

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2017

Diane M. Fremgen
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. 2017AP52
STATE OF WISCONSIN**

Cir. Ct. No. 2014JV60

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF D. J. A. R., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

D. J. A. R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Jefferson County:
DAVID WAMBACH, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ D.J.A.R. was adjudicated delinquent for engaging in conduct prohibited by the child sexual assault statute. He appeals the resulting dispositional order, as well as the order denying his motion for postdispositional relief. D.J.A.R. argues that the circuit court proceeded under the wrong statutory subsection, and thus erroneously required D.J.A.R. to register as a sex offender. He also argues that the court erroneously exercised its discretion by not staying this registration requirement.

¶2 Despite a delinquent brief notice dated June 15, 2017, the State, represented here by the Jefferson County District Attorney's Office, has not filed a responsive brief, or any other response. Thus, on July 10, 2017, this case was submitted to the court for a determination of whether D.J.A.R.'s appeal may be decided based solely on D.J.A.R.'s brief and the record.

¶3 I now conclude that the case can be decided based solely on D.J.A.R.'s brief and the record. I agree with D.J.A.R. that the circuit court proceeded under the wrong statutory subsection when the court required registration. On the facts here, however, it is clear that the court would have ended up making the same decision had it applied the correct subsection. Thus, I conclude that the court's error in this regard was harmless and should not result in reversal. As to the court's refusal to stay the registration requirement, D.J.A.R. does not persuade me that the court erred. I affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 2015-16 version. We refer to the current version because there have been no recent changes that affect our analysis here.

Background

¶4 D.J.A.R. was alleged delinquent for engaging in conduct prohibited by WIS. STAT. § 948.02(2), “sexual contact or sexual intercourse with a person who has not attained the age of 16 years.” According to the delinquency petition, then-16-year-old D.J.A.R. and then-13-year-old V.G. met by some school bleachers and started to make out. V.G. performed oral sex on D.J.A.R., and D.J.A.R. inserted his finger into V.G.’s vagina. V.G. told D.J.A.R. that she was not going to have sex with him, but D.J.A.R. proceeded to put his penis into V.G.’s vagina, and V.G. told D.J.A.R. “don’t do it.” D.J.A.R.’s penis was in V.G.’s vagina for approximately two seconds before he pulled it out.

¶5 D.J.A.R. entered into a stipulation of facts, agreeing that oral sex and finger-to-vagina contact had occurred as alleged. Based on this stipulation, the court found D.J.A.R. delinquent, and the case proceeded to disposition.

¶6 One of the dispositions the circuit court imposed on D.J.A.R. was that D.J.A.R. be required to register as a sex offender for 15 years. D.J.A.R. sought, but did not receive, a stay of this requirement pending successful completion of his one-year supervision period.

¶7 D.J.A.R. filed a postdispositional motion, seeking relief from the court’s registration decision. The circuit court denied it.

Discussion

¶8 As noted, D.J.A.R. argues that the circuit court proceeded under the wrong statutory subsection in requiring him to register as a sex offender, and that the court erroneously exercised its discretion by not staying this registration requirement. I address these arguments in separate sections below.

A. *Circuit Court's Error in Proceeding Under the Wrong Statutory Subsection When the Court Required D.J.A.R. to Register as a Sex Offender*

¶9 The circuit court's ultimate decision to require D.J.A.R. to register as a sex offender was discretionary. *See State v. Joseph E.G.*, 2001 WI App 29, ¶11, 240 Wis. 2d 481, 623 N.W.2d 137 (WI App 2000). However, I review de novo whether the court followed the correct statutory procedure, a question of law. *See Mared Indus., Inc. v. Mansfield*, 2005 WI 5, ¶9, 277 Wis. 2d 350, 690 N.W.2d 835.

¶10 I start by noting that the statutory scheme is somewhat complex. I need not summarize all of that scheme here. Rather, I summarize it only to the extent necessary for purposes of my discussion.

¶11 The pertinent statutes, in effect, create two procedural paths to sex offender registration for juveniles. One path is under WIS. STAT. § 938.34(15m)(am), and the other is under § 938.34(15m)(bm). The applicable procedure depends on the underlying criminal statute that forms the basis for the delinquency finding. *See* § 938.34(15m)(am)1. and (bm).

¶12 The (am) procedure covers a potentially broader range of crimes, but is narrowed by a requirement that the circuit court make a threshold finding that the juvenile's conduct was sexually motivated. *See* WIS. STAT. § 938.34(15m)(am)1. The (bm) procedure, in contrast, covers a more specific list of crimes, the bulk of which, by definition, would appear to involve a sexually motivated perpetrator. Not surprisingly then, the (bm) procedure does *not* require

the same threshold finding by the court that the juvenile's conduct was sexually motivated. *See* § 938.34(15m)(bm).²

¶13 Here, the (bm) path applies because the delinquency finding against D.J.A.R. was based on conduct prohibited by WIS. STAT. § 948.02(2), a crime identified in the (bm) subsection. *See* WIS. STAT. § 938.34(15m)(bm).

¶14 Generally speaking, the (am) procedure provides the circuit court with broader discretion to *not* require registration than does the (bm) procedure, such that application of the (am) procedure might seemingly be to D.J.A.R.'s benefit. D.J.A.R. nonetheless complains that the circuit court erred by proceeding under the (am) procedure instead of the (bm) procedure.

