COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2395-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NATHAN LISZEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Nathan Liszewski appeals from a judgment of conviction entered after he pleaded guilty to attempted first-degree intentional homicide, contrary to §§ 940.01(1) and 939.32, STATS. Liszewski also appeals from an order denying his postconviction motion to withdraw his plea. In his motion, Liszewski claimed that his counsel was ineffective by not appealing the

juvenile court's decision to waive him into adult court. The trial court found, without a hearing, that Liszewski was not prejudiced, reasoning that any appeal would not have been successful because: (1) § 48.366(1)(a)1, STATS., 1993-94, could not be construed to permit a juvenile court to extend jurisdiction to age twenty-five in cases involving attempted first-degree intentional homicide, and; (2) § 48.366(1)(a)1 was constitutional. Liszewski claims that the trial court was incorrect, and challenges the trial court's interpretation of the statute and the statute's constitutionality. We agree with the trial court and affirm.

I. BACKGROUND.

On February 26, 1995, Liszewski repeatedly stabbed James Eugene Bohorquez with a large butcher knife. Bohorquez survived, and an amended Petition for Determination of Status - Alleged Delinquent Child was filed, alleging that Liszewski had committed attempted first-degree intentional homicide, contrary to §§ 940.01(1) and 939.32, STATS. A petition for waiver of jurisdiction was also filed.

At the waiver hearing, the juvenile court found that § 48.366(1)(a)1, STATS., 1993-94, did not permit it to extend its jurisdiction in cases involving attempted first-degree intentional homicide, and decided to waive Liszewski into adult court. In explaining its reasoning, the juvenile court stated, "[I]f I had the opportunity today to extend jurisdiction to age 25, I think that probably would be the correct answer in this particular case, but I don't have that opportunity. I'm not legislatively provided with it."

Following waiver, a criminal complaint was filed charging Liszewski with attempted first-degree intentional homicide. Liszewski pleaded guilty and was sentenced to twenty-five years in prison. Liszewski subsequently

filed a postconviction motion to withdraw his plea based on ineffective assistance of counsel claims. The motion alleged that Liszewski's counsel was ineffective by failing to appeal the juvenile court's decision to waive Liszewski into adult court. The trial court denied the motion, finding that an appeal would not have been successful. Liszewski now appeals.

II. ANALYSIS.

Liszewski's motion to withdraw his plea alleged that his trial counsel was ineffective by not appealing the juvenile court's decision to waive him into adult court, by not advising him of his right to appeal that order, and by not advising him that a guilty plea in the circuit court could waive his right to pursue such an appeal. On appeal, Liszewski claims that the trial court erred by denying his motion to withdraw his plea without an evidentiary hearing.

If a motion alleges facts which, if true, would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion alleges such facts is a question of law which we review *de novo*. ***Id.*** However, if the motion fails to allege sufficient facts, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to deny the hearing. ***Id.*** at 309-10, 548 N.W.2d at 53. We will only reverse this decision upon an erroneous exercise of discretion. ***Id.*** at 311, 548 N.W.2d at 53.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington,*** 466 U.S. 668, 690 (1984); ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. To prove deficient performance, a defendant must

show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.*** Additionally, we will not find a defendant's counsel to be deficient for failing to pursue meritless arguments on appeal. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. However, if this court concludes that counsel's performance was not deficient, we need not address the prejudice prong. See ***Strickland***, 466 at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Proof of either the deficiency or the prejudice prong, however, is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

Liszewski claims that his trial counsel was ineffective by not appealing the juvenile court's decision to waive him into adult court. Liszewski claims that an appeal would have been successful because either: (1) § 48.366(1)(a)1, STATS., 1993-94, can be construed to permit a juvenile court to extend jurisdiction to age twenty-five in cases involving attempted first-degree intentional homicide, or; (2) § 48.366(1)(a)1 is unconstitutional. We conclude that the trial court correctly held that the statute cannot be construed in the manner Liszewski prefers, and that the statute is constitutional. Therefore, we conclude that any appeal would have been meritless; thus, Liszewski's counsel was not deficient. *See* ***Toliver***, 187 Wis.2d at 360, 523 N.W.2d at 118.

