COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1393 **Cir. Ct. No. 2010JV790**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

NIKO C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PEDRO COLON and MICHAEL J. DWYER, Judges. *Affirmed*.

¶1 FINE, J. Niko C., pled guilty to first-degree sexual assault of a child, *see* WIS. STAT. § 948.02(1)(c) ("Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony."). His victim was a fifteen-year-old girl,

and he was fourteen. Niko C. does not contest either his plea or the circuit court's adjudication of him as a delinquent. Rather, he appeals the circuit courts' orders (1) requiring him to register as a sex offender, *see* WIS. STAT. §§ 938.34(15m)(bm), 938.34(15m)(c), & 301.45, WIS. STAT. § 938.34(16) (stay of disposition orders); and (2) denying his motion for postdisposition relief. The Honorable Pedro Colon accepted Niko C.'s guilty plea and entered the sex-offender-registration order. The Honorable Michael J. Dwyer denied Niko C.'s motion for postdisposition relief.

¶2 Niko C. contends that Judge Colon erroneously exercised his discretion by allegedly: (1) not considering the required statutory factors; and (2) relying on information that Niko C. argues was not accurate. Niko C. also contends that Judge Dwyer erroneously determined that this was not new evidence warranting a modification of Judge Colon's order directing that Niko C. register as a sex offender: (1) an evaluation of Niko C. that was done after the entry of Judge Colon's order; and (2) studies purporting to show that registration of juvenile offenders was not good for either them or for society. We affirm.

I.

¶3 Niko C. forcibly raped his sister's fifteen-year-old friend when she slept over at the C. residence. Although he initially denied the assault, the case was plea bargained and, as noted, he pled guilty to violating WIS. STAT. § 948.02(1)(c). The State had charged Niko C. with both the completed sexual-assault violation of § 948.02(1)(c) (anal intercourse) as well as two counts of attempted first-degree sexual assault (penis to vagina and fellatio). *See* WIS. STAT. §§ 948.02(1)(c) & 939.32. In return for Niko C.'s guilty plea to the anal-intercourse charge, the State agreed to dismiss the two counts of attempted sexual

assault (which the circuit court accepted without an on-the-Record analysis, *but see* ***State v. Conger***, 2010 WI 56, ¶27, 325 Wis. 2d 664, 687, 797 N.W.2d 341, 352 ("[A] circuit court may, in an appropriate exercise of discretion, reject a plea agreement that it deems not to be in the public interest."). Niko's lawyer indicated at the plea hearing that the dismissed charges would be considered as "read-in" crimes. *See* WIS. STAT. § 973.20(1g)(b) ("'Read-in crime' means any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted."). The State also agreed to withdraw its attempt to send Niko C. to adult court. *See* WIS. STAT. § 938.18.

¶4 During the circuit court's plea-hearing colloquy with Niko C., Niko C. admitted that he "did, in fact, commit First Degree Sexual Assault." Later, Niko C.'s lawyer indicated that he and Niko C. "would stipulate to the facts in the petition [charging Niko C. with one count of first-degree sexual assault and two counts of attempted first-degree sexual assault] as being substantially true and correct." The lawyer told the circuit court that Niko C. "and I, along with his mother, have gone over those facts."

¶5 As pertinent here, the petition charging Niko C. in this case alleged that the victim "was in a bedroom by herself laying on the bed when she heard footsteps so she got up off the bed and her friend's twin brother, Nico [C.], came into the room and grabbed her by her shirt." Niko C. then "put his left hand over her mouth and forced her onto the bed with her stomach down on the bed." Although she tried to scream, Niko C. "kept his hand over her mouth and she was not able to scream or call for help." Niko C. then "pulled off her shorts and panties and got on top of her and tried to force his penis into her vagina," but was

unable to do so. He then "forced his penis into her 'butt.'" She said that this "was extremely painful and she was screaming, but Niko [C.] still had his hand over her mouth." He "was moving up and down while his penis was in her butt and that it lasted for 5 or 10 minutes." When he "eventually got up off of her and off the bed," he "took his hand off of her mouth," and "grabbed her by her hair and grabbed her head and tried to force her head to his penis." "[S]he was able to 'scoot' off the bed and fell on the floor and was crying." Niko C. "then put on his clothes and left the room."

