COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1666-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARRETT ELY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

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

¶1 CURLEY, J. Garrett Ely appeals the judgment of conviction, entered following his guilty plea, for first-degree reckless homicide, party to a crime, contrary to §§ 940.02 and 939.05, STATS. Ely argues that § 938.183(2)(a)2,

STATS.,[1] which allows the court of criminal jurisdiction to impose a juvenile disposition under certain limited circumstances after a juvenile has been convicted "of a lessor offense that is an attempt to violate s. 940.01, that is a violation of s. 940.02 or 940.05," is unconstitutionally vague and, thus, requires dismissal of his charge. Ely also argues that the trial court erred in finding that he was not eligible for a juvenile disposition under the statute. We conclude that Ely may not challenge the constitutionality of § 938.183(2)(a)2 because he failed to raise the issue in the trial court. However, we must consider his contention that the trial court erred in its interpretation of the statute. We conclude that the statute is ambiguous and, after applying the rules of statutory construction, we affirm the trial court's determination that Ely is not eligible for a juvenile disposition.

I. BACKGROUND.

¶2 Ely was charged with first-degree reckless homicide, while armed, as party to a crime, contrary to §§ 940.02, 939.63 and 939.05, STATS. The charge stemmed from an incident that occurred in July 1997. Ely, then sixteen years of age, and Joshua Macara were sitting on a porch when two rival gang members drove past and flashed gang signs at them. The car then stopped in front of the porch and the victim, Dante Roche, exited the car. He made a motion to Ely and Macara which revealed that he had a gun in his waistband. Upon seeing the weapon, Ely and Macara retrieved two guns from inside the house and came back outside. When they returned, Roche was pointing a gun at them. Both Ely and Macara shot Roche, killing him.

[1] The 1995-96 version of the Wisconsin Statutes is being used unless otherwise stated.

¶3 Ely's charge of first-degree reckless homicide, while armed, as party to a crime, was brought in adult court because Ely was over fifteen years of age. Ely was charged in adult court because the newly passed Chapter 938 of the Wisconsin Statutes required it. "Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday." Section 938.183(2), STATS.

¶4 Ely's attorney filed a variety of motions with the court, including a motion to dismiss alleging that § 938.183(2)(a)2, STATS., was unconstitutionally vague, denying Ely due process of law because "it deprives the defendant of notice for what he stands to lose." This motion was never heard or decided by the trial court, although, at an earlier proceeding, prior to Ely's guilty plea, Ely's attorney asked the trial court to stay the matter of the undecided motion challenging the constitutionality of § 938.138(2)(a)2 to allow Ely to commence an appeal. The trial court denied the request.

¶5 Several months after Ely's co-defendant, Macara, pled guilty and was sentenced, Ely pled guilty to first-degree reckless homicide, party to a crime, in exchange for the State's agreement to drop the § 939.63, STATS., "while armed" penalty enhancer. When the guilty plea was taken, Ely's attorney informed the trial court that the only remaining issue was whether Ely was eligible for a juvenile disposition. The trial court then proceeded to question Ely about his plea, referred to the guilty plea questionnaire signed by Ely and his attorney and, after accepting Ely's guilty plea, found him guilty. The trial court then ordered letter briefs concerning whether Ely fell within the ambit of § 938.138(2)(a)2, STATS., permitting a juvenile disposition, and adjourned the matter. At the subsequent

hearing, the trial court found that because Ely had pled to the original charge, he was not eligible for a juvenile disposition. After denying Ely's request for a stay of the sentencing hearing in order to permit Ely to petition for leave to appeal, the trial court sentenced him to fifteen years in prison.

II. ANALYSIS.

A. Ely cannot now raise the issue of the constitutionality of § 938.183(2)(a)2 because he failed to raise it in the trial court.

¶6 We conclude that we cannot address Ely's claimed error because here, the trial court never decided the issue. At the guilty plea proceeding, Ely's attorney announced to the trial court that the only remaining issue was whether Ely was eligible for consideration of a juvenile disposition. "The only issue which I believe remains unresolved is whether or not a plea to the charge of first-degree reckless homicide triggers the possibility of a juvenile disposition under 938.183 sub. (2) (a)."[2] The trial court then adjourned the matter to allow the parties to submit letter briefs on the question of whether Ely qualified for consideration

[2] Ely's attorney's position on what motions remained unresolved was inconsistent. After the guilty plea was accepted, Ely's attorney told the court that she believed the statute was unconstitutional and that a motion had been filed, claiming such:

> We believe the statute [§ 938.183(2)(a)2, STATS.] is unconstitutionally vague. We filed motions on that subject on this very issue. … So, we're asking the Court to rule so that either way, and then we're going to—if the Court were to deny our motion, we're going for a stay—we're asking the Court rule and then we're asking the Court to stay if it rules adversely to us and then we would go up and petition the Court of Appeals to make this decision.

