

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 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. 98-1503-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF JAMES C.M.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMES C.M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL J. DWYER, Judge. *Reversed and cause remanded.*

FINE, J. James C.M. was adjudicated delinquent and placed at the Ethan Allen School, a secured correctional facility, for a one-year period. See § 938.34(4m), STATS. (trial court may place juvenile adjudicated delinquent “in a secured correctional facility”). The trial court stayed eleven months of that term

pursuant to § 938.34(16), STATS.¹ Less than a month later, the trial court lifted the stay. James appeals. We reverse and remand.

Section 938.34, STATS., provides:

Disposition of juvenile adjudged delinquent. If the court adjudges a juvenile delinquent, the court shall enter an order deciding one or more of the dispositions of the case as provided in this section under a care and treatment plan. A disposition under sub. (4m) must be combined with a disposition under sub. (4n). In deciding the dispositions for a juvenile who is adjudicated delinquent, the court shall consider the seriousness of the act for which the juvenile is adjudicated delinquent and may consider any other delinquent act that is read into the record and dismissed at the time of the adjudication. The dispositions under this section are:

....

(16) STAY OF ORDER. After ordering a disposition under this section, enter an additional order staying the execution of the dispositional order contingent on the juvenile's satisfactory compliance with any conditions that are specified in the dispositional order and explained to the juvenile by the court. If the juvenile violates a condition of his or her dispositional order, the agency supervising the juvenile shall notify the court and the court shall hold a

¹ At the dispositional hearing, the trial court announced its order as follows:

I'm going to commit you to the Division of Corrections for a period of a year. I am going to stay all but 11 [sic] months of that. I'm going to send you to Corrections for 30 days. I want you to go to the Intake cabin at Wales. I want you to taste what jail is like. I want you to taste what Corrections is like. And after you serve those 30 days, I'm going to stay the balance of the 11 months and place you on a period of probation to let you go back to your family with the knowledge and the certainty that, if you haven't changed your life, if you haven't learned the lesson that you have to learn, that you go directly back to Corrections, that there is a hearing here but that it's not -- but it's just to establish that you haven't followed the rules of your probation.

The written order did not accurately reflect the trial court's oral order. The parties agree that in this case the oral order controls. Accordingly, upon remand, the trial court will enter an amended written order that reflects accurately its oral order.

hearing within 30 days after the filing of the notice to determine whether the original dispositional order should be imposed, unless the juvenile signs a written waiver of any objections to imposing the original dispositional order and the court approves the waiver. If a hearing is held, the court shall notify the parent, juvenile, guardian and legal custodian, all parties bound by the original dispositional order and the district attorney or corporation counsel in the county in which the dispositional order was entered of the time and place of the hearing at least 3 days before the hearing. If all parties consent, the court may proceed immediately with the hearing. The court may not impose the original dispositional order unless the court finds by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order.

James's disposition hearing was on October 24, 1997. On November 11, 1997, the State filed a motion "to lift stay." (Uppercasing omitted.) The State's motion alleged that the personnel at the Ethan Allen School needed more than the thirty-day period to assess and deal with James's needs. The trial court held a hearing on the State's motion on November 20, 1997. At that hearing, the trial court agreed with the State, and lifted the stay. The trial court recognized, however, that this was not permitted under § 938.34(16), because that provision requires a finding "by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order," and, as found by the trial court, "[t]here is no such evidence in the record."

Although it concluded "that there is no basis for lifting the stay under" § 938.34(16), STATS., the trial court construed the State's motion "as a request that this Court exercise its discretion to reconsider the disposition, which I believe to be a discretionary act and within my authority, although I don't have any statutory citation." The trial court then lifted the § 938.34(16) stay. The trial court's written order, entered November 24, 1997, recites:

The Court finds that: On November 20th, 1997, the Court previously ordered a Department of Corrections

Disposition under Wis. Stats. s. 938.34(4m) but, pursuant to Wis. Stats. s. 938.34(16), entered an additional order staying the execution of the dispositional order contingent on the juvenile's satisfactory compliance with conditions specified in the additional dispositional order and explained to the juvenile by the court. At this hearing today, the Court has reconsidered the disposition.

(Bolding, underlining, and uppercasing omitted.) The order directed that: “Pursuant to Wis. Stats. s. 938.34(16), the stay of execution is lifted and the original Department of Corrections disposition under Wis. Stats. s. 938.34(4m) takes effect immediately as of the date of today's hearing.” (Bolding and uppercasing omitted.)

As the trial court recognized, § 938.34(16), STATS., provides: “The court may not impose the original dispositional order unless the court finds by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order.” The trial court specifically found that James did *not* violate the conditions of his dispositional order.

The State asserts that the trial court's action was lawful under § 938.365, STATS., which permits the extension of dispositional orders. The State, however, has not demonstrated on this record how the requirements of that section were met here. Moreover, § 938.365 deals with the *extension* of orders; the trial court did not extend its order, it *lifted the stay* previously imposed. Section 938.365 does not apply.

Ours is a system of laws. Although the State and the trial court were attempting to accomplish what both believed was in the interest of the public and James, the routes set out by the legislature were not followed. Oliver Wendell Holmes, Jr., once observed in a different context that citizens “must turn square corners when they deal with the government.” *Rock Island, Ark. & La. R.R. v.*

United States, 254 U.S. 141, 143 (1920). The same holds true when government deals with its citizens—even more so, given the power of government and the overwhelming forces at the command of those whose commissions permit them to act on its behalf. Although we do not hold that a trial court exercising jurisdiction under the Juvenile Justice Code, chapter 938, STATS., may never reconsider a disposition, whether to increase or decrease its severity, see *Hayes v. State*, 46 Wis.2d 93, 99–106, 175 N.W.2d 625, 628–632 (1970) (trial court has inherent power to modify sentence even after its commencement) (criminal case), *overruled on other grounds*, *State v. Taylor*, 60 Wis.2d 506, 523, 210 N.W.2d 873, 882 (1973), proper procedures must be followed. That was not done here.

By the Court.—Order reversed and cause remanded.

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

