COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP651-CR **Cir. Ct. No. 2014CF1036**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM H. CRAIG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, J. William Craig appeals from a protective order, granted under WIS. STAT. § 971.23(6) (2015-16),[1] pertaining to the recorded interview of a

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

child victim.[2] He contends the circuit court erroneously exercised its discretion by granting the State's motion for a protective order over his objection, without first holding an evidentiary hearing.

¶2 We agree with the State that a circuit court is not required, in all circumstances, to hold an evidentiary hearing before granting a motion for a protective order under WIS. STAT. § 971.23(6). Instead, the court has discretion to decide whether a hearing is necessary in the specific case before it. Here, however, the circuit court erroneously exercised its discretion by failing to provide any rationale for its decision to grant the State's motion without first holding a hearing. We therefore reverse the court's order and remand for the court to exercise its discretion in deciding whether to hold a hearing on the State's motion.

BACKGROUND

¶3 The State charged Craig with four counts of sexual assault of a child under the age of sixteen. Each count pertained to the same victim. The victim participated in a video-recorded forensic interview.

¶4 Craig was initially represented by attorney Suzanne O'Neill. O'Neill, the State, and the circuit court signed a stipulation and order regarding the victim's forensic interview. The stipulation and order provided that: (1) the State would provide the defense with a copy of the recorded interview; (2) the defense would not copy the recording or use it for any purpose other than preparing for Craig's defense; (3) the recording would not be publicly exhibited, shown, or displayed, or used for educational, research, or demonstrative purposes; (4) the

[2] We granted leave to appeal the circuit court's nonfinal order on May 4, 2017.

recording would be viewed only by the parties, their attorneys, and the attorneys' employees, investigators, and experts; (5) no transcript or summary of the recording would be provided to any person not authorized to view the recording; (6) no person would be granted access to the recording, or a transcript or summary of the recording, unless that person first agreed to the terms of the stipulation; and (7) upon disposition of the case and expiration of the applicable file retention period, all copies and transcripts of the recording would be returned to the district attorney's office.

¶5 After Craig expressed dissatisfaction with O'Neill's representation, and after two additional attorneys were appointed to represent him and subsequently withdrew, attorney Andrew Martinez was appointed to represent Craig. On December 7, 2016, Martinez emailed the State, noting that he had a copy of the victim's forensic interview, but asking the State to provide copies of other recorded statements that were referenced in the discovery materials. On December 12, Martinez filed a discovery demand asking the State to provide "[a]ny and all relevant written or recorded statements" of witnesses the State intended to call at trial. The State apparently refused to provide copies of these statements. Instead, the State asked Martinez to sign the same stipulation regarding the victim's forensic interview that O'Neill had previously signed.

¶6 Martinez refused to sign the stipulation. He instead filed a motion to compel the State to comply with his discovery demands. In the motion, he argued Craig was entitled to any witness statements in the State's possession under WIS. STAT. § 971.23(1)(e). He further argued the State's request "that the defense sign a stipulation before receiving mandated discovery [was] not authorized by any applicable law."

¶7 Martinez acknowledged that a court may issue a protective order under WIS. STAT. § 971.23(6) limiting a defendant's right to discovery. However, he noted the State had not moved for a protective order under that subsection, and he argued there was no good cause for the issuance of a protective order. In addition, Martinez argued the State's proposed stipulation was "extremely problematic," in that it would require him to return certain materials to the district attorney's office following the disposition of Craig's case. Martinez contended that provision was inconsistent with Wisconsin ethics rules, under which the contents of an attorney's file belong to the client.

