

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 10, 1995

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. 95-1179

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE INTEREST OF MOSES SEAN P.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

MOSES SEAN P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Columbia County:
LEWIS W. CHARLES, Judge. *Affirmed.*

VERGERONT, J.¹ Moses Sean P., a juvenile, appeals from an order waiving juvenile court jurisdiction over him. The only issue on appeal is whether the trial court erred in determining that the delinquency petition

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

demonstrated prosecutive merit. We affirm the trial court's determination that the matter has prosecutive merit.

The delinquency petition alleges that Moses, as a party to a crime, intentionally damaged the DeWaide residence by means of fire in violation of § 943.02(1)(a), STATS., which would be a Class B felony if committed by an adult; and that he, as a party to a crime, intentionally caused damage to the physical property of the Poynette-Dekorra Fire Department in violation of § 943.01(1), STATS., which would be a Class A misdemeanor if committed by an adult. The State petitioned for the court to waive its juvenile court jurisdiction under § 48.12, STATS. Moses objected on the ground that the delinquency petition did not show prosecutive merit. Following the waiver hearing, the trial court entered an order waiving juvenile court jurisdiction. The trial court determined pursuant to § 48.18(4), STATS., that there was prosecutive merit regarding the two charges and made findings regarding the criteria for waiver under § 48.18(5).

The petition incorporates details of a report prepared by Michael J. Van Kueren, a special agent with the Division of Criminal Investigation of the Wisconsin Department of Justice. The pertinent parts of the petition are as follows.

On November 14, 1993, at approximately 3:03 a.m., the Poynette Fire Department received a report of a fire at the DeWaide residence at 730 South Main Street in Poynette. Emergency personnel arrived at the scene while the fire was in progress. Based on an interview with K.L. DeWaide and an inspection of the fire scene, Van Kueren concluded the cause was arson.

The Poynette Police Department reported that during the evening of November 13, 1993, or the early morning of November 14, 1993, a bottle was thrown against the front glass door of the Poynette Fire Department. Pieces of the broken bottle were gathered and tested by the State Crime Laboratory. The report of the state crime examiner concluded that bottle fragments contained the latent fingerprint of Moses and the latent fingerprint of Mark O. based on comparison with fingerprint cards submitted by the Poynette Police Department bearing the names of Mark O. and Moses.

Van Kueren interviewed Rae Buss on January 7, 1994, who told him that around 2:00 a.m. on the morning of November 14, 1993, she saw Moses and Mark walking along South Main Street, about one-half block south of the fire department. Buss also told Van Kueren that sometime between the fire and Thanksgiving, her nephew, who knows Moses and Mark, told her that he had talked to Moses and Mark on the telephone and Mark had told him that he and Moses were responsible for the fire at the DeWaide residence.

On January 14, 1994, Poynette Police Chief Dale McConkey interviewed Jessica Rankin. Rankin told him that about a week before December 17, 1993, Mark and Moses were at her house and she kiddingly said to them "You guys burned that house down, didn't you?" She then called them arsonists and said "Don't burn down my house." Moses and Mark then said something to the effect of, "They can't prove anything. They will never know." Mark said that if law enforcement officers talked to them about the fire, they would deny it.

On January 14, 1994, Treavor McGonigle testified at a fire marshall hearing conducted at the Poynette Police Department that sometime in the middle of December 1993, he had a conversation with Moses in which he, McGonigle, asked "What's going on with the fire?" Moses answered that he and Mark "went up there and that Mark lit a piece of paper or something on fire" in the garage; the purpose of being in the garage, Moses told McGonigle, was to look around. McGonigle also stated that he received a telephone call from Mark and told Mark that he had already talked to Moses about the fire. According to McGonigle, Mark said, "Well, don't tell anyone." McGonigle also stated that Moses told him that he and Mark had broken out the windows at the Poynette Fire Department in a conversation that took place several months before the fire marshall hearing on January 14, 1994.

