COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2510 **Cir. Ct. No. 03JV001077**

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

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACK S.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

¶1 CURLEY, J.[1] Barry S., *pro se*, the parent of Mack S., born January 29, 1989, a juvenile who has been adjudicated under the Juvenile Justice Code,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). Barry S. has requested a three-judge panel to hear his appeal. That request is denied.

appeals the trial court's order denying his WIS. STAT. § 938.46 (2003-04)[2] petition seeking a "rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication." Because most of what Barry S. has submitted is not "new evidence … affecting the advisability of the [trial] court's original adjudication," this court affirms that part of the trial court's decision. However, Barry S.'s claim that the victim of the armed robbery was prepared to recant his identification of Mack S. as his assailant is, if true, new evidence. Thus, this court remands this matter to the trial court for the sole purpose of determining whether this evidence rises to the level of affecting the advisability of the trial court's original adjudication.[3] Consequently, this court affirms in part, reverses in part, and remands with instructions.

I. BACKGROUND.

¶2 Mack S. has been adjudicated as a delinquent three times. In August 2002, Mack S. was charged with armed robbery in a delinquency petition. He was accused of having accosted an 82-year-old neighbor and, while brandishing a four-inch knife, demanded money and the victim's house keys. The petition states that Mack S. confessed. Later, in August 2002, Mack S. was accused of misdemeanor battery. He was identified as the party who struck a passenger on a county bus. In December 2002, Mack S. was also named in a delinquency petition that alleged that he committed a battery to an elderly person, as a party to the crime.

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[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] The record sent to this court does not contain the testimony of the armed robbery victim.

¶3 On April 30, 2003, following court trials at which Mack S. was found to be delinquent for misdemeanor battery and battery to an elderly person, he was sent to the Ethan Allen School for one year on each charge. On July 15, 2003, after finding Mack S. to be delinquent for committing an armed robbery, the trial court sent Mack S. to the Ethan Allen School for a period of five years.

¶4 Barry S. has filed numerous motions pursuant to WIS. STAT. § 938.46, seeking a vacation of the delinquency findings, and a rehearing in each case. The motions have all been denied. Later, Barry S. filed a motion for reconsideration that was also denied. Although Barry S.'s brief discusses all three cases, this court will only consider the claim concerning the armed robbery, as the other matters are now moot due to the fact that Mack S. has already served the dispositional time.[4] Thus, this court will confine itself to reviewing whether new evidence was presented to the trial court that "affect[ed] the advisability of the court's original [armed robbery] adjudication."

II. ANALYSIS.

¶5 Barry S. contends that the trial court erroneously exercised its discretion in determining that he presented no new evidence that would affect the

[4] Barry S. has also appealed other matters that are not currently before this court.

underlying armed robbery adjudication.[5] With respect to the armed robbery case, Barry S. claims that his new evidence consists of: the ineffectiveness of Mack S.'s trial attorney; the police report reflecting that the victim originally identified Mack S.'s brother as the assailant; the application of several Wisconsin statutes, both substantive and procedural, that, in Barry S.'s opinion, would have changed the trial court's decision, had they been applied;[6] a report of an interview with the armed robbery victim by an investigator hired by Mack S.'s prior attorney, which remains unavailable; testimony from an investigating detective who Barry S. anticipated would admit to manipulating the armed robbery victim into misidentifying Mack S.; and the proposed testimony of the armed robbery victim who would state that his earlier testimony identifying Mack S. was in error.

¶6 Barry S. has correctly noted that there are no published cases examining WIS. STAT. § 938.46. There are, however, several published cases dealing with different versions of a similar statute, WIS. STAT. § 48.46 (1971), for

[5] In Barry S.'s brief he also strongly disagrees with the finding of delinquency in each case. He claims that in the misdemeanor battery case "neither victim nor witness had ever given the police a description of him; neither had ever identified Mack at a show-up; neither had ever picked Mack for a photo-array; and neither had ever picked Mack from a line-up." With regard to the battery to an elderly person, he argues that the State failed to prove that the victim suffered from "a substantial risk of great bodily harm" because the victim testified his injury consisted of an eye infection and he received no medical treatment. As to the armed robbery, Barry S. submits that the real perpetrator was his son, Barry Jr., and not Mack S. He argues that he knows this to be true because the victim called him and told him so. He also believes that Mack S.'s confession was not "knowingly and voluntarily made."

