COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1652-CR **Cir. Ct. No. 2004CF4844**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER E. KYLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Walter E. Kyle, *pro se*, appeals an order of the circuit court, denying his motion for sentence modification. Kyle asserts that he should have been tried in juvenile court and that he presented a new factor showing he was sentenced on inaccurate information. We affirm the order.

BACKGROUND

¶2 In October 2004, the State charged Kyle with two counts of first-degree sexual assault of a child for events occurring between May 1, 2001, and October 31, 2001. Kyle, who was born on January 5, 1986, was eighteen when the criminal complaint was issued, but only fifteen at the time of the alleged offenses. Because Kyle was over seventeen at the time of charging, *see* WIS. STAT. § 938.02(10m) (2003-04),[1] his matter was heard in ordinary criminal court, or adult court, not in juvenile court.

¶3 In October 2005, the State amended the complaint, adding three charges. Count three was an additional charge of first-degree sexual assault, for events between May 1, 2001, and October 31, 2001, when Kyle was fifteen. Count four alleged repeated sexual assault of a child for events between January 7, 1997, and April 20, 2001, when Kyle was between eleven and fifteen. Count five alleged first-degree sexual assault for events between January 1, 1997, and October 31, 2001, when Kyle was between ten and fifteen.

¶4 Kyle entered guilty pleas to the two counts from the original complaint, amended down from first-degree to second-degree sexual assault of a child. As noted, the offenses occurred sometime between May 1, 2001, and October 31, 2001, when Kyle was fifteen. In January 2006, Kyle was sentenced to four years' initial confinement and five years' extended supervision on count one, plus a consecutive five years' initial confinement and five years' extended supervision on count two. The sentences were imposed and stayed in favor of ten

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

years' probation. Kyle did not pursue a direct appeal. However, in 2008, Kyle's probation was revoked.

¶5 In June 2014, Kyle filed a motion for sentence modification. He claimed, as relevant to this appeal, that: the court was "unaware" that the State "intentionally waited for the defendant to turn into an adult" before prosecuting him; he was "deprived of a Becker's hearing … to allow Walter E. Kyle to present his case before a Juvenile Court"; this case should have been sent to juvenile court by way of a reverse waiver hearing under WIS. STAT. § 970.032(2); and one of his victims came forward to say that Kyle "did not touch him in any sexual manner," so the circuit court should dismiss this case. The circuit court denied the motion, explaining why § 970.032(2) did not apply and why the victim's supposed recantation did not warrant relief. Kyle appeals.

DISCUSSION

I. Adult vs. Juvenile Court Jurisdiction

¶6 Kyle first asserts that this case should have gone before the juvenile court, and that the State manipulated events so as to avoid juvenile court jurisdiction.[2] Kyle claims that he was "only 10 years old when the alleged crimes took place" and that he told the circuit court as much.

¶7 First, though Kyle is correct that the amended criminal complaint included events that spanned back to when he was ten years old, he pled guilty to crimes that occurred when he was fifteen. Second, the age of the offender at the

[2] Had he been tried in juvenile court, Kyle reasons he would have completed his sentence when he turned twenty-five in 2011.

time of the offense is irrelevant: "'it is the date of commencing the action rather than the date of the alleged criminal act which determines whether there is juvenile jurisdiction.'" ***State v. Montgomery***, 148 Wis. 2d 593, 601, 436 N.W.2d 303 (1989) (citation omitted).

¶8 Nevertheless, Kyle complains that he "did not have a Becker hearing to be waived into adult court." This is a reference to ***State v. Becker***, 74 Wis. 2d 675, 247 N.W.2d 495 (1976). But ***Becker*** does not control whether one is waived into adult court.

¶9 The juvenile court generally has exclusive jurisdiction over juveniles, between ten and seventeen years of age, who are alleged to be delinquent. *See* WIS. STAT. §§ 938.12(1) (juvenile jurisdiction) & 938.02(10m) (defining "juvenile"). WISCONSIN STAT. § 938.183 specifies exceptions in which the *adult* criminal court has original jurisdiction, even over juveniles, for certain crimes and certain conditions. WISCONSIN STAT. § 938.18 provides a process for when, although the juvenile court has original jurisdiction, that court may be asked to waive its jurisdiction and send a juvenile offender to be tried in adult court.

¶10 A ***Becker*** hearing "is not the 'waiver' hearing which is required when the juvenile court has jurisdiction and it is desired to try the defendant as an adult." ***Id.***, 74 Wis. 2d at 677. Rather, ***Becker*** deals with the situation where the adult court has jurisdiction because of the offender's age at the time of charging,

but the State is alleged to have intentionally delayed charging so as to avoid juvenile court jurisdiction.[3] *See* ***id.*** at 677-79.

