

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-3114-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF001269

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUSTIN R. BAUMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Reversed.*

¶1 ANDERSON, P.J.¹ Justin R. Baumann asserts that the State intentionally delayed the filing of a juvenile referral until after his seventeenth birthday to deprive him of the procedures and benefits of the juvenile justice

¹ This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

system. Although a juvenile referral was completed before his seventeenth birthday, it was never forwarded for processing and an adult referral was completed and forwarded after he turned seventeen. While the criminal court found that there was a negligent delay in the transmittal of the referral, we conclude that because there is no credible evidence to explain why the juvenile referral for Baumann was not forwarded, the State has failed to show there was no manipulative intent to avoid the juvenile justice system. Therefore, we reverse.

BACKGROUND

¶2 After being charged with two felony counts of recklessly endangering safety, WIS. STAT. § 941.30(2), and a misdemeanor count of obstructing an officer, WIS. STAT. § 946.41(1), Baumann contended that the City of Pewaukee Police Department intentionally delayed referring its investigation to the district attorney until after his seventeenth birthday, violating his right to due process. The criminal court granted Baumann's request for a hearing under *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976), "at which the State had to establish that it did not intentionally delay filing the criminal complaint." *State v. Schroeder*, 224 Wis. 2d 706, 708, 593 N.W.2d 76 (Ct. App. 1999). After an evidentiary hearing, the criminal court found the testimony of some members of the Pewaukee police department was incredible, but it concluded any delay was

negligent and held that Baumann's due process rights were not violated.² Baumann appeals.

THE LAW

¶3 Baumann has a significant due process right not to be deprived of juvenile jurisdiction through deliberate state manipulation designed to avoid juvenile jurisdiction. *State v. Velez*, 224 Wis. 2d 1, 14, 589 N.W.2d 9 (1999). But he does not have due process protection from the loss of juvenile court jurisdiction attributable to the mere passage of time or negligence. *State v. LeQue*, 150 Wis. 2d 256, 267-68, 442 N.W.2d 494 (Ct. App. 1989).

¶4 When a defendant raises a claim of intentional manipulation he bears the “burden of production” to make a “prima facie showing of manipulative intent before gaining as a matter of right his or her request for an evidentiary hearing.” *Schroeder*, 224 Wis. 2d at 710 n.2. If a defendant carries his burden of production, a due process evidentiary hearing is required, at which hearing “the [S]tate has the burden of showing that ‘the delay was not for the purpose of manipulating the system to avoid juvenile court jurisdiction.’” *State v. Montgomery*, 148 Wis. 2d 593, 604, 436 N.W.2d 303 (1989). To meet its burden, the State only has to show that there was no “manipulative intent” to avoid the jurisdiction of the juvenile court. *LeQue*, 150 Wis. 2d at 268. Contrary to

² After his motion was denied, Baumann entered a plea pursuant to a plea agreement that dismissed the obstructing charge and amended the remaining charges to two misdemeanor counts of negligent operation or handling of a dangerous weapon in violation of WIS. STAT. § 941.20(1)(a). After finding the defendant guilty and imposing sentence, the criminal court stayed the sentence pending appeal. Because Baumann successfully sought a hearing under *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976), to challenge an alleged violation of his due process rights before he entered a plea, the guilty plea waiver rule does not prohibit this appeal. See *State v. Schroeder*, 224 Wis. 2d 706, 708, 722, 593 N.W.2d 76 (Ct. App. 1999).

Baumann's argument, the State does not have to prove a mere passage of time or a specific act of negligence that prevented a referral to juvenile jurisdiction. *See id.* at 267-68.