¶6 At the disposition hearing, the State told the circuit court that it "recommend[ed], based upon the seriousness of the offense, one year probation with one year Department of Corrections imposed and stayed" subject to conditions, as material here, that Niko C. "complete successfully a sex offender treatment and relapse prevention programming." The State asserted that Niko C.'s victim, who submitted a victim-impact statement, "experienced both anal and vaginal tears and had to be treated in the hospital," and "continues to have psychological trauma and emotional disturbances as a result" of the rape and attempted rapes. The victim's victim-impact statement, which is in the Record and appears to be hand-printed by the victim, says that she has trouble sleeping because the assaults are "always on [my] mind." She wrote: "Mostly every time I close my eyes I have flashbacks of me trying my best to scream with his hand over my mouth." She also said that she cries "mostly every night because no one knows how I feel inside." The victim concluded her victim-impact statement with the plea that she "really want[s] Niko to pay for what he did to me and how he has made me [] feel mentally, physically, and emotionally." Niko C.'s lawyer told the circuit court that he had a copy of the victim's victim-impact statement.

¶7 During the State's explanation of its recommendation, the State noted that despite his guilty plea, an evaluation of Niko C. revealed that he "basically still denies complete responsibility" for the crimes and "showed no evidence of remorse." Other than pointing out that Niko C. pled guilty, and that an evaluation suggested that Niko C. was "quite likely shocked by his own behavior and not understanding of this would lead to denial," neither his trial lawyer nor his appellate briefs on this appeal deny that. Niko C.'s trial lawyer told the circuit court that "[e]ven though the description of the offense is violent, there is no prior incidents in Niko's history of violence or of a sexual nature." The State did not and does not dispute that. The circuit court accepted the State's recommendations that were, as noted, based on the plea bargain, and opined that "but for this incident, there's very little indicia that you are not -- that you are in fact a good kid."

¶8 After about a year, the case returned to court on the sex-offender-registration issue. Under WIS. STAT. § 938.34(15m)(bm), "If the juvenile is adjudicated delinquent on the basis of a violation … of s. … 948.02(1) … the court shall require the juvenile to comply with the reporting requirements under s. 301.45 unless the court determines, after a hearing on a motion made by the juvenile, that the juvenile is not required to comply under s. 301.45(1m)."[1] This mandatory registration requirement, which is subject to the "unless" clause, is different than the sex-offender registration subsection in WIS. STAT. § 938.34(15m)(am)1, which provides:

[1] WISCONSIN STAT. § 301.45(1m) sets out various exceptions to the sex-registration requirement if the person was potentially subject to the requirement because of "underage sexual activity." (Small capitalization omitted.) Neither party relies on this subsection.

> Except as provided in par. (bm), if the juvenile is adjudicated delinquent on the basis of any violation, or the solicitation, conspiracy, or attempt to commit any violation, under ch. 940, 944, or 948 or s. 942.08 or 942.09, or ss. 943.01 to 943.15, 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.

The legislature has set out the non-exclusive factors that courts should consider, if applicable, in assessing whether registration under § 938.34(15m)(am)1 would be appropriate:

> In determining under par. (am)1. whether it would be in the interest of public protection to have the juvenile report under s. 301.45, the court may consider any of the following:
>
> 1. The ages, at the time of the violation, of the juvenile and the victim of the violation.
>
> 2. The relationship between the juvenile and the victim of the violation.
>
> 3. Whether the violation resulted in bodily harm, as defined in s. 939.22 (4), to the victim.[2]
>
> 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 juvenile will commit other violations in the future.
>
> [There is no subpart 6.]
>
> 7. Any other factor that the court determines may be relevant to the particular case.

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[2] WISCONSIN STAT. § 939.22(4) defines bodily harm as "physical pain or injury, illness, or any impairment of physical condition."

WIS. STAT. § 938.34(15m)(c) (footnote added). This provision is limited by its express language to § 938.34(15m)(am)1, and, as we have seen, the registration under § 938.34(15m)(bm) is mandatory ("the court *shall* require the juvenile to comply with the reporting requirements under s. 301.45") "*unless* the court determines, after a hearing on a motion made by the juvenile, that the juvenile is not required to comply." Section 938.34(15m)(bm) (emphasis added).