As noted, at the scheduled adjourned date to hear the motion concerning whether Ely was eligible for a juvenile disposition, the State advised the trial court that the only issue remaining was whether § 938.183(2)(a)2 applied to Ely. Ely's attorney did not contradict the State's assessment. However, Ely's attorney did argue at this proceeding that the statute was unconstitutional. After the trial court ruled that Ely was not eligible for a juvenile disposition, Ely's attorney never renewed her request that the trial court decide the constitutionality motion.

under § 938.183(2)(a)2, STATS. On the adjourned date following the submission of letter briefs on whether Ely could avail himself of a juvenile disposition, the State advised the trial court, "Judge, it's my understanding the matter is in front of the Court for the Court's decision as to whether there is availability of a juvenile disposition." Ely's attorney did not dispute this statement. However, later, while Ely's attorney was arguing that Ely was eligible for a potential juvenile disposition pursuant to § 938.183(2)(a)2, she reasserted her previous argument that the statute was unconstitutional. Notwithstanding this attempt at resurrecting the earlier constitutionality argument, the trial court confined its ruling to whether Ely was eligible for a juvenile disposition under the statute. The trial court found that Ely did not qualify for a juvenile disposition, saying "I think it's clear to me people read things and they see things in different ways. I think that he pled guilty to the original charge. This does not open the door to juvenile disposition. The motion is denied." Ely's attorney failed to ask the trial court to rule on the constitutionality of the statute. Instead, Ely's attorney urged the trial court to stay the sentencing so that the issue concerning the juvenile disposition could be appealed to this court, arguing, "If the Court—if the Court of Appeals says that this Court must consider a juvenile disposition, then my client at that point is substantially prejudiced because in all likelihood he would have been in an adult prison at that point." The trial court denied the motion for a stay and set a date for sentencing.

¶7 Thus, the record reveals Ely's constitutionality argument was never heard by the trial court. We will not consider it here.[3] *See* ***State v. Rodgers***, 196 Wis.2d 817, 825, 539 N.W.2d 897, 900 (Ct. App. 1995) (A party seeking reversal may not advance arguments on appeal which were not presented to the trial court for a determination.); ***State v. Gove***, 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989) ("This court has frequently stated that even the claim of a constitutional right will be deemed waived unless timely raised in the trial court."). *See* ***Damaske***, 212 Wis.2d at 188, 567 N.W.2d at 913-14.

B. The statute in question is ambiguous.

¶8 As a result of the waiver of the constitutionality issue, the only remaining issue in this appeal is whether the trial court correctly interpreted § 938.183(2)(a)2, STATS., when it determined that Ely was not eligible for a juvenile disposition. Ely argues that § 938.183(2)(a)2 is ambiguous, while the State contends that it is not, and claims only that the statute "is not a model of legislative drafting." The trial court, although never definitively stating so, implied that the statute was ambiguous when it said, "I think it's clear people read things and they see things in different ways." After examining the statute, we conclude that the statue is ambiguous.

[3] Were we to address the constitutionality argument, there is serious doubt as to whether Ely's argument that the statute was void for vagueness is proper. Precedent suggests that a procedural statute—a statute not regulating conduct—"may not be a proper subject for this type of challenge." ***State v. Roling***, 191 Wis.2d 754, 759-60, 530 N.W.2d 434, 436 (Ct. App. 1995) (citing ***State v. Dums***, 149 Wis.2d 314, 324, 440 N.W.2d 814, 817 (Ct. App. 1989) ("A challenge of a criminal statute for vagueness requires that the statute prohibit specific conduct.")). Moreover, the statute deals with the question as to whether, under certain conditions, it is constitutional to permit the trial court to consider a juvenile disposition. Were we to agree with Ely's argument that the statute is unconstitutional, Ely would lose the possibility of a juvenile disposition. This is not the remedy he seeks.

