

**COURT OF APPEALS
DECISION
DATED AND FILED**

SEPTEMBER 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-0835

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF ALEX S.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ALEX S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
DALE L. ENGLISH, Judge. *Affirmed.*

ANDERSON, J. Alex S. appeals from a dispositional order adjudging him delinquent for the commission of two acts of first-degree sexual assault in violation of § 948.02(1), STATS. We affirm the order in view of our conclusions that the State adequately stated the time frame in which the acts were

committed and this delinquency proceeding is not barred by a previous child in need of protection or services (CHIPS) adjudication.

Alex was originally charged with five counts of first-degree sexual assault of a child who had not yet attained the age of thirteen. A jury trial was conducted on his denial of the charges. The jury found him guilty of Counts 2 and 3, alleging that he sexually assaulted Kristina Y.S. and Brooke M.K. between September 1, 1992 and June 30, 1994. The trial court dismissed the remaining counts. Prior to the trial, Alex had sought the dismissal of the delinquency petition on the grounds that the State failed to sufficiently allege the time of the offenses. He also raised a double jeopardy challenge contending that a previous CHIPS adjudication under § 48.13(12), STATS., included the same acts described in the delinquency petition.

The juvenile court denied both motions. In beginning its discussion on the time frame of the alleged conduct, the court noted that it was “a real close call.” The court discussed the seven factors from *State v. Fawcett*, 145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988). It did find that there was a lengthy time period relative to the offenses and there was an inordinate delay from the alleged date of the offenses to the filing of the petition. However, the court resolved the *Fawcett* factors in favor of the State because the young age of the victims impaired their ability to particularize the date and time of the offense, and the specifics in the probable cause portion of the petition were in sufficient detail to permit defense counsel to mount a viable defense. Turning to Alex’s double jeopardy challenge, the juvenile court compared the delinquency petition and the previous CHIPS petition and reasoned that there were different time frames involved and separate events. Alex raises the same issues in this appeal.

Alex contends that the twenty-one month period of time alleged in Counts 2 and 3 of the petition is too broad to permit him to adequately prepare a defense. This raises an issue of constitutional fact which we decide independently of the trial court's determination. See *State v. Woods*, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984), *aff'd sub nom. Woods v. Clusen*, 794 F.2d 293 (7th Cir. 1986).

The charging portion of the petition alleged that the sexual assaults happened within a twenty-one month period. It is generally accepted that the date of the offense does not have to be stated precisely and greater tolerance is allowed in cases involving child victims. See *Fawcett*, 145 Wis.2d at 254, 426 N.W.2d at 96. The willingness to accept inexact time periods in these types of cases was explained in *Fawcett*:

[In child sexual assault cases] a more flexible application of notice requirements is required and permitted. The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance. Such circumstances ought not prevent the prosecution of one alleged to have committed the act.

Id. at 254, 426 N.W.2d at 96 (citations omitted).

Notwithstanding the greater tolerance in child sexual assault cases, the State does have a duty to inform a juvenile, within reasonable limits, of the time period when the offense charged was alleged to have been committed. See *State v. Stark*, 162 Wis.2d 537, 545, 470 N.W.2d 317, 320 (Ct. App. 1991). To determine reasonableness, we apply the seven factors used in *Fawcett*:

(1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged;

(5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Fawcett, 145 Wis.2d at 253, 426 N.W.2d at 95. Because Alex does not claim that the State could have obtained a more definite date through diligent efforts, we do not have to consider the first three factors. See *State v. R.A.R.*, 148 Wis.2d 408, 411, 435 N.W.2d 315, 316 (Ct. App. 1988).

