**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 4, 2001**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**No. 01-1583-FT**

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

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

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**JAMES A. H.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] James A.H. appeals from an order placing him in ten days of secure detention after he violated a condition of supervision by testing

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000), and expedited under WIS. STAT. RULE 809.17 (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

positive for THC. At the sanctions hearing, the circuit court offered to impose and stay the sanction if James would disclose the name of the person who furnished James's marijuana, but James refused. James argues that the circuit court sanctioned him because he would not speak rather than because he violated a condition of his supervision. James further contends that this was an erroneous exercised of discretion because it: (1) was not based on the conditions set forth in the original disposition; (2) converted the remedial nature of the sanction into punishment; and (3) violated his right to remain silent. We disagree and affirm.

## I. Background

¶2 At a dispositional hearing on June 28, 2000, the circuit court adjudicated James A.H., whose date of birth is May 24, 1984, delinquent because he committed disorderly conduct, contrary to WIS. STAT. § 947.01. The court ordered that James would undergo one year of supervision by the Department of Health and Family Services. Among the provisions in the dispositional order, James was required to submit to random drug testing and to refrain from violating any criminal statutes.

¶3 In October 2000, after a drug test indicated that James was using marijuana, the circuit court held a sanctions hearing and ordered that James be placed in secure detention for three days. James again tested positive for THC in a drug test collected on January 24, 2001.[2] At the sanctions hearing on February 20, 2001, James did not contest that he had violated a condition of his supervision.

[2] James also tested positive for opiates. However, the State did not request sanctions on this result because it may have been explained by medication that James was taking.

The circuit court ordered James to a ten-day placement in secure detention. James appealed the decision and was given a stay of the sanction pending appeal.

## II. Analysis

### *A. Standard of Review*

¶4 We review a circuit court's decision to impose a particular sanction under WIS. STAT. § 938.355(6)(d)[3] for an erroneous exercise of discretion. ***In Interest of B.S.***, 162 Wis. 2d 378, 396, 469 N.W.2d 860 (Ct. App. 1991).[4] Accordingly, we will affirm the trial court's decision if the court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999).

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[3] WISCONSIN STAT. § 938.355(6)(d) provides in part:

> If the court finds by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order, the court may order any of the following sanctions as a consequence for any incident in which the juvenile has violated one or more conditions of his or her dispositional order:
>
> 1. Placement of the juvenile in a secure detention facility or juvenile portion of a county jail that meets the standards promulgated by the department by rule or in a place of nonsecure custody, for not more than 10 days and the provision of educational services consistent with his or her current course of study during the period of placement. The juvenile shall be given credit against the period of detention or nonsecure custody imposed under this subdivision for all time spent in secure detention in connection with the course of conduct for which the detention or nonsecure custody was imposed.

[4] In ***In Interest of B.S.***, we upheld the constitutionality of WIS. STAT. § 48.355(6). The legislature repealed § 48.355 section in 1995 and replaced it with WIS. STAT. § 938.355. *See* 1995 Wis. Act 77, §§ 288 and 629. The portions of § 48.355(6) and § 938.355(6) relevant to this case contain no substantive differences that would suggest ***B.S.*** does not apply here.

*B. Notice of Condition*

¶5 We note first that James is not asserting that the circuit court lacked authority to place him in secure detention for violating a condition of his supervision. WISCONSIN STAT. § 938.355(6)(d) permits circuit courts to impose sanctions, including up to ten days of secure detention, for juveniles adjudged delinquent if they have violated a condition of the dispositional order. Further, secure detention may be imposed even if it is not the only means available to encourage compliance with the order. ***State v. Jason R.N.***, 201 Wis. 2d 646, 653-54, 549 N.W.2d 752 (Ct. App. 1996). James also does not contend that he did not violate a condition. Rather, the sole issue is whether the circuit court acted improperly in offering to impose and stay sanctions if James disclosed the source of his marijuana.

¶6 James contends that because his dispositional order does not require him to provide information regarding the source of his marijuana, the circuit court erroneously exercised its discretion in imposing sanctions. He relies on ***B.S.*** and ***D.L.D. v. Circuit Ct. of Crawford County***, 110 Wis. 2d 168, 327 N.W.2d 682 (1983), which held that the circuit court must provide the juvenile with notice of the supervision conditions before it can impose sanctions for violating a condition. *See also* WIS. STAT. § 938.355(6)(a) and (b).

