
STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,

Plaintiff,

Case No. F-971246

vs.

LATOSHA ARMSTEAD,

Defendant.

ONE MORNING GREGOR SAMSA AWOKE TO FIND HIMSELF TURNED INTO GIANT
COCKROACH. ON ANOTHER MORNING LATASHA ARMESTEAD AWOKE TO FIND
HERSELF METAMORPHIZED INTO AN ADULT: NEITHER GREGOR SAMSA NOR
LATASHA ARMSTEAD WERE AFFORDED DUE PROCESS OF LAW.

The defense on behalf of Latosha Armstead submitted a pre-hearing brief challenging the constitutionality of Wis. Stat sec. 938.183 and 970.032. The court ruled at the outset of the hearing to table its ruling on the constitutionality of the statute until after the conclusion of the hearing. After the hearing the defense filed additional submissions regarding the unconstitutional application of the previously described unconstitutional statute. The state in its response appears to be comfortable with both the statute and the hearing held allegedly pursuant to those statutes -their comfort is a rouse for attempting to uphold a statute based on their own misguided normative principles. They have closed their eyes to a thirteen-

year-old girl: we do not. Blindness is an affliction that is both comforting and tragic.

I. THE STATE HAS CITED CASES THAT ARE NOT CONTROLLING AND MISSTATES THE HOLDING FOR WHICH THEY STAND.

The State defends the constitutionality of Wis. Stat. Sec's. 938.183 and 970.032 by primarily citing two cases, State v. Martin, 191 Wis. 2d 646 (Wis. App. 1995) and State v. Verhagen, 198 Wis. 2d 177 (Wis. App. 1995). These cases upheld the validity of statutes that provided original adult criminal court jurisdiction over juveniles accused of committing a battery in a secured correctional facility. What the State throughout its submissions ignores, avoids or fails to acknowledge is that the defendant has not raised any of the arguments raised by Martin and Verhagen, that the facts in this case bear little relation to the facts in those cases, and that none of the arguments raised by Latosha Armstead were raised by the defendants in Martin or Verhagen.

The State, in its submission entitled State's Reply Brief to Defendant's Motion to Dismiss Alleging Constitutional Infirmities in Wis. Stat. Section 938.183 and 970.032, page 3, (hereinafter State's Reply) quotes from Martin. "Martin launches several constitutional arguments, all of them sounding

completely on equal protection grounds" (emphasis added).

Latosha Armstead has argued that she was denied equal protection only in the context of the deprivation of her fundamental right to her status as a child, Motion to Dismiss and Memorandum of Law, June 6 1997, pages 14-18 (hereinafter Motion to Dismiss). The defendant has drawn the Court's attention to the following Constitutional infirmities which have no bearing in the equal protection clause of the Fourteenth Amendment to the United States Constitution.

- She has been denied her procedural due process rights by being subjected to an unconstitutionally vague statute. Motion to Dismiss, pages 24-29. What are the Rules for a Reverse Waiver? (Day 4 Page 109), August 1 1997 (hereinafter What are the Rules), Additional Arguments and Authority in Support of Previously Submitted Motion to Dismiss and Memorandum of Law, August 1 1997, (hereinafter Additional Arguments).
- She has been deprived her substantive due process rights by being stripped of her legal and social status as a child. Motion to Dismiss, pages 3-14
- She has been deprived of her procedural due process rights by being denied her vested interest in education. Motion to Dismiss, pages 18-20.

- She has been denied her procedural due process rights by being subjected to conclusive irrebuttable presumptions. Motion to Dismiss, pages 21-24.
- The vagueness inherent to the statute has lead to a denial of effective assistance of counsel. Motion to Dismiss, pages 31-34.
- The statute exposes her to cruel and unusual punishment. Motion to Dismiss, pages 18-20, Evolving Standards of Decency: A Constitutional Right or a Hollywood Slideshow? August 1 1997 (hereinafter Evolving Standards).

Yet despite the fact that none of these arguments were raised by the defendant in Martin, the State presents that case as absolutely controlling. "That case is directly on point with the issues raised by the defendant in the present case and the holding of the Court of Appeals in Martin provides a clear basis for the denial of the defendant's motion to dismiss this case." Martin is an equal protection case. The present case is about due process. Any law student, nervous on the night before an exam, might check Ballantine's Law Dictionary and find the following definitions.

1. Equal Protection: "...a guarantee under the Fourteenth Amendment to the United States Constitution that no person or class of persons shall be denied the same protection of the law which is enjoyed by the other

persons or other classes under like circumstances..."

Ballentine's Law Dictionary, 3d Edition.

2. Due Process: "...established rules which do not violate private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding by hearing upon notice." Ballentine's Law Dictionary, 3d Edition.

