

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2014

Diane M. Fremgen
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. 2014AP467

Cir. Ct. No. 2008JV001272A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE INTEREST OF JERMAINE C., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JERMAINE C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Jermaine C. appeals from the circuit court’s order requiring him to register as a sex offender for fifteen years pursuant to WIS. STAT. §§ 938.34(15m) and 301.45. Jermaine argues that when the circuit court “stayed” sex offender reporting in its original dispositional order it entered a permanent stay pursuant to § 938.34(16). As such, Jermaine argues that the circuit court erred when it later found that it had only deferred deciding the issue of reporting and required Jermaine to show by clear and convincing evidence that he was entitled to the stay. Because the record shows that the circuit court only intended to defer deciding whether to enter a permanent stay pursuant to § 938.34(16), we affirm.

BACKGROUND

¶2 In December 2008, the State filed a WIS. STAT. ch. 938 delinquency petition, charging Jermaine with first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1). At a hearing in January 2009, the State advised Judge Michael Malmstadt, the presiding circuit court judge, that in exchange for Jermaine’s plea to the petition as charged, the State would recommend that Jermaine be placed in the Serious Juvenile Offender Program and “would agree to a stay of the reporting requirements until [Jermaine] would be released into the community.” Jermaine’s attorney confirmed the State’s recitation of the parties’ plea agreement and added that “both sides [remained] free to argue.” Jermaine then admitted to the charge.

¶3 After hearing arguments on disposition from the parties, Judge Malmstadt placed Jermaine in corrections for thirty days, asking that the

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

Department of Corrections bring back a plan demonstrating that it could deal with Jermaine's special needs.² Judge Malmstadt then continued the disposition until the following month.

¶4 The parties returned before Judge Malmstadt for disposition in February 2009. Our review of the four-page transcript from the hearing reveals that most of the proceedings were conducted off the record. As relevant here, the transcript shows that the State asked Judge Malmstadt: "As to the issue of [sex offender] reporting, are you staying that up-front?" to which Judge Malmstadt responded, "Yes."

¶5 Following the February 2009 dispositional hearing, Judge Malmstadt entered a written dispositional order, placing Jermaine in the Serious Juvenile Offender Program for five years, that is, until February 2014. The order stated that "[t]he Court STAYS reporting requirement at this time."

¶6 At a review hearing in October 2010, the State formally requested that the circuit court order Jermaine to report as a sex offender. The State agreed that because Jermaine was doing well in treatment "[i]t makes the most sense from the [S]tate's perspective to have a contested hearing [on sex offender reporting] after he completed all of his treatment." The circuit court, Judge Stephanie Rothstein now presiding, responded, "There's a stay in place. Things are going well. His [dispositional] order goes to 2014." Defense counsel agreed that "[a]

² There was much discussion during the January 2009 hearing about Jermaine's low IQ and concern that he would be victimized in an institutional setting. Judge Malmstadt's request to the Department of Corrections was meant to assess whether the DOC could address Jermaine's special needs—including his low IQ and high risk for being victimized—while also providing him with necessary rehabilitative services.

continued stay would be satisfactory.” As such, the issue of reporting was set over.

¶7 Over the next several years, the circuit court continued to hold hearings to review Jermaine’s progress. At each hearing, the State’s request for sex offender reporting was noted, and all agreed, given the positive reports from Jermaine’s treatment providers, that Judge Malmstadt’s order “staying” that decision should remain in place until Jermaine completed his treatment.

¶8 In January 2013, the circuit court, Judge Dennis Cimpl now presiding, held another review hearing. At that time Jermaine had transitioned home and it was again reported that he was doing well. Judge Cimpl noted that the last time the case had been reviewed was in “July of 2012 by Judge Rothstein. ... And on the State’s request, the Court deferred ruling on sex offender reporting.” Judge Cimpl then asked the State for its current position on sex offender reporting, stating: “Do you want me to stay -- make the stay permanent? Do you want further review?” Because the assistant district attorney familiar with the case was not present, Judge Cimpl set the matter over for review in February 2013. At the February hearing, the assistant district attorney told Judge Cimpl that the State was “requesting registration.” As such, the court set a hearing date for March 2013 at which to address sex offender reporting.

¶9 In March 2013, Judge Cimpl presided over the contested hearing on sex offender reporting. Judge Cimpl began the hearing by stating:

We’re here on a request by the juvenile, who’s really not a juvenile anymore but he’s still on [a dispositional] order until 2014, to make the stay of sexual reporting permanent. ... The burden of proof is on [Jermaine] to convince me by clear and convincing evidence that there are exceptions [to reporting] under [WIS. STAT. §] 301.45.

