COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP1727-CR
2009AP1728-CR
2009AP1729-CR

Cir. Ct. Nos. 2006CF446
2006CF455
2007CF96

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT S. WATLING,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J. Forty-six-year-old Brent S. Watling repeatedly sexually assaulted a fourteen-year-old girl. As part of the judgment of conviction,

the circuit court required him to register as a sex offender. Watling appeals the registration requirement on grounds that the court did not explain why registration was in the interest of the public's protection. We disagree and conclude that the record supports the court's exercise of discretion. Watling also appeals the sentences on two other convictions, alleging that the court improperly required sex offender registration for these as well. He points out that these convictions are not within the sex offender registration statute. He contends that the circuit court did not have the authority to order registration as to the non-sex offenses just because the court also ordered registration as to the sexual assault charges. We conclude, however, that he misreads the court's sentencing structure. The circuit court ordered Watling to register based on his sexual assault conviction only; the other convictions only referred to the registration requirement in his sexual assault case. The court ordered only that, as a condition of supervision on those remaining convictions, he must adhere to the order for sex offender registration. We further hold that the court had a legal basis to do so and affirm.

BACKGROUND

¶2 Watling's wife complained to the Walworth county sheriff's department that Watling had battered her. While investigating the battery complaint, the sheriff's department learned that Watling had repeatedly sexually assaulted a fourteen-year-old girl and that Watling had two wives (one from the state of Washington and one from Wisconsin). The State charged him with repeated sexual assault of a child and bigamy by cohabitation. Watling was released on bail. One of the conditions of bail was no contact with his Wisconsin wife or their residence. He violated this condition by residing with his Wisconsin

wife, and the State added multiple charges of felony and misdemeanor bail jumping. Watling was also charged with OWI-second offense.

¶3 Pursuant to a plea agreement, Watling pled guilty to three counts of fourth-degree sexual assault and one count each of bigamy, felony bail jumping, and OWI-second offense. Three charges of second-degree sexual assault of a child, five charges of felony and misdemeanor bail jumping, and other charges were dismissed and read-in; both sides were free to argue. The presentence investigation report writer recommended periods of confinement and extended supervision and that the conditions of extended supervision include registration with the Wisconsin Sex Offender Registration Program. At sentencing, the State was silent regarding sex offender registration; Watling asked that the court not require registration.

¶4 However, after sentencing Watling to terms of initial confinement and extended supervision, the court said that one of the conditions on the terms of extended supervision would be "registration with [the] sex[] offender registration program." The court explained that "his behaviors [were] significant"; he was forty-six years old and "[h]e had sexual contact with a 14-year-old girl including fondling her breasts and digitally and orally penetrating her vagina, and having her perform oral sex on him." The court discussed how his conduct showed "little regard for the laws of society," that he "denies and takes no responsibility for his action[s]," and that "his demeanor in court … was poor in that he disregarded conditions of bond." It concluded that "he should comply with the sex offender registration program for the safety of the public." Clarification was made that "the sex offender registration [would] appear in particular on the judgment for [the fourth-degree sexual assault convictions]."

¶5 The court referenced the registration requirement in the judgment of conviction for all three cases—the sexual assault case, the bigamy case, and the bail jumping case. The sexual assault case stated: "Must register as a sex offender." The court included the following identical orders in the bigamy and bail jumping cases as a condition of his sentence: Watling must "[r]egister as a sex offender as required in [the sexual assault case]."

¶6 Watling filed a postconviction motion arguing that the court lacked the authority to order registration as a sex offender in the felony bail jumping case and that the court misused its sentencing discretion when it required him to register as a sex offender for the fourth-degree sexual assault and bigamy convictions. The court denied the motion, commenting that Watling's conduct was sexually-motivated and that the protection of the public requires that he register. Watling appeals.

