COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2000

Cornelia G. Clark
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. 00-0372-FT

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

IN THE INTEREST OF AMANY E., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

AMANY E.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Reversed and cause remanded with directions*.

¶1 DEININGER, J.[1] Amany E. appeals an order which adjudicated her delinquent. She claims the trial court erred in concluding that it lacked the authority to dismiss the delinquency petition and refer the matter to the juvenile intake worker for deferred prosecution. We agree that this was an error of law, and accordingly, we reverse and remand to permit the trial court to determine whether, in the exercise of its discretion, it should grant Amany's motion for dismissal under WIS. STAT. § 938.21(7).[2]

¶2 The State filed a petition alleging that Amany was delinquent on the basis of her committing two criminal offenses. Amany moved the court for an order dismissing the petition and referring the matter to the intake worker for deferred prosecution, alleging that such an order would be "in the best interests of the juvenile and the public." *See* WIS. STAT. § 938.21(7). The State disputed that the court had the authority to grant the relief Amany sought, and it requested the court to "hear argument of counsel on the issue of whether the court has the power to grant the Motion to Dismiss." The State asserted that the "legal issues" should be resolved before taking evidence on the motion and "before witnesses are inconvenienced." Amany agreed that the court should first consider the parties'

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1997-98). This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 938.21(7) provides as follows:

> (7) DEFERRED PROSECUTION. If the judge or juvenile court commissioner determines that the best interests of the juvenile and the public are served, he or she may enter a consent decree under s. 938.32 or order the petition dismissed and refer the matter to the intake worker for deferred prosecution in accordance with s. 938.245.

arguments "on the Court's ability to grant the relief requested," and thereafter schedule evidentiary proceedings if it concluded that it had the requisite authority.

¶3 After hearing the parties' arguments on the issue, the court surmised that WIS. STAT. § 938.21(7) might be a "vestigial organ" which the legislature inadvertently carried over from ch. 48 to the new Juvenile Code, ch. 938. The court reasoned that because a dismissal under the cited provision was necessarily "without prejudice," and because the district attorney is authorized to terminate a deferred prosecution agreement by filing a delinquency petition,[3] it "makes no sense" to conclude the legislature intended courts to engage in a meaningless gesture which could be overruled by the prosecutor. It thus rejected "the reading that defense counsel is proposing." In concluding its decision, however, the court also remarked: "I don't believe that if there is authority in the statute it is a meaningful authority, so I would decline to exercise it if I have it."

¶4 Upon the court's denial of her dismissal motion, Amany tendered pleas admitting the commission of the two offenses, which the court accepted following a thorough colloquy.[4] The court subsequently entered a dispositional order which incorporated an adjudication of delinquency based on Amany's pleas. She appeals.

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[3] *See* WIS. STAT. § 938.245(6).

[4] The State does not argue on appeal that Amany is precluded from challenging the court's ruling on her motion to dismiss under the "guilty plea waiver rule." *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986) ("The general rule is that a plea of guilty or its functional equivalent, no contest, constitutes a waiver of nonjurisdictional defects and defenses."). We thus do not address whether this rule applies when a juvenile enters a plea admitting the allegations of a delinquency petition.

¶5 We agree with Amany that the language of WIS. STAT. § 938.21(7) plainly authorizes the juvenile court to "order the [delinquency] petition dismissed and refer the matter to the intake worker for deferred prosecution…." The State does not argue that this language is ambiguous, nor does it provide any reason for this court to conclude that the inclusion of this language in ch. 938 is attributable to legislative inadvertence. Rather, the State's argument is simply that it would be unwise to grant the juvenile court authority to order dismissal of a petition in favor of deferred prosecution, when the district attorney is concurrently granted "veto" authority over deferred prosecution agreements. It asserts that granting the court this authority is inconsistent with the legislature's clear mandate that the executive branch, in the form of the district attorney, be given the ultimate discretion to decide which juvenile cases are prosecuted and which are deferred. We disagree.

