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May 17, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP357-CRNM State of Wisconsin v. Elese E. Taylor (L.C. # 2010CF5986)
2015AP358-CRNM State of Wisconsin v. Elese E. Taylor (L.C. # 2011CF1596)

Before Curley, P.J., Kessler and Brash, JJ.

Elese E. Taylor appeals judgments of conviction entered after a jury found him guilty of two counts of second-degree sexual assault of a child and one count of first-degree sexual assault of a child. Appellate counsel, Attorney Russell D. Bohach, filed a no-merit report, concluding that further proceedings would be frivolous within the meaning of ***Anders v. California***, 386 U.S. 738 (1967). At our request, Attorney Bohach filed a supplemental no-merit report

addressing whether Taylor could mount any arguably meritorious claim based on the three-year delay between the date that the first-degree sexual assault was reported to police—a date on which Taylor was fifteen years old—and the date on which the State charged him as an adult with committing the offense. Upon review of the record and the no-merit report and supplement, we conclude that it would not be frivolous for Taylor to pursue postconviction and appellate relief as to matters arising out of the charging delay. Although appellate counsel, not this court, should select the precise issues to pursue, the materials suggest Taylor could raise arguably meritorious claims relating to due process and criminal court jurisdiction, joinder and severance, and ineffective assistance of trial counsel. Therefore, we reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Taylor to file a postconviction motion.

The record is uncontroverted that Taylor's date of birth is March 24, 1992. The State filed a criminal complaint on December 9, 2010, alleging that in June 2010, Taylor had sexual intercourse with his cousin A.M., born October 13, 1994, and that he had sexual contact with her sister J.G.M., born October 21, 1996. While the case was pending, the State filed a criminal complaint on April 12, 2011, alleging that during the period from April 25, 2007 through April 24, 2008, Taylor had sexual intercourse with his cousin K.T.N., born April 25, 1997. The State successfully moved to join the two cases.

Taylor pled not guilty to all of the charges and demanded a jury trial. At the outset of the trial proceedings, the State moved without objection to amend the timeframe within which Taylor allegedly committed the first-degree sexual assault to include the period beginning on April 25, 2006. At trial, the State showed that K.T.N. reported to Waukesha police in 2008 that Taylor sexually assaulted her when she lived in South Milwaukee, Wisconsin. The State

produced evidence that K.T.N. lived in South Milwaukee during the 2005-06 school year, a period during which Taylor had his fourteenth birthday.

'"When the charging authorities have reason to believe that a child has committed an offense which, if committed by an adult, constitutes a crime, jurisdiction in a criminal court cannot be maintained on a charge brought after the child becomes eighteen, unless it is affirmatively shown 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) (citing ***State v. Becker***, 74 Wis. 2d 675, 678, 247 N.W.2d 495 (1976)).[1] In circumstances where the delay was manipulative, '"the circuit court can maintain jurisdiction only after a due-process hearing.'" ***Velez***, 224 Wis. 2d at 15 (citation omitted). The purpose of the hearing "is to determine 'whether the delay in charging was in fact occasioned by a deliberate effort to avoid juvenile court jurisdiction."' ***Id.*** (citation omitted). The State has the burden to show a lack of manipulative intent. ***State v. Bergwin***, 2010 WI App 137, ¶11, 329 Wis. 2d 737, 793 N.W.2d 72. The defense has a preliminary burden of production. ***Velez***, 224 Wis. 2d at 15-16.

We asked appellate counsel to file a supplemental no-merit report addressing whether Taylor could raise any arguably meritorious claims as a result of the charging delay here, including whether trial counsel was ineffective for failing to pursue dismissal of the charge of first-degree sexual assault in light of ***Velez***, and whether the charging delay affected the analysis

[1] When the supreme court decided ***State v. Becker***, 74 Wis. 2d 675, 677, 247 N.W.2d 495 (1976), an adult was defined as any person who had attained the age of eighteen. *See* WIS. STAT. § 48.02(3) (1975-76). The age at which a court of criminal jurisdiction has original jurisdiction of a defendant accused of committing a crime has since been lowered from eighteen to seventeen. *See* WIS. STAT. §§ 938.02(1), 10(m), and 938.12 (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

of the joinder question. In response, appellate counsel provided a copy of a Waukesha Police Department incident report showing that, on March 18, 2008, K.T.N. reported that Taylor sexually assaulted her "in 2006." In the accompanying supplemental no-merit report, appellate counsel asserted that pursuit of postconviction or appellate relief for Taylor would be frivolous because the district attorney did not receive a referral from a juvenile intake worker and the Waukesha incident report reflects the police "forwarded the police report to South Milwaukee, but no further action was taken by anyone." Appellate counsel concluded: "the District Attorney's office cannot intentionally delay charging of a case that it never reviewed."

