



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 13, 2016

To:

Hon. Richard A. Bates
Circuit Court Judge
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Perry L. Folts
Deputy Dist. Atty.
51 S. Main St.
Janesville, WI 53545

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mitchell J. Sherman
611 Parish Street
Delavan, WI 53115

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

2015AP163-CR

State of Wisconsin v. Mitchell J. Sherman (L.C. # 2006CF2625)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Mitchell J. Sherman appeals *pro se* from an order denying his motion for sentence modification. Sherman's arguments boil down to two categories of challenges: (1) whether Sherman was properly charged and convicted in the adult system rather than the juvenile system, and (2) whether the circuit court adequately considered Sherman's age at sentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.23 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On August 28, 2006, Sherman was charged with one count of repeated sexual assaults against the same child, WIS. STAT. § 948.025(1)(b) (2005-06). Law enforcement first became aware of the allegations in July 2006. Sherman turned seventeen years old in February of 2006. Sherman entered a guilty plea to a single count information alleging June 30, 2006, as the offense date. The circuit court imposed a seven-year term of probation. Probation was later revoked, and the circuit court sentenced Sherman to six years' initial confinement and four years' extended supervision. Sherman filed a motion for sentence modification which the circuit court denied.²

One of Sherman's challenges must be dispensed with on jurisdictional grounds. He argues that statutes such as WIS. STAT. §§ 990.01(3)³ and 938.02(10m), which define "adult" and "juvenile," are unconstitutional. Because the record does not demonstrate that Sherman complied with WIS. STAT. § 806.04(11), which requires that he serve the attorney general with the pleadings alleging the unconstitutionality at the circuit court level, we are without subject matter jurisdiction to consider his challenge. *Walt v. City of Brookfield*, 2015 WI App 3, ¶36 n.7, 359 Wis. 2d 541, 859 N.W.2d 115 (2014); *see also* WIS. STAT. § 972.11(1) (rules of practice in civil actions apply in all original proceedings).

Sherman also complains that the circuit court did not conduct a *Becker* hearing to determine whether the State manipulated charging procedures to avoid juvenile court jurisdiction

² Sherman's motion included claims that collaterally attack his conviction, and, to that extent, it was in part a motion under WIS. STAT. § 974.06.

³ WISCONSIN STAT. § 990.01(3) defines "adult" as "a person who has attained the age of 18 years, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, 'adult' means a person who has attained the age of 17 years."

over Sherman. *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976). Sherman was seventeen years old at the time he was charged with repeated sexual assault of a child and seventeen years old when he committed the series of assaults for which he was charged in the information and later convicted. Law enforcement became aware of the allegations in the summer of 2006 when Sherman was already seventeen and promptly charged him. Thus, pursuant to WIS. STAT. § 938.02(10m)⁴ Sherman was not a “juvenile,” but was an “adult” as defined in WIS. STAT. § 938.02(1)⁵ both at the time he was charged and at the time of the offense of conviction, and, therefore, was subject to criminal, rather than juvenile, court jurisdiction from the date of the offense through charging. *Becker* requires a hearing only in instances in which the offense was allegedly committed at a time when the defendant was a “juvenile,” but not charged until the defendant was an “adult.” See *Becker*, 74 Wis. 2d at 679. Sherman has no basis to request a *Becker* hearing.

Sherman’s next two issues are grounded in his baseless assertion that he qualified as a “juvenile,” despite the governing statutes. Sherman complains that the circuit court erred in conducting neither a “waiver” proceeding, WIS. STAT. § 938.18(1), which would have determined whether he should be sent from the juvenile court to the criminal court nor a “reverse waiver” proceeding, WIS. STAT. § 970.032(2), which would have determined whether he should

⁴ WISCONSIN STAT. § 938.02(10m) provides: “‘Juvenile,’ when used without further qualification, means a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, ‘juvenile’ does not include a person who has attained 17 years of age.”

⁵ WISCONSIN STAT. § 938.02(1) provides: “‘Adult’ means a person who is 18 years of age or older, except that for purposes of investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance, ‘adult’ means a person who has attained 17 years of age.”

be sent from the criminal court to the juvenile court. Neither provision is applicable to his situation because each applies only in cases in which the defendant meets the definition of “juvenile,” and Sherman did not.⁶ The criminal court properly maintained jurisdiction over Sherman from start to finish.

Finally, we reject Sherman’s argument that the sentence the circuit court imposed failed to take his age into consideration and that he should have been given a sentence less than one that would have been given to an adult. Our review of Sherman’s original sentencing reveals the circuit court’s concern with imposing probation, which was the disposition recommended by defense counsel and the prosecutor jointly. Noting Sherman’s young age and lack of criminal history, and the availability of resources in the community, the circuit court acceded to the recommended probation disposition, but imposed it for seven years rather than the five jointly recommended. The circuit court made clear its hesitation in imposing probation for felony conduct that Sherman perpetrated over the course of years against a victim who was considerably younger than Sherman and who bore a baby as a result, describing the crime as “one of the most serious felonies that we have in Wisconsin.” With a potential maximum sentence of twenty-five years in prison and fifteen years of extended supervision, the circuit court observed the probation disposition was “no where near the maximum,” and indicated its desire to require more than a year in the county jail as a condition if that were permissible, which it was not. The circuit court,

⁶ “Reverse waiver” is also confined to specific offenses, WIS. STAT. § 938.183(1), which fall under original criminal court jurisdiction despite the defendant’s juvenile status. Sherman’s offense is not one of those included.

despite its reservations due to the seriousness of the offense, was swayed that probation was appropriate. The circuit court properly exercised its sentencing discretion.

Similarly, when the circuit court sentenced Sherman after revocation, it noted that it had imposed probation due to Sherman's "very young" age at the time, and emphasized that it was now time for Sherman, then twenty-one, to "grow up," sentencing him to six years in prison and four years of extended supervision. The circuit court concluded that Sherman was "incorrigible," and that Sherman refused to acknowledge that he was required to comply with the restrictions probation placed upon him. The circuit court also noted that Sherman was an untreated sex offender and that Sherman had not been successful in community-based services while on probation. We conclude that the circuit court considered the requisite relevant sentencing factors and properly exercised its sentencing discretion following revocation.⁷

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

⁷ Sherman filed a WIS. STAT. RULE 809.30(2)(h) postconviction motion to amend the sentence imposed following revocation, which the circuit court granted. However, the motion merely sought amendment of the judgment of conviction to deem the sentence a Risk Reduction Sentence under former WIS. STAT. § 973.031 (2009-10) (*repealed by 2011 Wis. Act 38, § 92*), and did not go to the merits of the sentence imposed. We exercise our discretion to review the sentence on its merits.