¶10 In response, Jermaine argued that Judge Malmstadt had entered a permanent stay of the sex offender reporting requirement pursuant to WIS. STAT. § 938.34(16) when he stated in the dispositional order that “[t]he Court STAYS reporting requirement at this time.” As such, Jermaine argued that it was not his burden to show by clear and convincing evidence that the stay should be granted, but rather the burden was on the State to show that Jermaine had violated the dispositional order and that the stay should be lifted.

¶11 Judge Cimpl responded, “My understanding is that Judge Malmstadt, when he put [Jermaine] on the five year order, deferred ruling on [sex offender reporting] and stayed it ... until after treatment.” In other words, Judge Cimpl believed Judge Malmstadt only intended to *defer* deciding whether to enter a dispositional order requiring sex offender reporting and did not intend to enter a permanent stay pursuant to WIS. STAT. § 938.34(16). Judge Cimpl continued:

I know when I make these orders it’s my intent that we put it off and see how the juvenile does on probation, a DOC order, whatever disposition I give, and we then review his progress, or lack thereof, and make a decision on whether or not to make the stay permanent or to order him to report for any period up to a lifetime. And that’s what I’m going to rule is the situation right now.

At the close of the March 2013 hearing, Judge Cimpl reiterated his findings:

[M]y reading of [*State v. Cjesar G.*, [2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1] and the statutes and everything else say that if a judge is going to stay [sex offender reporting], the judge has to set forth the reasons why he feels it’s in the interest of the public interest to stay it. If he’s-- In other words, making a stay, and you’re asking that, and the State is asking that the stay be lifted. But at this point even though the judgment says stay, it’s really a delay. That’s what I believe Judge Malmstadt intended.

However, Judge Cimpl agreed to set the hearing over to give Jermaine time to obtain a transcript of the February 2009 dispositional hearing at which Judge Malmstadt first “stayed” the reporting requirement.

¶12 In April 2013, Judge Cimpl held the hearing to review the February 2009 transcript and heard further arguments on the burden of proof issue. As we have already noted, the transcript from the February 2009 dispositional hearing reveals very little in that most of the discussion had been held off the record. With regard to the stay, the record only shows that defense counsel had asked Judge Malmstadt: “As to the issue of reporting, are you staying that up-front?” and Judge Malmstadt responded, “Yes.” After hearing arguments as to Judge Malmstadt’s intent from both parties, Judge Cimpl affirmed his earlier ruling, finding, “I think Judge Malmst[a]dt deferred when he said ‘temporary stay.’”

¶13 The matter was scheduled for a final contest hearing in June 2013. Following the June 2013 hearing, Judge Cimpl ordered Jermaine to register as a sex offender for fifteen years. Jermaine appeals.

DISCUSSION

¶14 Jermaine argues that when Judge Malmstadt stated in the dispositional order that “[t]he Court STAYS reporting requirement at this time,” he intended to stay the sex offender reporting requirement pursuant to WIS. STAT. § 938.34(16). If so, the circuit court could not lift the stay of the reporting requirement without first finding that Jermaine “violated a condition of his ... dispositional order” “by a preponderance of the evidence.” *See id.* Because it is clear from the record that the circuit court did not enter a stay of the reporting

requirement pursuant to § 938.34(16), but rather used the term “stay” generally to indicate that it was deferring the issue of reporting until a later date, we affirm.

¶15 Jermaine admitted to first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1). As such, WIS. STAT. § 938.34(15m)(bm)³ mandated that he comply with the WIS. STAT. § 301.45 sex offender reporting requirement. However, he could avoid sex offender reporting if the circuit court issued a stay pursuant to § 938.34(16).⁴

¶16 A circuit court can issue a stay of the sex offender reporting requirement pursuant to WIS. STAT. § 938.34(16) on its own initiative. *Cesar G.*, 272 Wis. 2d 22, ¶51. In addition, a juvenile can file a motion seeking a § 938.34(16) stay of the reporting requirement. *Cesar G.*, 272 Wis. 2d 22, ¶51. In the motion, the juvenile must show, “by clear and convincing evidence,” that he is

³ WISCONSIN STAT. § 938.34(15m)(bm) states:

If the juvenile is adjudicated delinquent on the basis of a violation ... of s. ... 948.02(1) ... the court *shall* require the juvenile to comply with the reporting requirements under s. 301.45 unless the court determines, after a hearing on a motion made by the juvenile, that the juvenile is not required to comply under s. 301.45(1m).

(Emphasis added.)

⁴ WISCONSIN STAT. § 938.34(16) states, in relevant part:

STAY OF ORDER. After ordering a disposition under this section, enter an additional order staying the execution of the dispositional order contingent on the juvenile’s satisfactory compliance with any conditions that are specified in the dispositional order and explained to the juvenile by the court. ... The court may not impose the original dispositional order unless the court finds by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order.

entitled to a stay based on “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, ¶¶50-51.