Essentially the difference between due process and equal Protection is that due process has both a substantive and a procedural component - due process is about the rules that ensure fairness. Equal protection, on the other hand is about the principle that laws should apply to all equally. Whereas many an equal protection argument can fit the contours of due process - due process most often concerns issues much broader than classification.

The State cites the Supreme Court of Wisconsin in State v. McManus, 152 Wis. 2d 113. According to the State "(t)he McManus case also holds that equal protection and due process analysis of this type of challenge are **substantially equivalent**. See McManus, 152 Wis. 2d 130." (Emphasis added). State's Reply, page

9. **This is a complete misrepresentation of the case.** What McManus says on the issue is the following.

This court has held the due process and equal protection clauses of the Wisconsin Constitution are the substantial equivalents of their respective clauses in the federal constitution. McManus, at 130.

In summary, not only has the State ignored the defendant's arguments, and mislead the court by portraying analogous authority as controlling, it has also misrepresented an opinion of the Supreme Court.

The misrepresentations and exaggerations of the State run deep in State's Reply. So deep in fact that it becomes difficult to take much of its argument seriously. "What the defendant has failed to do is to present **any relevant legal precedent** to support her challenge to the constitutionality of the above statutes." State's Reply, page 1, (emphasis added). If the State had read or understood the submissions of the defendant it might have pause to analyze the authority that supports her. But it is difficult to distinguish what the State has simply neglected to read, from what it has not understood, from what it has invented.

Verhagen, the second case that the State primarily relies on, hardly bears any relevance to the present case. Verhagen concerns Wis. Stat. Sec. 970.032, the same statutory sections as Martin. Verhagen at 185. The court found that the relevant statute was ambiguous in that it did not establish to whom the burden of proof in a reverse waiver hearing belongs, Id at 186. The Court conducted a five factor analysis which resulted in a finding that the burden of proof was the defendant's. Id at 187-190.

Absent in Martin and Verhagen, and mostly avoided by the State's briefs, is any discussion of the procedural due process rights relevant to Latosha Armstead. There are two obvious reasons why the cited cases avoid this discussion: 1) those defendants did not raise the issue; and 2) the issue is not relevant in the factual and legal context of juveniles charged with committing a battery in a correctional institution. There is one obvious reason why the State largely avoids the issue, the State wishes to save an unconstitutional statute by evading the argument.

Wis. Stat. sec. 970.032 - the statute in Martin and Verhagen has been amended since 1995 - the year those cases were decided. The statute now explicitly places the burden of proof on the defendant. However, the three criteria¹ that the defendant bears the burden of proving have not changed. Wis. Stat. Sec. 938.183, the statute that establishes adult court jurisdiction over certain children, has also been amended since 1995. It now not only applies to juveniles who are charged with committing a battery in a correctional facility, but also to any child at least ten years old who is accused of homicide.

II. AS LATE AS DAY 4 PAGE 109, THE RULES WERE STILL UP FOR GRABS. A VAGUE STATUTE CANNOT SURVIVE A POLITE JUDGE WHO ASKS FOR THE BASIC RULES AFTER THE HEARING IS OVER.

The State may not have read the briefs the defendant submitted on August 1 of 1997. Or if it did, it may have simply chosen not to respond to them. Either way, the simple question - what rules apply to a reverse waiver hearing? - remains unanswered. Implied in this unanswered question is the troubling truth - this law is unconstitutionally vague. As highlighted in Additional Arguments, a statute fails on substantive due process grounds if it is impermissibly vague. The dangers of vague statutes are twofold; first, they do not provide notice, and second they invite arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 105 (1972).

Wisconsin and Federal courts have applied a two prong test to statutes that are challenged on vagueness grounds. The first prong is that a person of "ordinary intelligence" must be able to understand the law; the second is that it must contain **explicit standards** to guide its enforcement. If the statute fails on either prong it is unconstitutionally vague. State v. Strassburg, 120 Wis.2d 30, 352 N.W.2d 215, 218 (Wis. App. 1984)

citing Grayned, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), Wright v. New Jersey, 469 U.S. 1146 (1985).

The fact that this statute does not provide the defendant, the court, or the prosecutor with explicit standards has been illustrated in every submission the defendant has made to this court. The defense brief entitled What are the Rules, in particular, highlights the vagueness of the statute. The legislature did not provide explicit standards when it enacted this law, leaving the Court in the position of having to ask the parties for guidance on the following issues:

- The weight to be given to psychological testimony.
- Whether the rules of evidence applied.
- What legal and personal consequences the defendant faces based on an adult criminal conviction.

