

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2016

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. 2015AP1634

Cir. Ct. No. 2010JV1059

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE INTEREST OF D.S., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

CITY OF MILWAUKEE,

INTERVENOR-RESPONDENT

v.

D.S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
REBECCA G. BRADLEY and LAURA GRAMLING PEREZ, Judges. *Affirmed.*

¶1 BRASH, J.¹ D.S. appeals an order requiring him to register as a sex offender for life, and an order denying his postdisposition motion to stay the registration requirement.² D.S. seeks a new hearing on sex offender registration, arguing that: (1) the circuit court relied on inaccurate and improper information in the form of a study performed by a psychologist at Lincoln Hills School regarding the recidivism rate of sexual offenders released from the school; and (2) that the circuit court relied on information from the Juvenile Sex Offender Assessment (JSOAP-II) that was inaccurately interpreted as predicting a juvenile's risk to reoffend. We disagree and affirm.

BACKGROUND

¶2 On October 18, 2010, the State filed a petition seeking adjudication of D.S., who was fourteen years old at the time, alleging that he had sexual intercourse twice with a six-year-old, in violation of WIS. STAT. § 978.02(1)(b), and exposed his genitals to a two-year-old, in violation of WIS. STAT. § 948.10(1). The State alleged that these violations occurred at the All People's Church in Milwaukee over a ten-month period. On December 2, 2010, D.S. entered an admission to one count of first-degree sexual assault of a child—intercourse with a person who is under the age of twelve in violation of WIS. STAT. § 978.02(1)(b). The additional charges of first-degree sexual assault of a child and the charge of exposing genitals to a child, were dismissed and read in.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All other references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Honorable Rebecca G. Bradley presided over the sex offender registration hearing and the Honorable Laura Gramling Perez presided over the postdisposition motion.

¶3 A one year period of incarceration in the Department of Corrections was imposed and stayed, and D.S. was placed on one year of probation. The dispositional order was then extended for an additional year, until December 12, 2012. On October 18, 2012, the State filed a motion to lift the stay of the dispositional order due to inappropriate sexual conduct and place D.S. in the Department of Corrections for one year. On January 22, 2013, the circuit court granted the State's motion and ordered that D.S. be placed at Lincoln Hills School, a secured correctional facility, until December 30, 2013.

¶4 On October 30, 2013, the circuit court held a hearing on the sex offender reporting requirement. The State argued that D.S. should be required to register as a sex offender for either fifteen years or life, while D.S. sought a permanent stay of the requirement.

¶5 In making its determination, the circuit court reviewed, among other things, a report prepared by Dr. Paul Hesse, a psychologist at Lincoln Hills School. The report included D.S.'s treatment history, as well as the JSOAP-II scores for D.S. These scores, which are based on risk factors associated with reoffending by juvenile sex offenders, were computed at the time of D.S.'s intake into Lincoln Hills, and at transition, the end of his time there. At intake, D.S.'s score was average as compared to other youths in the Sex Offender Treatment Program at Lincoln Hills; at transition, after treatment, D.S.'s score had declined somewhat. The average rate of decline of the scores after treatment, however, is generally greater, which meant that D.S.'s score was slightly higher than average.

¶6 Additionally, Dr. Hesse's report discussed an ongoing unpublished recidivism study he was conducting regarding sex offenders incarcerated at Lincoln Hills. The study suggests that the recidivism rate for those juveniles is

about 20%; in contrast, other statewide and nationwide studies on youth sex offenders have generally found the recidivism rate to be only 10% or less.

¶7 At the hearing regarding sex offender registration, the circuit court stated the factors it considered in making its determination that D.S. must register for life. These factors included: the ages of the victims compared to the age of D.S. at the time of the incidents; that the incidents took place in a church setting, where people generally feel safe; that D.S. knew his victims, that the victims trusted him, and that he took advantage of that relationship; any physical harm to the victims, noting that one of the victims had suffered an anal break; that D.S. had been moved to several residential treatment centers prior to being sent to Lincoln Hills and, due to the timing of his placement there, he was not able to complete the second phase of treatment; and, the probability that D.S. would reoffend. Based on these factors, the circuit court ordered D.S. to register as a sex offender for life.

