COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP792 **Cir. Ct. No. 2004JV192**

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

IN THE INTEREST OF SIR S. M. L., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SIR S. M. L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed in part and dismissed in part.*

¶1 HIGGINBOTHAM, J.[1] Juvenile Sir S.M.L. appeals from a circuit court order compelling him to provide a DNA sample to the Wisconsin Department of Justice pursuant to WIS. STAT. § 938.34(15) (2003-04).[2] Sir S.M.L. argues the § 938.34(15) requirement to provide a DNA sample, as applied, violates his right to equal protection under both the United States and Wisconsin Constitutions because it arbitrarily and irrationally requires him to provide the sample when neither adults nor juveniles waived into adult court convicted of the same offense are required to do so nor can be required to do so. Furthermore, Sir S.M.L. argues, if the statutes can constitutionally require the DNA sample, then the circuit court's denial of his request for a stay of the DNA requirement, under the facts of this case, constituted an erroneous exercise of discretion. We disagree with both contentions and affirm the order of the circuit court.

FACTS

¶2 Sir S.M.L., a thirteen-year-old boy and an eighth-grade student, was adjudicated delinquent of two counts fourth-degree sexual assault, contrary to WIS. STAT. § 940.225(3m). As part of the disposition, the circuit court ordered Sir S.M.L. to provide a DNA sample to the Wisconsin Department of Justice pursuant to WIS. STAT. § 938.34(15). Sir S.M.L. moved to stay the submission of that sample pending briefing on the equal protection question and on whether the circuit court had the authority to grant the stay. The circuit court granted a stay.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 After the parties submitted their briefs, the Wisconsin Supreme Court held in ***State v. Cesar G.***, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1, that a circuit court has discretion under WIS. STAT. § 938.34(16) to stay that portion of a dispositional order requiring a delinquent juvenile to register as a sex offender under WIS. STAT. §§ 938.34(15m)(bm) and 301.45(1m). ***Cesar G.***, 272 Wis. 2d 22, ¶2. In light of this decision, the circuit court ordered additional briefing to address the potential implication of ***Cesar G.*** on Sir S.M.L.'s equal protection claim.

¶4 After additional briefing, the circuit court issued an order concluding that while the ***Cesar G.*** court did not directly address a stay of an order requiring a DNA sample under WIS. STAT. § 938.34(15), it relied upon § 938.34(16) in holding that circuit courts have discretion to stay one or more portions of a dispositional order, including the sex offender registry and the requirement to provide a DNA sample. The circuit court further concluded § 938.34(16) should be interpreted to allow discretion in staying the DNA sample requirements of § 938.34(15) for the same reasons the ***Cesar G.*** court applied to the sex offender registry requirements of § 938.34(15m). The circuit court then found that § 938.34(15), if directory and mandatory, required Sir S.M.L. to provide a DNA sample. The court further concluded that even if ***Cesar G.*** grants circuit courts the authority to stay the DNA requirement of § 938.34(15), the factors enumerated in the statute to guide the court's discretion weighed in favor of denying Sir S.M.L. a stay. The circuit court then lifted its prior stay and ordered Sir S.M.L. to provide a DNA sample without addressing Sir S.M.L.'s objections on equal protection grounds.

¶5 On July 20, 2004, Sir S.M.L. asked the circuit court to address his equal protection arguments and requested a continuing stay of the DNA

requirement until the equal protection issue was resolved. On October 13, 2004, the circuit court issued an order on the equal protection issue, concluding WIS. STAT. § 938.34(15) did not violate Sir S.M.L.'s equal protection rights. Sir S.M.L. appeals.

DISCUSSION

¶6 The constitutionality of a statute is a question of law we review de novo. ***State v. Jeremy P.***, 2005 WI App 13, ¶5, 278 Wis. 2d 366, 692 N.W.2d 311. All statutes reach us with the presumption that they are constitutional and the party challenging the statute bears the burden of demonstrating beyond a reasonable doubt it is unconstitutional. ***Id.*** "There are two major categories of constitutional challenges: 'facial' challenges and 'as-applied' challenges." ***Id.*** (citation omitted). Sir S.M.L. makes an as-applied challenge to WIS. STAT. § 938.34(15). A party challenging the constitutionality of a statute as applied must demonstrate it is unconstitutional beyond a reasonable doubt. ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶7 WISCONSIN STAT. § 938.34 addresses the dispositions available for a juvenile adjudged delinquent and states, in relevant part,

> If the court adjudges a juvenile delinquent, the court shall enter an order deciding one or more of the dispositions of the case as provided in this section under a care and treatment plan. A disposition under sub. (4m) must be combined with a disposition under sub. (4n). In deciding the dispositions for a juvenile who is adjudicated delinquent, the court shall consider the seriousness of the act for which the juvenile is adjudicated delinquent and may consider any other delinquent act that is read into the record and dismissed at the time of the adjudication. The dispositions under this section are:
>
> ….

