

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 23, 2009**

David R. Schanker  
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. 2008AP419-CR**

**Cir. Ct. No. 2007CF115**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**ROBERT J. FEATHERSTON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Green Lake County:  
RICHARD O. WRIGHT, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Storck,<sup>1</sup> JJ.

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<sup>1</sup> Circuit Court Judge John R. Storck is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. The State appeals from that portion of the order of the circuit court that dismissed a charge for reckless driving, WIS. STAT. § 346.62(4) (2007-08), against Robert J. Featherston.<sup>2</sup> The circuit court concluded that the State had not proven that a delay in charging Featherston, until after his seventeenth birthday, was not intentional for the purpose of avoiding juvenile court jurisdiction. The State argues that a charge under § 346.62(4) is not subject to a jurisdictional challenge. Because we conclude the circuit court did not address whether the delay in charging affected the charge under § 346.62(4), and the argument presented by the parties on appeal is being heard for the first time, we reverse and remand the matter to the circuit court for a new hearing. At that hearing the parties are free to raise the arguments they have raised to this court.

¶2 Featherston was involved in an accident in July 2006, in which his car ended up embedded about nine feet off the ground in the side of a barn. A passenger in the car was severely injured. Featherston was sixteen years old at the time. The State waited until February 2007, two weeks after he turned seventeen, to charge him. Featherston was charged with three counts, including reckless driving under WIS. STAT. § 346.62(4), the count at issue in this appeal. Featherston moved to dismiss all three counts on a number of grounds.

¶3 The circuit court dismissed all of the charges on the basis that the State had not met its burden of proving that the delay in charging was not manipulative. At the hearing an investigating officer testified he was told by “management” to wait to refer the matter until an accident reconstruction report

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

was completed. The circuit court found that the officer who testified was not the person who made the decision to delay referring the charges, and that the State had not offered any evidence to show why the person in charge had decided to wait. The court noted that the accident reconstruction report was not necessary to refer the matter for charging, and there was sufficient evidence, based on the facts of the accident and Featherston's statement at the time of the accident, that indicated it occurred because of reckless driving.

¶4 The State then moved the court to reconsider its decision. The State argued that under WIS. STAT. § 938.17(1) exclusive jurisdiction over reckless driving charges lies in adult court from the time a defendant turns sixteen, so the delay in charging did not affect the adult-court jurisdiction. The State noted that it had argued this point in its brief in response to Featherston's motion to dismiss. Featherston responded to this argument stating that the delay in charging did affect him because § 938.17(1) provides that a sixteen-year-old who is charged in adult court is sentenced according to the juvenile code. Consequently, the intentional delay in charging him with reckless driving deprived him of the "due process right not to be deprived of the potential benefits of juvenile [court] jurisdiction." *State v. LeQue*, 150 Wis. 2d 256, 267, 442 N.W.2d 494 (Ct. App. 1989). The circuit court scheduled a hearing on the motion for reconsideration, and the State filed a notice of appeal. The record was transmitted to this court before the hearing took place.

¶5 On appeal the State renews its argument that the juvenile court would not have had jurisdiction over Featherston for the reckless driving charge in any event because WIS. STAT. § 938.17(1) provides for adult-court jurisdiction for this charge. Featherston responds that he had a due process right to have the benefit of being sentenced under the juvenile code, and that the State's significant

delay deprived him of that benefit. In its reply brief the State raises for the first time the argument that it was an “unlikely scenario” that Featherston would have actually been convicted and sentenced before he was seventeen, and that Featherston would have been charged as an adult, regardless of any charging delay. The State is arguing, in essence, that the delay in charging Featherston under the statute was harmless error because the conviction and sentencing would not have occurred before he turned seventeen.

¶6 Featherston has a due process right not to be deprived of juvenile court jurisdiction because the State has engaged in deliberate manipulation to avoid juvenile court jurisdiction. *State v. Velez*, 224 Wis. 2d 1, 14, 589 N.W.2d 9 (1999). The State has the burden of showing that the delay was not for a manipulative purpose. *State v. Montgomery*, 148 Wis. 2d 593, 604, 436 N.W.2d 303 (1989). Whether a defendant has been denied his or her right to due process is a question of constitutional fact that we review de novo. *State v. Tulley*, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807. A question of constitutional fact presents a mixed question of fact and law that we review using a two-step process. *State v. Weed*, 2003 WI 85, ¶13, 263 Wis. 2d 434, 666 N.W.2d 485. The first step is that we give deference to the circuit court’s findings of evidentiary and historical fact, and we will not upset them unless they are clearly erroneous. *Id.* Then we review the circuit court’s determination of constitutional fact de novo. *Id.*

¶7 As both parties recognize, the premise for the circuit court’s dismissal of all three charges—that delay in charging affected adult-court jurisdiction—does not apply to WIS. STAT. § 346.62(4). The issue presented on appeal concerning that charge was not addressed by the circuit court and involves

determining whether the delay in bringing this charge deprived Featherston of the benefit of being sentenced while he was still sixteen.

¶8 We cannot make this determination based on the present record. Accordingly, we conclude we must reverse the dismissal of the reckless driving charge and remand for further proceedings. On remand the parties are free to present any arguments on the issue presented by this appeal: whether any delay in charging this count mattered. Featherston is free to argue that the State improperly delayed charging him on this count to avoid allowing him the benefit of being sentenced as a juvenile under WIS. STAT. § 938.17(1), and the State is free to argue that it did not delay improperly on this count, or if it did, that the delay was harmless.<sup>3</sup> The circuit court will then be faced with the admittedly difficult task of determining whether Featherston would have obtained the benefit of being sentenced as a juvenile if the State had timely charged him.

¶9 For the reasons stated, we reverse and remand the matter to the circuit court for a hearing consistent with this opinion.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>3</sup> We note, however, that the State did not contest in this appeal the circuit court's conclusion that it had improperly delayed on the other charges, and it would be difficult to distinguish its delay on this charge from the delay on the other charges.

