COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1476 **Cir. Ct. No. 2013JV369A**

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

IN THE INTEREST OF D. T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] D.T., a juvenile previously found delinquent, appeals the trial court's order lifting the stay of his five-year sentence to the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14).

(continued)

Serious Juvenile Offender Program. He argues that because the State's motion seeking to lift the stay of his earlier five-year sentence only referenced the fact that he had been recently charged with two new felony counts, and included nothing regarding the extensive procedural history of the case, the trial court erroneously exercised its discretion and violated D.T.'s due process right. This allegedly occurred when the trial court usurped the role of the prosecutor by taking judicial notice of its file *sua sponte* and calling a witness. Ultimately, the trial court determined that by a preponderance of the evidence, D.T. had violated a condition of his additional dispositional order.

¶2 This court is satisfied that, under the unusual circumstances presented here, D.T. was provided with sufficient notice to satisfy due process in the State's motion to lift the stay of D.T.'s sentence. Therefore, for reasons other than those the trial court relied upon, this court is satisfied that ample evidence in the record supports the trial court's finding that by a preponderance of the evidence, the motion to lift the stay should be granted and this court affirms.

BACKGROUND

¶3 On October 18, 2013, a delinquency petition was filed against D.T. The petition alleged that D.T. had committed an armed robbery with threat of force. According to the petition, the victim told the police that on October 15, 2013, he was walking on West Vliet Street back to the Marquette University campus. He had just made a phone call and had put his Apple iPhone back in his pocket when D.T. approached him and told him to give him (D.T.) his phone.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

When the victim did not immediately comply, D.T. claimed that he would shoot the victim if he did not give him the phone. D.T. made a gesture suggesting that he had a gun under his shirt. Fearful that he would be shot, the victim gave D.T. his phone. The victim then contacted the police, and using his "find my iPhone" app, he was able to view the phone's location. The location turned out to be D.T.'s home. The victim viewed a photo array and identified D.T. as the armed robber. A search warrant was issued for the house, and in executing it, the police found the victim's iPhone, and five additional phones, inside D.T.'s bedroom.

¶4 On November 21, 2013, D.T. entered an admission to the petition, and the trial court found him delinquent. As a result, the trial court ordered that D.T. be placed in the Lincoln Hills School, a secured correctional facility, for a period of five years under the Serious Juvenile Offender Program. This disposition was stayed, and he was placed on probation. The trial court placed him under the supervision of the Milwaukee County Wraparound and FOCUS Programs for a period of one year. Various conditions were placed on D.T., including:

> - Commit no new law violations arising to the level of probable cause;
>
> - Obey rules of the placement, home, and school;
>
> - Attend school daily, on time, every class and follow school rules, including no unexcused absences;
>
> - No use of alcohol or illegal drugs;
>
> - No contact with weapons of any kind;
>
> - No contact with victim Austin Lens
>
> - Cooperate with the Department, including making all scheduled appointments with your probation officer and meetings or counseling sessions deemed appropriate by the Department;

> - Pay restitution, jointly and severally, in the amount of $400.00;
>
> - Perform 20 hours of community service;
>
> - Write a letter of responsibility/apology to the victim to be submitted to the PO within 30 days; and
>
> - Cooperate and participate with AODA and any recommended treatment, including random urine screens.

D.T. had difficulties following the conditions imposed on him. This resulted in a hearing being held on August 25, 2014, at which D.T. was given a sanction of ten days in secure detention for violating his probation. Another hearing was held on September 22, 2014, at which time D.T. was again found not to be in compliance with the conditions placed upon him. In the memo submitted to the court, the monitoring agency explained that not only did it have problems locating D.T. and his mother, but also D.T. violated many of the conditions placed upon him. At that time, he was given a sanction of ten days with six of those days stayed.

¶5 On August 29, 2014, the State filed a motion to lift the stay of the five-year sentence. That motion was later withdrawn. On September 26, 2014, days after the hearing that resulted in a sanction, the worker assigned to D.T. filed a petition with the court asking for a one-year extension of D.T.'s dispositional order. The trial court set a hearing date of October 27, 2014. On October 27, 2014, a letter from Wraparound to the trial court, dated October 16, 2014, was filed, and that letter stated that D.T. was in the Milwaukee County Jail awaiting trial on two felony counts of Operation of a Vehicle without the Owner's consent. At that hearing, the trial court set November 19, 2014 as the date for a hearing on the extension motion and the State's motion to lift the stay. The court also ordered that if D.T. made bail on the adult felony charges, he was to be placed in service detention until his next court date.