¶9 "The interpretation of a statute is a question of law which this court reviews independently, without deference to the lower courts." ***State v. Sweat***, 208 Wis.2d 409, 414-15, 561 N.W.2d 695, 697 (1997). "'[A] statutory provision is ambiguous if reasonable minds could differ as to its meaning.'" ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 283, 548 N.W.2d 57, 61 (1996) (quoted source omitted). "Ambiguity can be found in the words of the statutory provision itself, or by the words of the provision as they interact with and relate to other provisions in the statute and to other statutes." ***Sweat***, 208 Wis.2d at 416, 561 N.W.2d at 697. Here, the statute is capable of several different interpretations. Section 938.183(2)(a)2, STATS., reads:

> **(2)** (a) Notwithstanding ss. 938.12 (1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday. Notwithstanding subchs. IV to VI, a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday is subject to the procedures specified in chs. 967 to 979 and the criminal penalties provided for the crime that the juvenile is alleged to have committed, except that the court of criminal jurisdiction shall impose a disposition specified in s. 938.34 if any of the following conditions applies:
>
> ….
>
> 2. The court of criminal jurisdiction convicts the juvenile of a lesser offense that is an attempt to violate s. 940.01, that is a violation of s. 940.02 or 940.05 or that is an offense for which the court assigned to exercise jurisdiction under this chapter and ch. 48 may waive its jurisdiction over the juvenile under s. 938.18 and the court of criminal jurisdiction, after considering the criteria specified in s. 938.18 (5), determines by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to impose a disposition specified in s. 938.34.

One could reasonably conclude that the statute applies to a juvenile charged with a violation of §§ 940.01, 940.02 or 940.05, STATS., but who is convicted of a lesser offense of § 940.01 (first-degree intentional homicide), specifically an attempted first-degree intentional homicide; or is convicted of either § 940.02 (first-degree reckless homicide) or § 940.05 (second-degree intentional homicide). One could also interpret the statute to mean that a juvenile qualifies for a juvenile disposition under the statute if, after being originally charged with first-degree intentional homicide, the juvenile is convicted of an attempted first-degree intentional homicide or another lesser-included offense of first-degree intentional homicide; or if the juvenile is charged with first-degree reckless homicide or second-degree intentional homicide, but ultimately is convicted of an offense which is less than first-degree reckless homicide or second-degree intentional homicide. An additional interpretation is that given to the statute by Ely, who posits that he falls within the ambit of the statute because he was convicted of the charged offense, but only after he was told that, if he did not enter a plea of guilty to first-degree reckless homicide, the state was going to amend the information to charge him with first-degree intentional homicide. Thus, Ely reasons, the originally charged offense of first-degree reckless homicide was transformed into a lesser offense because of the threatened amendment of the charge to a more serious felony.[4] Given the fact that a reasonable person can interpret the statute to mean different things, the statute is clearly ambiguous.

[4] The argument that the dismissal of the "while armed" penalty enhancer transformed the first-degree reckless charge into a "lesser offense" was never raised below. Thus, we will not address that question here. *See* ***State v. Rogers***, 196 Wis.2d 817, 825, 539 N.W.2d 897, 900 (Ct. App. 1995).

C. In applying the rules of statutory interpretation to the statute, we conclude that Ely was not eligible for a juvenile disposition.

¶10 Having found that the statute is ambiguous, we are next required to apply the rules of statutory construction to determine its meaning. "If, however, the statute is ambiguous, this court must look beyond the statute's language and examine the scope, history, context, subject matter, and purpose of the statute." ***UFE, Inc.***, 201 Wis.2d at 282, 548 N.W.2d at 60.

¶11 As conceded by Ely's attorney at oral argument, one of the purposes behind the recent enactment of Chapter 938 was to make juveniles who commit serious felonies more accountable for their actions. Indeed, the report of the Juvenile Justice Study Committee, whose recommendations provided the foundation for the newly created chapter, states that two of the reasons for the changes were so that "[p]unishment and sanctions should be better tailored to match the seriousness of the juvenile's offense" and to "[e]xpand adult court jurisdiction to homicides or attempted homicides committed by youth age 10 or older." *Juvenile Justice: A Wisconsin Blueprint For Change, Report of the Juvenile Justice Study Committee*, at 6 (1995) (Dennis J. Barry, Chairperson). This same report also sheds light on the correct interpretation of § 938.183(2)(a)2, STATS. It states that:

> The committee recommends granting to an adult court original jurisdiction over a juvenile who is alleged to have attempted or committed first-degree intentional homicide or to have committed first-degree reckless homicide or second-degree intentional homicide on or after the juvenile's 10th birthday. Such a juvenile will be subject to the procedures specified in the criminal procedure code and to adult sentencing unless the adult court convicts the juvenile of a lesser offense, in which case the adult court must impose a disposition permitted under the juvenile justice code.