DISCUSSION

¶7 We begin by discussing whether it was proper for the circuit court to order Watling to register as a sex offender for the three counts of fourth-degree sexual assault. The sex-offender registration statute, WIS. STAT. § 301.45 (2007-08),[1] establishes a sex-offender registry and imposes registration and reporting requirements upon persons who meet certain statutory criteria. ***State v. Martel***, 2003 WI 70, ¶10, 262 Wis. 2d 483, 664 N.W.2d 69. A separate statute—WIS. STAT. § 973.048—permits, and in some cases requires, a circuit court to order sex offender registration pursuant to § 301.45. ***Martel***, 262 Wis. 2d 483, ¶16. Section

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

973.048 differentiates between circumstances where a circuit court *must* order sex-offender registration at sentencing, and occasions where a court *may* do so in the exercise of sentencing discretion. ***Martel***, 262 Wis. 2d 483, ¶16. This case involves the latter situation.

¶8 We review a circuit court's sentencing decision under the clearly erroneous standard of review. ***State v. Gardner***, 230 Wis. 2d 32, 48, 601 N.W.2d 670 (Ct. App. 1999). This is a deferential standard and we maintain a "consistent and strong policy against interference with the discretion of the [circuit] court." ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. We review the record to determine whether the court provided a "rational and explainable" basis for the decision founded on the relevant facts and accepted legal principles. ***Id.***, ¶¶76-77.

¶9 WISCONSIN STAT. § 973.048(1m)(a) explains that when a person is sentenced or placed on probation pursuant to certain enumerated offenses, the circuit court may order sex offender registration in the exercise of sentencing discretion if the court determines that the underlying conduct was sexually motivated and that registration would be in the interest of public protection. Watling concedes that the sexual assault was sexually motivated but disputes the circuit court's determination that sex offender registration was in the interest of public protection. He argues that the circuit court failed to consider any of the factors in § 973.048(3) regarding whether registration was required for public protection.

¶10 WISCONSIN STAT. § 973.048(3) provides an illustrative list of factors that the court may consider in deciding whether it would be in the public interest to order registration. The factors include (1) the ages, at the time of the violation,

of the person and the victim of the violation; (2) the relationship between the person and the victim of the violation; (3) whether the violation resulted in bodily harm to the victim; (4) whether the victim suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions; (5) the probability that the person will commit other violations in the future; and (6) any other factor that the court determines may be relevant to the particular case. ***Id.***

¶11 Watling contends that the circuit court failed to consider that despite the discrepancy in ages, the victim appeared older and was drinking in a bar when they met, no one alleged that the victim did not willingly participate, there was no evidence of violence, verbal abuse or mental health issues that would have made the victim incapable of evaluating the consequences of her conduct, and this was Watling's first sexual assault. Under our standard of review, however, we review whether the circuit court acted within the realm of its discretion, not whether there is an alternate or better conclusion.

¶12 Watling also asserts that the court did not explain its decision and made only the conclusory statement that the crime was sexually motivated and that sex offender registration was in the interest of public protection. Admittedly, the circuit court's analysis was not as comprehensive as it could have been. But, when we look at the sentencing transcript, we conclude that the circuit court did more than just make "the conclusory statement that the crime was sexually motivated and that sex offender registration was in the interest of public protection" as Watling alleges.

¶13 The circuit court explained in its oral sentencing decision that Watling was forty-six years old where as the victim was fourteen years old, that

both Watling and the victim had emotional problems and that Watling had a long history of drug and alcohol problems. The circuit court concluded that Watling needed to "adopt a better attitude" and "fully admit to all of his criminal and abusive actions," that confinement was "necessary to protect the public from further criminal actions" because it was "clear that Mr. Watling [had] little regard for the laws of society," and that not all of the counseling could be accomplished in confinement.

¶14 As to the probability of future violations, the circuit court commented on Watling's propensity for criminal activity as he had a series of convictions in the 1980s and then again in the 2000s, and that the time period of his military enlistment "pretty much correlates with the time period of while he was free from any type of criminal activity." The court also commented that Watling "denies and takes no responsibility for his action[s]" and "clearly has no idea how to avoid this behavior in the future"; "Watling chose to reside with his wife in direct violation of his bond."