¶9 ***State v. Cesar G.***, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1, opined, however, that the mandatory command of WIS. STAT. § 938.34(15m)(bm) is subject to the stay provisions of WIS. STAT. § 938.34(16). ***Cesar G.***, 2004 WI 61, ¶¶2, 15–41, 272 Wis. 2d at 24, 29–40, 682 N.W.2d at 2, 4–10 ("A circuit court has discretion under Wis. Stat. § 938.34(16) to stay that part of a dispositional order requiring a delinquent child to register as a sex offender" even though that person falls within § 938.34(15m)(bm).). Section 938.34(16) reads:

> STAY OF ORDER. After ordering a disposition under this section, 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. If the juvenile violates a condition of his or her dispositional order, the agency supervising the juvenile or the district attorney or corporation counsel in the county in which the dispositional order was entered shall notify the court and the court shall hold a hearing within 30 days after the filing of the notice to determine whether the original dispositional order should be imposed, unless the juvenile signs a written waiver of any objections to imposing the original dispositional order and the court approves the waiver. If a hearing is held, the court shall notify the parent, juvenile, guardian, and legal custodian, all parties bound by the original dispositional order, and the district attorney or corporation counsel in the county in which the dispositional order was entered of the time and place of the hearing at least 3 days before the hearing. If all parties consent, the court may proceed immediately with the hearing. The court may not impose the original dispositional order unless the court finds by a

> preponderance of the evidence that the juvenile has violated a condition of his or her dispositional order.

"[I]n determining whether to stay such an order, a circuit court should consider the seriousness of the offense as well as the factors enumerated in Wis. Stat. §§ 938.34(15m)(c) and 301.45(1m)(e)." ***Cesar G.***, 2004 WI 61, ¶3, 272 Wis. 2d at 25, 682 N.W.2d at 2. The factors listed under § 301.45(1m)(e) are similar to those listed under § 938.34(15m)(c), and are:

> 1. The ages, at the time of the violation, of the person and of the child with whom the person had sexual contact or sexual intercourse.
>
> 2. The relationship between the person and the child with whom the person had sexual contact or sexual intercourse.
>
> 3. Whether the violation resulted in bodily harm, as defined in s. 939.22 (4), to the child with whom the person had sexual contact or sexual intercourse.
>
> 4. Whether the child with whom the person had sexual contact or sexual intercourse suffered from a mental illness or mental deficiency that rendered the child 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.
>
> 6. The report of the examination conducted under par. (d).[3]
>
> 7. Any other factor that the court determines may be relevant to the particular case.

¶10 A juvenile seeking a stay of a sex-registration order has the burden of proof "by clear and convincing evidence." ***Cesar G.***, 2004 WI 61, ¶51, 272

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[3] WISCONSIN STAT. § 301.45(1m)(d) provides that "a court may request the person to be examined by a physician, psychologist or other expert approved by the court."

Wis. 2d at 45, 682 N.W.2d at 12 ("[U]pon moving the circuit court to issue a stay of the sex offender registration requirement, the juvenile has the burden to prove by clear and convincing evidence that, based on these factors, a stay should be granted in his or her case.").

¶11 In arguing that the circuit court should stay the requirement that Niko C. register as a sex offender, his lawyer pointed to the factors under WIS. STAT. § 938.34(15m)(c) that he asserted militated against the otherwise mandatory registration: Niko C.'s age, the victim's age, and their relationship, pointing out that "the victim was a friend of my client's twin sister." The lawyer also noted that there was no evidence that the victim was under a disability when Niko C. attacked her, and did not dispute that the victim suffered "some bodily harm." He also noted that Niko C.'s sexual assaults of the victim were not "a random act" and that "there was some level of trust" between Niko C. and his sister's friend.