¶15 I agree that the circuit court incorrectly proceeded under the (am) procedure. I disagree, however, that this error mattered. Rather, as I now explain, it is clear that the circuit court's error did not affect the court's decision to require registration, and that the court ended up substantially complying with the (bm) procedure. I conclude, therefore, that the error did not affect D.J.A.R.'s substantial rights and was harmless. *See Weborg v. Jenny*, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (discussing the harmless error standard).

¶16 D.J.A.R. focuses on two differences between what the circuit court did under the (am) procedure and what is supposed to occur under the (bm) procedure. I address each in turn.

² Some types of crimes are listed in *both* (am) *and* (bm), but the statute is written so that these particular crimes trigger the (bm) procedure. *See* WIS. STAT. § 938.34(15m)(am)1. ("Except as provided in par. (bm)").

¶17 First, D.J.A.R. points out that the circuit court made the threshold finding that is required only under the (am) procedure, namely, the finding that D.J.A.R.'s conduct was sexually motivated. But the only apparent consequence of that finding here was that the court went on to consider six statutory factors that the court would have considered anyway under the (bm) procedure. Those factors are:

- D.J.A.R.'s and V.G.'s ages at the time of the violation;
- The relationship between D.J.A.R. and V.G.;
- Whether the violation resulted in bodily harm to V.G.;
- Whether V.G. suffered from a mental illness or mental deficiency that rendered her temporarily or permanently incapable of understanding or evaluating the consequences of her actions;
- The probability that D.J.A.R. will commit other violations in the future; and
- Any other factor that the court determines may be relevant to the particular case.

Compare WIS. STAT. § 938.34(15m)(am) and (c) to § 938.34(15m)(bm) and WIS. STAT. § 301.45(1m)(e).

¶18 The second purported difference that D.J.A.R. points out relates to expert psychological reports. The (bm) procedure authorizes the circuit court to request and consider an expert psychological report providing an opinion as to whether registration is in the interest of public protection. *See* WIS. STAT. § 301.45(1m)(d) (made applicable by WIS. STAT. § 938.34(15m)(bm)). Under the (bm) procedure, this report constitutes an additional factor for the court to consider. *See* § 301.45(1m)(e)6. (made applicable by § 938.34(15m)(bm)).

¶19 Here, there were two expert reports, and the circuit court considered both of them. Both reports assessed D.J.A.R. as “low risk” to reoffend, and the reports did *not* offer opinions on whether D.J.A.R. should be required to register.

¶20 I have difficulty understanding D.J.A.R.’s argument as to why the circuit court erred in respect to the reports. D.J.A.R. concedes that the court was not bound by the expert opinions. As best I can tell from D.J.A.R.’s argument, the only arguable error relating to the reports was the omission of the experts’ opinions on whether D.J.A.R. should be required to register. I see no reason to conclude that this omission in the reports was the result of *circuit court* error in proceeding under the wrong subsection. Regardless, I will treat it as such for purposes of this opinion. Even so, the error plainly had no effect for the reasons that I now explain.

¶21 The circuit court’s decision makes clear that, even if the experts had opined more specifically on the registration topic, the court’s decision would have been the same. The court rejected the expert opinions that D.J.A.R. was “low risk” based on the experts’ acknowledgment that their actuarial methods were limited and lacked reliability for juveniles. The court placed considerably more weight on other permissible factors, including the difference in D.J.A.R.’s and V.G.’s ages; the fact that V.G.’s mother had previously warned D.J.A.R. not to engage in sexual activity with V.G.; and D.J.A.R.’s use of alcohol and other substances at a relatively young age. Accordingly, I see no reason to think that the court would have reached a different conclusion if the experts had offered opinions more specific to registration.

¶22 Before I move on to the stay issue, I note one other argument that D.J.A.R. makes in his briefing section on the registration requirement. D.J.A.R.

appears to argue that, when he brought his postdispositional motion challenging the court's registration decision, the court should have considered new facts, including that D.J.A.R. had attained adulthood, had not reoffended, and had completed his supervision successfully. D.J.A.R. cites no authority, however, for the proposition that the court was authorized, much less required, to reconsider its registration decision this way in the context of D.J.A.R.'s postdispositional motion. Thus, I consider the argument no further.

B. Whether the Circuit Court Erroneously Exercised its Discretion by Not Staying the Sex Offender Registration Requirement

¶23 I turn to D.J.A.R.'s argument that the circuit court erroneously exercised its discretion by not staying the registration requirement. "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." *State v. Cesar G.*, 2004 WI 61, ¶2, 272 Wis. 2d 22, 682 N.W.2d 1. In exercising that discretion, the circuit court considers the same statutory factors listed above, as well as the seriousness of the offense. *See id.*, ¶¶48-50.

¶24 D.J.A.R. does *not* argue that the circuit court failed to consider any factors, ignored significant facts, or misapplied the law by not staying the registration requirement. Rather, D.J.A.R.'s argument appears to boil down to a request that I reweigh the factors and substitute my own judgment for that of the circuit court. This request runs contrary to the applicable standard of review. *See id.*, ¶42 ("An appellate court will affirm a circuit court's discretionary decision as long as the circuit 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.'" (quoted source omitted)).

Conclusion

¶25 For the reasons stated above, I affirm the dispositional order and the order denying D.J.A.R.'s motion for postdispositional relief.

By the Court.—Orders affirmed.

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