A. Statutory Interpretation Claims.

The juvenile court based its decision to waive Liszewski into circuit court partly on its belief that § 48.366(1)(a)1 did not permit it to extend its jurisdiction to age twenty-five in Liszewski's case. The trial court agreed and found that § 48.366(1)(a)1 did not permit the juvenile court to extend its jurisdiction to age twenty-five in Liszewski's case, and that any appeal premised on a claim that the statute could be so interpreted would have been meritless. We agree with the trial court.

The construction of a statute involves a question of law, which we review *de novo*. ***State v. Ambrose***, 196 Wis.2d 768, 776, 540 N.W.2d 208, 211 (Ct. App. 1995).

> [T]he purpose of statutory construction is to ascertain and give effect to the intent of the legislature. In determining legislative intent, however, first resort must be to the language of the statute itself. "If the meaning of the statute is clear and unambiguous on its face, resort to extrinsic aids for the purpose of statutory construction is improper. A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses."

State v. Martin, 162 Wis.2d 883, 893-94, 470 N.W.2d 900, 904 (1991) (citations omitted).

Section 48.366(1)(a)1 and (a)2, STATS.,[1] states that the juvenile court may extend its jurisdiction until a person reaches 25 years of age "[i]f the person committed any crime specified under s. 940.01," and the trial court may extend its jurisdiction until a person reaches twenty-one years of age if a person committed any crime specified under "[§§] 940.02, 940.05, 940.21, or 940.225(1)(a) to (c), 948.03 or 948.04." Liszewski was charged with attempted first-degree intentional homicide, contrary to §§ 939.32 and 940.01(1), STATS. According to the plain language of § 48.366(1)(a)1, attempted first-degree intentional homicide, contrary to § 939.32, STATS., is not one of the enumerated crimes under which the juvenile court may extend jurisdiction to age twenty-five. Although Liszewski argues that § 48.366(1)(a)1 can be construed as "implicitly including the crime of attempted first-degree intentional homicide," unless the statute is ambiguous, we must give the language its "plain, ordinary and accepted meaning." *See* ***State v. Mendoza***, 96 Wis.2d 106, 114, 291 N.W.2d 478, 483 (1980). We conclude that § 48.366(1)(a)1 clearly and unambiguously does not allow the juvenile court to

[1] Section 48.366(1)(a), STATS., 1993-94, states in full:

> **48.366 Extended court jurisdiction. (1)** APPLICABILITY. (a) If the person committed any crime specified under s. 940.01, 940.02, 940.05, 940.21, or 940.225(1)(a) to (c), 948.03 or 948.04, is adjudged delinquent on that basis and is transferred to the legal custody of the department under s. 48.34 (4m), the court shall enter an order extending its jurisdiction as follows:
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> 1. If the act for which the person was adjudged delinquent was a violation of s. 940.01, the order shall remain in effect until the person reaches 25 years of age or until the termination of the order under sub. (6), whichever occurs earlier.
>
> 2. If the act for which the person was adjudged delinquent was any other violation specified in this paragraph, the order shall remain in effect until the person reaches 21 years of age or until the termination of the order under sub. (6), whichever occurs earlier.

extend jurisdiction to age twenty-five in cases involving attempted first-degree intentional homicide. Therefore, the trial court did not err in reaching the same conclusion.

B. Constitutional Claims.

Liszewski also argues that an appeal of the juvenile court's decision would have succeeded because § 48.366(1)(a)1, if interpreted not to allow the juvenile court to extend jurisdiction to age twenty-five in cases involving attempted first-degree intentional homicide, is unconstitutional on equal protection and due process grounds. We conclude that § 48.366(1)(a)1 is constitutional, and therefore, that any appeal involving a constitutional challenge would have been meritless.