¶11 A defendant must "make a prima facie showing of manipulative intent [by the State] before gaining as a matter of right" the evidentiary hearing contemplated by ***Becker***. *See* ***State v. Velez***, 224 Wis. 2d 1, 16, 589 N.W.2d 9 (1999). Kyle has made no such showing here; his mere assertion that the State intentionally waited until he was an adult to charge him does not suffice. Indeed, the State noted at Kyle's sentencing hearing that "these things [came] out at a time when Mr. Kyle is now treated as an adult,"[4] suggesting that the State was not made aware of the allegations with enough time, or any time, to charge Kyle in the juvenile system. Thus, Kyle has not shown entitlement to a ***Becker*** hearing.

¶12 Kyle also claims that his case belonged in juvenile court under WIS. STAT. § 970.032(2), the "reverse waiver" process which allows the adult court with original jurisdiction to transfer a case within its jurisdiction back to juvenile court. But § 970.032(2) does not apply under these facts.

---

[3] Contrary to the language often used when discussing it, a ***Becker*** hearing is not actually about subject matter jurisdiction. Instead, it is concerned with potential due process violations. *See* ***State v. Schroeder***, 224 Wis. 2d 706, 715, 721-22, 593 N.W.2d 76 (Ct. App. 1999). As such, a valid guilty plea would waive any challenge to the lack of a ***Becker*** hearing. *See* ***Schroeder***, 224 Wis. 2d at 722.

[4] This portion of the transcript contains an observation that "[h]ad this been reported or dealt with at the time it happened, [Kyle] would have been in the juvenile system instead of in the adult system and I take that into account here." Kyle, who reproduced only a single page of transcript in his appendix, attributes this comment to the sentencing court. In reality, it was a comment by the assistant district attorney in the context of her sentencing recommendation.

Additionally, we note that although he does not develop it into any sort of argument, Kyle mentions that his motion for sentence modification should have gone before his original sentencing judge. This would have been impossible: Kyle filed his motion in June 2014, but his original sentencing judge, the Honorable Charles F. Kahn, Jr., retired from the bench in November 2013.

¶13 If the circuit court holds a preliminary examination for a juvenile subject to original adult court jurisdiction because of WIS. STAT. § 938.183(1), the circuit court must determine whether there is probable cause to believe the juvenile committed the charged offense. *See* WIS. STAT. § 970.032(1). If the circuit court determines there is probable cause, then the circuit court "shall determine whether to retain jurisdiction or to transfer jurisdiction" to the juvenile court. *See* WIS. STAT. § 970.032(2). Kyle was not before the circuit court because of § 938.183(1); he was there because he was an adult at the time of charging. *See* ***Montgomery***, 148 Wis. 2d at 601. Thus, the reverse waiver provision of § 970.032(2) did not apply to him, and waiver into juvenile court was not warranted.

II. The Recantation

¶14 One of Kyle's victims, the victim in count two, supposedly recanted his allegations through an affidavit.[5] Kyle appears to be claiming that this is a new factor warranting sentence modification and that, because the victim recanted, the circuit court originally sentenced him on inaccurate information (*i.e.*, the fact that Kyle sexually assaulted the victim).

¶15 A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *and see* ***State v.***

[5] The circuit court noted that the affidavit was not actually signed by the victim.

Harbor, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

¶16 Also, "a criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

¶17 Kyle's problem with the recantation is three-fold. First, as the circuit court noted, the "recantation" is not exactly that. The statement says that "[o]n April 95 through 2001, I mistakenly stated that Walter E. Kyle touched me in a sexual way," but the victim did not actually report to authorities that Kyle had sexual contact with him prior to May 2001. Moreover, the victim simply stated that he does not *recall* Kyle touching him inappropriately. Second, Kyle admitted during his guilty plea colloquy that he had sexual contact with the victim. Finally, newly discovered recantation evidence must be corroborated by other newly discovered evidence, *see* ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997), which Kyle does not have. It was not error for the circuit court to disregard the unsubstantiated recantation.

¶18 Kyle was not erroneously tried in adult court. Although he was fifteen years old when he committed the crimes to which he pled, he was an adult when charged and he has failed to make a *prima facie* showing that the State

intentionally delayed charging him so as to avoid juvenile court. Further, there was no basis for resentencing because the supposed recantation was, at a minimum, uncorroborated.[6] Accordingly, the circuit court did not err in denying the motion for sentence modification.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[6] At the end of his brief, Kyle appears to be claiming ineffective assistance of trial counsel. The argument is not developed but, to the extent it relates to trial counsel's purported failure to seek to have Kyle's case sent to juvenile court, there is, as explained herein, no basis on which the circuit court could have granted that request. Counsel is not ineffective for failing to pursue meritless issues. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).