COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2151-CR **Cir. Ct. No. 2010CF1779**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER JAMES ATHAS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. DI MOTTO, Judge. *Affirmed*.

¶1 FINE, J. On February 11, 2011, the circuit court entered a judgment convicting Christopher James Athas of two counts of fourth-degree sexual assault, *see* WIS. STAT. § 940.225(3m), on his no-contest pleas. The judgment ordered that Athas get "[s]ex offender evaluation and treatment," and that he "[c]omply with conditions of sex offender registry." The judgment further "stayed [the] sex

offender registry requirement upon review by the court scheduled for July 18, 2012." (Uppercasing omitted.) The circuit court held the sex-offender-registry review (the transcript cover sheet indicates that the hearing was held on July 20, 2012), lifted the stay, and entered a written order to that effect on August 7, 2012. Athas appeals only that order.

I.

¶2 Athas's appeal complains that the circuit court should not have considered an earlier case where he was accused of sexually assaulting his former wife because the charge was dismissed; according to the Record here, the woman refused to grant access to her medical records. Athas also complains that a circuit court order postdating the August 7 order lifting the stay and that set how long Athas would have to remain on the sex offender registry was entered without his personal appearance. We affirm.

II.

¶3 WISCONSIN STAT. § 973.048(1m)(a) provides, as material, that "if a court imposes a sentence or places a person on probation for any violation … under ch. 940 … the court may require the person to comply with the [sexual offender] reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45."[1] WISCONSIN STAT. § 301.45 is the lengthy provision establishing the

[1] WISCONSIN STAT. § 980.01(5) reads: "'Sexually motivated'" means that one of the purposes for an act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim."

rules governing the registration of sex offenders.[2] Whether to order sex-offender registration is part of the circuit court's sentencing discretion. ***State v. Jackson***, 2012 WI App 76, ¶7, 343 Wis. 2d 602, 608, 819 N.W.2d 288, 291. Among the factors the circuit court may consider are: "The probability that the person will commit other violations in the future."; and "Any other factor that the court determines may be relevant to the particular case." § 973.048(3)(e)&(g).

1. *Consideration of dismissed case.*

¶4 Here, the State accused Athas of sexually assaulting, in his house, a woman he met at a bar. The circuit court noted that the assaults here and in an earlier case where the State charged Athas with sexually assaulting his former wife had "similarities of the modis [*sic*] operandi." Athas does not dispute the similarities but, rather, argues that the circuit court should not have considered the case involving his former wife because those charges were dismissed. The circuit court and Athas's lawyer discussed the earlier case at the sentencing hearing, and the circuit court disagreed with the lawyer's representation that the sexual-assault charges involving Athas's former wife were dismissed "because they were false."

> THE COURT: No. That's not why.
>
> MR. BUCHER: Well, that's true.
>
> THE COURT: Actually, no. That's not why, counsel. You know it.

[2] For what it is worth, ***Doe v. Raemisch***, 895 F. Supp. 2d 897, 901, 909 (E.D. Wis. 2012), held that the hundred-dollar-fee requirement in WIS. STAT. § 301.45(10) was an unconstitutional *ex post facto* provision. We say "for what it is worth" because we are bound by declarations of constitutionality only by the Wisconsin and the United States Supreme Courts. *See* ***State v. Felton***, 2012 WI App 114, ¶8 n.3, 344 Wis. 2d 483, 489 n.3, 824 N.W.2d 871, 874 n.3. In any event, Athas does not complain about any fee.

> MR. BUCHER: I know the case was dismissed. I was in court.
>
> THE COURT: I understand that. Then say the truth why it was dismissed. She wouldn't sign a medical release for her records.
>
> MR. BUCHER: That's why, Judge.
>
> THE COURT: It was a Schiffer [*sic*] motion.[3]
>
> MR. BUCHER: Yes. I understand.
>
> THE COURT: And the case was then dismissed because it couldn't be prosecuted any further.
>
> MR. BUCHER: Right.

The circuit court opined that had Athas's former wife's purported recantation been true, "it wouldn't have been necessary to have her records, would it? It could have just gone to trial on that basis. She says it didn't happen." Athas's trial lawyer responded, "I agree."

> THE COURT: Yes. I saw those letters [where she allegedly recanted]. I just wanted it to be clear that the reason it was dismissed was not because of those letters in any way, shape, or form.
>
> MR. BUCHER: True.

Thus, contrary to Athas's trial lawyer's initial assertion, the charges against Athas in connection with his alleged sexual assault of his former wife were not dismissed *because* they were false.

¶5 A sentencing court may consider anything in the defendant's background that is relevant to the sentencing factors, including dismissed charges

[3] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) (defendant's right to discover victim's medical records), *modified*, ***State v. Green***, 2002 WI 68, ¶¶32–35, 253 Wis. 2d 356, 379–382, 646 N.W.2d 298, 309–310.

and uncharged conduct. ***State v. Damaske***, 212 Wis. 2d 169, 180, 567 N.W.2d 905, 910–911 (Ct. App. 1997) ("The case law is clear that the state can submit uncharged, unproven offenses, dismissed cases and so on all for consideration for what they are worth in terms of the Court fashioning an appropriate sentence.") (quoting the trial-court's assessment with approval); *see also* ***State v. Marhal***, 172 Wis. 2d 491, 502–503, 493 N.W.2d 758, 763–764 (Ct. App. 1992). The circuit court determined that what it called the "similarities" between Athas's alleged assault of his former wife was relevant to the probability that he would re-offend, which, as we have seen, is a permissible consideration. *See* WIS. STAT. § 973.048(3)(e). Athas has not shown that the circuit court erroneously exercised its discretion in requiring that he register as a sex offender.

1. *Presence at a hearing to determine how long Athas should be on the sex-offender registry.*

¶6 Athas also argues that the circuit court erred in entering an order designating how long he should remain on the sex-offender registry, without holding a hearing at which he could appear. He points out that defendants must appear at their sentencing, WIS. STAT. § 971.04(1)(g), unless they specifically waive that right in misdemeanor cases, § 971.04(2). He supports this argument by referring to a document in his appendix that he did not make part of the Record. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753, 755–756 (Ct. App. 1991) (appellant responsible for assembling and submitting record). As the State points out, we may not consider matters not of Record. ***State v. Kuhn***, 178 Wis. 2d 428, 439, 504 N.W.2d 405, 411 (Ct. App. 1993). Further, as the State also points out, Athas never raised this issue before the circuit court, and thus forfeited his right to argue it here. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997). Moreover, Athas's reply brief does not dispute the

State's assertion that we should not consider his appearance-at-sentencing argument, and thus concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matter not refuted deemed admitted).

By the Court.—Order affirmed.

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