¶12 Niko C.'s lawyer focused most of his argument on that Niko C. had "completed a number of various programs within the sex offender" treatment regimen as he had been ordered to do. The lawyer argued that as a result, Niko C. is "able to identify risk factors for possible future inappropriate behaviors, he's developed strategies to manage the risks as of the time that [assessment] report was written," approximately six months earlier. The lawyer also told the circuit court that Niko C. "has indicated to the treating professionals he would continue to engage in therapy after this order concludes, that he would continue the individual therapy sessions and that that would continue to lower any risk." The lawyer also said that Niko C.'s mother was giving him support with respect to trying to minimize the likelihood that he would attack someone else. The lawyer continued:

> And we do not minimize the terrible nature of the offense; but given his age at the time this occurred and his age now [the hearing was on December 6, 2011], the fact that he's successfully completed [the assigned facility's regimen], successfully completed sex offender treatment, that he's engaged in whatever he needs to in order to attempt relapse prevention and his risk is low, weighing that against what occurs when somebody at his young age is forced to report for many, many years and potential that that has to deprive him of the abilities in school and work and other options, I'm asking that the Court look at a weighing of all the matters here and look at the serious nature of what reporting does to somebody's options in the future.

¶13 The State asked the circuit court to order that Niko C. register as a sex offender. In addressing Niko C.'s lawyer's recitation of the collateral consequences of sex-offender registration, the State told the circuit court: "Actually, when it's a juvenile sex offender registry, only law enforcement has access to that registry. Nobody in the public can look it up on the internet and see his location and realize that he's been adjudicated because it's a juvenile adjudication. It's confidential." Later, the State repeated: "I know these registries are not open to the public. They're not even open to the parties involved in other delinquency cases he might be related to."

¶14 As noted, the circuit court ordered that Niko C. register, and explained its rationale to him:

> You complied with everything that the Court has required of you and you are a low risk to reoffend, and that is where it would typically end.
>
> Given the nature of the act which brought you here, I don't think I can do that at this time.

> I don't believe -- Given the violent nature of the assault, given the subsequent conduct of the victim, I think there was an understanding.[4]
>
> And you are young and you are younger. Having said that, I just can't get over that hump and if that is the actual occurrence what happened on that day.

[The circuit court then asked if there was a statement from the victim in the file, and indicated that it had not seen it, although, as noted, the State had given the circuit court the gist of the victim's victim-impact statement during the disposition hearing about a year earlier.]

> And I don't want to speculate as to the implications. I know I have to be cognizant of the implications of what the registration may do or may not do.
>
> You've gotten yourself to the best place you can; but again, I have to go back to that original offense, and it was forcible. There was an understanding by the victim.[5] It is atypical in that you were younger and the young lady was older.
>
> I don't think it stops there. I think there was a further understanding, further victimization that is outright violent.[6]
>
> So that will be my decision in this case.

The circuit court denied Niko C.'s request to stay his sex-offender registration. As we have seen, the postdisposition court denied Niko C.'s motion for postdisposition relief. We now turn to Niko C.'s appellate contentions, both with

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[4] Neither of the parties discuss what the circuit court might have meant by its use of the word "understanding."

[5] See footnote 3.

[6] See footnote 3.

respect to the circuit court's order requiring that Niko C. register and refusing to stay that requirement, and, also, with the postdisposition court's denial of relief.

II.

¶15 We have set out at length the history of this appeal and the governing legal principles because they coalesce to show why Niko C.'s contentions are without merit. We take those contentions in sequence.

¶16 First, Niko C. argues in his main brief on this appeal that the circuit court (Judge Colon, presiding) "ordered registration without considering the factors set forth in Wis. Stat. § 938.34(15m)(bm) [*sic*—the non-exclusive list of factors are in, as we have seen, WIS. STAT. §§ 938.34(16) and 301.45(1m)(e)]." (Initial capitalization omitted.) As noted earlier, whether to stay the otherwise mandatory registration requirement is a matter within the circuit court's discretion. *See* ***Cesar G.***, 2004 WI 61, ¶2, 272 Wis. 2d at 24, 682 N.W.2d at 2. A circuit court acts within its discretion if it "'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.***, 2004 WI 61, ¶42, 272 Wis. 2d at 41, 682 N.W.2d at 10 (quoted source omitted). The circuit court did that here.

