COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2058 **Cir. Ct. No. 2006JV110**

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

IN THE INTEREST OF LOGAN R.C., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LOGAN R.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] This is a WIS. STAT. ch. 938 delinquency proceeding in which the State filed a petition charging Logan R.C., then thirteen,

[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.

with first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(b). The charge arose out of incidents with his younger sister. Logan entered an admission to the charged offense and the parties agreed to the disposition with the exception of the sex offender registration requirement. Logan appeals from the court's order that he register as a sex offender, contending that the court erroneously construed WIS. STAT. § 301.45(1m)(a)1g., which describes one element of an exception to the rule requiring that persons who have committed certain categories of crimes register as a sex offender. For the reasons we explain below, we affirm the court's order.

¶2 WISCONSIN STAT. § 301.45(1m) provides in relevant part:

> **(1m)** EXCEPTION TO REGISTRATION REQUIREMENT; UNDERAGE SEXUAL ACTIVITY. (a) A person is not required to comply with the reporting requirements under this section if all of the following apply:
>
> 1. The person meets the criteria under sub. (1g) (a) to (dd) based on any violation, or on the solicitation, conspiracy or attempt to commit any violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2).
>
> 1g. The violation, or the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2) did not involve sexual intercourse, as defined in s. 948.01 (6), either by the use or threat of force or violence or with a victim under the age of 12 years.
>
> 2. At the time of the violation, or of the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2), the person had not attained the age of 19 years and was not more than 4 years older or not more than 4 years younger than the child.
>
> 3. It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.

In addition, WIS. STAT. § 938.34(15m)(am) provides that if a juvenile is adjudged delinquent

> on the basis of any violation … [of ch.] 948[,] the court may require the juvenile to comply with the 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 juvenile report under s. 301.45.

¶3 Before the circuit court the parties disagreed on the proper construction of WIS. STAT. § 301.45(1m)(a)1g., as they do on appeal. Logan's position is that the violation of the enumerated statutes in that subdivision must not involve sexual intercourse by use or threat of force or violence or sexual intercourse with a victim under the age of twelve years. Based on his construction, Logan argued to the circuit court that he satisfied the requirement in WIS. STAT. § 301.45(1m)(a)1g. because the offense with which he was charged did not involve sexual intercourse. The State's position is that the phrases "by the use or threat of force or violence" and the phrase "with a victim under the age of twelve years" do not modify sexual intercourse but instead are two categories in addition to sexual intercourse. Based on its construction, the State argued that the requirement in subd. 1g. was not met because the victim was nine years old and because Logan threatened force or violence.

¶4 The circuit court adopted a construction of this subdivision that was different than that of both parties. It concluded that, even if Logan had sexual contact with the victim and not sexual intercourse, if he used or threatened force or violence, he would not meet the subdivision standard. The court therefore decided to take evidence to determine exactly what Logan had done. Based on the evidence, the court found that sexual assault had occurred on at least three different occasions utilizing force, but that sexual intercourse had not occurred. Because there was force and because the victim was under the age of twelve, the

court concluded that the requirement in WIS. STAT. § 301.45(1m)(a)1g. was not met.

¶5 In argument after the close of evidence, the State asserted that, even if the requirements in WIS. STAT. § 301.45(1m)(a)1g. were met, it was in the interests of the public to require Logan to comply with the reporting requirement as provided for in § 301.45(1m)(a)3. After the court determined that the requirements in subd. 1g. had not been met, the court also stated that to the extent it had the opportunity to "override an exception to the reporting requirement" under subd. 3. it would do that because on at least three occasions there was an assault, although not sexual intercourse, of a nine-year-old girl by threat of or use of actual force, and in the court's view this demanded reporting. The court also recognized that it had the discretion to impose and stay the registration requirement, but, it stated, it was exercising its discretion not to stay the requirement.

¶6 On appeal, the parties renew their arguments on the proper construction of WIS. STAT. § 301.45(1m)(a)1g. We do not resolve this dispute because the court also rested its decision on subd. 3. Logan does not argue that the circuit court did not have the authority to decide that the exemption did not apply under subd. 3., nor does he argue that the court erroneously exercised its discretion in coming to that conclusion. Indeed, Logan does not mention the court's ruling concerning subd. 3. in his main brief. After the State points out in its brief that the court rested its decision on the alternative basis of subd. 3., Logan asserts in reply that the circuit court decided that it was "statutorily prohibited from considering the exemption for Logan" and therefore its decision was based on an incorrect view of the law. We do not agree with this analysis.

¶7 The circuit court very deliberately made a determination that the exemption did not apply based on WIS. STAT. § 301.45(1m)(a)3. as an alternative to its ruling on subd. 1g. The court's ruling that the exemption did not apply because of subd. 3. was not based on an error of law. The circumstances here are not the same as in ***In the Interests of Cesar G.***, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1, on which Logan relies. In that case the supreme court determined that it was an erroneous exercise of discretion for the circuit court to deny the juvenile's request to stay the requirement that he register as a sex offender as required by § 301.45 because that determination was based on the flawed premise that the circuit court lacked such authority under WIS. STAT. § 938.34(16). ***Id.***, ¶¶42-46. After construing the statute to grant this authority to the circuit court, ***id.***, ¶40, the supreme court decided that it was necessary to reverse and remand so that the circuit court could exercise its discretion based on a correct view of the law.[2] ***Id.***, ¶52. In contrast, in this case if the circuit court did have an incorrect view of the law, as Logan contends, it was with respect to subd. 1g., not subd. 3.

¶8 Because we conclude the circuit court rested its decision to order sex offender registration on the alternative ground that it was necessary to protect the public, WIS. STAT. § 301.45(1m)(a)3., and because Logan does not develop an argument that the court erroneously exercised its discretion in doing so, we affirm the court's order on this ground. It is therefore unnecessary to decide whether the court erroneously construed subd. 1g.

[2] In ***In the Interests of Cesar G.***, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1, the court focused on whether it could stay the reporting requirement after it was imposed, whereas here, we address whether the respondent may be exempt from the reporting requirement. Apparently in ***Cesar G.*** the exemption did not apply because respondent was not "convicted or adjudicated delinquent on or after December 25, 1993…." ***Id.***, ¶15 and n.7 (citing WIS. STAT. § 301.45(1g)(a)).

By the Court.—Order affirmed.

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