STANDARD OF REVIEW

¶5 Whether Baumann's due process right to juvenile court jurisdiction was violated is a question of constitutional fact. *See State v. Lohmeier*, 205 Wis. 2d 183, 191-92, 556 N.W.2d 90 (1996). We review the criminal court's determination using a two-step analysis. *State v. Weed*, 2003 WI 85, ¶13, 263 Wis. 2d 434, 666 N.W.2d 485. The first step is that an appellate court will not upset a criminal court's findings of evidentiary or historical facts unless they are clearly erroneous. *Id.* As part of this first step, we give special deference to the credibility findings of the criminal court. *State v. Carnemolla*, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). The second step requires the appellate court to review the criminal court's application of historical facts to constitutional principles. *See State v. Bermudez*, 221 Wis. 2d 338, 345, 585 N.W.2d 628 (Ct. App. 1998). At this step of the analysis, we owe no deference to the criminal court, "[w]e are permitted to independently determine from the facts as found by the [criminal] court whether any time-honored constitutional principles were offended in this case." *Id.* at 346.

DISCUSSION

¶6 Baumann's date of birth is May 3, 1985. On April 19, 2002, three city of Pewaukee police officers were dispatched to a house in the city of Pewaukee to investigate a possible underage drinking party. When the officers were denied admission to the house, they waited in the backyard for fifteen or twenty minutes until they saw seven individuals leave the house and walk down

the street. The three officers took a route through the backyards that paralleled the route taken by the seven individuals. When the officers saw five of the individuals start to enter a black Honda, two of the officers came out from the bushes and approached the Honda. One of the officers, Brian Fredericks, walked into the middle of the street, started walking toward the car and issued the command, "Stop police." The car pulled from its parking space and headed toward Fredericks. The officer again told the vehicle to stop and then had to jump out of the path of the vehicle. There was another officer several feet behind Fredericks and this officer also had to move out of the Honda's path.

¶7 Through investigative work, Baumann was identified as the driver of the Honda and on April 20, 2002, he voluntarily appeared at the City of Pewaukee Police Department to talk with Fredericks. Sometime between April 23 and 27, 2002, Fredericks' supervisor directed him to prepare a juvenile referral of the incident. Fredericks completed the referral and forwarded it to his supervisor for review up the chain of command. Later, Fredericks was ordered by Lieutenant Gary Bach to complete an adult referral and he completed that form on May 5 or 6, 2002.

¶8 Bach testified that he directed Fredericks to prepare a juvenile referral; and two to four weeks after the incident of April 19, 2002, Susan Opper, of the Waukesha County District Attorney's office, returned the juvenile referral with a request for additional information. Bach stated that because the additional information was not gathered until after Baumann's seventeenth birthday, he directed Fredericks to prepare an adult referral.

¶9 Baumann presented several witnesses from the juvenile services division of the Waukesha County Clerk of Courts and the Department of Health

and Human Services (DHHS). These witnesses testified to the practice of their offices in receiving, logging and processing juvenile referrals from law enforcement. Through these witnesses, Baumann established that the juvenile services division and DHHS never received a juvenile referral concerning him.

¶10 The criminal court also heard an offer of proof from Opper that she had not been assigned to the juvenile court for ten years, that she never received a juvenile referral involving Baumann and that she did not return a juvenile referral for further investigation. The deputy district attorney who supervised the juvenile division of the district attorney's office testified that Opper was not assigned to the juvenile division in April or May 2002.

¶11 The criminal court issued an oral decision from the bench in which it made findings of historical facts.

As to the facts in this case, Mr. Baumann was arrested for actions that occurred in the City of Pewaukee on or about the date of April 19th, 2002. He spoke to the police, I believe, the day following, on April 20th, 2002, when he was asked into the City of Pewaukee Police Department to meet with Officer Fredericks from that Department. At that point in time, Mr. Baumann was 16 years of age. He turned 17 on May 3rd, 19—excuse me, 2002, approximately two weeks after the date of this incident. Mr. Baumann now is 18 years of age.

It is abundantly clear to the Court that after this meeting was held with Mr. Baumann and I believe his mother and Officer Fredericks, that paperwork was prepared by Officer Fredericks and submitted to his then supervisor, Sergeant Ripplinger. Sergeant Ripplinger, according to the chain of command, was then to refer this to the Chief of Police who at that time was Chief Stone—and it is now Chief Bach—but it became abundantly clear to the Court through the somewhat confusing testimony of Officer Fredericks and then Chief Bach, that this paperwork, the juvenile court paperwork, was never submitted to the juvenile court authorities, that being the Department of Human Services where all juvenile court paperwork and juvenile court referrals would start.