Alex gets the benefit of the extensive twenty-one month time period when we consider the length of the alleged period of time in relation to the number of individual criminal acts alleged. Also, there is almost a three-year time period between the last date alleged in the petition and the filing of the petition that could accrue to Alex's benefit. However, the offenses alleged in Counts 2 and 3 did not come to light until April 1997, when the victim's mother became aware of allegations that Alex had sexually assaulted another child and received a phone call that Kristina was having difficulties in school. After receiving this information, the mother talked with both Kristina and Brooke and the allegations against Alex became known. It was within one month of the mother becoming aware of the sexual assault of her daughters that the delinquency petition was filed.

The last factor we consider is the ability of the victims and witnesses to particularize the date and time of the offense. During the alleged time period, Kristina was less than eight years old and Brooke was less than five years old. When their mother first questioned them in 1997 about the possibility of Alex having assaulted them, Kristina was eleven and Brooke was less than nine years old. The victims' ages are important because young children are not held to an

adult's ability to comprehend and recall dates and other specifics. *See Fawcett*, 145 Wis.2d at 249, 426 N.W.2d at 94.

Combining these factors under the reasonableness test, we again observe that Alex was alleged to have committed sexual assaults over a twenty-one month period against two victims, one under the age of eight and the other under the age of five.

Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind. Moreover, child molestation is not an offense which lends itself to immediate discovery. Revelation usually depends upon the ultimate willingness of the child to come forward.

Id. at 254, 426 N.W.2d at 95. Here, the petition was immediately filed after the victims' mother first learned of the assaults in April 1997.

Considering all of the factors, we conclude that the twenty-one month charging period was reasonable and that Alex was sufficiently informed of the charges against him.¹

Alex maintains that his adjudication as a child in need of protection or services in June 1993 for sexually assaulting Kristina and Brooke bars the prosecution of Counts 2 and 3 of the delinquency petition. He seeks the protection of the Double Jeopardy Clauses of the United States and Wisconsin Constitutions. He argues that the time frame of the 1993 CHIPS petition overlaps with the time frame in the delinquency petition and the 1993 CHIPS dispositional order was in place during the time not covered by the CHIPS petition. He reasons that because

¹ Although Alex complains that he was not given sufficient notice to prepare a defense, he has failed to identify any defense that would have been made available had the time frame been further narrowed. *See State v. Stark*, 162 Wis.2d 537, 548, 470 N.W.2d 317, 321 (Ct. App. 1991).

the time frames overlap, the same incidents are included in the two petitions. Therefore, he concludes that because the petitions cover the same time frame and same incidents, the subsequent delinquency proceeding is a violation of the Double Jeopardy Clauses.

Whether the previous CHIPS adjudication and this delinquency prosecution violate Alex's double jeopardy protections under the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution is a question of law that we decide de novo. See *State v. Saucedo*, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992).

The record on appeal conclusively establishes that the two petitions are based on separate incidents, even though they occurred during the same time frame. At the motion hearing, the juvenile court compared the probable cause portions of the CHIPS petition and the delinquency petition. The juvenile court concluded that the two petitions alleged separate and distinct incidents.

Our independent review of the record is limited by the failure of Alex to include all or portions of the 1993 CHIPS proceeding.² However, the "Court Report" is a part of the record and our review of that document leads us to conclude that the CHIPS petition was based upon incidents of fellatio in early 1993. While Counts 2 and 3 of the delinquency petition are based upon incidents of sexual contact with Kristina and Brooke, the incidents are distinctly different in

² It is the responsibility of the appellant to ensure that evidence and other materials pertinent to the appeal are made part of the record on appeal. See *State v. Smith*, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). Our review is limited to those portions of the record available to us. See *Ryde v. Dane County Dep't of Soc. Servs.*, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). Without portions of the CHIPS file, we must assume that the juvenile court's findings and conclusions, reached during the motion hearing, are supported by the evidence. See *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis.2d 683, 689, 273 N.W.2d 285, 287-88 (1979).

fact, and prosecution of the delinquency petition did not violate the Double Jeopardy Clauses. *See State v. Anderson*, ___ Wis.2d ___, 580 N.W.2d 329, 334 (1998).

By the Court.—Order affirmed.

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

