COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP549 **Cir. Ct. No. 2011JV62**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALBERT A.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Albert A. appeals a dispositional order requiring him to register as a sex offender and an order denying his post-disposition motion to stay that registration requirement. Albert argues the circuit court erroneously exercised its discretion because its decision was based on errors of law and fact, and because the circuit court failed to consider the purposes of the juvenile justice code. We disagree and affirm.

BACKGROUND

¶2 Thirteen-year-old Albert was adjudicated delinquent for first-degree sexual assault of a child under the age of twelve, contrary to WIS. STAT. § 948.02(1)(b), and child enticement, contrary to WIS. STAT. § 948.07(1). A second first-degree sexual assault charge and a physical abuse of a child charge were dismissed and read in at disposition. Five other counts were dismissed outright. According to the report attached to the delinquency petition, Albert's eight-year-old victim was playing with Albert's younger sister when Albert pulled down the victim's pants and began licking the victim's vagina. Albert then put a tooth numbing medication on the victim's vaginal area causing burns, and held the victim down while he had penis-to-vagina intercourse with her.

¶3 At disposition, the only disputed question was whether the court would stay its order requiring Albert to register as a sex offender.[2] The circuit court denied the request to stay the registration requirement. In reaching its

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Because Albert was adjudicated delinquent for first-degree sexual assault of a child, and because Albert does not qualify for an exception to the registration requirement under WIS. STAT. § 301.45(1m), the circuit court was required to order that Albert register as a sex offender. *See* WIS. STAT. § 938.34(15m)(bm); *see also* WIS. STAT. § 301.45(1m).

decision, the court observed that psychosexual evaluator Tim Koller[3] opined that Albert had a "low risk" of reoffending. The court stated that, because "Albert ranks at the low end, … that would tend to militate towards imposed and stayed." The court later reasoned,

> but low risk, of course, is not nothing. It's not lack of risk. It's that the risk is relatively low compared to the general population. And all evaluation schemes for that cannot be individual. They essentially look at the categories of people and say what kind of percent are likely to repeat their behavior, and that kind of thing.

¶4 The court also observed that there was no romantic or "love type situation" between Albert and his victim, and that Albert, who was babysitting the victim at the time, was older, "considerably bigger," and in a position of power and authority over his prepubescent victim. The court reasoned registration was necessary to protect the public because it would act as a deterrent for Albert and because it would prevent Albert from being placed in a position of authority over a younger person.

¶5 Finally, the court stated, "So those [factors] basically fit into the concept that I do think the public would be harmed if I did not have [Albert] on the registry. I think he can show over time that there's no need for him to stay on that registry. And then that would be proving Mr. [Koller's] prognosis right … that [Albert] is at a low risk."

¶6 At the end of the hearing, Albert's trial counsel asked, "[D]id the court say that there's a mechanism by which he can ask the Court to be removed

[3] Different spellings of Koller's last name appear in the record. We adopt the spelling Koller used in the psychosexual evaluation he prepared for the court.

from the registry?" The court responded, "Oh, right. Yeah. If you go long enough, they will take you off the registry if you have no problems."

¶7 Albert filed a post-disposition motion for a new hearing on staying the sex offender registration requirement and a motion to stay the registration requirement. Albert asserted the circuit court's decision was based on inaccurate information—specifically, that "there is no legal mechanism for Albert to be taken off the registry early," and that "Albert's risk assessment was an individual assessment; it was not based on actuarial tools." Albert also argued the circuit court had erroneously exercised its discretion by failing to consider the purposes of the juvenile justice code.

¶8 At the post-disposition hearing, Koller testified he used the ERASOR instrument when determining Albert's risk of reoffending. He explained the ERASOR is an actuarial instrument, just not as actuarial as the J-SOAP. Koller stated his ultimate opinion on Albert's risk of reoffending was based on something in between the ERASOR actuarial assessment and his clinical judgment. Specifically, his assessment "was based on the ERASOR, and the clinical judgment would say that Albert doesn't have … legal problems, and he hasn't had mental health hospitalization and … there's a lot of things that didn't apply to Albert. And I use that in unison with the ERASOR."

¶9 Koller also testified that juvenile and adult sex offenders are different, that juveniles generally respond better to treatment, and that the juvenile rate of recidivism is usually less than that of adults. Koller explained that Albert had been responsive to treatment, and Albert's risk of recidivism at the time of the post-disposition hearing was "low to very low."

