

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2011AP714

Cir. Ct. No. 2009JV438

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF MALCOLM L., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MALCOLM L.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
STEPHEN A. SIMANEK and RICHARD J. KREUL, Judges. *Reversed and
cause remanded with directions.*

¶1 BROWN, C.J.¹ Malcolm L. appeals from a dispositional order requiring him to register as a sex offender and from the order denying him postdisposition relief. He contends that the trial court failed to decide his motion to stay sex offender registration under WIS. STAT. § 938.34(16). The postdisposition court² found that although the trial court failed to make a finding on the stay issue, the postdisposition court was not competent to decide it because the rest of the dispositional order had expired on his eighteenth birthday, before the postdisposition hearing. We disagree, and reverse.

¶2 Malcolm was adjudicated delinquent for second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2) based on a no contest plea. After he was adjudicated delinquent, Malcolm filed a Motion to Exempt from the Sex Offender Registration Requirement. In addition to the title's reference to exemption, the motion pointed out that "[t]he court has the authority to stay sex offender registration" and cited to *State v. Cesar G.*, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1.

¶3 At the motion hearing, the trial court described its purpose as considering whether "there ought to be registration under [WIS. STAT. §] 938.34(15m) ... and whether or not under [§ 938.34](16) there ought to be a stay of the order if it is ordered that he comply." The State argued that the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Although we often refer to both the trial court and the postconviction or postdisposition court as the "trial court," we distinguish between the two in this case because the judge who initially heard Malcolm's case, Stephen A. Simanek, retired before his postdisposition motion was heard. So, a different judge, Richard J. Kreul, presided over Malcolm's postdisposition motion.

examining nurse's reports showed that Malcolm had used force against his victim, which would require the judge to order Malcolm to register. *See* WIS. STAT. §§ 938.34(15m)(bm) & 301.45(1m)(a). Malcolm offered the report of a psychologist who had evaluated Malcolm and concluded that he was at low risk to reoffend. There was no testimony from either the nurse who evaluated the victim or the psychologist who evaluated Malcolm. At the conclusion of the hearing, the trial court denied Malcolm's motion because he was a "mandatory reporter." The trial court then ordered Malcolm to report to the sex offender registry for fifteen years.

¶4 The trial court never expressly considered whether the registration requirement should be stayed under WIS. STAT. § 938.34(16), which states that the court may "enter an additional order staying the execution of the dispositional order contingent on the juvenile's satisfactory compliance with any conditions that are specified in the dispositional order and explained to the juvenile by the court." Malcolm filed a postdisposition motion alleging that the trial court had erred by applying only the standard for exemption from sex offender registration under § 938.34(15m)(bm), without considering whether to stay the registration requirement pursuant to § 938.34(16). The postdisposition court found that the trial court had not considered whether to stay the registration requirement when it found that Malcolm was a mandatory reporter under § 938.34(15m)(bm). Nevertheless, it declined to decide the issue, and expressed its understanding that it was not competent to do so. Malcolm appeals.

¶5 We begin by explaining the distinction between the WIS. STAT. §§ 938.34(15m)(bm)'s possible *exemption* from the sex offender registration requirement and § 938.34(16)'s discretionary *stay* of parts of a dispositional order. As the supreme court explained in *Cesar G.*, a court that is required to order a juvenile to register under § 938.34(15m)(bm) may still issue a discretionary stay

of that requirement under § 938.34(16). *Cesar G.*, 272 Wis. 2d 22, ¶¶13-14, 25. A juvenile who moves the court to stay sex offender registration must prove, by clear and convincing evidence, that based on the factors enumerated in WIS. STAT. §§ 938.34(15m)(c) and 301.45(1m)(e), and the seriousness of the offense, a stay should be granted. *Cesar G.*, 272 Wis. 2d 22, ¶¶50-51. Whereas § 938.34(15m)(bm) requires registration for Malcolm's offense unless the § 301.45(1m)(a) factors are all met, the decision to stay is discretionary and requires consideration of several factors, none of which are individually dispositive. *See Cesar G.*, 272 Wis. 2d 22, ¶¶42-51. One of the factors for the court to consider is a juvenile's likelihood to reoffend. *Id.*, ¶50.

¶6 As the supreme court did in *Cesar G.*, we address whether the trial court exercised its discretion in deciding whether to impose a WIS. STAT. § 938.34(16) stay. *See Cesar G.*, 272 Wis. 2d 22, ¶42. We will affirm a trial court's discretionary decision as long as the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* (citation omitted). The State contends that the trial court denied Malcolm's motion to stay when it mandated sex offender registration for Malcolm. Malcolm disagrees and argues that the postdisposition court was correct in finding that the trial court never addressed the stay issue.

¶7 What is clear from the record is that (1) the trial court never explicitly stated an intention not to stay Malcolm's sex offender registration requirement and (2) the trial court made repeated reference to denying Malcolm's motion because reporting was "mandatory" for his offense. Based on those facts, we agree with Malcolm that the trial court never decided his motion for stay of the sex offender registration requirement. Even if we were to accept the State's

contention that the trial court did in fact deny Malcolm’s motion to stay, we would find that it did so without applying “a proper standard of law.” *See id.*, ¶42. It is simply inaccurate to state that registration is “mandatory” for Malcolm’s offense. It is mandatory that the judge order Malcolm to register, but his registration is not mandatory if the judge stays that portion of the order and Malcolm successfully avoids having the stay lifted. *See id.*, ¶34.

