

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2007

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2007AP139

Cir. Ct. No. 2004JV574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JEREMY J. S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
CHARLES H. CONSTANTINE and JOHN S. JUDE, Judges. *Reversed and cause
remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.¹

¶1 BROWN, C.J., In *State v. Cesar G.*, 2004 WI 61, ¶¶40-42, 272 Wis. 2d 22, 682 N.W.2d 1, our supreme court held that a circuit court has the discretion, pursuant to WIS. STAT. § 938.34(16), to stay that part of a dispositional order requiring a delinquent child to register as a sexual offender. While the parties here raise multiple issues, we limit our focus only to the *Cesar G.* hearing. Because of circumstances which we will hereafter describe, no one was ready for this hearing—not the juvenile court judge who was assigned this matter at the last moment, not the prosecutor, not the defense counsel who had the burden of proof and certainly not the juvenile himself. We conclude that this was no one’s fault—it was a case that just happened to fall through the cracks, a circumstance which, thank goodness, occurs rarely in Wisconsin’s justice system, but does happen. We must reverse and remand for a new hearing in the interests of justice because the real controversy was not tried—particularly, whether the juvenile was a low risk to reoffend and, if so, whether it would nonetheless be in the interests of public protection to have the juvenile register.

¶2 The story really begins about nine months before the *Cesar G.* hearing. As a result of a plea agreement, the juvenile, Jeremy J.S., admitted a charge of third-degree sexual assault pursuant to WIS. STAT. § 940.225(3). The

¹ Though this is a case under WIS. STAT. ch. 938 (2005-06), and thus would ordinarily be decided by one judge, *see* WIS. STAT. § 752.31(2)(e), we ordered it converted to a three-judge case because there were potentially at least two issues of first impression which may have warranted publication. *See* WIS. STAT. § 809.41(3). After the panel carefully reviewed the transcripts, however, our attention became focused on the issue which is the subject of our opinion.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

admission was made before the Honorable Judge Charles Constantine at a hearing on December 20, 2004. At this hearing, Jeremy was represented by an attorney from the office of the state public defender, Nathan Opland-Dobs.

¶3 Under WIS. STAT. § 938.34(15m)(bm), since the victim was a minor, the court was obligated to require the juvenile to comply with the reporting requirements. At the disposition hearing before Judge Constantine on January 18, 2005, Opland-Dobs explained that Jeremy was remorseful and was getting needed treatment and asked that Jeremy be placed on supervision and the registration stayed. Judge Constantine refused to put Jeremy under supervision, noting that this was a circumstance of repeated assaults by Jeremy upon a young cousin lasting over four years and was not simply a one-time “case of simple curiosity between two relatives.” Instead, Judge Constantine ordered that Jeremy be placed in corrections until his eighteenth birthday. (He was seventeen at the time.) As to the registration issue, however, Judge Constantine had this to say:

I'll stay it until he's done with treatment, but I won't stay it forever. If he cooperates, comes out with a clean bill of health, I'll consider staying it. No. That's a carrot I'll throw out in front of him. But we'll wait to see how he does.

¶4 Judge Constantine at first set the case for further review on November 1, 2005, but Richard Barta, the assistant district attorney, requested that the review occur before Jeremy's eighteenth birthday. To this request, the clerk stated: “October 14, review on the stay, at 11:00.” Jeremy was thereupon sent to Ethan Allen School.

¶5 The next hearing on the matter indeed took place on the appointed date, October 14. But Opland-Dobs was not there; another state public defender, Janice Pasaba, represented Jeremy on that date. Judge Constantine was not

available. Therefore, the Honorable John S. Jude presided. Richard Barta again appeared for the State. We will relate substantial parts of the record at this point, italicizing those portions we deem particularly significant. We will only quote those parts of the record pertinent to our discussion. We open with the introductory statement by Judge Jude, with our emphasis added:

THE COURT: All right. I've reviewed the minutes here.... Apparently back on January 18, 2005, Judge Constantine stayed the registration—sex offender registration until—and this is a quote from the minutes—*until the Court sees how Jeremy does in treatment* and set this review for today at 11:00.

