

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-3687

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SAMUEL J.G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oconto County:
LARRY L. JESKE, Judge. *Affirmed.*

MYSE, J. Samuel J. G., a minor, appeals a dispositional order placing him at Lincoln Hills, a secured facility, after a jury found that he cut the brake lines of nineteen school buses. Samuel contends that the trial court erred first by denying his motion to dismiss the case because of the State's alleged failure to timely secure his plea, and second by erroneously finding that he was dangerous and in need of restrictive treatment. Because the State's delay in

securing Samuel's plea was permissible under § 48.315(1)(a), STATS., and because there is sufficient evidence to support a finding that Samuel was dangerous and in need of restrictive treatment, the order is affirmed.¹

The facts underlying this case are substantially undisputed. On February 20, the State filed a juvenile delinquency petition alleging that Samuel, while a party to the crime, committed one act of reckless endangerment of another's safety and nineteen acts of criminal damage to property for cutting the brake lines of nineteen school buses. The plea hearing was set for twenty days later, on March 11. On March 11, however, Samuel's plea was not taken because the State filed a petition for waiver of juvenile jurisdiction. The trial court set a hearing for the waiver motion on April 12, at which the motion was denied. A second plea hearing was then set for April 23.

At the April 23rd hearing, the trial court granted the State's motion to stay the proceedings so that it could appeal the denial of its waiver motion.² On August 6, this court affirmed the trial court's refusal to waive juvenile jurisdiction. The remittitur to the circuit court was dated September 11, but was not actually filed by the trial court clerk until September 17. On September 24 a plea hearing date was set for October 29, and at that hearing Samuel denied the charges. At no time during this six-month period was Samuel asked to waive his rights with respect to the timing of his plea.

¹ The old juvenile code, ch. 48, STATS., was applied to these proceedings because the incident occurred prior to the effective date of the new juvenile code, ch. 938, STATS.

² The trial court also refused to allow Samuel to enter his plea at this hearing.

A fact hearing was conducted before a twelve-person jury, and the jury found Samuel not guilty of the reckless endangerment charge but guilty on all nineteen counts of criminal damage to property. In rendering its verdict on the criminal damage charges, however, the jury answered the question whether Samuel's action posed the danger of physical injury or bodily harm to another in the negative.

A dispositional hearing was then held, and the State requested the court to order secure physical placement at Lincoln Hills. Testimony was received from Samuel's social worker, the vice-principal of the high school Samuel was then attending, a retired social worker who knew Samuel's family, a Catholic priest, and Samuel's mother. Not one of these witnesses testified that he or she considered Samuel to be a danger to the public. Nonetheless, the trial court ordered Samuel's placement at Lincoln Hills. Samuel brought motions challenging the timeliness of his plea and the secured placement provision, which the trial court denied.

Samuel first argues that the juvenile delinquency petition should be dismissed with prejudice because the State failed to secure his plea in a reasonable time. Under § 48.30(1), STATS., the court is required to hold a plea hearing within thirty days of the filing of the petition. In the absence of an applicable exception, the petition must be dismissed if that time limit is not met. *In re Joshua M.W.*, 179 Wis.2d 335, 341, 507 N.W.2d 141, 143 (Ct. App. 1993). Determining whether a plea hearing was timely involves statutory interpretation, which is a question of law reviewed independently of the trial court. *Id.* at 340-41, 507 N.W.2d at 143.

Several delays are excluded from the requirement that a plea hearing be held within thirty days, including “any period of delay resulting from other legal actions concerning the child, including ... waiver motions” Section 48.315(1)(a), STATS. Samuel concedes this point, but argues that the thirty days elapsed by adding up the following times: (1) the initial twenty days after the petition was filed until the first plea date; (2) the eleven days between the denial of the waiver and the next plea date; and (3) the thirteen days between the remittitur of the case and the setting of the final plea date. Because the delay between September 24, when the final plea date was set, and October 29, when the plea was taken, was due in part to an accommodation of Samuel’s counsel’s schedule, Samuel concedes that this time period was reasonable and not in violation of the time requirements in setting a plea hearing.

This court concludes that the State did not fail to meet the thirty-day limit imposed by § 48.30, STATS. First, the days between the State’s March 11 waiver motion and the filing of the remittitur on September 17 are excluded from the thirty-day period. Section 48.315(1)(a), STATS., is broadly written to exclude “[a]ny period of delay resulting from ... waiver motions” Because the appeal of an adverse waiver motion is itself a part of the waiver motion, any delay resulting from a waiver appeal must be excluded. This necessarily encompasses any time between an adverse waver motion and the filing of an appeal.

This court also concludes that all thirteen days after the remittitur should not be included in the thirty-day period. First, the actual time between the time the remittitur was filed by the trial court and when the plea hearing was set was only seven days. Although Samuel also wishes to include six days between the time the trial court received the remittitur and when the trial court clerk filed it, the State was not at liberty to arrange a new plea date during that time because the

remittitur had not yet been filed. The trial court would have lacked jurisdiction to hold a plea hearing before the filing of the remittitur. See *State v. Neutz*, 73 Wis.2d 520, 522, 243 N.W.2d 506, 507 (1976) (circuit court can only take cognizance of cause upon remittitur of record filed in that court).

