COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2007

A. John Voelker
Acting 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. 2006AP2059-CR **Cir. Ct. No. 1996CF554**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN M. BOETTCHER, A/K/A SHAWN M. MICHAEL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Shawn Boettcher[1] appeals an order denying his motion for relief from the sex offender registry and an order denying his motion for reconsideration. Boettcher argues the trial court erred by denying the motion because the court inappropriately discounted his expert's testimony, failed to appoint a court-approved expert, placed too much emphasis on the victim's statement, and did not adequately address the relevant statutory factors. We disagree and affirm the orders.

BACKGROUND

¶2 A criminal complaint filed on October 24, 1996, alleged that Boettcher had sexual contact with Christopher J. At the time of the incidents, Boettcher was seventeen and Christopher was fourteen. Boettcher pled no contest to felony sexual assault and received ten years' probation and six months in county jail.

¶3 On March 13, 2006, Boettcher filed a motion for relief from sex offender registration and reporting. At the April 11 motion hearing, Susan Turell, a professor at University of Wisconsin Eau Claire and a licensed psychologist at First Things First counseling center, testified. Turell indicated that she performed a psychological assessment of Boettcher, reviewed evaluations performed by another therapist at the counseling center who worked with Boettcher, and interviewed Boettcher. Turell recommended taking Boettcher off the sex offender registry. When asked how often she treats sex offenders, Turell informed the court that she did not typically work with sex offenders but worked with many

[1] In the complaint and other documents and transcripts in this case, Boettcher was identified as "Shawn M. Boettcher." Subsequent documents refer to Boettcher as Brian Morris and Shawn Michael. For clarity, we refer to him as Boettcher throughout this opinion.

victims, some of whom have also offended. Turell also acknowledged that part of Boettcher's test results revealed that he might be "faking good" or he might have a "social naivety." Based on her interview, she determined it was more likely that he had social naivety than that he was faking on the test. Turell did not reveal anything in Boettcher's case notes that supported her opinions, although she did note that his therapist concurred in her recommendation. The court indicated it was not convinced by Turell's testimony and preferred a second opinion.

¶4 The matter was then continued so the victim could be informed of the hearing. At the continued hearing on May 25, the State informed the court that it had contacted the victim, and the victim's position was as follows:

> He did tell me though that he does not, he's very uncomfortable with and is opposed to the idea of [Boettcher] not being a sexual offender [registrant]. He wants to have the ability to know where [Boettcher] is and under the law he has that right to know where his so-called perpetrator is at all times. It's just one of the purposes of the sexual offender registration. So he is adamantly opposed to lifting of that.

¶5 The State explained it had not obtained an expert because the burden of proof was on Boettcher. Boettcher did not present any further evidence. The court then issued an order denying the motion. Boettcher filed a motion to reconsider, which the court also denied.

DISCUSSION

¶6 Boettcher filed his motion for relief pursuant to WIS. STAT. § 301.45(1m),[2] which requires him to prove by clear and convincing evidence that

[2] WISCONSIN STAT. § 301.45(1m) provides in relevant part:

(continued)

he met all of the statutory criteria to be exempted from registering and reporting. The State does not dispute that Boettcher met the first two statutory requirements

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> (1m) EXCEPTION TO REGISTRATION REQUIREMENT; UNDERAGE SEXUAL ACTIVITY. (a) A person is not required to comply with the reporting requirements under this section if all of the following apply:
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> 1. The person meets the criteria under sub. (1g) (a) to (dd) based on any violation, or on the solicitation, conspiracy or attempt to commit any violation, of s. 948.02(1) or (2), 948.025, or 948.085 (2).
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> 1g. The violation, or the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2) or 948.025, or 948.085 (2) did not involve sexual intercourse, as defined in s. 948.01 (6), either by the use or threat of force or violence or with a victim under the age of 12 years.
>
> 2. At the time of the violation, or of the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2), the person had not attained the age of 19 years and was not more than 4 years older or not more than 4 years younger than the child.
>
> 3. It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.
>
> ….
>
> (bm) A court shall hold a hearing on a motion made by a person under par. (b) or s. 51.20 (13) (ct) 2m., 938.34 (15m) (bm), 971.17 (1m) (b) 2m. or 973.048 (2m) requesting a determination of whether the person is required to comply with the reporting requirements under this section. The district attorney who receives a copy of a motion under par. (be) may appear at the hearing.
>
> ….
>
> (e) At the hearing held under par. (bm), the person who filed the motion … has the burden of proving by clear and convincing evidence that he or she satisfies the criteria….

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

because he was convicted of a violation of WIS. STAT. § 948.02, there is no evidence in the record that he committed the crime by use or threat of force or violence, and at the time of the crime he had not attained the age of nineteen and was not more than four years older than the victim. The only criteria in dispute is whether it was "necessary, in the interest of public protection, to require the person to comply with the reporting requirements…." WISCONSIN STAT. § 301.45(1m)(a)3.

¶7 Boettcher presented expert testimony in an attempt to prove he posed no danger to the public. Boettcher first argues the trial court erred by not accepting his expert's testimony. The trial court, not the appellate court, is the ultimate arbiter of weight and credibility. WIS. STAT. § 805.17(2). Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). In this case, the expert, Turell, stated she did not typically work with sex offenders, and was not holding herself out "as someone who specializes in sex offender type treatment or evaluation." Turell also acknowledged that Boettcher's test results indicated that he might be "faking good." The trial court indicated it did not have confidence in Turell's background or assessment and Boettcher had not presented the opinion of an expert who was knowledgeable and had a reputation in the relevant field. There is nothing inherently incredible about the trial court's credibility assessment. *See* ***id.***[3]

[3] Boettcher also claims the trial court erred because it determined his expert witness was not qualified to testify as an expert witness. However, the trial court never stated Turell was not qualified, rather it found her opinion unpersuasive.