¶8 The State did not respond to Martinez's motion to compel discovery. Instead, on March 15, 2017, the State moved the circuit court for a protective order regarding the victim's forensic interview. The proposed order contained essentially the same terms as the stipulation previously signed by attorney O'Neill. The State's entire argument in support of its motion was as follows:

> In this case, the Defendant is charged with four (4) counts of Sexual Assault of a Child under 16 years of Age. [The subject of the forensic interview] is the victim. The State has concerns about the sensitive content of the recorded forensic interview being disseminated beyond the Defendant and his attorney and for reasons other than trial preparation in the above-captioned case. The State sent a copy of the standard Stipulation and Order Regarding Use of Videotaped Statements to defense counsel. Defense counsel refused to sign the Stipulation.

¶9 The circuit court signed the State's proposed protective order on March 22, 2017, and the order was filed on March 28. Martinez wrote to the court on March 28 objecting "to the issuing of this order without a hearing first being held and … without good cause being shown." Martinez argued the State's motion for a protective order provided "no factual basis whatsoever" for its claimed concerns that the forensic interview would be disseminated beyond

Martinez and Craig or used for purposes other than trial preparation. He contended the State's "unsupported and conclusory statements" were "insufficient to support a finding of good cause under [WIS. STAT. §] 971.23(6)." Martinez therefore asked the court to rescind the March 28 protective order "pending a hearing and the showing of good cause."

¶10 The circuit court did not rescind the March 28 order or schedule a hearing on the State's motion. It instead signed a second protective order on March 28 that was identical to its prior order. The second order was subsequently filed on April 4, 2017. Craig now appeals, arguing the court erred by granting the State's motion for a protective order over his objection, without first holding an evidentiary hearing.

DISCUSSION

¶11 WISCONSIN STAT. § 971.23(1) grants criminal defendants a "broad right to pretrial discovery." ***State v. Bowser***, 2009 WI App 114, ¶21, 321 Wis. 2d 221, 772 N.W.2d 666. However, that right is "tempered by the circuit court's discretion under WIS. STAT. § 971.23(6)." ***Bowser***, 321 Wis. 2d 221, ¶21. That subsection states, in relevant part: "Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses required under this section be denied, restricted or deferred, or make other appropriate orders."

¶12 Before issuing a protective order under WIS. STAT. § 971.23(6), a court must find that good cause exists for the order's issuance. ***Bowser***, 321 Wis. 2d 221, ¶10. The party seeking the order—here, the State—has the burden to establish good cause. *See* ***id.*** Once the State has made a showing of good cause, the burden shifts to the defendant "to either rebut the State's reasons or demonstrate that his [or her] ability to mount an adequate defense would be

hampered" by the proposed protective order. ***Id.***, ¶14. We review a circuit court's decision to grant a protective order under § 971.23(6) for an erroneous exercise of discretion. ***Bowser***, 321 Wis. 2d 221, ¶9.

¶13 The State construes Craig's argument on appeal as advocating that an evidentiary hearing is always required when the State moves for a protective order under WIS. STAT. § 971.23(6). To the extent Craig actually intends to make that argument, we reject it. Nothing in the text of § 971.23(6) indicates a circuit court is required to hold a hearing before issuing a protective order under that subsection. Moreover, as our supreme court has previously noted, a court "does not have to hold an evidentiary hearing on a motion just because a party asks for one. An evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." ***State v. Velez***, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999) (quoting ***United States v. Sophie***, 900 F.2d 1064, 1070 (7th Cir. 1990)).

¶14 We therefore conclude a circuit court has discretion to decide whether to hold a hearing—evidentiary or otherwise—before ruling on a motion for a protective order under WIS. STAT. § 971.23(6). There may be circumstances in which the court could appropriately decide not to hold a hearing—for instance, where the nonmoving party does not object to the protective order; where there is some emergency requiring prompt action by the court; or where the parties' submissions conclusively demonstrate that, based on the relevant law and the undisputed facts, good cause exists to issue a protective order and the order's issuance will not hamper the defendant's ability to mount an adequate defense. Conversely, the court should hold a hearing when either the facts or the law are disputed, unless the court determines, in its discretion, that other factors override the need for a hearing.