I understand that because Jeremy is going to be turning 18 on the 18th [sic] of October; Judge Constantine is not available today, the matter was placed on my calendar for further proceedings. Is that the posture that we're in?

MR. BARTA: [F]rankly, I don't know why this couldn't be done in front of Judge Constantine next week.... I think this matter should be scheduled before the Judge who entered the dispositional order.... Is it set to expire tomorrow?

MS. PASABA: [Jeremy's] birthday is in fact tomorrow and I believe that's the reason why the matter had to be heard today.

....

MR. BARTA: Then we need to proceed here today I am not going to go through all the facts again unless the Court wants me to in which case *I have to go back to the office and get additional paperwork.*

THE COURT: Is there a specific order relative to the stay and with findings under *Cesar G.*?

MS. PASABA: I believe there was not, your Honor....

....

THE COURT: Well, then I think we need to go through all of it.

MR. BARTA: *Well, I'm not prepared for that right now, your Honor. I'll need to go back across to the office.*

....

Frankly, I haven't read Cesar G. so I'm not familiar with what findings you're making reference to.

THE COURT: [T]his would be a *Cesar G.* case....

....

MR. BARTA: So, the burden then goes to the defense ... in terms of the stay?

THE COURT: Exactly.

.....

MS. PASABA: *I am at the same disadvantage as everyone else in that until late yesterday, I did not have this hearing scheduled on my calendar So I haven't had a lengthy period of time to consult with people*

¶6 From this, we conclude that none of the key players were ready for this hearing. The question is, how did that affect the content of the hearing, if at all? The record also provides the answer to this question. Pasaba informed the court that Jeremy had told her that he had successfully completed *a* sex offender treatment training at Ethan Allen and was now engaged in another program that he would not be able to complete because he was being released. In so doing, she gave the name of his counselor at Ethan Allan, Barbara Jansen. Judge Jude speculated that Barbara Jansen must be either the therapist or his social worker. Judge Jude then asked Pasaba whether there was anything to indicate that Jeremy completed the program. To this question, Pasaba responded: *“I have nothing from him because I—I only got a chance to talk to him last night after hours at detention and so--.”* (Emphasis added.) Judge Jude then thought it appropriate to try and get Barbara Jansen on the telephone. The court then asked whether there would be any legal impact to continuing the matter to a later date, to which Barta

responded that it would be a matter of first impression, that he hesitated to answer and that he thought it should be completed before Jeremy turned 18 “just to be safe.”

¶7 Judge Jude was able to connect with Barbara Jansen. Judge Jude explained that he was calling her because there was some indication that she was the therapist or social worker involved with Jeremy and he was trying to get accurate information as to Jeremy’s compliance with the sex offender program at Ethan Allen. The judge told Jansen: “*I realize that this has not been planned ... I realize that we’re calling you unprepared.*” However, the judge nonetheless wanted her input that afternoon. Jansen replied:

It depends on—on how much detail the Court, you know, wants to pursue. If you just ask me in general terms, I can respond in general terms right now to tell you that Jeremy has been compliant in treatment. Behaviorally he has been just fine. The problem is that he was not—he did not complete treatment because he did—was not here long enough at Ethan Allen School to complete the full treatment program. That would be the only problem, you know, right now. (Emphasis added.)

¶8 Jansen was thereafter sworn in. Because Jeremy had the burden of proof, Pasaba examined Jansen first. Jansen identified herself as a social worker at Ethan Allen School. She explained that Jeremy had successfully completed two phases out of four at the Ethan Allen School, that the only reason he was unable to complete the rest was because his term was coming to an end at Ethan Allen, and that she had discussed the situation with Jeremy’s family and they were desirous of continuing his treatment in the community. Jansen was asked about future risk and offered the opinion that all youth are possibly at risk for reoffending but she was not the treatment provider. She testified:

I am not like the treatment provider. I just get information and write reports from information that I am given from the

treatment providers; meaning, the people who do the groups. So the information I have basically is that he's been doing well. (Emphasis added.)