[6] These include WIS. STAT. § 938.23(lm)(a), concerning the right to counsel; the constitutional right to a jury trial; and WIS. STAT. § 804.08, setting forth the procedure for written interrogatories.

example, which includes some language almost identical to that of WIS. STAT. § 938.46.[7] Section 938.46 reads:

> **New evidence.** A juvenile *whose status is adjudicated by* the court under this chapter, or the juvenile's parent, guardian or legal custodian, *may at any time within one year after the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication. Upon a showing that such evidence does exist, the court shall order a new hearing.* This section does not apply to motions made under s. 974.07 (2).[8]

(Emphasis added.) Section 48.46 reads:

> **New evidence.** A parent, guardian, legal custodian or next friend of any child *whose status has been adjudicated* by the juvenile court *may at any time within one year of the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. Upon a showing that such evidence does exist, the court shall order a new hearing* and make such disposition of the case as the facts and the best interests of the child warrant.

(Emphasis added.) Thus, this court will utilize the standard that has been adopted for § 48.46 as guidance in this case.

¶7 In ***Schroud v. Milwaukee County Department of Public Welfare***, 53 Wis. 2d 650, 193 N.W.2d 671 (1972), the supreme court held that WIS. STAT. § 48.46 has two requirements: "(1) There must be shown the existence of newly discovered evidence, and (2) the evidence must be of such a character as to affect

[7] WISCONSIN STAT. § 938.46 was created with the rest of Ch. 938—the Juvenile Justice Code—by 1995 Wis. Act 77, § 629. WISCONSIN STAT. ch. 48 contains the Children's Code.

[8] The last sentence was added when the statute was amended by 2001 Wis. Act 16, § 3900.

the advisability of the original adjudication." ***Id.*** at 654. The supreme court also adopted the standard of review found in ***Bear v. Kenosha County***, 22 Wis. 2d 92, 125 N.W.2d 375 (1963), stating that the "granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court." ***Schroud***, 53 Wis. 2d at 654. These standards are relevant and applicable here as well. Thus, this appeal is limited to determining whether the trial court properly exercised its discretion and whether new evidence was provided that would affect the trial court's original ruling on the delinquency petition.

¶8 WISCONSIN STAT. § 938.46 refers to "new evidence." Thus, Barry S. was obligated to produce newly-discovered evidence in order to obtain the relief he seeks. Newly-discovered evidence has been defined as:

> **Newly-discovered evidence.** Evidence of a new and material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause after the rendition of a verdict or judgment therein. Testimony discovered after trial, not discoverable before trial by exercise of due diligence.

BLACK'S LAW DICTIONARY 940 (5th ed. 1980) (citations omitted). The application of this definition to Barry S.'s claims defeats most of his "evidence." The claim that Mack S.'s attorney was ineffective does not fall within the ambit of new evidence. While an attorney's ineffectiveness may result in overturning the delinquency finding in a direct appeal, *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), it does not relate to a fact in issue. Additionally, the police reports are not new evidence, because these documents were in existence at the time of the hearing and were available to all parties. For the same reason, the statutes that Barry S. relies upon are not new evidence.

¶9 The alleged failure of the trial court to adhere to statutory mandates may result in a reversal, but such conduct—if it occurred—does not create new material facts touching on the elements of the crime. The report of an interview with the armed robbery victim that was conducted at the request of Mack S.'s first attorney is also not new evidence because it was in existence at the time of the hearing. Moreover, it is not known whether the report contradicts the victim's testimony. It is also likely that Mack S.'s appellate counsel has obtained the report and evaluated its worth. Barry S.'s belief that one of the investigating detectives will testify, if permitted to do so, that he manipulated the victim into identifying Mack, is also not new evidence. In fact, it is not evidence at all. Rather, it is pure speculation.

¶10 Thus, much of what Barry S. has claimed as "new evidence" is neither new, nor evidence. Barry S. has repeatedly confused legal principles and legal defenses with new evidence. The one exception is his contention and offer of proof that the armed robbery victim was prepared to testify at a hearing that he identified the wrong person as his assailant. If, indeed, the victim recants his earlier identification of Mack S. as the armed robber, this evidence directly impacts the facts of the case and could result in an order for a new hearing. Thus, this court affirms the trial court's decision in every respect, except its determination regarding the possible recanted evidence of the armed robbery victim. This court remands for the sole purpose of permitting Barry S. to present the victim's testimony to the court. The trial court must then decide whether this evidence is believable and sufficient to require a rehearing on the delinquency petition. Accordingly, we affirm in part; reverse in part and remand with instructions.

By the Court.—Order affirmed in part; reversed in part and cause remanded with instructions.

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