¶8 Next, we address the postdisposition court’s competence.³ Whether a trial court has lost competency to proceed is a question of law that we review independently. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. In its decision, the postdisposition court reasoned that it was not competent to act because Malcolm had turned eighteen and his dispositional order expired before his postdisposition hearing. But the bottom line in this case is that Malcolm *timely* requested a stay of the sex offender registration condition, thereby preserving the issue⁴—before he turned eighteen and while the entire dispositional order was still in effect. The trial court either did not make a decision on Malcolm’s motion to stay or it made a decision based on an erroneous application of the law. Either way, it would not make sense to say that Malcolm cannot appeal an error in part of his order *that is still in effect* simply because his

³ The State’s brief only argued that the trial court properly decided the stay issue, without addressing whether the postdisposition court had competence to decide the issue if the trial court had erred. While we could arguably dispose of this issue using the law that an argument not refuted is deemed admitted, *see Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), we choose to address it in terms of the trial court’s decision since the trial court took the time to write a lengthy and thoughtful explanation of its reasoning.

⁴ The postdisposition court points out that while Malcolm did raise the issue in his motion, he did not explicitly point out to the trial court that it did not decide the issue. However, the issue was preserved when he raised it—he was not required to object to the trial court’s decision once it was made.

birthday has passed. The juvenile court does not lose the power to correct its own errors merely because a juvenile reaches the age of eighteen.

¶9 In its decision, the trial court pointed to case law stating a juvenile court does not have the authority to enter a dispositional order against a juvenile after his or her eighteenth birthday, *see State v. Kleser*, 2010 WI 88, ¶119, 328 Wis. 2d 42, 786 N.W.2d 144 (citing WIS. STAT. § 938.355(4)), and case law and statutes clearly state that a stay of a dispositional order constitutes an additional order, *see* WIS. STAT. § 938.34(16). *See also State v. Kendell G.*, 2001 WI App 95, ¶11, 243 Wis. 2d 67, 625 N.W.2d 918.⁵ It reasoned that these two cases, when read together, prevent the juvenile court from entering any sort of dispositional order after a juvenile’s eighteenth birthday.

¶10 We disagree with the postdisposition court’s analysis—the *Kleser* decision is inapplicable here. In *Kleser*, the supreme court addressed whether Kleser, who was eighteen when the supreme court decided his case, should get a new reverse waiver hearing on remand or be remanded for further proceedings in adult court. *See Kleser*, 328 Wis. 2d 42, ¶¶118-19. The supreme court found that Kleser should not get a new reverse waiver hearing because “[u]nder the Juvenile Justice Code, no dispositional options would be available for Kleser if the circuit court chose to order reverse waiver.” *Id.*, ¶119. It further noted that it did “not

⁵ The postdisposition court also pointed to case law stating that once a juvenile dispositional order expires, it “simply ceases to be in effect.” *See State v. Michael S.*, 2005 WI 82, ¶62, 282 Wis. 2d 1, 698 N.W.2d 673. It reasoned that since Malcolm’s dispositional order expired on his eighteenth birthday, there is no longer any way to modify it with a stay of the sex offender registry requirement. We do not address this argument in detail because while the order may have expired as to all other conditions, the sex offender registration condition is clearly still in effect. Extrapolating the postdisposition court’s logic, if it were true and all juvenile dispositions ceased to exist upon a juvenile’s eighteenth birthday, then the order that he register would no longer be in effect. We know, of course, that this cannot be.

see the juvenile court’s authority to issue a dispositional order after the juvenile turns 18.” *Id.* However, that conclusion was drawn before there was an adjudication or dispositional order in place for Kleser.⁶ *Id.*, ¶32. In other words, *Kleser* dealt with the court’s ability to exercise new authority over a juvenile. What Malcolm requests, in contrast, is a hearing on an order to stay an already existing dispositional order. And, as we already noted, he initially requested that hearing before his eighteenth birthday.

¶11 In *Kendell G.*, we emphasized the importance of looking at the “entire juvenile adjudication process” when interpreting the Juvenile Justice Code. *Kendell G.*, 243 Wis. 2d 67, ¶14 (citing *S.D.R. v. State*, 109 Wis. 2d 567, 574, 326 N.W.2d 762 (1982) (emphasis omitted)). Here, examining the entire process requires us to acknowledge the injustice that would occur if we were to say that Malcolm’s opportunity for relief was somehow extinguished by his eighteenth birthday when the delay beyond that was caused by an error of the trial court. This is especially so where the sex offender registration order will affect him for many years after his eighteenth birthday, very much unlike the usual dispositional orders which are intended to cease when the juvenile turns eighteen.

¶12 Malcolm should have a determination of whether his registration should be stayed under WIS. STAT. § 938.34(16), and the postdisposition court—as

⁶ In addition, as Malcolm points out, the *Kleser* court based its decision on WIS. STAT. § 938.355(4)(b), which provides that most dispositional orders end at age eighteen and refers to placement orders made before age eighteen. *See State v. Kleser*, 2010 WI 88, ¶¶119-20, 328 Wis. 2d 42, 786 N.W.2d 144. We note that § 938.355(4) makes no reference to either WIS. STAT. § 938.34(16) stays or the § 938.34(15m) sex offender registration requirement. The sex offender registration is clearly an exception to dispositional orders ending at age eighteen. *See* § 938.34(15m)(bm).

an extension of the trial court—is the one to make it. *See* WIS. STAT. RULE 809.30(2)(h)-(i). We therefore remand and direct the postdisposition court to give Malcolm the opportunity to prove, by clear and convincing evidence, that he should be granted a § 938.34(16) stay of the order requiring him to register as a sex offender. *See Cesar G.*, 272 Wis. 2d 22, ¶¶50-51.

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

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