The constitutionality of a statute is a question of law which we review *de novo*. ***State v. Post***, 197 Wis.2d 279, 301, 541 N.W.2d 115, 121 (1995), *cert. denied*, 117 S. Ct. 2507 (1997). We presume statutes to be constitutional, and we will indulge every presumption favoring the validity of the law. ***Id.*** As the challenger, Liszewski must prove that § 48.366(1)(a)1 is unconstitutional beyond a reasonable doubt. ***Id.***

"Governmental action violates 'substantive due process' when the action in question, while adhering to the forms of law, unjustifiably abridges the Constitution's fundamental constraints upon the content of what government may do to people under the guise of the law." ***Reginald D. v. State***, 193 Wis.2d 299, 307, 533 N.W.2d 181, 185 (1995). "'[D]ue process requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment; if it does, and the legislative purpose is a proper one, the exercise of the police power is valid.'" ***Id.***

"Equal protection similarly requires that there exist reasonable and practical grounds for the classifications drawn by the legislature" when enacting a statute. ***State v. McManus***, 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (1989). Liszewski admits that no fundamental interest or suspect classification is involved in his case. Therefore, we must apply the rational basis test. Under that test, we will uphold a statute unless it is so "arbitrary and irrational" that we must conclude it has no "reasonable basis." ***State v. Martin***, 191 Wis.2d 646, 657, 530 N.W.2d 420, 425 (Ct. App. 1995).

Liszewski claims that § 48.366(1)(a)1 has no reasonable basis because it creates an "arbitrary and irrational classification." In support of his claim, Liszewski argues:

> It is not reasonable to assume that the legislature intended to permit every juvenile who tries to, and does, commit first-degree intentional homicide to be eligible for extended juvenile court jurisdiction, while disallowing that option for every juvenile who tries to, but does not, commit that offense.

Essentially, Liszewski argues that the legislature enacted § 48.366(1)(a)1 in order to assist certain juvenile offenders, presumably by protecting them from facing possibly lengthy sentences in adult court, by allowing the juvenile court to extend jurisdiction in certain cases. From this point of view, it does seem irrational to assist those who successfully commit murder, while denying assistance to those who fail to complete the crime. Liszewski's argument, however, is flawed, because its underlying premise is incorrect. After examining the statute, its place in the overall legislative scheme, and its legislative history, we conclude that the legislature enacted § 48.366(1)(a)1, not to assist certain juvenile offenders, but,

rather, to protect the community from a limited class of dangerous juvenile offenders.

Section 48.18, STATS., 1993-94,[2] gives the juvenile court the authority to waive a juvenile into adult court if the juvenile is alleged to have

[2] Section 48.18, STATS., provides in relevant part:

> **Jurisdiction for criminal proceedings for children 14 or older; waiver hearing. (1)** (a) Subject to s. 48.183, a child or district attorney may apply to the court to waive its jurisdiction under this chapter in any of the following situations:
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> 1. If the child is alleged to have attempted to violate s. 940.01 on or after the child's 14th birthday or is alleged to have violated s. 161.41 (1), 940.01, 940.02, 940.05, 940.06, 940.225 (1), 940.305, 940.31 or 943.10 (2) on or after the child's 14th birthday.
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> 2. If the child is alleged to have committed, on or after the child's 14th birthday, a violation, at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9), that would constitute a felony under ch. 161 or under chs. 939 to 948 if committed by an adult.
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> 3. If the child is alleged to have violated any state criminal law on or after the child's 16th birthday.
>
> (b) The judge may also initiate a petition for waiver in any of the situations described in par. (a) if the judge disqualifies himself or herself from any future proceedings on the case.
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> ….
>
> **(5)** If prosecutive merit is found, the judge, after taking relevant testimony which the district attorney shall present and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the following criteria:
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> (a) The personality and prior record of the child, including whether the child is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the child, whether the child has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the child's motives and attitudes, the child's physical and mental maturity, the child's

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committed any one of a number of different offenses. While § 48.18 establishes guidelines under which a juvenile court may decide to waive juveniles who are alleged to have committed serious offenses into adult court, the juvenile court may decide not to waive a particular juvenile, even if that person has allegedly committed a very serious offense. *See* § 48.18, STATS. Section 48.355(4), STATS., 1993-94,[3] however, prevents the juvenile court from exercising its jurisdiction

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> pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.
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> (b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or willful manner, and its prosecutive merit.
>
> (c) The adequacy and suitability of facilities, services and procedures available for treatment of the child and protection of the public within the juvenile justice system, and, where applicable, the mental health system.
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> (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in circuit court.
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> **(6)** After considering the criteria under sub. (5), the judge shall state his or her finding with respect to the criteria on the record, and, if the judge determines on the record that it is established by clear and convincing evidence that it would be contrary to the best interests of the child or of the public to hear the case, the judge shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate criminal proceedings in the circuit court, and the circuit court thereafter has exclusive jurisdiction. In the absence of evidence to the contrary, the judge shall presume that it would be contrary to the best interests of the child and of the public to hear the case if the child is alleged to have violated any state criminal law on or after the child's 16th birthday and if the court has waived its jurisdiction over the child for a previous violation.