¶15 Moreover, even when a circuit court fails to articulate its reasoning, we will independently review the record to determine whether there is any reasonable basis for the circuit court's discretionary decision. ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. Aside from the facts relied upon by the circuit court, we note that the record explains that Watling initially faced second-degree sexual assault charges, for which he would have been *required* to register. The State ultimately accepted a plea deal dismissing and reading in these second-degree offenses in part because Watling fired his counsel after trial was scheduled, delaying the case, and, in the meantime, the State's witness (a friend of Watling's who let him use his car and the homes where the

sexual assaults took place) died and the State was concerned about the victim testifying given her severe emotional issues. The record further indicated that Watling had a lack of respect both for the law and women and that Watling admitted to having a drinking problem whereby he gets "nasty and promiscuous when he drinks." We hold that the circuit court's decision to require registration as part of his sentence on the fourth-degree sexual assault offenses was not an erroneous exercise of discretion.

¶16 Watling also argues we should reverse because the circuit court allegedly erred by ordering him to register as a sex offender in association with his bigamy and bail jumping convictions. Watling asserts that this was erroneous because there was no independent basis to order registration for his bigamy and bail jumping offenses under the specific sex offender registration statute. In support, he cites the holding in ***Martel***, 262 Wis. 2d 483, ¶76, that the court cannot order sex offender registration absent an offense enumerated by the sex offender statutes.

¶17 What the circuit court actually ordered in the bigamy and bail jumping convictions was that Watling comply with the sex offender registration mandate in the sexual assault case while on supervision for those related crimes. As the State points out, Watling was ordered to register as a sex offender for his sexual assault offenses only; the conditions in the bigamy and bail jumping cases related back to the order in the sexual assault case. There was no order to register based on his bigamy conviction or his bail jumping conviction. We also point out that the conditions for all of the cases were alike since, by virtue of the plea agreement, Watling was sentenced in all three counts at the same hearing. The conditions of extended supervision and probation in the remaining two counts

were based on the same facts and the same dismissed and read-in charges we discussed above. We therefore conclude that it was reasonable and appropriate for the court to refer to the registration requirement in the sexual assault case because the condition was reasonably related to the dual purposes of extended supervision—rehabilitation and the public interest. *See* ***State v. Miller***, 175 Wis. 2d 204, 208-09, 499 N.W.2d 215 (Ct. App. 1993).

¶18 Watling replies that, under ***State v. Oakley***, 2000 WI 37, ¶27, 234 Wis. 2d 528, 609 N.W.2d 786, a court cannot order that a defendant comply with a condition mandated in another case if there is a specific statutory section governing when the condition may be applied. This is a misstatement of the holding in ***Oakley***, a case that this court is very familiar with, it having originated in this district. ***Oakley*** agreed with Judge Harry Snyder's dissent, which stated that conditions of probation should not be used as a collection device for the payment of old fines. *See* ***id.***, ¶2. Judge Snyder was concerned that our majority opinion would be tantamount to reinventing the concept of a debtor's prison—punishing a person for nonpayment of a fine which would otherwise not be subject to a possible loss of liberty. *See* ***State v. Oakley***, 226 Wis. 2d 437, 445-46, 594 N.W.2d 827 (Ct. App. 1999) (J. Snyder, dissenting); *see also* ***Oakley***, 234 Wis. 2d 528, ¶¶14-15. The supreme court opinion merely made Judge Snyder's view the law in this state.

¶19 ***Oakley*** has absolutely zero to do with the facts and circumstances here. We are not concerned about the possibility of loss of liberty for failure to pay an old fine. Rather, we are concerned about a person convicted of sexually assaulting a fourteen-year-old girl on numerous occasions—thus flouting the law of this state and punishable by imprisonment rather than a mere fine, committing

bigamy by being married to two different women at the same time—thus flouting the law in this state and punishable by imprisonment rather than a mere fine, and bail jumping—thus flouting the law of this state, not to mention a specific admonition by the circuit court and which behavior is punishable by imprisonment rather than a fine. In short, the conditions of supervision are designed to get this man to adhere to the laws of society. And the sentence is geared to that purpose. We reject Watling's reliance on ***Oakley***.

¶20 Further, Watling has not explained what difference the circuit court's orders in the bigamy and bail jumping cases make since he is already required to register as a sex offender in the sexual assault case. We therefore affirm the circuit court's judgments and orders in toto.

By the Court.—Judgments and orders affirmed.

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