I'm convinced after listening to the testimony [of witnesses who process juvenile referrals in the Clerk of Courts and DHHS] that the juvenile referral form prepared by Officer Fredericks never got to the juvenile court authorities. This would, I think, somewhat explain some of the confusing aspects of Officer Fredericks who I think was candid with the Court when he said that: "I submitted the paperwork to my supervisors, and the next thing I know, that the matter is back in front of me after Mr. Baumann turned 17 years of age," and then being instructed by, I believe, then Lieutenant Bach, now Chief Bach, to submit this as an adult referral since Mr. Baumann was now 17 years of age.

Now, Chief Bach testified in here, and he testified that he had received word from the juvenile court authorities that—well, actually from the Waukesha County D.A.'s office, and specifically Ms. Opper, who according to Chief Bach, was assigned to the Juvenile Court Division, for lack of a better word, in the D.A.'s office, that the matter should be referred as an adult referral because of a passage of time and that Mr. Baumann was now 17 years of age.

Well, I am satisfied that that is incorrect and is clearly inconsistent with the other testimony offered in this case. Ms. Opper, as an officer of the court, has indicated that she never authored any letter back to the City of Pewaukee Police Department and, in fact, had never been assigned to this case until, I believe, recently. She, I believe, was the charging D.A. but only received this referral after Mr. Baumann had turned 17 years of age and that she had never handled this case at all through the juvenile court; and through the testimony of Deputy District Attorney, Steve Centinario, who was—supervises all Assistant D.A.s assigned to juvenile court at this point in time, the important points in time in this case, Ms. Opper never was assigned to juvenile court.

To my knowledge, Ms. Opper's never been assigned to juvenile court, so the testimony of now Chief Bach that he got a letter from Ms. Opper saying that, you know, please refer this in as an adult matter just is inconsistent with the other testimony that's been offered in this case.

Therefore, again, I am satisfied that the juvenile court referral, initially put together by Officer Fredericks, never, ever was referred to the juvenile court authorities and that the only time that these matters were referred for review by a prosecutor was when the matter crossed the desk of Ms. Opper after Mr. Baumann's 17th birthday.

¶12 Using these historical facts, the criminal court addressed the question of whether the State intentionally manipulated the filing of the referral in order to avoid juvenile court. The court stated that it believed “that there was absolutely no intentional delay charging Mr. Baumann in order to avoid juvenile court jurisdiction.” The court also stated that the City of Pewaukee Police Department was negligent in getting the referral filed. The court concluded that the State had “shown to the satisfaction of the Court that there was no intentional delay, rather only negligent delay; therefore, the Court is going to deny the Defendant’s motion to dismiss these matters.”

¶13 Whether the State met its burden at the *Becker* hearing and proved there was no manipulative intent to avoid juvenile court jurisdiction, *LeQue*, 150 Wis. 2d at 268, by holding the referral until after Baumann’s seventeenth birthday is a question of constitutional fact. See *State v. Trochinski*, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891 (whether plea was knowing and intelligent poses a constitutional fact question); *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 700, 530 N.W.2d 34 (Ct. App. 1995) (whether a party could meaningfully participate in a hearing by telephone poses a constitutional fact question). Questions of constitutional fact are subject to independent review, and require us to independently apply the constitutional principles involved to facts as found by the criminal court. *State v. Pultz*, 206 Wis. 2d 112, 119, 556 N.W.2d 708 (1996).

¶14 We begin our independent review by restating the State’s burden at a *Becker* hearing, “to show lack of manipulative intent.” *LeQue*, 150 Wis. 2d at 268. We conclude, contrary to the criminal court’s conclusion, that the State failed to meet its burden. To recap the facts, Fredericks completed a juvenile referral sometime between April 23 and 27, prior to Baumann’s seventeenth birthday on May 3, 2002, and forwarded it up the chain of command to Bach, who

had the sole authority to decide whether the referral should be forwarded to DHHS, the juvenile services division of the clerk of courts and/or the district attorney. None of these offices ever received a juvenile referral for Baumann.