¶7 Had the sanctions hearing been held in response to an allegation that James refused to disclose who had provided him with marijuana, we would agree that James had not been provided with the requisite notice. The State was not requesting sanctions for withholding information, however, but rather for testing positive on a drug test. Again, James does not contest that he used marijuana or that this violated a condition of his supervision. He also does not argue that he

had insufficient notice that this behavior was in violation of the order or that he could be sanctioned for it. WISCONSIN STAT. § 938.355(6)(d) plainly authorizes circuit courts to impose secure detention for a juvenile adjudicated delinquent if he or she has violated a condition of a dispositional order. Therefore, because James violated a condition, the circuit court had the authority to impose a sanction.

¶8 Although the circuit court did offer to impose and stay the ten-day placement in secure detention, the underlying basis for the sanction was James's drug use, not his refusal to reveal the person who provided his marijuana. Before coming to its decision to impose a sanction of secure detention, the court emphasized James's repeated use of marijuana:

> Well what I want to know is why hasn't something been done about his use of these substances until the sanction is about to be imposed? We imposed a sanction in October. He continued to use marijuana.

In response to a comment by James that he had only been given "a little bit of marijuana," the court stated:

> This isn't a little bit of marijuana, sir. You were using it two times. You were using it in October. You were put in secure detention for three days. That didn't teach you a lesson. You're on electronic monitoring. You were using it then. This stuff is illegal, sir, because it affects people's ability to function in life, go to school, stay out of trouble, all sorts of things. You, it tells me that you are unable to stay away from this stuff, because you're on electronic supervision, you know she's going to come over and give you a test, and you use it anyway.

The court again emphasized James's drug use and his failure to respond to previous sanctions when it imposed secure detention:

> The other thing is, is it shows you the real seriousness of this drug. You know they're going to test your urine or blood for this substance and you cannot,

> apparently you don't have the willpower to say no, or you refuse to say no, or you don't care….
>
> … You've been continually sanctioned under this present supervision, and I don't want to do it, but you leave me no choice.

¶9 The court also stated that it would "impose and stay the ten day secure detention … as long as [James] tells [his social worker] where he got the dope." When James refused, the court stated, "You won't tell me who is selling you or giving you this crap, then you've got to pay the price." It is clear, then, that although the court based its decision to impose sanctions on James's drug use, James could have avoided being placed in secure detention by disclosing the source of his marijuana.

¶10 In effect, the circuit court, even though it concluded that sanctions were warranted, was offering to allow James to purge the sanction by revealing his drug source. WIS. STAT. § 938.55 does not prohibit circuit courts from doing this. Further, we do not believe that James was entitled to notice of the purge condition so long as he had notice of the underlying violation. Rather, in determining whether the condition was permissible, we view as instructive the test for purge conditions in contempt proceedings, namely, whether they are feasible and reasonably related to the cause or nature of the contempt. ***City of Milwaukee v. Kilgore***, 193 Wis. 2d 168, 188, 532 N.W.2d 690 (1995); ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991).

¶11 James never asserted that he did not know the identity of the person who provided him with marijuana. Additionally, the circuit court concluded, and we agree, that knowing the source of the drugs would also aid in preventing James from violating the conditions of supervision in the future. In sum, because we conclude that the basis for the sanction was James's drug use, and the purge

condition was both feasible and reasonably related to the violation of the order, James's argument that he had insufficient notice fails.

*C. Punitive vs. Remedial*

¶12 James also argues that the circuit court's decision to impose sanctions was improper because it punished him for failing to disclose the source of his marijuana. In ***B.S.*** we held that the statute authorizing circuit courts to order juveniles to secure detention for violating a condition of their dispositional order after having been adjudicated delinquents did not on its face violate due process. 162 Wis. 2d at 396-97. This holding was based on our conclusion that the statute authorized imposing secure detention only "as an incident to the legitimate purpose of a dispositional order" rather than "for the purpose of punishment." ***Id.*** at 396. We also concluded, however, that a circuit court could erroneously exercise its discretion if it were to "misuse secure detention (or any other sanction) by applying it so unreasonably as to convert it to punishment." ***Id.***

¶13 We find unpersuasive James's argument that by providing him with an opportunity to purge his sanction, the circuit court converted the remedial nature of the sanction into punishment. The sanction was still imposed "as an incident to the legitimate purpose of a dispositional order," namely, to keep James from using drugs. If anything, the purge condition indicates the sanction was less punitive than it otherwise could have been because the circuit court gave James a second chance, even though it was within its authority to order secure detention regardless whether James cooperated.

