorney's Office to avoid juvenile jurisdiction in this matter.

Therefore, no due process violation exists.

¶12 Smith then pled guilty to first-degree sexual assault of a child and was sentenced to thirteen years in confinement, followed by fifteen years of extended supervision.

DISCUSSION

¶13 Whether a defendant has been denied due process is a question of constitutional fact. *State v. Tulley*, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807. A question of constitutional fact is a mixed question of law and fact and is reviewed in a two step process. *State v. Post*, 2007 WI 60, ¶8, 733 N.W.2d 634. We first review the circuit court’s findings of historical fact under the clearly erroneous standard of review. *Id.* We review the application of those facts to constitutional principles without deference. *Id.*

¶14 The State violates a defendant’s due process rights when it delays filing charges in order to avoid juvenile court jurisdiction. *State v. Montgomery*, 148 Wis. 2d 593, 595, 436 N.W.2d 303 (1989). At an evidentiary hearing on this issue, the State bears the burden of proving that “the delay was not for the purpose of manipulating the system to avoid juvenile court jurisdiction.” *State v. Velez*, 224 Wis. 2d 1, 9, 589 N.W.2d 9 (1999).

¶15 Here, Smith does not take issue with the circuit court’s findings of fact. That is, he does not contest the court’s finding that Merriwether’s decision to charge only two assaults in 2003 was due to the facts she knew at the time and was not an attempt on her part to manipulate the system. Smith also does not challenge the court’s finding that Merriwether did not file the 2005 petition before he turned seventeen simply due to office procedures.

¶16 Instead, Smith contends Merriwether’s testimony only established her personal intent. He argues the State did not meet its burden because it did not prove that other State actors—Baker, the police, and social services—did not intentionally manipulate the system in order to avoid juvenile jurisdiction.

¶17 Smith’s argument fails for two reasons. First, Smith’s argument does not account for the fact that the police and social services did in fact refer the case to the district attorney’s office five days before Smith’s seventeenth birthday. Had Merriwether reviewed the file during those five days, Smith would have been charged as a juvenile. While the timing of the referral may have played a role in the timing of the charges, the fact remains that charges would have been filed by Smith’s birthday except for the fact that Merriwether did not review the referral immediately when she received it. When the State proved the charges were not timely filed as a result of the office procedures in place, it met its burden of proving the charges were not delayed in order to manipulate the system to avoid juvenile court jurisdiction. *See Velez*, 224 Wis. 2d at 9.

¶18 Second, Merriwether did explain why Baker’s presence at the interviews did not lead to additional charges. She explained that Baker was present simply to be sure all pertinent questions were asked, and did not have any role in prosecuting the case. Smith argues Baker’s knowledge should be attributed to Merriwether. However, Merriwether explained why the two never communicated—Baker was there for a limited purpose that did not include a role in the prosecution going forward. Nothing indicates the lack of communication was an attempt by the district attorney’s office to avoid juvenile jurisdiction through compartmentalization. Even assuming the best practice would have been for Baker and Merriwether to have discussed the interviews, their failure to do so was at most negligent. A negligent delay of prosecution is not a due process violation. *Montgomery*, 148 Wis. 2d at 602-03.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