Id. at 14. Noting that the committee's recommendations ultimately became the underpinnings of Chapter 938's provisions, we give great weight to the stated rationale found in the report.

¶12 Further, in construing a statute this court must ascertain and give effect to the intent of the legislature by giving words their ordinary and accepted meanings and by trying to give effect to every word so as to not render any part of the statute superfluous. *See* ***State v. Petty***, 201 Wis.2d 337, 355, 548 N.W.2d 817, 823-24 (1996). Moreover, this court is required to reject unreasonable or absurd interpretations of a statute. *See* ***State v. West***, 181 Wis.2d 792, 796, 512 N.W.2d 207, 209 (1993). Armed with these rules of statutory construction, we conclude that § 938.183(2)(a)2, STATS., must be interpreted to mean that the only juveniles eligible for a juvenile disposition under the statute are those whose ultimate convictions are to lesser offenses than the original charge, and these lesser offenses, had they been charged originally, would have been brought in the juvenile court rather than the adult court.

¶13 We make this determination because this meaning comports with the overall scheme of the legislation—that is, to place juveniles charged with serious homicides automatically into the adult court, but to retain the possibility of a juvenile disposition if the crime for which the youth is actually convicted is of a type that would have started in the juvenile court had it been charged originally.

¶14 To read the statute to permit *any* lesser offense to trigger the operation of the statute would lead to absurd results. For example, a juvenile who is originally charged with first-degree intentional homicide but who is convicted of first-degree reckless homicide would be eligible for a juvenile disposition,

while a juvenile originally charged and convicted of first-degree reckless homicide would not be eligible.

¶15 Applying our interpretation to the facts present here, Ely is not eligible for a juvenile disposition. Ely would have had to have been convicted of a lesser offense that, had that offense been charged originally, would have commenced in juvenile court. Thus, Ely's conviction for first-degree reckless homicide falls outside this scenario because the charge of first-degree reckless homicide is one of the charges for which the adult court has original jurisdiction and, consequently, he cannot be sentenced under the penalties available for a juvenile disposition.

¶16 Lending support to our interpretation is the fact that the legislature amended § 938.183, STATS., to clarify who is eligible for a juvenile disposition. Section 938.183(2)(a)2 has been abolished. In its place is § 938.183(2), 1997-98, which states in pertinent part:

> Notwithstanding subchs. IV to VI, a juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 15th birthday and a juvenile who is alleged to have attempted or committed a violation of any state criminal law, if that violation and an attempt to commit a violation of s. 940.01 or the commission of a violation of s. 940.01, 940.02 or 940.05 may be joined under s. 971.12 (1), is subject to the procedures specified in chs. 967 to 979 and the criminal penalties provided for the crime that the juvenile is alleged to have committed, *except that the court of criminal jurisdiction shall, in lieu of convicting the juvenile, adjudge the juvenile to be delinquent and impose a disposition specified in s. 938.34 if the court of criminal jurisdiction finds that the juvenile has committed a lesser offense than the offense alleged under this subsection or has committed an offense that is joined under s. 971.12 (1) to an attempt to commit a violation of s. 940.01 or to the commission of a violation of s. 940.01, 940.02 or 940.05 but has not attempted to commit a*

> *violation of s. 940.01 or committed a violation of s. 940.01, 940.02 or 940.05*, and the court of criminal jurisdiction, after considering the criteria specified in s. 938.18 (5), determines that the juvenile has proved by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to adjudge the juvenile to be delinquent and impose a disposition specified in s. 938.34.

(emphasis added.) The amendment corrects the ambiguity found in the earlier statute. It is now clear that, in order to qualify for a juvenile disposition, a juvenile cannot be convicted of first-degree intentional homicide, attempted first-degree intentional homicide, first-degree reckless homicide or second-degree intentional homicide. The language of this statute now more readily comports with the recommendation of the Juvenile Justice Study Committee that juveniles convicted of serious homicides fall automatically under the authority of the adult court and those charged with serious homicides but convicted of lesser crimes have the opportunity to obtain a juvenile disposition. Here, the legislature amended the statute to eliminate the ambiguity. Given the new language, we are satisfied that our interpretation of the older version is correct. *See* ***Scott A. v. Garth J.***, 221 Wis.2d 781, 796, 586 N.W.2d 21, 27 (Ct. App. 1998) ("If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act.").

¶17 Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

¶18 SCHUDSON, J. *(concurring).* Although I agree that the circuit court judgment must be affirmed, I do not join in the majority opinion. Accordingly, I respectfully concur.