[3] Section 48.355(4), STATS., provides:

> **(4)** TERMINATION OF ORDERS. (a) Except as provided under par. (b) or s. 48.368, all orders under this section shall terminate at the end of one year unless the judge specifies a shorter period of time. Except if s. 48.368 applies, extensions or revisions shall

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over juvenile offenders after their nineteenth birthday. Therefore, prior to the enactment of § 48.366(1)(a)1, violent juveniles, who had not been waived into adult court, could possibly have been released back into the community as early as their nineteenth birthday. The legislative history of § 48.366(1)(a) reveals that it was enacted to remedy this risk to the community by preventing certain classes of dangerous juvenile offenders, who were not waived into adult court, from being released prior to their twenty-first or twenty-fifth birthday.

Section 48.366(1)(a)1 was created by 1987 Wisconsin Act 27, § 893c. Language which originally appeared in the statute, but which was vetoed, required a "petition for extension" to be filed by the department having legal custody over a person eligible for juvenile court jurisdiction extension. The statute originally stated that the "petition shall state the factual basis for believing that if the person is released from custody or supervision, there are reasonable grounds to believe that the person will pose a threat of bodily harm to other persons." 1987 WIS. ACT. 27, § 893c (vetoed). Although this language was removed from the statute by veto, it clearly shows that the legislature's intent in enacting § 48.366(1)(a)1 was to protect the community from violent juvenile

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> terminate at the end of one year unless the judge specifies a shorter period of time. No extension under s. 48.365 of an original dispositional order may be granted for a child whose legal custody has been transferred to the department under s. 48.34 (4m) if the child is 18 years of age or older when the original dispositional order terminates. Any order made before the child reaches the age of majority shall be effective for a time up to one year after its entry unless the judge specifies a shorter period of time.
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> (b) An order under s. 48.34 (4m) for which a child has been adjudicated delinquent is subject to par. (a), except that the judge may make the order apply for up to 2 years or until the child's 19th birthdate, whichever is earlier.

offenders who had been adjudged delinquent by the juvenile court and who could otherwise have been released from custody as early as their nineteenth birthday.

Viewed in this light, the legislative decision to allow the juvenile court to extend jurisdiction in cases of completed first-degree intentional homicide, but not in cases of attempted first-degree intentional homicide, is perfectly reasonable. The legislature was entitled to believe that juveniles who actually committed first-degree intentional homicide posed a greater risk of bodily harm to members of the community than those who attempted, but failed to complete, the crime. Classifying persons who have completed a crime as more dangerous than those who attempted, but failed to complete, a crime is surely not "arbitrary and irrational." Therefore, we conclude that § 48.366(1)(a)1 does not violate equal protection. Additionally, protecting the community from violent juvenile offenders is a proper legislative purpose, and the extension of the juvenile court's jurisdiction is a means which bears a rational relationship to that purpose. Therefore, § 48.366(1)(a)1 also fails to violate substantive due process.

Because we have concluded that § 48.366(1)(a)1 is constitutional, and did not allow the juvenile court to extend jurisdiction in Liszewski's case, we conclude that any appeal on either basis would have been meritless. Therefore, Liszewski's counsel was not deficient for failing to pursue such an appeal, and Liszewski has consequently failed to prove ineffectiveness. *See* ***Toliver***, 187 Wis.2d at 360, 523 N.W.2d at 118. In addition, the record conclusively demonstrates that Liszewski was not entitled to relief, and therefore, the trial court's denial of his motion for plea withdrawal, without a hearing, was a proper exercise of discretion. *See* ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.