¶8 Boettcher next argues the trial court erred by not appointing an expert or explaining why it did not appoint an expert. WISCONSIN STAT. § 301.45(1m)(d)1 provides that before deciding a person's motion to be excused from the sex offender registration and reporting requirement, the court "*may* request the person to be examined by a physician, psychologist or other expert approved by the court." (Emphasis added). The interpretation of a statute is a question of law we resolve without deference to the trial court. ***White v. General Casualty Co.***, 118 Wis. 2d 433, 437, 348 N.W.2d 614 (Ct. App. 1984). In a case analyzing a similar statute, the court concluded that it is within the trial court's discretion to determine whether to appoint an expert.[4] *See* ***State v. Burdick***, 166 Wis. 2d 785, 792, 480 N.W. 2d 528 (Ct. App. 1992). If a trial court fails to adequately articulate the basis for a discretionary decision, the appellate court will independently review the record and will affirm the discretionary decision if there is any reasonable basis for the trial court's decision under the facts of record. ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606.

¶9 The court stated it did not have confidence in Turell's testimony and told Boettcher that if he wanted to pursue his attempt to get off the sex offender registry, "he'd better get somebody that's knowledgeable in the field and has a reputation in the field…." Neither Boettcher nor the district attorney asked the

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[4] ***Burdick*** did not involve the statute at issue but instead analyzed the following similar statute, WIS. STAT. § 971.16(1) (1989-90), which provided:

> Whenever the defendant has entered a plea of not guilty by reason of mental disease or defect or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, the court *may* appoint at least one physician ….

State v. Burdick, 166 Wis. 2d 785, 788, 480 N.W.2d 528 (Ct. App. 1992) (emphasis added).

court to appoint an expert. Boettcher bore the burden of proving by clear and convincing evidence that he met the statutory requirements and presented an expert to aid in his effort. The trial court warned Boettcher at the April 11 hearing that it did not find Turell's testimony convincing. Boettcher had the opportunity between the April 11 hearing and the May 25 hearing to obtain another expert. Given the facts, it was reasonable for the trial court to leave the burden on Boettcher rather than appointing an additional expert.

¶10 Boettcher also argues the trial court erred by placing too much emphasis on the victim's statement and asserts the victim's statement was not relevant to the statutory criteria.[5] Under WIS. STAT. § 301.45(1m)(bv), a victim's statement "must be relevant to whether the person satisfies the criteria specified in par. (a)." The victim's statement, that he was very uncomfortable with Boettcher not being a sexual offender registrant and wanted to have the ability to know Boettcher's location, is relevant to whether Boettcher posed a danger to the public. *See* WIS. STAT. § 301.45(1m)(a)3. It is reasonable to infer that the victim feared coming into contact with Boettcher in the future because he felt Boettcher still posed a danger. Therefore, the trial court did not err in considering the victim's statement.

[5] Boettcher also claims the trial court violated the statute by permitting the prosecutor to relay the victim's comments, rather than requiring the victim to come to court and make a statement or provide a written statement. *See* WIS. STAT. § 301.45(1m). However, at the hearing, Boettcher did not object to the procedure used. By failing to object, Boettcher waived the right to appellate review of this issue. *See* ***State v. Silva***, 2003 WI App 191, ¶29, 266 Wis. 2d 906, 670 N.W.2d 385. Boettcher concedes in his reply brief that he did not object and thus this argument is waived.

¶11 Finally, Boettcher argues he met his burden on all of the statutory criteria and the trial court erred by not considering all of the factors.[6] WISCONSIN STAT. § 301.45(1m) requires Boettcher to prove by clear and convincing evidence that he met all of the statutory criteria. As noted above, the trial court did not find Boettcher's expert credible on the issue of whether Boettcher posed a danger to the public, and the victim's statement lent support to the determination that

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[6] WISCONSIN STAT. § 301.45(1m)(a) provides in part:

> (e) At the hearing held under par. (bm), the person who filed the motion … has the burden of proving by clear and convincing evidence that he or she satisfies the criteria specified in par. (a). In deciding whether the person has satisfied the criterion specified in par. (a) 3., the court may consider any of the following:
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> 1. The ages, at the time of the violation, of the person and of the child with whom the person had sexual contact or sexual intercourse.
>
> 2. The relationship between the person and the child with whom the person had sexual contact or sexual intercourse.
>
> 3. Whether the violation resulted in bodily harm, as defined in s. 939.22 (4), to the child with whom the person had sexual contact or sexual intercourse.
>
> 4. Whether the child with whom the person had sexual contact or sexual intercourse suffered from a mental illness or mental deficiency that rendered the child temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.
>
> 5. The probability that the person will commit other violations in the future.
>
> 6. The report of the examination conducted under par. (d).
>
> 7. Any other factor that the court determines may be relevant to the particular case.

Boettcher should be on the registry in order to protect the public. Therefore, Boettcher could not meet his burden with regards to all of the factors as required by the statute.

By the Court.—Orders affirmed.

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