

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 20, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2691-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF KYLE W.F., A
PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KYLE W.F.,

RESPONDENT-APPELLANT.

APPEAL from an order circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Kyle F. appeals the trial court's order finding that he is delinquent and directing various dispositions. He contends the evidence was insufficient to prove that venue was in Marquette County beyond a reasonable doubt. We disagree and conclude the evidence was sufficient to establish venue in Marquette County, and we therefore affirm.

¶2 The petition was filed in Marquette County on February 12, 1999, alleging that on January 7, 1999, Kyle, date of birth 9/24/88, engaged in disorderly conduct in violation of WIS. STAT. § 947.01 arising out of an incident that occurred in Spring Hill Grade School. A fact-finding hearing took place on April 19, 1999, pursuant to WIS. STAT. § 938.31. At the beginning of the hearing, the district attorney stated that the incident did not occur in Marquette County,² that it was therefore necessary to establish residence in Marquette County to prove proper venue and Jim Pritzkow from the Marquette County Department of Social Services would testify as to venue. After the district attorney presented two witnesses concerning the January 7 incident and they were cross-examined by Kyle's attorney, the district attorney presented Pritzkow as a witness.

¶3 Pritzkow testified that he worked for the Marquette County Department of Human Services as a social worker and was currently assigned to the matter involving Kyle. The district attorney then asked these two questions:

Q. Are you familiar or do you know whether or not Kyle lives in Marquette County?

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). This appeal has been expedited. WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1997-98 version.

² The petition alleged that the incident took place in Marquette County, so we understand the district attorney at the fact-finding hearing to be acknowledging that was an error.

A. To the best of my knowledge, I believe that he does.

Q. Do you know what his address is?

A. Not off hand. I know that it is in Briggsville.

This concluded the district attorney's questioning of Pritzkow and Kyle's attorney did not cross-examine him.

¶4 At the close of evidence, the court found that Kyle committed the acts complained of in the petition. However, because Kyle's attorney asserted that venue had not been established in that there was no testimony on where Kyle was living on January 7, 1999, the court scheduled another hearing. In the interim, Kyle's attorney filed a motion to dismiss the petition on the ground that there was no evidence presented at the fact-finding hearing as to the residence of the child on the date of the incident, January 7, 1999, and therefore venue had not been established.

¶5 At the hearing on the motion to dismiss, Kyle's attorney argued that, although there was testimony at the fact-finding hearing that Kyle lived in Briggsville, parts of Briggsville are in different counties. She also argued that there was no testimony that established where he lived on the date of the incident. The district attorney pointed out the critical point in time for residence was not the date of the incident but the date the petition was filed; the petition asserted that Kyle's address was a Briggsville address; and the testimony of Pritzkow at the fact-finding hearing was sufficient to establish that Kyle lived in Briggsville and lived in Marquette County at the time the petition was filed. The court found that it understood the question to Pritzkow "whether or not Kyle lives in Marquette County" and his answer to mean that Kyle "live[d] in Marquette County the entire time that is pertinent to this petition," and denied the motion. The court subsequently entered a dispositional order.

DISCUSSION

¶6 In a juvenile delinquency proceeding, venue lies in:

- (a) The county where the juvenile resides.
- (b) The county where the juvenile is present.
- (c) In the case of a violation of state law ... the county where the violation occurred....

WIS. STAT. § 938.185(1). The State has the burden of proving venue beyond a reasonable doubt. *See State v. Corey J.G.*, 215 Wis. 2d 395, 409, 572 N.W.2d 845, 850 (1998). Since the district attorney conceded that the alleged violation of state law did not occur in Marquette County, venue was proper in Marquette County only if Kyle was either present in Marquette County at the time the petition was filed, *see id.* at 414, 572 N.W.2d at 852, or resided in Marquette County at the time the petition was filed. *See id.* at 419, 572 N.W.2d at 854. Where the juvenile “resides” means the juvenile’s “domicile,” which means living in that locality with intent to make it a fixed and permanent home. *See id.* at 415-16, 572 N.W.2d at 853.

¶7 We do not reverse a conviction based upon the State’s failure to establish venue unless the evidence, viewed most favorably to the State and the conviction, is so insufficient that there is no basis “upon which a trier of fact could determine venue beyond a reasonable doubt.” *Id.* at 408, 572 N.W.2d at 850. A minor’s domicile is generally that of his or her parent or parents. *Id.* at 418, 572 N.W.2d at 854.