¶8 On October 30, 2014, D.S. filed a postdisposition motion requesting a new hearing to stay sex offender registration on the grounds that the order for lifetime registration was based on inaccurate information.³ Specifically, D.S. argued that Dr. Hesse's report relating to recidivism rates was inaccurate, and further, that D.S.'s JSOAP-II scores were represented as being a percentage of risk to reoffend, when this is not an accurate interpretation of that information.

¶9 On July 17, 2015, the postdisposition court denied the motion. The postdisposition court found that with regard to the study relating to recidivism

³ In his postdisposition motion, D.S. also argued that there was new evidence which affected the registration agreement; however, those issues were not presented on appeal and therefore are not before this court.

rates, D.S. failed to establish that the information was in fact inaccurate. Moreover, the postdisposition court found that although the State did not accurately present the meaning of the JSOAP-II scores to the circuit court, and the circuit court relied on that inaccurate information, the error was harmless. This appeal follows.

DISCUSSION

¶10 Defendants have a constitutionally protected due process right for their sentences to be based on accurate information. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. This due process right extends to juveniles as well, during both the adjudicatory and dispositional phases of a proceeding. *See G.G.D. v. State*, 97 Wis. 2d 1, 8, 292 N.W.2d 853 (1980). Whether a defendant has been denied this due process right is a constitutional issue that we review *de novo*. *See Tiepelman*, 291 Wis. 2d 179, ¶9.

¶11 There is a three-step process for analyzing the request of a defendant seeking resentencing due to the circuit court's use of inaccurate information at the sentencing hearing. *Id.*, ¶26. First, the defendant must show that the information was inaccurate. *Id.* Next, the defendant must establish that the court actually relied on the inaccurate information in sentencing the defendant. *Id.* If both of these steps are met, the burden then shifts to the state to prove that the error was harmless. *Id.*

¶12 An error is harmless unless “the error complained of has affected the substantial rights of the party....” WIS. STAT. § 805.18(2). “For an error ‘to affect the substantial rights’ of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.” *Martindale v. Ripp*, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698 (citation

omitted). “A reasonable possibility of a different outcome is a possibility sufficient to ‘undermine confidence in the outcome.’” *Id.* (citation omitted). The harmless error inquiry is a question of law that we review *de novo*. *State v. Magett*, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42.

¶13 The nature of D.S.’s appeal requires us to apply the test outlined in *Tiepelman* to two different pieces of information that were presented to the court at the hearing for sex offender registration: Dr. Hesse’s study relating to recidivism rates, and the State’s presentation of D.S.’s JSOAP-II scores. We examine each in turn.

I. Dr. Hesse’s study relating to recidivisms rates.

¶14 With regard to the Dr. Hesse’s study relating to recidivism rates, the postdisposition court found that D.S. did not affirmatively show that the information presented by Dr. Hesse was inaccurate. We agree. While Dr. Hesse’s study is different from the statewide and nationwide studies offered in comparison, these differences can be attributed to the different scope, nature and time frame of the studies. Dr. Hesse’s study was limited to juvenile offenders treated at Lincoln Hills School over a period of fifteen years, apparently as more of an informal analysis of treatment methods at Lincoln Hills. On the other hand, the study by Michael F. Caldwell, a professor at the University of Wisconsin—Madison, appears to have been conducted and prepared for academic purposes. Therefore, it is not unexpected that the results are different. In fact, Dr. Hesse’s study is arguably more relevant to this case since it focuses solely on juvenile offenders like D.S. who were treated and then released from Lincoln Hills. Accordingly, we conclude that D.S. has not satisfied the first prong of the test for Dr. Hesse’s study relating the recidivism rates and, as a result, our analysis goes no further. *See Tiepelman*, 291 Wis. 2d 179, ¶26.