¶9 When Pasaba had completed her examination, it was Barta's turn. Barta asked who would be responsible for administering the treatment program and Jansen replied that it would be Paul Ninneman who was the section manager of the program, Dr. Michael Hagan, the head psychologist, and Beth Remitz, a social worker who actually led Jeremy's group. Barta asked about their availability that afternoon and Jansen did not know about Remitz but thought Ninneman might be available. Upon further questioning, Jansen described the four programs as (1) the offenders' assaults, their own victimization and their victimization of others; (2) the offenders' sexual history; (3) the offenders' family, gang behavior, drugs and alcohol behaviors; and (4) formulating their own safety and relapse prevention plans. Barta then asked her opinion, which was allowed over objection as to her being qualified to render such opinion, about whether she thought Jeremy should register. Jansen replied:

My opinion would be that all sex offenders should register. So I'm not specifically stating Jeremy for any reason but I would say yes and particularly because he has not finished treatment and that is not his fault.

¶10 Jeremy's father was the only other witness to testify. He discussed the counseling set to take place following Jeremy's release from Ethan Allen, and the family's plan to have Jeremy engage in this counseling.

¶11 When the hearing had concluded, Judge Jude engaged in the balancing test required by *Cesar G.* based on the record and testimony that day. Judge Jude noted the ages of the juvenile and the victim at the time and the familial relationship between them, and held that the assault did not result in physical harm and that Jeremy had no mental illness or mental deficiency. With

respect to the probability that Jeremy would commit other violations in the future, Judge Jude simply noted that sex offender treatment is “very specialized ... very long-term and in some cases lifelong.” Judge Jude determined that because the assaults occurred over a long period of time—from 2000 through 2004, and consisted of many varied instances of sexual contact including two instances of intercourse, the actions were more of a “predatory nature.” Judge Jude also commented on the vulnerability of the victim because of her age and threats Jeremy made to the victim’s brother not to tell. Judge Jude also acknowledged Jeremy’s success in treatment thus far and commented favorably concerning the community psychologist that Jeremy was now seeing. But Judge Jude ultimately decided that the interests of public protection outweighed the other considerations, lifted the stay and ordered Jeremy to register. However, Judge Jude also allowed the stay to continue pending appeal.

¶12 Subsequently, an appeal was filed pursuant to WIS. STAT. § 809.30 by yet a different state public defender, Brian Findley. A postadjudication motion had previously been filed. Findley alternatively moved to vacate Judge Jude’s ruling and for a new hearing on the grounds that the hearing with Judge Jude was conducted like “an emergency hearing” which meant that the parties were not properly prepared to fully and carefully argue the issue. These motions were directed to Judge Constantine, the original juvenile judge on the case. With regard to the motion to vacate and request for a new hearing, Judge Constantine ruled that Jeremy was not entitled to a “do-over.” Judge Constantine found that

there was a fairly significant hearing with nine months['] notice that Ms. Pasaba had, and I think your client testified, a number of other people testified

....

[T]here was two separate hearings on two separate days with Judge Jude, which were really done at the insistence, I think of Ms. Pasaba, who [was] representing your client. And at that time there was testimony from a number of individuals. I think there was an individual from Ethan Allen that testified ... and there may have been others.

....

I understand your position, Mr. Findley, is that you somehow get a second kick at the cat totally from square one and that what Judge Jude did with the District Attorney and Ms. Pasaba was basically a trial run that had no meaning at all

....

[J]ust for the record again, the matter was set ten months in advance, all right? Everybody knew about it because I set it in January.

Findley replied: “But it was not calendared, your Honor.” To which the court responded: “That’s not my fault.”

