

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1556-CR

Cir. Ct. No. 01-CF-312

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID P. BYRNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ David P. Byrne appeals from an amended judgment of conviction for three counts of fourth-degree sexual assault and an order denying

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

his request to remove the requirement that he register as a sex offender. Byrne argues that because fourth-degree sexual assault is not a sex offense under WIS. STAT. § 301.45(1d)(b), he cannot be required to register as a sex offender. We affirm the amended judgment of conviction and the order.

FACTS

¶2 Byrne was originally charged with three counts of incest. However, the charges were eventually amended and on January 9, 2002, Byrne pled no contest to three counts of fourth-degree sexual assault, contrary to WIS. STAT. § 940.225(3m). The circuit court imposed and stayed three consecutive nine-month sentences and placed Byrne on probation.² In addition to the conditions of probation, the judgment of conviction required Byrne to register as a sex offender.

¶3 In April 2002, Byrne filed a motion to modify the judgment of conviction to eliminate the requirement that he register as a sex offender. A hearing was held on May 22, 2002, wherein the circuit court determined that it had the discretion to require sex offender registration because the underlying conduct was sexually motivated and it would be in the interest of public protection to have Byrne report under WIS. STAT. § 301.45. The circuit court denied Byrne's motion to eliminate the sex offender registration requirement. Byrne's probation was eventually revoked and an amended judgment of conviction was issued that still required Byrne to register as a sex offender.

² The original judgment of conviction indicates that sentence was withheld before probation was imposed. However, the transcript reveals that the circuit court imposed and stayed the sentences and then placed Byrne on probation. Where there is conflict between a trial court's unambiguous oral pronouncement and a written judgment, the oral pronouncement controls. *State v. Ortiz*, 2001 WI App 215, ¶27, 247 Wis. 2d 836, 634 N.W.2d 860.

DISCUSSION

¶4 Byrne argues that fourth-degree sexual assault is not a sex offense under WIS. STAT. § 301.45(1d)(b) and therefore he cannot be required to register as a sex offender. Specifically, he argues that § 301.45(1d)(b) defines “sex offense” as a violation of a number of statutes specifically set forth in its subsection but fourth-degree sexual assault is “conspicuously” absent from that list. Consequently, according to Byrne, the crime for which he was convicted and sentenced is not a sex offense under the section of the law requiring sex offender registration. While Byrne focuses on the provisions of § 301.45(1d)(b), he ignores the provisions of § 301.45(1g)(e).

¶5 WISCONSIN STAT. § 301.45 addresses sex offender registration; Byrne focuses solely on § 301.45(1d), which provides only the applicable definitions for this section. However, § 301.45(1g)(e) addresses who is covered under sex offender registration and states:

WHO IS COVERED. Except as provided in sub. (1m), a person shall comply with the reporting requirements under this section if he or she meets one or more of the following criteria:

....

Is ordered by a court under s. 51.20(13)(ct)1m., 938.34(15m)(am), 938.345(3), 971.17(1m)(b)1m. or 973.048(1m) to comply with the reporting requirements under this section.

WISCONSIN STAT. § 973.048(1m), referenced in § 301.45, addresses sex offender reporting requirements and states:

Except as provided in sub. (2m), if a court imposes a sentence or places a person on probation for any violation, or for the solicitation, conspiracy or attempt to commit any violation, under ch. 940, 944 or 948 or ss. 943.01 to 943.15,

the court may require the person 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 person report under s. 301.45.

¶6 It is irrelevant that Byrne was not convicted of a sex offense under WIS. STAT. § 301.45(1d)(b); under § 301.45(1g)(e), a court can order sex offender registration pursuant to WIS. STAT. § 973.048. Section 973.048(1m) does not require commission of a sex offense; it gives the circuit court discretion to order sex offender registration when the person is sentenced or placed on probation for “any violation ... under ch. 940.” Byrne was convicted of three counts of WIS. STAT. § 940.225(3m). Thus, the circuit court had the discretion to order sex offender registration if it found that the underlying conduct was sexually motivated and in the interest of public protection.

¶7 We review a trial court’s discretionary decision under the erroneous exercise of discretion standard. *State v. Kivioja*, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). Thus, we will uphold a discretionary decision if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. *Id.* In reviewing a discretionary decision, we will look for reasons to sustain the trial court. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶8 The circuit court found that the underlying conduct was sexually motivated and it would be in the interest of public protection to have Byrne report under WIS. STAT. § 301.45. Byrne concedes that there is a sufficient factual record to support these conclusions. The circuit court was thus well within its discretion to order Byrne to register as a sex offender.

By the Court.—Judgment and order affirmed.

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