When a juvenile contests the prosecutive merit of a delinquency petition, it is within the juvenile court's discretion whether to hold a hearing to take testimony or consider evidence in addition to the petition. *In re P.A.K.*, 119 Wis.2d 871, 887, 350 N.W.2d 677, 685 (1984). If there is a challenge by the juvenile accompanied by a showing that his or her confession is unreliable, the juvenile court must set the confession aside and determine whether the petition is sufficient, without the challenged confession, to show prosecutive merit. *In re J.G.*, 119 Wis.2d 748, 763, 350 N.W.2d 668, 676 (1984); *In re Curtis W.*, 192 Wis.2d

719, 725, 531 N.W.2d 633, 635 (Ct. App. 1995). If the remainder of the petition is not sufficient for a finding of prosecutive merit, the juvenile court must conduct a hearing at which the State must prove that the confession is reliable by a preponderance of the evidence. *In re J.G.*, 119 Wis.2d at 763-64, 350 N.W.2d at 676.

Moses is not challenging the failure of the trial court to hold an evidentiary hearing on the issue of prosecutive merit. He is not contending, nor has he made a showing, that the statements he reportedly made to others were involuntary or unreliable. Although the State appears to consider otherwise, we do not understand Moses to claim that the statements he made to others that are reported in the petition are confessions and cannot be considered. Rather, we understand Moses's only claim to be that the petition does not show that the hearsay statements of McGonigle contain adequate guarantees of trustworthiness to sustain the trial court's finding of prosecutive merit based on the petition. It was therefore proper for the trial court, as Moses apparently concedes, to look solely at the petition in determining prosecutive merit.

In order to be the basis for a finding of prosecutive merit, the petition must contain adequate and detailed information of the juvenile's alleged violation of state criminal law and have demonstrable circumstantial guarantees of trustworthiness. *In re P.A.K.*, 119 Wis.2d at 886, 350 N.W.2d at 685. Hearsay evidence may be considered if it has demonstrable guarantees of trustworthiness. *Id.* at 885, 350 N.W.2d at 685. Prosecutive merit under both § 48.18(4) and (5), STATS., involves the same standard as probable cause at the preliminary hearing stage in an adult criminal proceeding--a reasonable probability that the alleged crime has been committed and that the juvenile has probably committed it. *Id.* at 884, 350 N.W.2d at 684. Whether a petition shows prosecutive merit presents a question of law that we review de novo. *Cf. Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763, 768 (1980) (whether facts fulfill a particular legal standard is a question of law).

With respect to the charge of criminal damage to property, we conclude the petition shows prosecutive merit. Moses does not argue otherwise. The petition states that Moses was seen in the vicinity of the fire department during the time period when the bottle was reportedly thrown against the door of the fire department. A state crime lab report shows his fingerprint was found on a fragment of the bottle.

With respect to the arson charge, Moses does not challenge the information in the petition that the cause of the fire was arson. We therefore focus on the information that ties Moses to the fire. He was seen walking on the street (South Main Street) on which the DeWaide residence was located approximately an hour before the fire was reported at a time of night when presumably not many people are out walking. There are then statements by three separate witnesses that either Mark or Moses or both made statements indicating that Moses took part in setting the fire--Buss (based on statements made by her nephew), Rankin and McGonigle. Since Moses makes a claim of lack of trustworthiness only with respect to McGonigle's testimony, we consider his testimony first.

Moses claims that McGonigle's testimony was not sufficiently trustworthy because it was not a statement against interest and did not contain enough detail about the circumstances of his conversations with Moses. There is no requirement that a statement be against interest to be considered sufficiently trustworthy for finding prosecutive merit, although that may be one indicium of trustworthiness. McGonigle's statements were made as testimony at a fire marshall hearing. He did testify in specific terms as to what Moses told him about the fire. We conclude McGonigle's testimony possessed sufficient guarantees of trustworthiness to justify its consideration as a basis for finding prosecutive merit. We further conclude that McGonigle's testimony about Moses's statements to him, in conjunction with Buss's statement about seeing Moses an hour before the fire, show prosecutive merit for charging Moses with setting fire to the DeWaide residence. We therefore need not address Rankin's statement or Buss's statement about her nephew's conversation with Moses and Mark.

By the Court.—Order affirmed.

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