The State weighed in with its opinions on these legal and policy matters in the State's Responsive Brief to Reverse Waiver. The prosecution believes that "(t)he use of psychological testimony has a limited relevance in a reverse waiver hearing on the issue whether the defendant could receive adequate treatment in the adult system." They then add "(t)he psychological testimony should be child specific, and should not contain speculation as to the system in general." State's Responsive Brief to Reverse Waiver, page 11. The State cites no authority to these insights. No statutory section, no

legislative history, no court case, no treatise, nothing in the State's brief tells us that these opinions are anything other than the wishful thinking of two partisan men. Neither thoughts nor the desires of these two men are the duly enacted laws of the State of Wisconsin for which the defendant had notice prior to the commencement of the hearing.

On the issue of what evidentiary rules apply to the reverse waiver hearing, the prosecution appears less certain, "(t)he fact that the reverse waiver provision is placed as an adjunct to a preliminary hearing, **it seems** the legislature intended that the rules of evidence apply to the reverse waiver hearing."

State's Responsive Brief to Reverse Waiver, page 12, (emphasis added). Again, the state supplies no authority to this opinion. It cites two cases to illustrate the fact that the rules of evidence apply to preliminary hearings. But we all agree that the rules apply to preliminary hearings. Clearly evidence regarding the three conclusive presumptions would be inadmissible at a regular preliminary hearing. The legislature again failed to provide explicit standards, and the prosecution's inability to provide any supporting authority is further evidence of the vagueness under which Latosha has been forced to blindly stumble.

What would Latosha be facing if convicted under the adult system? The State admits that children as young as fourteen

have been sent to adult prisons in our state. The State's own witnesses acknowledged that there may have been a child of thirteen at Taycheedah. Yet the prosecution seeks to assure us that there is no chance that Latosha could be sent to a prison until she reached the age of fifteen, and that it would be likely that she would remain in a juvenile facility until the age of seventeen. State's Responsive Brief to Reverse Waiver, pages 5,6. Again the State provides us with no legal authority. While the defendant acknowledges that the prosecution's opinion on this matter does describe one possible reality, it is by no means a legal certainty - and there is no reason to believe that it is the most likely outcome.

The prosecution does not respond to the issue raised by the defendant in the document entitled Argument of Counsel, August 1, 1997, page 7, that Wis. Stat. 938.02(15m) only permits "persons adjudged delinquent" to be held in a juvenile correctional facility. Wisconsin law by definition prohibits the placement of criminals in one of these facilities. The prosecution has chosen to avoid this question and instead supply us with their unsupported speculation as to what might happen to Latosha. The Court, the State, and the defendant all wonder what will happen. The law however does not tell us.

Where does this leave us? Back where we started. We have a child who does not know what she is facing, how to defend

herself, or what rules apply. We have a court that has been given no guidance by the legislature - and has been cornered into the remarkable position of having to ask the parties for guidance. We have a prosecution that submits its unsupported opinions as interpretations of law. And we have an unconstitutionally vague statute.

III. UNDER DIFFERENT LEGAL APPLICATION THESE THREE CRITERIA HAVE BEEN HELD TO BE CONSTITUTIONAL.

The three criteria that are supposed to govern a reverse waiver hearing are on their face the exact same criteria that governed reverse waiver proceedings in cases of children accused of committing a battery in a juvenile correctional facility. Martin and Verhagen never argued the vagueness of this language. Consequently the court never had reason to rule on this issue. However there is a more profound distinction between cases such as Verhagen and Martin and the present case.

Latosha is required to show that she can not receive adequate treatment in the criminal justice system, Wis. Stat. 938.032(2)(a). What is adequate? What is treatment? Is it education, counseling, friendship, or guidance? Is it living facilities? What time period is she supposed to look to in order to demonstrate that a system designed for adults can not meet her childhood needs? The child who has committed a battery in a

juvenile correctional facility would not have to ask these questions. The treatment needs of the child would be known from his or her history in the juvenile facility. These needs could then be measured against the availability of adequate treatment in the adult system. Latosha has no way of knowing how she will respond to the treatment she could receive in a juvenile facility. The language of the statute is taken out of its definitional context when applied to a child who has never been in custody.

Latosha is asked to prove that waiving her into juvenile court would not depreciate the seriousness of the offense, Wis. Stat. 938.032(2)(b). How is Latosha supposed to prove this? How does seriousness become depreciated by the act of waiving her into the jurisdiction of a juvenile court in the first place? To what subjective mind does the legislature direct us to look at to decide whether it feels that the seriousness of the offense has been depreciated? Who is Latosha supposed to ask if they feel that the seriousness of the offense would be depreciated by the waiver? In the case of the child charged with battery in a juvenile correctional facility these questions would not be asked because it is the other inmates and the staff members of the juvenile correctional facility that would provide the basis for understanding depreciation. But, the statutory language becomes saturated with vagueness when taken out of the context

of a child that committed a battery in a juvenile correctional facility.