*D. Right Against Self-Incrimination*

¶14 Finally, James argues that the circuit court violated his right to remain silent when it imposed a sanction on him after he refused to reveal his marijuana source. Both the Fifth Amendment of the United States Constitution and article I, section 8, of the Wisconsin Constitution protect individuals from being "compelled in any criminal case to be a witness against" themselves. The right to remain silent under the state constitution is no broader than under the federal constitution. ***State v. Sorenson***, 143 Wis. 2d 226, 259-60, 421 N.W.2d 77 (1988). The privilege against self-incrimination may be invoked whenever a person has a real and appreciable apprehension that information compelled by the State could be used against him or her in a criminal proceeding. ***State v. Hall***, 207 Wis. 2d 54, 68, 557 N.W.2d 778 (1997). Further, the State may not penalize the assertion of the right to remain silent with punitive sanctions when the privilege holder refuses to testify. ***Lefkowitz v. Cunningham***, 431 U.S. 801, 805 (1977). The privilege applies to juveniles as it does with respect to adults. ***In re Gault*****,** 387 U.S. 1, 55 (1967); *see also* ***B.S.***, 162 Wis. 2d at 404.

¶15 We assume without deciding that James would have further incriminated himself had he provided the information the circuit court requested. However, we reject that James may rely on the right to remain silent to challenge the circuit court's sanction because he never invoked either the Fifth Amendment or article I, section 8, as a justification for refusing to answer the court's question. Persons who desire the protection of the privilege against self-incrimination are required to claim it. ***Rogers v. United States***, 340 U.S. 367, 370 (1951); *see also* ***In the Matter of Disciplinary Proceedings Against Haberman***, 126 Wis. 2d 411, 376 N.W.2d 852 (1985) (concluding that attorney could not rely on the Fifth

Amendment right against self-incrimination when he had failed to invoke it during the proceeding).

¶16 In ***Rogers***, a witness refused to answer a question regarding the identity of other individuals, stating "I don't feel that I should subject a person or persons to the same thing that I'm going through." 340 U.S. at 368. In concluding that the witness had waived her privilege, the Court noted that she "expressly placed her original declination to answer on an untenable ground, since a refusal to answer cannot be justified by a desire to protect others from punishment." ***Id.*** at 371. The facts in this case are similar. In declining to identify his marijuana source, neither James nor his attorney claimed that James was attempting to protect himself from incrimination. Rather, in response to the court's request, James stated, "So what you're basically saying is I have to tell on somebody, get them in trouble, put them in jail for who knows how long, for giving me a little bit of marijuana?" This statement demonstrates that James was only interested in the effect of his disclosure on others, and, as ***Rogers*** makes clear, the right against self-incrimination does not provide protection for that interest.

¶17 The circuit court did not violate James's right against self-incrimination simply because it asked a question that could incriminate James. *See* ***Minnesota v. Murphy***, 465 U.S. 420, 428 (1984). Had James expressly invoked his right to remain silent, the circuit court could then have considered whether James's answer would in fact be incriminating, and if so, whether there

was a possibility that James could be prosecuted for using marijuana,[5] and whether the court would be penalizing him by imposing sanctions after he failed to answer. Because James deprived the circuit court of the opportunity to consider the application of the Fifth Amendment and article I, section 8, during the sanctions hearing, he may not now assert the argument on appeal.

¶18 We also conclude, however, that even if James had invoked his privilege, the circuit court would not have "penalized" his invocation had it decided to impose sanctions on him regardless. As we have noted, the circuit court was within its authority to impose a sanction of secure detention on James for violating a condition of his dispositional order. By offering to stay the sanction if James disclosed the source of his marijuana, the circuit court was giving James the opportunity to obtain a benefit he otherwise would not have had. Therefore, the circuit court's decision not to stay the sanction was not a penalty, but rather a denied benefit, and the circuit court did not violate James's right to remain silent by ordering secure detention after James refused to reveal his source. *Cf.* ***United States v. Cojab***, 978 F.2d 341, 343 (7th Cir. 1992) (holding that district court's decision not to grant defendant a sentence reduction for failure to provide potentially incriminating information to the probation officer was a "denied benefit" rather than a penalty for the purpose of the Fifth Amendment).

[5] Because we have concluded that James's argument regarding his right to remain silent fails on other grounds, we need not decide whether there is a possibility that James could be prosecuted for using marijuana when he was already sanctioned for that behavior under WIS. STAT. § 938.355. *See* ***Craig S.G. v. State***, 209 Wis. 2d 65, 71 n.4, 561 N.W.2d 807 (Ct. App. 1997) (declining to reach the issue whether imposition of ten days of secure detention was punitive for the purpose of double jeopardy because sanction was stayed after juvenile agreed to purge the sanction).

¶19 In sum, we conclude that James had sufficient notice, that his sanction was not punitive, and that his right to remain silent under either the state federal constitution was not violated. We therefore affirm the order of the circuit court.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. § 809.23(1)(b)4