¶10 The circuit court denied Albert's post-disposition motion and refused to stay the sex offender registration requirement. The court first clarified its statement about whether Albert could be released from registration early and stated, "I think everybody is on the same page about the 15 years that would apply right now under the existing decision. And then [Albert's trial counsel] had asked a question like that, so I made it clear to him [at the disposition hearing] that [Albert] was under the termination provision, meaning 15 years."

¶11 The circuit court did not specifically address Albert's assertion that it allegedly believed Albert's risk assessment was based on actuarial tools instead of an individual risk assessment. However, Koller testified he used an actuarial instrument in his assessment and his opinion was based on "something in between" an actuarial assessment and his clinical judgment. The court also stated that it did know at the time of disposition that "usually recidivism for juveniles is lower than adult offenders." The court noted, "I recognize that this was classed as a low risk. I recognized that at the dispositional hearing."

¶12 The court also supplemented its earlier decision by recognizing that Albert has had "good short-term performance with the counselor." However, the court did not believe Albert's behavior toward an adult counselor when the counselor is in charge would be the same as his behavior toward a younger child when Albert is in charge. It explained some of the things it viewed as more important at the disposition hearing were the age differential between Albert and his victim, the victim's prepubescent status, and Albert's "bigger authoritarian figure." The court stated that, since the disposition hearing, Albert has made some sexually related comments at school, which "doesn't reassure [the court] at all." Finally, the court noted Koller testified that an individual's tendency to reoffend is sometimes impacted by stressors in that person's life, and the court found Albert

had significant stressors in his life, which also did not "reassure" the court that Albert was "an extremely low risk."

DISCUSSION

¶13 Juveniles are required to register as sex offenders under certain circumstances. *See* WIS. STAT. §§ 301.45(1m) and 938.34(15m). However, in ***State v. Cesar G.***, 2004 WI 61, ¶40, 272 Wis. 2d 22, 682 N.W.2d 1, our supreme court interpreted WIS. STAT. § 938.34(16) as giving courts discretion to stay sex offender registration. The juvenile has the burden of proving by clear and convincing evidence that a stay should be granted. ***Id.***, ¶51.

I. Inaccurate information

¶14 Albert first renews his argument that the circuit court misused its discretion when denying his request to stay the sex offender registration requirement because the court relied on inaccurate information. Albert likens a court's reliance on inaccurate information at disposition to a court's reliance on inaccurate information at sentencing. He argues he is entitled to a new hearing on whether to stay the sex offender registration requirement if he can show the information was inaccurate and the circuit court actually relied on the inaccurate information, and if the State fails to establish the error was harmless. *See* ***State v. Tiepelman***, 2006 WI 66, ¶¶2-3, 291 Wis. 2d 179, 717 N.W.2d 1. For purposes of this decision, we assume without deciding that the ***Tiepelman*** standard applies.

¶15 Albert contends the circuit court erroneously believed he could somehow earn early release from the registration requirement if he had "no problems." Albert argues the court's assumption is inaccurate because WIS. STAT. § 301.45(5) establishes a term of fifteen years for juveniles placed on the

registry, unless the court orders lifetime registration, and there is no mechanism that would shorten the fifteen-year term.

¶16 We reject Albert's assertion that the circuit court believed there was a legal mechanism whereby Albert could earn early release from the sex offender registry. At the disposition hearing, the circuit court never stated there was a way for Albert to earn early release. Rather, it stated that Albert will be taken off the registry if he "go[es] long enough," has no problems, and proves Koller's low risk prognosis to be accurate (i.e., does not reoffend). At the post-disposition hearing, the court clarified that when it made statements about how Albert would be released from the sex offender registry, the court was referring to the "termination provision, meaning 15 years." It is an accurate statement of the law that Albert will be taken of the registry in fifteen years if he does not commit any more sexual assault offenses. We conclude Albert has not proved the circuit court believed there was a way for Albert to earn early release from the registration requirement. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶2.

¶17 Albert next argues "the court's second erroneous assumption was that the evaluator's assessment that Albert was a low risk to reoffend was based on an actuarial assessment, rather than a personal assessment of Albert's individual characteristics, attitudes, and beliefs." Albert asserts that, because the court believed Koller's evaluation was an actuarial assessment, "the court devalued the psychosexual evaluation of Albert as a low risk to reoffend, which is one of the criteri[a] in determining whether his registration should be stayed." Albert argues that at the post-disposition hearing, the court did not address the allegation of this inaccuracy.