¶15 We emphasize, however, that a court must actually exercise discretion in deciding whether to hold a hearing on a motion for a protective order under WIS. STAT. § 971.23(6). "A proper exercise of discretion requires that the court rest its decision on the relevant facts, apply the proper standard of law, and arrive at a reasonable conclusion using a demonstrated rational process." ***Bowser***, 321 Wis. 2d 221, ¶9. "Discretion is not synonymous with decision-making." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). "[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." ***Id.*** (quoting ***State v. Hutnik***, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968)).

¶16 Here, there is no evidence in the record that the circuit court exercised discretion in granting the State's motion for a protective order over Craig's objection, without first holding any kind of hearing. The court merely signed the State's proposed order (and later a second, identical order) without providing any oral or written explanation for its decision to do so. The court did not make an express finding that the State had established good cause for issuance of the protective order, nor did the court address Martinez's concern, previously relayed in his motion to compel discovery, that the order's terms conflicted with his ethical obligations as an attorney. Nothing in the record indicates that the court considered the relevant facts, applied the proper standard of law, or used a demonstrated rational process when deciding to sign the State's proposed order. *See* ***Bowser***, 321 Wis. 2d 221, ¶9.

¶17 When a circuit court fails to explain its reasoning for a discretionary ruling, we *may* search the record to determine whether it supports the court's decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. However, we are not *required* to do so, *see, e.g.*, ***State v. Gary M.B.***, 2003

WI App 72, ¶27, 261 Wis. 2d 811, 661 N.W.2d 435, and we decline to do so here. We have previously refused to search the record for reasons to sustain a circuit court's discretionary decision in circumstances where the record was insufficiently developed to permit us to determine whether the court's decision was a proper exercise of discretion. *See, e.g.*, ***Bernier v. Bernier***, 2006 WI App 2, ¶¶25-31, 288 Wis. 2d 743, 709 N.W.2d 453; ***Gary M.B.***, 261 Wis. 2d 811, ¶27. We have also declined to search the record when, because of the circuit court's total failure to explain its reasoning, doing so would have been tantamount to exercising discretion in the first instance, rather than reviewing the circuit court's discretionary decision. *See* ***Vlies v. Brookman***, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642; *see also* ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663-64, 279 N.W.2d 227 (1979).

¶18 In the instant case, the factual record regarding the State's motion for a protective order is minimally developed. In addition, the circuit court failed to provide any basis for its decision to grant the State's motion without a hearing. Under these circumstances, it would be inappropriate for this court to independently review the record and attempt to determine, in the first instance, whether granting the motion without a hearing was a proper exercise of discretion.

¶19 We therefore reverse the protective order entered in this case and remand for the circuit court to exercise its discretion in determining whether to hold a hearing on the State's motion. In so doing, the court should consider: (1) whether the State's motion demonstrates good cause for the issuance of its proposed protective order; (2) whether Craig's filings show that there are disputed issues of fact or law regarding the existence of good cause; (3) whether Craig's filings indicate that issuance of the State's proposed order would hamper his ability to present a defense; and (4) whether any other relevant factors outweigh

the need for a hearing under the specific circumstances of this case. Notably, in its previous decision to grant a protective order, it appears the court may have relied on the fact that the State's proposed order is considered "standard" in Marathon County cases involving child victims.[3] We caution that the "standard" nature of a proposed protective order is not, in and of itself, a valid basis to grant the order. ***Bowser*** clearly states that "whether a particular proposed protective order is appropriate is determined on a case-by-case basis." ***Bowser***, 321 Wis. 2d 221, ¶23.

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

Not recommended for publication in the official reports.

[3] In an email to Martinez, the State represented that the stipulation it had asked Martinez to sign was "a standard stipulation in Marathon County that the judges approve of." The State similarly asserted in its motion for a protective order that it had sent Martinez "a copy of the standard Stipulation and Order Regarding Use of Videotaped Statements." Because the circuit court failed to explain its reasoning, the record does not reveal whether the court relied on the "standard" nature of the State's proposed order when granting the State's motion.