¶17 As we have seen, the factors that a circuit court must consider, if they are appropriate in a particular case, are, as ***Cesar G.*** tells us, in WIS. STAT. §§ 938.34(15m)(c) and 301.45(1m)(e). Many of those factors are not, of course, applicable here, as Niko C.'s trial lawyer recognized during his argument for a stay. As we have seen from the circuit court's oral decision requiring that Niko C. register as a sex offender, it considered the factors appropriate to this case, and although it recognized that Niko C. was "a low risk to reoffend," the serious nature of the crimes persuaded it that a stay of the otherwise mandatory registration

requirement was not warranted. *See, e.g.,* WIS. STAT. § 938.34(15m)(c)3 ("bodily harm" to the victim); WIS. STAT. § 301.45(1m)(e)3 ("bodily harm" to the victim). "Seriousness" of the crimes is, of course, an appropriate factor, as ***Cesar G.*** repeatedly recognized. ***Cesar G.***, 2004 WI 61, ¶¶3, 47, 50, 52, 272 Wis. 2d at 25, 43, 44, 45, 682 N.W.2d at 2, 11, 12. Although Niko C. argues that the circuit court placed too much emphasis on the seriousness of the crimes, we cannot say that it erroneously exercised its discretion, especially since Niko C. had the burden of showing by clear and convincing evidence that the mandatory registration requirement should be stayed; it is paradigm that sentencing courts may give whatever weight the various sentencing factors require and that it is not error for a sentencing court to view the nature of the crime as the overarching consideration. *See* ***State v. J.E.B.***, 161 Wis. 2d 655, 675, 469 N.W.2d 192, 200 (Ct. App. 1991).

¶18 Second, Niko C. argues that the State misled the circuit court when the State told the circuit court that juvenile sex-offender registrations are not available to the public, and that "only law enforcement has access to" a juvenile sex-offender registry. This, of course, is true. *See* WIS. STAT. §§ 301.46(4)(ag), 301.46(5)(c). Although Niko C. argues that there could be some leakage under some circumstances, including what the federal sex-offender registration program may require when and if it is adopted by Wisconsin, Niko C.'s trial lawyer never made that argument, although he did remind the circuit court of the serious collateral consequences of a sex-offender registration. Thus, whether the lawyer should have fine-tuned the State's assertion to reflect the matters Niko C. raises on this appeal resolves to whether the trial lawyer's failure to do so was constitutionally ineffective assistance. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension);

State v. Carprue, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41 (in the absence of an objection, we address issues under the ineffective-assistance-of-counsel analysis). Given that the circuit court accepted the possibility that Niko C.'s sex-offender registration could trigger adverse collateral consequences but declined "to speculate as to the implications" of that, Niko C. would not be able to prove that he was prejudiced by his lawyer's failure, assuming without deciding that the lawyer should have fine-tuned the State's representation. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To establish constitutionally ineffective legal representation, a defendant must show: (1) deficient representation; and (2) prejudice.). Simply put, the circuit court said that it was "cognizant of the implications of what the registration may do or may not do." The failure by Niko C.'s lawyer to further elucidate the issue did not make the result of the stay hearing "unreliable" or the hearing "fundamentally unfair." *See* ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) ("In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'") (citations and quoted source omitted).

¶19 Third, Niko C. contends that what he proffered to the postdisposition court: (1) "a forensic evaluation prepared [by his expert] that found Niko to be a low risk to reoffend"; and (2) various studies that show that, according to Niko C.'s offer of proof, sex-offender registration for juveniles harmed them without a significant concomitant public benefit, was new evidence in connection with Niko C.'s request that the circuit court stay the mandatory sex-offender registration requirement. He contends that the postdisposition court thus erred in rejecting the proffer. These contentions, too, are without merit.

¶20 As we have seen, the circuit court specifically found that Niko C. was "a low risk to reoffend." Thus, the additional postdisposition "forensic evaluation" would largely have been old wine in a new bottle—cumulative to what the circuit court had already decided. Further, as the State cogently points out, whether sex-offender registration for juveniles is a good thing or a bad thing has already been decided by the legislature, which, as we have seen, made such registration mandatory for many crimes, subject, of course, to the circuit court's ability to stay the registration if the person subject to the mandatory registration requirement proves by clear and convincing evidence that registration should be stayed in an individual case (that is, not a blanket stay in all cases, for which Niko C. seems to argue). The postdisposition court did not err by rejecting Niko C.'s submissions.

By the Court—Orders affirmed.

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