COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2381 **Cir. Ct. No. 2001JV175**

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

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

STATE OF WISCONSIN,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

ADAM D.B.,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] This is an appeal and cross-appeal of a circuit court order expunging a first-degree sexual assault juvenile adjudication, but

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

denying expungement on two fourth-degree sexual assault adjudications. The State and Adam D.B. each appeal the trial court's order. The State claims that the circuit court erred by considering the wishes of the first-degree assault victim, because the statute sets out the factors for consideration and the victim's wishes are not among them. The State further argues, presumably in the alternative, that the court gave the victim's wishes too much weight. We note that the statute allows expungement where the court finds that it would not harm society, and we conclude that the court properly considered the victim's testimony in determining that expunging the first-degree assault would not.

¶2 Both parties also challenge the circuit court's exercise of discretion, claiming that expunging one charge while refusing to expunge the others was inconsistent and illogical. The State claims that, in view of the circuit court's refusal to expunge the fourth-degree assaults, it made no sense to expunge the first-degree assault; Adam argues that the court got it right with the first-degree assault and that the denial of expungement for the fourth-degree assaults therefore cannot be correct. We sustain the circuit court's exercise of discretion because the court reasonably concluded that there were meaningful distinctions between the facts surrounding each adjudication.

¶3 Adam was found delinquent of three sexual assaults as a juvenile. The first occurred between July and August of 2000, when Adam invited a fourteen-year-old female over to his house for a party. Adam did not throw a party, but instead made sexual advances to her and was physically aggressive,

exposed himself to her, and forcefully touched above and beneath her clothing against her will.[2] The victim then called her mother to pick her up.

¶4 The second incident occurred in January 2001. A different fourteen-year-old female met Adam in the parking lot of a hospital to visit a patient, Adam's sister. Adam invited her to his car where he became physically aggressive with her. Adam locked the doors repeatedly so that she could not exit and began touching her breasts, and briefly choked her. Her father intervened.

¶5 The third incident took place in February 2001 and involved Adam's nine-year-old stepsister. Adam admitted that he had his stepsister perform oral sex on him. The stepsister told investigators that Adam had twice had her perform oral sex, once by force. The stepsister eventually told her mother, who was also Adam's mother, and the mother called the sheriff.

¶6 In March 2001, the State filed a delinquency petition against Adam, alleging one count of disorderly conduct, two counts of second-degree sexual assault of a child and two counts of first-degree sexual assault of a child. As a result of plea negotiations, the two counts of second-degree sexual assault of a child were amended to two counts of fourth-degree sexual assault. In May 2001, the court found Adam delinquent based on the plea agreement. The court ordered that Adam register as a sex offender.

¶7 In April 2006, Adam filed a motion for expungement. Because Adam's first-degree sexual assault charge required him to register as a sex

[2] Adam maintains that the sexual contact involved in the fourth-degree sexual assaults was, in fact, consensual; this description of events is taken from the delinquency petition and the testimony of the victims.

offender, *see* WIS. STAT. §§ 301.45(1g) and (2), the expungement of that charge was of particular concern to him. The expungement of a juvenile's record is governed by WIS. STAT. § 938.355(4m)(a), which states:

> **(4m)** EXPUNGEMENT OF RECORD. (a) A juvenile who has been adjudged delinquent under s. 48.12, 1993 stats., or s. 938.12 may, on attaining 17 years of age, petition the court to expunge the court's record of the juvenile's adjudication. Subject to par. (b), the court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement.

Thus, the statute states that the court *may* expunge a juvenile's record if it makes the following determinations: (1) the juvenile has complied with his or her dispositional order, (2) the juvenile will benefit from expungement, and (3) society will not be harmed by the expungement.

¶8 At the hearings on the matter, Adam (who is now twenty-two years old) testified that since the assaults, which occurred when he was fifteen, he had not been accused of inappropriate sexual behavior or sexual assault. He also testified that he was working full-time and hoped to enter an apprenticeship at some time in the near future. The victims of his two fourth-degree sexual assaults testified, each describing the assaults and stating that they did not want Adam's adjudication expunged. Adam's stepsister, the now fourteen-year-old victim of the first-degree sexual assault, also testified. She described her present relationship with Adam as that of a normal brother and sister, and she requested

that the court expunge his adjudication, stating that Adam had made a bad mistake but that it had changed him and he was a good person.[3]

¶9 The circuit court also considered a psychologist's report prepared at the request of Adam's attorney. The report stated that, though research on juvenile sex offenders is in its infancy, it is known that adolescent sex offenders are more responsive to treatment than adult offenders and less likely to reoffend in adulthood. The report also stated that the overall sexual recidivism rate for adolescent offenders is low, and adolescent sex offenders against children tend to have slightly lower sexual recidivism rates than adolescents who rape other teens. The court noted that the conduct with the two teenage victims was not "in the nature of rape."[4] The court further cited the report's statement that Adam "has been residing in the community managing his low risk very well." The court also stated that Adam's treating physician is of the opinion that Adam has a low risk for sexual recidivism. On the other hand, as the court remarked, the psychologist had concerns regarding Adam's maturity (he was apparently not fully cooperative

[3] The State points out that someone present during the stepsister's testimony stated in the record that Adam's mother gave her nonverbal cues at one point. The court asked the mother to refrain from gesturing, and the transcript does not give any suggestion of nonverbal communication after this point. Evaluating the credibility of witnesses is for the circuit court, not this one, and the circuit court clearly found that the stepsister's testimony was entitled to some weight.