¶15 There is no credible explanation of what happened to the juvenile referral once it was forwarded to Bach. The criminal court rejected Bach's testimony that the juvenile referral was forwarded and then returned to the Pewaukee police department by Opper with directions to conduct a further investigation.

¶16 Fredericks next saw the referral after Baumann's birthday when Bach directed him to complete an adult referral on May 5 or 6. Fredericks testified, "I was advised by Lieutenant Bach to complete an adult referral form. He had indicated that it went to juvenile court, and they stated something to the effect that on the date of the referral, he was no longer considered a juvenile, so it had to go through adult court." We note that Fredericks' testimony directly contradicts Bach's discredited testimony that the district attorney returned the referral for further investigation.

¶17 The State failed to carry its burden at the *Becker* hearing. The testimony that the criminal court found credible does nothing more than establish (1) that after Fredericks completed the juvenile referral he forwarded it, up the chain of command, to Bach; (2) Bach had sole authority to forward referrals for prosecution; (3) the juvenile referral never left the Pewaukee police department; and (4) approximately ten days after Fredericks completed the juvenile referral, Bach ordered him to complete an adult referral because Baumann had turned eighteen. This evidence does not support a finding of negligence.

¶18 When the precipitating events are also considered, certainly the most reasonable inference is that there was an intentional manipulation to avoid juvenile jurisdiction. Approximately fourteen days before Baumann's seventeenth birthday, three Pewaukee police officers were frustrated in their attempt to investigate an underage drinking party when they were denied entry into a private residence. These three officers hid in the backyard of the residence hoping that those inside would leave. When they saw a group leave through the front door, the officers followed them by walking through backyards, out of sight of the suspects. As the suspects entered a vehicle, the officers came from behind bushes and entered the street. When ordered to stop, the operator of the vehicle allegedly attempted to run down two of the officers. Fredericks completed the juvenile referral and forwarded it to Bach sometime between April 23 and 27, no more than seven to ten days before Baumann's seventeenth birthday. Finally, sometime on May 5 or 6, Bach ordered Fredericks to complete an adult referral because Baumann had turned seventeen on May 3.

¶19 The facts of this case are easily distinguishable from those cases in which it was found that there was no manipulative intent in delaying the charging of the defendant until he or she became an adult. In all of those cases, the State presented evidence that either ongoing investigations or problems in locating the defendant were the reason for the delay. In *Becker*, the delay in charging was found not to be manipulative because of an ongoing undercover drug investigation and Becker was charged at the same time as all other drug offenders. *Becker*, 74 Wis. 2d at 678. Likewise, in *Bendler v. Percy*, 481 F. Supp. 813, 815-16 (E.D. Wis. 1979), it was not manipulative to wait until the conclusion of an undercover drug investigation before charging. In *Montgomery*, the supreme court held that the police had not engaged in manipulative practices but had employed reasonable,

but unsuccessful, methods in attempting to locate Montgomery before his eighteenth birthday. *Montgomery*, 148 Wis. 2d at 599-600. We held in *LeQue*, that a twenty-one day delay between the report of an assault and LeQue's eighteenth birthday was reasonable and the delay arose from conflicting schedules rather than manipulative intent to avoid juvenile court jurisdiction. *LeQue*, 150 Wis. 2d 268-69. Finally, in *Velez*, we again confirmed that the period of time needed to investigate the crime and locate the defendant was not indicative of manipulative intent. *See Velez*, 224 Wis. 2d at 21-22 (defendant did not dispute that police made a good faith effort to find him before his birthday; evidence did not support intentional manipulation).

¶20 Here, there was no ongoing undercover investigation that would be compromised by immediately charging Baumann. Similarly, the investigation was anything but lengthy; it was completed the day after the incident. Baumann was not difficult to contact, he voluntarily appeared at the police station. There is no explanation of what happened between the time Fredericks forwarded the juvenile referral to Bach and the time Bach ordered Fredericks to complete an adult referral. The facts in this case do not support the conclusion that either negligence or a passage of time is the cause of the delay in charging Baumann. We conclude that the State has failed to show that there was no manipulative intent. *LeQue*, 150 Wis. 2d at 268.

By the Court.—Judgment reversed.

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