¶13 Now that we have laid out a decidedly long recitation of the pertinent facts, we can explain why we reverse in the interests of justice. First, we underscore what Judge Constantine said in response to the fact that the *Cesar G.* hearing had not been calendared. Judge Constantine said it was not his fault. And we agree. It was not his fault. Nor was it the fault of the district attorney. Maybe it was Opland-Dobs’ fault or the fault of the local office of the state public defender. We do not know, although Findley appeared to give much emphasis to the fact the case had not been calendared as being the reason why the state public defender’s office was not ready. Maybe it was the clerk who dropped the ball. Again, we do not know. We simply cannot point fingers at anyone—least of all Judge Jude or Judge Constantine. But one thing is certain—the ball *was* dropped and Jeremy did not drop the ball.

¶14 Contrary to what Judge Constantine thought was the case, only two witnesses testified: Barbara Jansen, who basically was nothing more than the keeper of records, and Jeremy's father, who testified about continuing Jeremy's counseling after release. What is important here is that no one testified about the probability that Jeremy will commit other violations in the future. All we have is Judge Jude's opinion that, generally speaking, sexual predators require long and sometimes lifelong treatment and that Jeremy's actions classified him as a predator. A close look at *Cesar G.* shows why this opinion of Judge Jude's, made without any individualized expert opinion about how to classify Jeremy, will not suffice.

¶15 In *Cesar G.*, the court unanimously rejected the State's contention that juvenile courts had no discretion to stay the registration requirement. The court commented that while the legislature did have the protection of the public as one goal, the Juvenile Justice Code required that a juvenile's rehabilitation was also a goal to be equally considered. *See Cesar G.*, 272 Wis. 2d 22, ¶¶35-36. The court wrote that the purpose of the juvenile code was to adopt an approach that "balances rehabilitation, personal accountability and public protection and which best serves both the offender and society." *Id.*, ¶36. In this regard, the court was concerned that the circuit court had failed to discuss the probability that Cesar would commit other violations in the future. *Id.*, ¶43. In *Cesar G.*, the circuit court had before it an evaluation which had concluded that Cesar would "not be likely to continue 'perpetration of antisocial behaviors.'" *Id.* But the circuit court ignored that evaluation because it thought it had no authority to order a stay. *Id.*, ¶46. Here, Judge Jude had no evaluation but offered his opinion that Jeremy was a predator and that, as a predator, his treatment would be lifelong or close to that. In our view, both the circuit court in *Cesar G.* and the court here did no balancing—

one because it believed it had no authority to do so and the other because it had no evidence to do so. The balancing was not made here because there was no record from which to balance. And that, as we have repeatedly said by now, was no one's fault.

¶16 What especially concerns us here is that Jeremy now has expert evidence that he is at low risk to reoffend. This evidence was not presented at his *Cesar G.* hearing before Judge Jude. The court should be allowed to balance this expert opinion, which individualizes Jeremy's condition, with the need to protect the public, and make a decision based on all the evidence before it. Because that is the real issue and it has not been tried, a reversal in the interests of justice is warranted and a remand to the juvenile court for a new hearing is justified. *See* WIS. STAT. § 752.35.

¶17 Before we leave this case, we have one further comment. It is true that Dr. David Thompson, a clinical psychologist, testified at the postorder hearing before Judge Constantine. As well, Paul Goetz, a social worker, and Karrie Vobeda, a case manager at the Safe Passage Residential Program, testified. But Judge Constantine did not consider this evidence because he had previously held that Jeremy was not entitled to a "do-over," and that if the evidence were to be considered at all, it would have to be under WIS. STAT. § 938.46. This statute allows a juvenile to move for a rehearing on the grounds that new evidence has been discovered. Judge Constantine refused to consider the adduced testimony because it was not in existence at the time of the hearing before Judge Jude. By this decision, we are vacating Judge Jude's order. Therefore, § 938.46 does not come into play. The record containing this "new" evidence may be considered because it is relevant to the extent of Jeremy's rehabilitation during the entire length of Jeremy's stay. Moreover, if there is further evidence as to how Jeremy

has either progressed or regressed since the hearing before Judge Constantine, that evidence—whether elicited by the State or by Jeremy—may also be presented to the court for its consideration. At bottom, by the time the ultimate decision has been made, the juvenile court should have a strong record with which to make the required balancing decision—whatever that decision may be.

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

Not recommended for publication in the official reports.