¶6 Several days later, on October 31, 2014, the State filed its second motion to lift the stay on D.T.'s sentence. In the petition, the State included the following reason why the stay should be lifted: "The juvenile has violated the conditions of the stay of execution of the SJO [Serious Juvenile Offender] order" as D.T. had been charged with two felony counts of Operating a Motor Vehicle Without the Owner's Consent.[2] At the combined hearing at which the request for an extension of the dispositional order and the motion to lift the stay were both scheduled, D.T.'s attorney vigorously objected to the trial court relying on any information other than that found in the motion to lift the stay. D.T.'s attorney argued that due process required the trial court to limit the inquiry to the fact that he had been arrested for two new felonies because the motion did not state any other reasons why the stay should be lifted.

¶7 At the hearing, the trial court stated that it did not find the fact of D.T.'s new charges to be sufficient to lift the stay. However, the trial court determined that it could take judicial notice of its extensive file with D.T. as support for the motion, and the trial court also, *sua sponte*, called a witness who supervised D.T. This witness testified to D.T.'s various violations while on probation. At the conclusion of the hearing, the trial court ordered the stay lifted and this appeal follows.

[2] The criminal complaint actually states that he was charged with one count of Operating a Motor Vehicle Without Owner's Consent, as party to a crime, and one count of Conspiracy to Commit Operating a Motor Vehicle Without Owner's Consent.

ANALYSIS

¶8 D.T. argues that the trial court erroneously exercised its discretion when it lifted the stay of his five-year sentence. He submits that the motion to lift the stay never gave him proper notice of the allegations that the trial court relied upon when determining whether or not to lift the stay. He contends that the trial court violated his due process rights when it purportedly usurped the role of the prosecutor when it took judicial notice of its file concerning D.T. and called a witness to validate the information found in the file concerning D.T.'s many violations.

¶9 WISCONSIN STAT. § 938.34(4m) permits a juvenile court to order an adjudged delinquent to a secured correctional facility. WISCONSIN STAT. § 938.34(4h) describes the Serious Juvenile Offender Program and the requirement for such placement. Pursuant to WIS. STAT. § 938.34(16), a trial court, after ordering a disposition, may enter an additional order staying the execution of the dispositional order contingent on the juvenile's satisfactory compliance with any conditions the court specifies in the dispositional order. WISCONSIN STAT. § 938.34(16) directs that a court "may not impose the original dispositional order unless the court finds by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order."

¶10 D.T. seeks review of the trial court's discretionary decision to lift the stay on his five-year sentence. We will sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991), *overruled on other grounds*

by ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. "Our task as the reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion." ***Hughes v. Hughes***, 223 Wis. 2d 111, 120, 588 N.W.2d 346 (Ct. App. 1998).

¶11 D.T. contends that he was not afforded due process when the trial court went beyond the allegations in the motion to lift the stay, took judicial notice of its own file, and, *sua sponte*, called a witness to validate information found in its file.

¶12 There is no doubt that due process requires effective notice before either property or liberty may be taken. *See* ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 313-15 (1950); ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 583-85, 326 N.W.2d 768 (1982). WISCONSIN STAT. § 938.34(16) recognizes this and provides that "[i]f the juvenile violates a condition of his or her dispositional order, the agency supervising the juvenile or the district attorney … shall notify the court and the court shall hold a hearing within 30 days after the filing of the notice to determine whether the original dispositional order should be imposed.…" Here, there was both effective, actual notice and an adversarial hearing. The petition filed on October 31, 2014, notified the trial court that D.T. had violated a condition of the stay order. It also notified D.T. that the State sought the imposition of the stayed sentence because D.T. had committed new crimes. The petition gave both the trial court and D.T. sufficient due-process notice of the alleged violation, and its specifics were spelled out in the attached criminal complaint. D.T. was neither sandbagged nor surprised. This procedure complied with due process. *See* ***Thompson***, 109 Wis. 2d at 583-85. Moreover, the trial court had in front of it the information compiled to support the extension of D.T.'s dispositional order. Given that D.T. had notice that an

extension was being sought, and the motion outlined D.T.'s lack of compliance, surely, the trial court could have relied on this information in deciding whether to lift the stay.

¶13 This court's reading of the relevant statutes suggests that the trial court need not have taken judicial notice of its file nor called a witness to support such a finding. This is because the motion to lift the stay noted that D.T. had been charged with two new felonies in adult court, and the motion attached a copy of the criminal complaint in which D.T. admitted to his involvement. At the motion hearing, the trial court was advised that the felony cases were scheduled for a projected guilty plea. Although D.T.'s attorney stated D.T. had not yet made up his mind whether he would be pleading guilty, his attorney did confirm that probable cause had been found on the new charges. Indeed, the State reported that D.T. had gone through the preliminary hearing stage and that probable cause had already been found. Inasmuch as the first condition of D.T.'s original dispositional order finding him delinquent stated that he was to "[c]ommit no new law violations arising to the level of probable cause," the trial court had ample evidence to lift the stay order based upon a preponderance of the evidence without resorting to additional information. As a result, we leave for another day the question of the propriety of the court's taking judicial notice of its file and the trial court's calling of a witness *sua sponte*.

By the Court.—Order affirmed.

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