By excluding all days between the filing of the waiver motion and the filing of the appeal, Samuel cannot prevail. At most, twenty-six days elapsed: the twenty days between the State's filing of the juvenile delinquency petition and its filing of the waiver motion, and the six days after the remittitur of the appeal was filed by the trial court. For clarification purposes, however, this court will also address why the trial court properly could exclude the six days subsequent to the filing of the remittitur. The State is entitled to a reasonable amount of time after its waiver motion was denied to prepare for the plea hearing. At the very least, the State is entitled to sufficient time to contact the parties, arrange for time on the trial court calendar, and send out statutorily required notices. See *Joshua M.W.*, 179 Wis.2d at 343, 507 N.W.2d at 144. The trial court excluded this time, finding that the State acted within a reasonable time in bringing the plea hearing after the rejection of its waiver motion. This is a factual finding, and it will not be overturned unless clearly erroneous. *In re Shawn B.N.*, 173 Wis.2d 343, 358, 497 N.W.2d 141, 146 (Ct. App. 1992).

Samuel argues that the State never explained why it waited so long before acting. This court disagrees with that representation. The State has argued that it needed the time to contact the parties, arrange for time on the trial court calendar, and to send out the statutorily required notices. The trial court considered this matter, and concluded that the delay was reasonable. This finding is not clearly erroneous. Therefore, this court concludes that the seven days between the filing of the remittitur and the setting of the final plea date was

properly excluded from the requirement to hold the plea hearing within thirty days.

Samuel next argues that he never was asked to waive his right to have a plea hearing within thirty days. While the State might have been wise to obtain such a waiver, this argument is of no assistance because the State did not violate Samuel's right to a timely plea hearing. Because all the delay subsequent to the State's waiver motion resulted from the waiver motion, the thirty-day period never was reached. The State therefore did not need to obtain Samuel's waiver of his right to a timely plea.

Samuel's final argument concerning the timeliness of his plea is that by accepting the State's attempted justifications this court will open the door to "untold prosecutorial delays and abuses." This court concludes, however, that there are sufficient safeguards in place to prevent this from happening. First, any decision by the State to appeal a waiver motion must be within the statutorily-imposed time limits. *See* § 809.50(1), STATS. (the State must seek leave to appeal an adverse waiver decision within ten days of the entry of the order). Second, prosecutorial discretion is always subject to review, as it was in this case. If a prosecutor has no valid excuse for delaying a plea hearing, the delay will not be reasonable and will therefore not be excluded from the thirty-day period. In this case, however, the prosecutor advanced a valid reason, and therefore the delay was justifiably excluded from the thirty-day requirement.

Samuel next contends that the trial court abused its discretion in placing him at Lincoln Hills, a secure location. Before ordering secured placement, a court must find that the juvenile has been found to be a danger to the

public and in need of restrictive custodial treatment. Section 48.34(4m), STATS.³ Samuel concedes that the trial court's disposition is a discretionary decision, and must be affirmed unless there was an abuse of discretion. See *In re B.M.*, 101 Wis.2d 12, 24, 303 N.W.2d 601, 607 (1981).

Samuel first argues that there was insufficient evidence of his dangerousness to the public. This court disagrees. While it is uncontested that neither Samuel's caseworker nor any other witness opined that he was an ongoing danger to the public, there are sufficient facts supporting the trial court's finding.⁴ The trial court was concerned with the progression in Samuel's conduct, because prior to cutting the buses' brake lines he had admitted to shooting a firearm towards a highway, hitting two occupied cars. The trial court also noted that Samuel's dangerousness was reflected in his attitude because he either did not think about the consequences of his conduct or did not care. By relying on these factors the trial court could properly conclude that Samuel posed a danger to the public.

Next, Samuel argues that there was insufficient evidence to establish the need for restrictive custodial treatment. Again, this court disagrees. The trial court properly relied on Samuel's history of dangerous behavior to conclude that restrictive custodial treatment was necessary. Although Samuel argues that no witness testified that such treatment was necessary, this was not a requirement for

³ The court must also find that the juvenile has been found to be delinquent for the commission of an act which if committed by an adult would be punishable by a sentence of six months or more. The existence of this element, however, is not contested.

⁴ This court notes that although Samuel's caseworker did not state that he was a danger to the public, this was not so much because he believed Samuel was not a danger but rather because the caseworker felt he did not have enough evidence of Samuel's recent behavior.

the trial court to order secured placement. The court considered and rejected less restrictive measures, noting that less restrictive measures did not work in the past. The court also expressed its belief that Samuel's movement needed to be restricted because he "thinks he's smart enough to get away with criminal conduct." Samuel's conduct and attitude provided a sufficient basis for the trial court to infer the need to hold him accountable for his actions by placing him at Lincoln Hills.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