> **(15)** DEOXYRIBONUCLEIC ACID ANALYSIS REQUIREMENTS. (a)1. If the juvenile is adjudicated delinquent on the basis of a violation of s. 940.225, 948.02 (1) or (2) or 948.025, the court shall require the juvenile to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
>
> 2. Except as provided in subd. 1., if the juvenile is adjudicated delinquent on the basis of any violation under ch. 940, 944 or 948 or ss. 943.01 to 943.15, the court may require the juvenile to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
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> 3. The results from deoxyribonucleic acid analysis of a specimen under subd. 1. or 2. may be used only as authorized under s. 165.77 (3). The state crime laboratories shall destroy any such specimen in accordance with s. 165.77 (3).
>
> (b) The department of justice shall promulgate rules providing procedures for juveniles to provide specimens under par. (a) and for the transportation of those specimens to the state crime laboratories under s. 165.77.

¶8 Sir S.M.L. first argues that, as applied to him, the statutory requirement under WIS. STAT. § 938.34(15) to submit a DNA sample violates his right to equal protection under both the United States and Wisconsin constitutions because it arbitrarily and irrationally requires him to provide a DNA sample when neither adults nor juveniles waived into adult court convicted of the same offense can be required to do so. Specifically, Sir S.M.L. contends it is patently arbitrary to require the DNA sample from delinquent juveniles while excusing similarly convicted adults and waived juveniles from also providing a sample under identical circumstances. We disagree.

¶9 "The Equal Protection Clause prohibits discrimination based on certain invidious classifications, but it does not, in and of itself, create substantive

rights."[3] ***Joseph E.G.***, 240 Wis. 2d 481, ¶7. The classification of which Sir S.M.L. complains, requiring juveniles adjudicated delinquent of fourth-degree sexual assault to submit a DNA sample while excusing similarly convicted adults and waived juveniles from the same requirement, is not a suspect classification or even a quasi-suspect classification. Implicitly acknowledging this, Sir S.M.L. concedes WIS. STAT. § 938.34(15) should be evaluated using the rational basis test. *See* ***Joseph E.G.***, 240 Wis. 2d 481, ¶7. However, he contends there is no rational basis for the legislature's omission of similarly convicted adults and waived juveniles from the DNA submission requirement.

¶10 Sir S.M.L. notes that under existing law, all adults and all juveniles waived into adult court who are convicted of any felony must submit a sample to the DNA database. WIS. STAT. § 973.047(1f). Similarly, all juveniles found delinquent for certain sex offenses (including fourth-degree sexual assault, a misdemeanor) must submit a sample to the DNA database. WIS. STAT. § 938.34(15)(a). However, according to Sir S.M.L., neither adults nor waived juveniles convicted of misdemeanors, including fourth-degree sexual assault, can be required to do so. While currently all adult felons are required to provide a DNA sample, previously a DNA sample was only required of adult felons convicted of certain sex offenses, which included fourth-degree sexual assault. Sections 938.34(15) and 973.047(1f) (requiring DNA samples) were identical and treated delinquents and convicted adults identically; this changed with the passage of 1999 Wis. Act 9, § 3202k which renumbered § 973.047(1)(a) as § 973.047(1f).

[3] The equal protection clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution. ***State v. Joseph E.G.***, 2001 WI App 29, ¶5 n.4, 240 Wis. 2d 481, 623 N.W.2d 137.

1999 Wis. Act 9 also amended that subsection of § 973.047 so the DNA sampling requirement was made applicable for adults for any felony conviction. However, no corresponding change was made to § 938.34(15). Now, juveniles found delinquent of fourth-degree sexual assault are still required to provide a DNA sample while neither adults nor waived juveniles can be similarly required. According to Sir S.M.L., "[t]his failure to harmonize the two statutes creates an arbitrary and irrational distinction between juveniles adjudicated delinquent of 4th-degree sexual assault and adults and waived juveniles convicted of the same offense."

¶11 "When considering an equal protection challenge not involving a suspect or quasi-suspect classification, "the fundamental determination to be made is whether there is an arbitrary discrimination in the statute …, and thus whether there is a rational basis which justifies a difference in rights afforded." ***Joseph E.G.***, 240 Wis. 2d 481, ¶8 (citation omitted). "A statute violates equal protection if it creates an irrational or arbitrary classification." ***Id.*** "However, a statute that creates a classification that is rationally related to a valid legislative objective does not violate equal protection guarantees." ***Id.*** Simply because a statutory classification results in some inequity does not provide a basis for holding it unconstitutional. ***State v. McManus***, 152 Wis. 2d 113, 130-31, 447 N.W.2d 654 (1989). A legislative enactment must be upheld unless it is "patently arbitrary." ***Id.*** (citation omitted).

¶12 The question before us is whether there is a rational basis supporting the distinction between juveniles adjudicated delinquent of fourth-degree sexual assault and adults and waived juveniles convicted of the same offense; WIS. STAT. § 938.34(15)(a)1. must be examined with this question in mind. We consider the reasonableness of a statute's classification with five criteria in mind:

> (1) All classification must be based upon substantial distinctions which make one class really different from another.
>
> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only.... 'It must not be so constituted as to preclude addition to the numbers included within a class.'
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Dane County v. McManus, 55 Wis. 2d 413, 423, 198 N.W.2d 667 (1972) (quotations and citations omitted).