¶8 On appeal, Kyle argues there was no evidence showing that he was present in Marquette County on February 12, 1999, and that the evidence Pritzkow presented concerning where he resided was insufficient to prove beyond a

reasonable doubt that he was domiciled in Marquette County at the time the petition was filed for several reasons. First, Pritzkow's answer to that question was qualified by "to the best of my knowledge" and "I believe," and no foundation for his opinion was presented other than that he was assigned "currently" to Kyle's case. Second, it was not a reasonable inference from Pritzkow's answer that Kyle was domiciled in Marquette County at the time the petition was filed. Third, it was not a reasonable inference from Pritzkow's answer to that question that Kyle domiciled in Marquette County as opposed to living there temporarily. With respect to Pritzkow's answer to the second question—that Kyle had a Briggsville address—Kyle argues that it is insufficient because, as the trial court acknowledged in response to this argument at the hearing on the motion to dismiss, a person with a Briggsville address could be living in three different counties. He also argues that address does not establish domicile, and that this answer concerned Kyle's address at the time of the April 19 fact-finding hearing rather than the time that the petition was filed on February 12.

¶9 We conclude Pritzkow's testimony was sufficient to establish that Kyle either resided in Marquette County within the meaning of WIS. STAT. § 938.185(1) or was present there on the date the petition was filed. We first reject Kyle's challenges to the foundation of Pritzkow's testimony that "to the best of his knowledge" "he believed" Kyle lived in Marquette County. Kyle's counsel made no objection to this testimony based on lack of foundation and did not cross-examine. It is a reasonable inference that Pritzkow, as the social worker assigned to the case, had contact with Kyle and knew where lived and the circumstances under which he was living. It is also reasonable to infer the answer that Pritzkow gave was not limited to the date of the hearing in April, but included, as the court

put it, “the entire time that is pertinent to this petition,” including the date the petition was filed.

¶10 With respect to Pritzkow’s answer concerning a Briggsville address, it is reasonable to infer from that answer that he knew where Kyle lived. The fact that a person with a Briggsville address may live in one of three counties³ does not mean that it is unreasonable to infer that Kyle lived in the part of Briggsville that was in Marquette County, given Pritzkow’s answer to the preceding question.

¶11 We also do not agree that Pritzkow’s testimony established neither domicile nor presence in Marquette County at the time the petition was filed. Whether the Briggsville address was his domicile in the sense of his living there with intent to make it a fixed and permanent home (or was his parents’ domicile), or whether he was only temporarily living there, is not significant. If the former is the case, subsec. (a) is satisfied; if the latter is the case, subsec. (b) is satisfied.

¶12 We do not agree that this case is factually similar to *Corey*. There the only testimony was that the incident occurred at a place in another county and that the child was living in that other county at the time of the incident, and for a more extended period of time. *See id.* at 402, 419, 572 N.W.2d at 847, 855. In this case, there was no evidence that Kyle was at anytime living in a county other

³ There is no evidence in the record establishing this. However, in Kyle’s motion to dismiss the petition he requested that the court take judicial notice of this fact, *see* WIS. STAT. § 902.01, and we treat the court’s comment at the hearing as taking the requested judicial notice.

than Marquette County, and, more importantly, there was the testimony of Pritzkow.⁴

By the Court.—Order affirmed.

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

⁴ We observe that Kyle and his mother and father had been under the supervision of the Marquette County Department of Health and Social Services under a consent decree that was to terminate on January 15, 1999. That was vacated in January 1999 because of a violation of the conditions and the petition for a child in need of protection and services (JIPS) was reinstated. However, apparently a plea hearing was never scheduled on that petition for a child in need of protection and services because of the delinquency petition filed in this matter. Proceedings for children in need of protection and services are subject to the same venue requirement as for delinquency proceedings. *See* WIS. STAT. § 938.185(1). The record shows that an earlier JIPS petition was originally filed in Columbia County, but was ordered transferred to Marquette County by order dated October 13, 1997, on the ground that Kyle had then resided for six months or more in Marquette County. The documents in the record after the transfer to Marquette County list the same Briggsville address for Kyle's mother, father and Kyle, as stated in the delinquency petition filed on February 12, 1999.