As we understand appellate counsel's analysis, it is counsel's position that further postconviction proceedings would be frivolous if the district attorney was not told by police about the 2008 incident report until Taylor reached majority. We cannot agree. In ***Velez***, the supreme court indicated that the relevant inquiry included an assessment of the actions taken by government actors other than the prosecutor. *See* ***id.*** at 21 (reviewing the evidence and stating that it "does not support an allegation of intentional manipulation of the system *by the police*") (emphasis added).

Further, the facts here appear distinguishable from those in cases where reviewing courts have excused a charging delay. As we observed in ***Bergwin***, 329 Wis. 2d 737, ¶15:

> [i]n other cases, the state has presented evidence that either an ongoing investigation or problems locating the defendant caused the delay. *See* ***State v. Velez***, 224 Wis.2d 1, 21, 589 N.W.2d 9 (1999) (defendant did not dispute that police made a good faith effort to find defendant before his birthday); [***State v.***] ***Montgomery***, 148 Wis.2d at 599-600[, 436 N.W.2d 303(1989)] (measures to locate and charge the defendant were reasonable); ***Becker***, 74 Wis.2d at 678 (delay due to ongoing drug investigation acceptable); [***State v.***] ***LeQue***, 150 Wis.2d at 268-69[, 442 N.W.2d 494(Ct. App. 1989)] (investigative period justified charging delay).

We contrasted the foregoing facts with the situation we faced in ***Bergwin*** where a police officer testified that the investigation ended a month and a half before the offender turned seventeen, the offender was not charged until after his birthday, and nothing showed that the offender was uncooperative or unavailable in a way that would have necessitated delay. ***Id.***, 329 Wis. 2d 737, ¶15. We ultimately concluded that the State improperly deprived the juvenile court of jurisdiction. ***Id.***, ¶16. Further, we reversed the bail jumping convictions that arose when the offender was seventeen years old but that flowed from his failure to comply with conditions of bail imposed by the adult court for a charge that should have been in children's court. "The adult criminal court lacked jurisdiction to adjudicate [the offender's] case, and therefore also lacked authority to establish bond conditions." ***Id.***, ¶17.

In this case, Attorney Bohach has not directed our attention to anything that necessitated a charging delay. We recognize his concern that the Waukesha incident report states K.T.N. did not want to cooperate, but such reluctance is not unusual. *See* ***State v. Mitchell***, 144 Wis. 2d 596, 618, 424 N.W.2d 698 (1988) (noting the "reluctance of sexual assault victims to report the crime"). Further, the importance of the police investigator's conclusion about K.T.N.'s reluctance to cooperate appears potentially diminished by the indications in the report that a counselor who had been working with her also "felt she would not disclose at all" but then "[she] did disclose." As to other relevant factors, K.T.N. identified Taylor as the alleged perpetrator and the record indicates he was available to police throughout 2008. Specifically, at the time of the incident report, he was already subject to a CHIPS order and was receiving wrap-around services. Two months later, in May 2008, he was placed at the Norris Adolescent Center. Further, he was formally adjudicated delinquent in November 2008 for charges that arose in June and August of that year and that were investigated by Waukesha County law enforcement.

Under the foregoing circumstances, we do not think it would be frivolous for Taylor to seek postconviction and appellate relief because the State delayed charging him for three years with an offense reported to police when he was a fifteen-year-old juvenile. The constellation of possible issues includes claims related to due process and jurisdiction, joinder and severance, and trial counsel's ineffectiveness in relation to those matters.

When appointed counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, comment (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988). Because we cannot conclude that further proceedings in this matter would lack arguable merit, we will reject the no-merit report filed by appellate counsel, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Taylor, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Taylor or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Taylor to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the public defender's office that it has appointed new counsel for Taylor or that new counsel will not be appointed.

Diane M. Fremgen
Clerk of Court of Appeals