[4] The State strenuously objects to this characterization, and states that "[b]y statutory definition all three crimes [Adam] requested expungement from are considered 'rape' in … Wisconsin." The State further claims that the court's statement shows that it "does not recognize [Adam's] conduct as a law violation," and demonstrates "blatant disregard of the law and application of the facts to the statute." We disagree with the State's characterization of the court's remarks. From context, it is clear that the court meant only that Adam's assaults of the teenage victims involved sexual contact, rather than sexual intercourse. There is not now a crime called "rape" in this state, but under the pre-1976 law, intercourse involving vulvar penetration was an element of "rape." *See* WIS. STAT. §§ 944.01, 939.22(36) (1973-74). It is quite plain that the circuit court recognized Adam's conduct as a sexual assault and a violation of the law.

with the psychologist's investigation, thwarting her attempts to contact his current girlfriend), and stated that Adam did not seem to have learned much about his risk of reoffending.

¶10 At the conclusion of the hearing, the court announced its decision. With respect to the two fourth-degree sexual assaults, it declined to expunge Adam's adjudications. The court noted that the offenses were "aggressive, forceful, … intimidating and persistent." The court noted that Adam continues to deny that the assaults occurred, and found the testimony of the witnesses credible and persuasive. The court stated that it was concerned about Adam's "continued outright denial and certainly downplaying of your role in … unacceptable, threatening and intimidating, and persistent and aggressive behavior toward these two individuals." Given the nature of the offenses and Adam's failure to accept responsibility, the court found that it would not be in either Adam's or the community's best interest to expunge the adjudications.

¶11 Turning to the first-degree sexual assault, the court again cited many of the considerations it had discussed with respect to the fourth-degree sexual assaults: Adam's low risk of recidivism, his success residing in the community, his increased maturity, and no indication that the previous behaviors had resurfaced. The court further discussed the testimony of the victim, stating that she had "express[ed] her wish that, in effect, her relationship with you be restored to a normalcy" and the court remove "the impediment … of having to register as a sex offender because of this particular offense." The court asked rhetorically how the "development of the relationship with her … affects the analysis in terms of predicting your risk of reoffense … that is, your threat of harm to the community." The court ultimately stated that, in view of all of the other indications that Adam was a low risk to reoffend, it would honor the request of the victim, and find that

expungement of the first-degree charge would not harm society. Specifically, it found that being relieved of the need to register as a sex offender would not, under the circumstances, "present [a] risk to the community."

¶12 On appeal, the State argues that the circuit court erred by considering the wishes of the victim in granting the expungement of the first-degree sexual assault. The State argues that the "factors" to be considered are listed in the expungement statute and that the wishes of victims are not among them. Alternatively, the State argues that the court gave too much weight to the victim's wishes.

¶13 We disagree. We first note that the three statutory criteria—compliance with the dispositional order, benefit to the juvenile, and lack of harm to society—are required factual findings, rather than factors to be considered in the court's discretion. Only after the court has found in favor of the juvenile on all three may it exercise its discretion to grant or deny expungement. As to that discretion, the statute says only that the court "may" grant expungement, and does not limit the criteria that the court may consider. *See* WIS. STAT. § 938.355(4m)(a). Thus, the State's argument that the three required findings are the only proper considerations is misplaced. Nevertheless, it is clear that the circuit court viewed the victim's testimony as tending to demonstrate that expungement would not harm society, and so we will view the State's argument as a claim that it did not so show.[5]

[5] The State does not challenge the court's findings that Adam had complied with his dispositional order and that expungement would benefit him.

¶14 The State urges a narrow understanding of the "harm to society" criterion, arguing that the circuit court's duty is only to look to the threat that Adam may present to the public as a whole; i.e., his likelihood of recidivism. First, we believe this to be an unduly constrained reading of the court's responsibility. Families are the basic unit of society, broken families can be a threat to society, and the mending of a family is a benefit to society. Certainly, in assessing whether society would be harmed by expungement, the court was entitled to consider the possible benefits to society as well—including those to Adam's immediate family. Further, it is plain that a decision that strengthens Adam's family connections is likely to benefit not only Adam and the family itself, but the broader community in which they reside, by giving Adam greater resources to resist taking the sorts of harmful actions that he has in the past. Viewing the court's words in context, we think it is clear that it considered the victim's testimony as one indication that Adam would not be likely to offend again if he were freed from the requirement that he register and, in weighing all of the other evidence, concluded that society would not be harmed. We uphold that conclusion.

¶15 The State also argues that the court abused its discretion in granting expungement on the first-degree sexual assault and denying it on the fourth-degree sexual assaults, claiming that there is no logical distinction between them. We reject this claim because it is clear that the court found meaningful differences between them. Chiefly, Adam has refused to accept responsibility for the fourth-degree sexual assaults, while he has consistently taken responsibility for the first-degree sexual assault, apologizing to and reconciling with the victim. The court could reasonably conclude that it would be sending Adam a very dangerous message by granting him a clean slate when he has never come to grips with the

wrongfulness of his conduct with his two teenage victims. On the other hand, the court could reasonably decide that expunging the first-degree sexual assault would benefit Adam and his family, without threatening future harm or excusing Adam's wrongful conduct.

¶16 Adam, for his part, reverses the State's argument and claims that the court was *required* to expunge the fourth-degree sexual assaults for the same reason that it expunged the first-degree sexual assault. Adam makes the same error that the State makes, failing to recognize that positive findings on the statutory criteria *allow* the court to exercise its discretion and do not *require* it to grant expungement. For the same reasons noted above, we hold that the court in its discretion had a reasonable basis for the distinction that it drew.

By the Court.—Order affirmed.

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