¶17 If a circuit court orders sex offender reporting under WIS. STAT. § 938.34(15m), followed by a stay of that disposition pursuant to § 938.34(16), the stay remains in place forever unless the State proves “by a preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order.” *See id.*

¶18 Here, the sole issue before the court is what Judge Malmstadt meant in the dispositional order when he included the phrase “[t]he Court STAYS reporting requirement at this time.” If he intended to enter a stay of the sex offender reporting requirement pursuant to WIS. STAT. § 938.34(16), lifting the stay required the State to prove “by a preponderance of the evidence that [Jermaine] ... violated a condition of his ... dispositional order.” *See id.*

However, if as Judge Cimply found, Judge Malmstadt only intended to defer deciding whether to stay the reporting requirement, the burden was on Jermaine to prove by clear and convincing evidence that he was entitled to a stay. *See Cesar G.*, 272 Wis. 2d 22, ¶51 (“the juvenile has the burden to prove by clear and convincing evidence that ... a stay should be granted”). Determining the circuit court’s intent at a dispositional hearing, and thereby the meaning of a dispositional order, is a question of law that we review *de novo*. *See Wright v. Wright*, 92 Wis. 2d 246, 255, 284 N.W.2d 894 (1979).

¶19 Having reviewed the singular reference to reporting in Judge Malmstadt’s dispositional order, that is, that “[t]he Court STAYS reporting requirement at this time,” we conclude that the order itself is, at least arguably, ambiguous. *See State v. Oglesby*, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727 (If two or more reasonably well-informed persons can construe a sentence differently, the sentencing order is ambiguous.). However, even if the written order is ambiguous, a review of the record in its entirety makes it clear that Judge Malmstadt meant to defer ruling on the issue of reporting and did not intend to enter a permanent stay pursuant to WIS. STAT. § 938.34(16).

¶20 First, there is nothing in the record to demonstrate that Judge Malmstadt considered the factors necessary to enter a stay pursuant to WIS. STAT. § 938.34(16). In *Cesar G.*, our supreme court held that a circuit court must consider the following factors before entering a § 938.34(16) stay: the seriousness of the offense; the age of the victim and the juvenile at the time of the violation; the relationship between the victim and the juvenile; whether the violation resulted in bodily harm to the victim; the victim’s intellectual capabilities; the probability that the juvenile will reoffend; and any other factors the court determines may be relevant. *Cesar G.*, 272 Wis. 2d 22, ¶50. Here, the record is absolutely void of

any reference to any of these factors. In fact, the only reference to reporting in the transcript from the dispositional hearing is the State asking Judge Malmstadt if he was “staying [reporting] up-front” and Judge Malmstadt’s response that he was. Nowhere in the record did Judge Malmstadt consider the *Cesar G.* factors before “staying” the sex offender reporting requirement.

¶21 Second, Judge Malmstadt did not follow the statutory procedures for entering a permanent stay of the sex offender reporting requirement pursuant to WIS. STAT. § 938.34(16). Section 938.34(16) directs a circuit court, in relevant part, as follows:

[a]fter ordering a disposition under this section, *enter an additional order* staying the execution of the dispositional order contingent on the juvenile’s satisfactory compliance with any conditions that are specified in the dispositional order and *explained to the juvenile by the court.*

(Emphasis added.) Judge Malmstadt did not “enter an *additional order* staying the execution of the dispositional order” as required by the statute nor did he “explain[] to [Jermaine]” that the stay was contingent upon his satisfactory compliance with the conditions of the dispositional order. *See id.* (emphasis added). Such steps were necessary to enter a permanent stay. *See id.*

¶22 Third, prior to the entry of Judge Malmstadt’s dispositional order, all references to a “stay” had been qualified by time, indicating that the parties did not intend the “stay” to be permanent under WIS. STAT. § 938.34(16), but rather intended merely to defer deciding the issue of reporting until a later date. For example: the State relayed, and defense counsel agreed, that the plea agreement was that the State “would agree to a stay of the reporting requirement *until [Jermaine] would be released into the community*”; Judge Malmstadt confirmed with the State at the dispositional hearing that he would be staying reporting “*up-*

front”; and the written order itself explicitly says that “[t]he Court STAYS reporting requirement *at this time*.” (Emphasis added.) These qualifications regarding the length of the “stay” all indicate that everyone intended the “stay” to be temporary rather than a permanent stay pursuant to statute.

¶23 In sum, while the circuit court’s use of the word “stay” in the dispositional order may have left the order ambiguous with regards to the sex offender reporting requirement, the record in its entirety makes it clear that the court did not intend to enter a stay pursuant to WIS. STAT. § 938.34(16). The circuit court made none of the findings required by *Cesar G.*; did not follow the procedures required for a § 938.34(16) stay pursuant to the statute; and the parties and the court all referred to the stay in temporary, rather than permanent terms prior to issuing the dispositional order. Consequently, we affirm.

By the Court.—Order affirmed.

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