Latosha is also supposed to prove that keeping her in the adult system is not necessary in order to deter other children from committing the crime she is charged with, Wis. Stat. 970.032(2)(c). Which children is Latosha supposed to ask? How is she supposed to predict the future behavior of anyone? How is she supposed to prove the future behavior of children, neither defined in time or space? In the context of a child that committed a battery in a juvenile correctional facility these questions need not be asked. There would be definite population - the inmates of correctional facilities - that would provide the backdrop to answer these questions. But for Latosha there is no knowing. There is only blindness and the awareness that she has been asked to prove the impossible, to define the impossible, and to understand the impossible.

As to the other points of procedural vagueness and ambiguity that defendant has expressed her alarm and concern about (whether she has the right to appeal the reverse waiver and what type of appeal she is entitled to) the State has not weighed in with further speculation. But these questions also remain unanswered. And the burden of uncertainty falls not only on this thirteen year old child, but on the legal system that is

entrusted with the protection of our highest values - fairness, justice, and liberty.

IV. FUNDAMENTAL RIGHTS ARE DEFINED BY OUR NATIONS TRADITIONS AND HISTORY.

Despite the State's insistence and misrepresentations, the defendant does not argue that she has a fundamental right to being treated as juvenile. The State may miss the subtlety of the distinction, but what the defendant argues is that she has a fundamental liberty interest in the presumption that she is a child. Fundamental liberties are those that are deeply rooted in the nation's tradition and history. Bowers v. Hardwick, 419 U.S. 186, 192 (1986). The fact that we presume that children are not adults, and by extension that they are not capable of the same level of responsibility, reasoning, accountability, or wisdom is one of the central ideas by which the family and society are organized. It is difficult to conceive of a principle more deeply rooted in our tradition and history.

Latosha is entitled to these presumptions. She is not entitled to the juvenile system, nor is she entitled to not be incarcerated for criminal behavior - which is what the State attempts to convince the court she is asking for. State's Reply, page 11. She is entitled to the presumption that she is a

child, and this is what she has argued. See Motion to Dismiss pages 8-11, 1-7. This fundamental right triggers a strict scrutiny analysis under the due process clause.

V. UNITED STATES SUPREME COURT CASE LAW STILL COUNTS FOR SOMETHING—DOESN'T IT?

In her assertion that she has a vested property right in continuing her public education the defendant cited the United States Supreme Court decision of Goss v. Lopez, 419 U.S. 565 (1975), Motion to Dismiss, page 18. "...(T)he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause..." Goss, at 574.

The State, in State's Reply, writes,

I can only respond by saying I do not think the opportunity for a public education is the kind of 'property' that is encompassed by the Constitution which forbids the taking of one's property by the State without due process. I see no precedent of any persuasive value presented by defendant Armstead to support such an interpretation. State's Reply, page 15, (emphasis added).

The State has a First Amendment right to say what it pleases about Supreme Court decisions and holdings. But once again, just because the State weighs in with an opinion, does not mean that it is supported by the principles of law.

VI. CRUEL AND UNUSUAL PUNISHMENT: THE TRAIN WHICH CARRIED THE EVOLVING STANDARDS OF DECENCY LEFT THE STATION BEFORE ITS SCHEDULED DEPARTURE TIME. AS A RESULT THIS TRAIN HAS BEEN CANCELLED WITHOUT NOTICE.

The State offers us its assurances that Latosha would be placed in a juvenile facility until she reached the age of seventeen. State's Reply, page 14-15. This, it argues, is enough to satisfy any concerns she may have about Eighth Amendment violations. It cites Wis. Stat. 938.183(2)(b) to support this position. However, there are three problems with its analysis. First, 938.183(2)(b) does not appear to apply to children under fifteen. Second, in a separate submission the State says that she could be sent to a prison at the age of fifteen, State's Responsive Brief to Reverse Waiver, page 5. And third, the State's own witnesses testified that children as young as fourteen and perhaps thirteen have been imprisoned at Taycheedah - an adult prison.

Misstatement, misunderstanding, misrepresentation, fabrication? The defendant is not sure. But it has become clear that the State has momentarily - via ignorance, carelessness, or deceit - forgotten its duty to rigorously protect the rights of all children, even those accused of murder.

It is respectfully requested that this court dismiss the charge and hold these statutes unconstitutional. In the event that it does not, one asks the court to yet again have the courage to ask the question, "What are the rules of a reverse waiver?" and find that the hearing was in violation of the 5th and 14th amendments to the United States Constitution and Article 1 Section 1 of the Wisconsin Constitution as it applied to the hearing held on behalf of the 13 year old child defendant.

Dated this 3rd day of September, 1997.

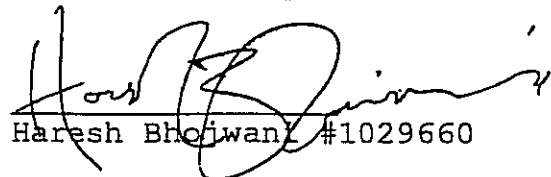
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