¶18 Albert, however, overlooks that, at the post-disposition hearing, Koller testified he used the ERASOR in part when making his opinion and the ERASOR was an actuarial assessment. Accordingly, the court's reference to the actuarial data when it observed that Koller had classified Albert as a "low risk" individual was not necessarily inaccurate. That being said, we recognize that Koller clarified at the post-disposition hearing that his ultimate opinion was based on "something in between" the ERASOR and his clinical judgment.

¶19 However, even if we determined the court's reference to the actuarial assessment was partially inaccurate and the court "actually relied" on this information at disposition, we conclude any error based on the court's reference was harmless. Contrary to Albert's argument, nothing in the record suggests that the court "devalued" the evaluation because it was based on an actuarial assessment. The record indicates the circuit court's concern was not with how Koller reached his opinion, but with Koller's ultimate opinion that Albert had a "low risk" of reoffending. The circuit court reasoned "low risk, of course, is not nothing." The court also considered how the particular facts of this case demonstrated a need for community protection through sex offender registry. There is no reasonable probability that any error concerning how Koller's opinion was derived contributed to the disposition. *See* ***State v. Travis***, 2013 WI 38, ¶¶70, 86, 347 Wis. 2d 142, 832 N.W.2d 491.

II. Erroneous exercise of discretion

¶20 Albert next argues the circuit court erroneously exercised its discretion by refusing to stay the sex offender registration requirement. In determining whether to stay the sex offender registration requirement, the circuit court should consider the seriousness of the offense and the following factors:

1. The ages, at the time of the violation, of the juvenile and the victim of the violation;

2. The relationship between the juvenile and the victim of the violation;

3. Whether the violation resulted in bodily harm, as defined in s. 939.22(4), to the victim;

4. Whether the victim suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions;

5. The probability that the juvenile will commit other violations in the future; and

6. Any other factor that the court determines may be relevant to the particular case.

Cesar G., 272 Wis. 2d 22, ¶¶49-50.

¶21 "[We] will affirm a circuit court's discretionary decision as long as the circuit court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.***, ¶42 (citation omitted). "[T]he record on appeal must 'reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case.'" ***Id.*** (citation omitted).

¶22 Albert argues the circuit court erroneously exercised its discretion because the court failed to address the purposes of the juvenile justice code, did not give consideration to Albert's young age or rehabilitation, and discounted Albert's progress in treatment.

¶23 We disagree. At the disposition hearing, the circuit court specifically agreed that Albert needed the counseling and treatment recommended by Koller, and stated it had reviewed Koller's treatment plan and found that Koller

was "on the right track" with his specific goals. The court emphasized that Albert was classed as a "low risk" and that it knew juvenile offenders were less likely to reoffend than adults. At the post-disposition hearing, the court recognized that Albert made progress in treatment, but reasoned this "short-term performance" and cooperation with his counselor presented a very different situation from the babysitting situation during which the offense occurred.

¶24 Further, the record reflects that the circuit court properly considered the ***Cesar G.*** factors. The circuit court considered the age differential between Albert and his victim and observed that Albert had gone through puberty and his victim was prepubescent, and that Albert was considerably bigger than his victim. The court also considered the relationship, noting there was no romantic relationship and, at the time of the offense, Albert was in a "position of power and authority" with regard to his victim. The court noted the victim was harmed when Albert applied the tooth numbing medication to her vaginal area; however, it believed Albert's intent was "to make her feel better, but it had the opposite effect." The court observed Koller opined that Albert presented a "low risk" of reoffending; however, the court determined low risk did not mean no risk. The court also reasoned the public would be protected if Albert was required to immediately register because it would act as a deterrent for Albert and because it would prevent Albert from being placed in a position of authority over a younger person.

¶25 At the post-disposition hearing, the court supplemented its earlier decision by recognizing Albert's "good short-term performance with the counselor"; however, the court did not believe Albert's behavior toward an adult counselor would necessarily be the same as his behavior toward a younger child. The court also stated that, since the disposition hearing, Albert had made some

sexually related comments in school, which "doesn't reassure [the court] at all." And, the court noted that Koller testified at the post-disposition hearing that an individual's tendency to reoffend is sometimes impacted by stressors in that person's life, and the court found Albert had significant stressors, which did not "reassure" the court that Albert was "an extremely low risk" of reoffending.

¶26 Given this record, we conclude the circuit court properly considered the ***Cesar G.*** factors, and simply gave more weight to factors that would require Albert to register. That choice was completely within the circuit court's discretion. Because the record "reflect[s] the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case," we affirm the circuit court's discretionary decision denying a stay of the sex offender registration requirement. *See* ***Cesar G.***, 272 Wis. 2d 22, ¶42 (citation omitted).

By the Court.—Orders affirmed.

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