¶6 The supreme court has recognized that, although the legislature intended to enhance notions of "personal accountability" and "community protection" when it created ch. 938, it "did not lose sight of the fact that the [Juvenile Code] provisions are distinct from the criminal code provisions…." *See* ***State v. Hezzie R.***, 219 Wis. 2d 848, 871-73, 580 N.W.2d 660 (1998). In its discussion, the court specifically pointed to WIS. STAT. § 938.21(7), noting that the subsection vests in "a judge or juvenile court commissioner … the discretion to dismiss a petition and refer a juvenile's case to a social worker for deferred prosecution, if it is in 'the best interests of the juvenile and the public.'" ***Id***. at 874. We therefore cannot accept the State's argument that the legislature's inclusion of § 938.21(7) was a "mistake."

¶7 It may well be that WIS. STAT. §§ 938.21(7) and 938.245(6) are inconsistent with each other, or that their coexistence is unwise. Nonetheless, these are not proper justifications for ignoring the plain language of § 938.21(7).

The trial court concluded that the district attorney's authority under § 938.245(6) to reject a deferred prosecution agreement by refiling the delinquency petition effectively "trumps" the court's authority to dismiss under § 938.21(7).[5] Amany argues, however, that the statutes may easily be reconciled by concluding that, after a court has dismissed a petition under § 938.21(7) and referred the matter to the intake worker for deferred prosecution, the district attorney may only refile on the same allegations if he or she has acquired new evidence. *Cf.* ***Wittke v. State ex rel. Smith***, 80 Wis. 2d 332, 259 N.W.2d 515 (1977).

¶8 We need not decide, however, who, between the district attorney and the court, holds the winning hand in the event of a standoff over whether a particular juvenile delinquency prosecution should proceed. Because there has been no judicial decision to dismiss in the present case, and consequently no subsequent prosecutorial decision to refile the instant charges against Amany, the facts necessary for that determination are not before us. For the present, it is sufficient for us to conclude that the legislature meant what it said in WIS. STAT. § 938.21(7): "If the judge or juvenile court commissioner determines that the best interests of the juvenile and the public are served, he or she may … order the petition dismissed and refer the matter to the intake worker for deferred prosecution in accordance with s. 938.245."

¶9 The State also argues that the trial court did not decide that it *could not* dismiss the petition, but that it *would not* do so. We agree with Amany, however, that the agreement of the parties to address the "legal issues" first, their

[5] The trial court, in analogizing the perceived statutory conflict to a different card game, remarked that "the Legislature is going to deal four aces to the [S]tate and even if I have two pairs, I think I'm in trouble."

arguments at the motion hearing, and the court's own decision all belie this assertion. The court did comment in passing at the conclusion of its decision that it "would decline to exercise" its authority to dismiss under WIS. STAT. § 938.21(7) even if had concluded it had that authority, but this was premised on the court's view of the apparent futility of doing so, not on a consideration of whether dismissal and deferred prosecution would be in "the best interests of the juvenile and the public."

¶10 After considering those interests, the court may well decide to again deny Amany's motion. Our reversal is for the limited purpose of permitting the court, now knowing that it may do so if it chooses, to consider whether it should dismiss under WIS. STAT. § 938.21(7). *See* ***State v. Peterson***, 222 Wis. 2d 449, 460, 588 N.W.2d 84 (Ct. App. 1998) ("When the trial court has made an error that underlies the exercise of its discretion, we may not exercise the trial court's discretion for it, but are to remand to permit the trial court to exercise its discretion."). Amany has not sought in this appeal to withdraw her pleas admitting the offenses alleged in the petition, nor has she challenged the disposition the court ordered. Accordingly, if the court determines on remand that a dismissal and deferral under § 938.21(7) is not in "the best interests of the juvenile and the public," the delinquency adjudication and dispositional order shall stand. *See* ***Peterson***, 222 Wis. 2d at 460. Pending that determination, we encourage the parties to cooperate in preserving the status quo insofar as Amany's present placement, programming and services are concerned, and we authorize the trial court to enter whatever interim orders may be appropriate to that end.

By the Court.—Order reversed and cause remanded with directions.

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