II. The State's presentation of D.S.'s JSOAP-II scores.

¶15 As to the issue of the JSOAP-II scores, the postdisposition court held that the State clearly linked D.S.'s percentage score on the JSOAP-II to his likelihood to reoffend, and that the circuit court relied on that risk information in its dispositional decision. We agree.

¶16 At the hearing for sex offender registration, the assistant district attorney, in describing the JSOAP-II scores, referred to the percentages as a level of risk, stating that 57% is a high risk to reoffend. That interpretation of the scores is not accurate. Rather, the percentages are calculated as a means of comparing the total number of items in a particular category of risk factors to the number of factors present for the juvenile being analyzed. Therefore, we find that the information relating to the JSOAP-II scores was inaccurately represented to the circuit court, satisfying the first prong of the test. *See id.*

¶17 Turning to the reliance prong, in discussing the factors considered in determining sex offender registration, the circuit court noted that it had reviewed Dr. Hesse's report, which included D.S.'s JSOAP-II scores. Furthermore, the circuit court specifically referred to the assistant district attorney's representations regarding the JSOAP-II scores, stating that D.S.'s risk of reoffending was classified as moderate, but that the district attorney thinks it may be high and that it is higher than average for juveniles at this state of transition at Lincoln Hills based on the sex offender treatment program data from Lincoln Hills. We find that these references indicate that the circuit court considered, and thus relied on, the misinterpreted JSOAP-II scores in imposing lifetime registration for D.S. Accordingly, we conclude that D.S. has met his threshold burden in satisfying the

first two prongs of the test, showing that inaccurate information was relied upon for sentencing. *See id.*

¶18 With that determination, the burden shifts to the State to prove that the circuit court's reliance on the inaccurate representation of the JSOAP-II scores was harmless error. *See id.* The postdisposition court found this reliance to be harmless error, due to the wide array of statutory factors that the circuit court considered at the hearing for sex offender registration. We agree.

¶19 At the hearing for sex offender registration the circuit court considered the significant age difference between D.S. and his victims, the number of victims and the time span of the offenses, the fact that the offenses took place in a church setting, the trusting relationship that existed between D.S. and the victims, the specific types of violations involved, and D.S.'s difficult upbringing. While the circuit court did consider D.S.'s likelihood of reoffending, it based its judgment on a myriad of factors and other relevant information in addition to the JSOAP-II scores. Specifically, the circuit court considered the fact that D.S.'s dispositional placements were increasingly restrictive, that he was not able to complete sex offender programming due to his relatively late move to Lincoln Hills, and that D.S.'s participation in the sex offender programming was often marginal. The circuit court noted that at times D.S. was dismissed from group sessions for failing to complete work, that he was counseled by staff at Lincoln Hills for calling female staff members inappropriate and disrespectful names, and that he had a history of sexually acting out at earlier treatment facilities including failing to keep his zipper on his pants up, and tearing a hole in the crotch of his pants at Lincoln Hills. It was after considering all of these factors that the circuit court ruled that in the interest of public safety, D.S. must report as a sex offender for life.

¶20 The postdisposition court found as a matter of fact that the circuit court considered all of the factors articulated above in making its determination that D.S. must register as a sex offender for life. We will not overturn findings of fact unless they are clearly erroneous. See *State v. Novy*, 2013 WI 23, ¶22, 346 Wis. 2d 289, 827 N.W.2d 610. After our independent review of the record, we agree with the postdisposition court that D.S.’s JSOAP-II scores were only one of many factors considered by the circuit court.

¶21 While the record shows that the inaccurate interpretation of the JSOAP-II scores was considered by the circuit court, this consideration is not “sufficient to ‘undermine confidence in the outcome’” of the hearing for sex offender registration. See *Martindale*, 246 Wis. 2d 67, ¶32. The JSOAP-II scores played a small role not only in the circuit court’s overall decision, but in its analysis of D.S.’s risk to reoffend. We conclude, therefore, that the circuit court’s reliance on the inaccurate representation of the JSOAP-II scores constitutes harmless error.

¶22 For all the foregoing reasons, we affirm.

By the Court.—Orders affirmed.

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