¶13 Requiring juveniles adjudged delinquent of fourth-degree sexual assault to provide a DNA sample is rationally related to two stated goals of the Juvenile Justice Code. One important interest is the protection of the public. WIS. STAT. § 938.01(2)(a). Public safety is improved by the expansion of the DNA databank. Such samples can lead to early positive identification of sexual offenders. In addition, early identification of juvenile sexual offenders would help meet another Juvenile Justice Code goal, to respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency. WIS. STAT. § 938.01(2)(f).

¶14 Another purpose of the DNA databank is to assist in solving crimes. *See* WIS. STAT. § 973.046. DNA samples provide a databank of genetic markers that are unique to individuals. *See* Lisa Schriner Lewis, *The Role Genetic Information Plays in the Criminal Justice System*, 47 Ariz. L. Rev. 519, 522

(Summer 2005). In those cases where biological evidence has been recovered by the police, the DNA from such evidence can be extracted and compared with samples already contained in the databank. *See* ***id.*** at 526-27. Such comparisons can and do provide nearly indisputable proof not only of identification of individuals who commit crime but also persons who are innocent of crime. *See* D.H. Kaye and Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 414. Such evidence is particularly useful in certain classifications of crime, such as sexual assault. *See* ***id.*** at 415.

¶15 With many sexual assault cases, the only witnesses to the crime are the victim and the perpetrator. Without DNA evidence, the identification of the perpetrator is dependent solely on the victim's observations and any collateral evidence that may exist. If the perpetrator is a stranger, the likelihood of reliable identification can be small. This is especially true in cases of child sexual assault. If DNA evidence can be collected, especially in cases of stranger sexual assaults, such evidence can be compared to the samples already in the databank in an effort to positively identify the perpetrator. Such identification is generally more reliable than the victim's personal observations. In addition, sexual assault is one classification of crime where DNA evidence is frequently obtainable. Thus, if the legislative purpose in creating such a databank and requiring DNA samples is to aid in the identification of perpetrators of crime, then it would follow that expansion of the databank would serve that purpose.

¶16 The significant differences between the juvenile and adult justice systems also provide a rational basis for the dissimilar classification here. Juveniles hold a distinctive position in our constitutional structure and our recognition of juvenile courts as separate from the adult justice system assumes

juvenile offenders may constitutionally be treated differently than adults. *See* ***Milwaukee v. K.F.***, 145 Wis. 2d 24, 45, 426 N.W.2d 329 (1988). The state's authority to control children is greater than the scope of its authority over adults. ***Id.*** We conclude that requiring Sir S.M.L., who is a juvenile convicted of fourth-degree sexual assault, to provide a sample of his DNA under § 938.34(15)(a)1. is rationally related to valid legislative objectives and therefore does not violate his right to equal protection under either the United States or Wisconsin constitutions.

¶17 Sir S.M.L. next argues that, assuming we conclude WIS. STAT. § 938.34(15)(a)1. does not violate his equal protection rights, the circuit court erroneously exercised its discretion by denying his request for a stay of the DNA requirement pending briefing on the equal protection topic. The State counters Sir S.M.L. did not file a notice of appeal within twenty days of the July 14, 2004 order denying his request for a stay, as required by WIS. STAT. § 809.30(2)(b). The State points out that the notice of appeal of the July 14, 2004 order was not filed until October 21, 2004, well past the twenty days as required by statute. The State seeks dismissal of the appeal on this issue. We agree with the State.

¶18 We restate the relevant facts on this issue. On July 14, 2004, the circuit court lifted its stay and ordered Sir S.M.L. to provide a DNA sample. On July 20, 2004, Sir S.M.L. asked the circuit court to address his equal protection challenge to WIS. STAT. § 938.34(15) and to continue the stay until the equal protection issue was determine. However, Sir S.M.L. did not challenge the circuit court's decision to lift the stay. Sir S.M.L. did not file a notice of appeal on the issues covered in the July 14, 2004 order within twenty days as required by WIS. STAT. § 809.30(2)(b); the notice of appeal was not filed for this issue until October 21, 2004, over 120 days later. Under WIS. STAT. § 809.83(2), this delay is grounds for dismissal of the appeal.

¶19 Sir S.M.L. did not file a reply brief in this matter and thus fails to respond to the State's argument. We deem this omission a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments not refuted may be deemed conceded). We therefore do not address this issue any further.

CONCLUSION

¶20 WISCONSIN STAT. § 938.34(15) does not violate Sir S.M.L.'s equal protection rights as there is a rational basis for requiring juveniles to provide DNA samples for fourth-degree sexual assault. Furthermore, Sir S.M.L., by failing to file a reply brief countering the State's arguments, concedes that he failed to timely file a notice of appeal challenging the circuit court's denial of his request for a stay of the DNA requirement. We there affirm the order of the circuit court on the equal protection issue and dismiss the remainder of the appeal.

By the Court.—Order affirmed in part and dismissed in part.

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