COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1739-CR **Cir. Ct. No. 2013CF1052**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. LANDRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] This case concerns whether the circuit court erred when it ordered Timothy L. Landry to comply with the sex offender

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

registry—in his case, a discretionary call for the circuit court after Landry pled no contest to two counts of fourth-degree sexual assault. Landry argues that the circuit court erroneously exercised its discretion because the findings required by WIS. STAT. § 973.048(1m)(a) to impose registration were not made and were not sufficiently explained. We conclude that the circuit court properly exercised its discretion; the requisite findings were established and explained.

BACKGROUND

¶2 Landry was charged with second-degree sexual assault and false imprisonment. The complaint alleged that Landry showed up drunk at the residence of a former girlfriend, A.D. A.D. let Landry in because Landry claimed he wanted to talk. Landry began talking about sex and stated that he wanted to have sex with A.D. A.D. declined and told Landry to go home. Landry did not take no for an answer and sexually assaulted A.D. by forcibly disrobing her and inserting his finger into her vagina and sucking on her breasts. He left when A.D.'s two-year-old son started to wake up. Landry refused to turn himself in and was later arrested after fleeing the scene of an accident, which resulted in a criminal charge for hit-and-run.

¶3 While out on bail and despite a no contact order, Landry pulled behind A.D.'s car while she was getting gas. Landry looked at A.D. and yelled, "you're a bitch" and "you're a ho" as he was driving away. This misconduct resulted in a charge of felony bail jumping for violating the no contact order. Landry reached an agreement with the State to resolve all three cases. In exchange for pleading no contest on the bail jumping and hit-and-run charges, the State agreed to amend the second-degree sexual assault and false imprisonment charges to two counts of fourth-degree sexual assault, misdemeanors. Landry

agreed to plead no contest to these two charges as well. After Landry pled no contest to the charges, the court held a sentencing hearing.

¶4 During the hearing, the court remarked that Landry had a lengthy history of criminal offenses and undesirable behavior, including multiple convictions for "domestic abuse." Although Landry did not have any previous convictions for sexual assault, the court noted an incident where police caught Landry having sex in a park, and Landry left his "penis exposed to the officers" and asked them whether they "liked" it. Given his history of "domestic abuse convictions" and his current sexual assault charges, the court concluded that Landry had "some sort of issue with women and with respect in general." The court also noted that it did not believe Landry was "taking responsibility for this sexual assault." The court placed heavy emphasis on the serious nature of the offenses and the need to protect the public from Landry's behavior. "Evidently women in this community need to be protected from you given your history of domestic violence and the sexual assault that you committed." The circuit court imposed nine months of jail time on each sexual assault count (the maximum), followed by three years of probation. The court further concluded, "Given the serious nature of the sexual assault and the effect it's had on [A.D.], I am ordering you to comply with the Wisconsin Sex Offender Registry."

¶5 Landry moved for postconviction relief. He argued that the circuit court failed to adequately explain the reasons for requiring him to register as a sex offender.[2] During the hearing on the motion, the circuit court further explained its

[2] Landry's motion conceded that he did "not dispute … that the conduct underlying the fourth-degree sexual assault charges was sexually motivated."

decision to impose sex offender registration. The court noted (and Landry's counsel confirmed) that the sexual motivation of the sexual assault convictions was "not being contested." Rather, the issue was "whether it would be in the interest of public protection to have [Landry] report." The court pointed to its sentencing remarks that Landry had "some sort of issue with women and with respect in general" and failed to take responsibility for the sexual assaults. The court also highlighted its previous statement that "women in this community need to be protected from you given your history of domestic violence and the sexual assault that you committed." Thus, the circuit court denied the postconviction motion. Landry appeals.

DISCUSSION

¶6 The sole issue on appeal is whether the circuit court erroneously exercised its discretion when it ordered Landry to comply with the sex offender registry. The other charges resolved by the plea agreement are not before us.

¶7 WISCONSIN STAT. § 973.048 permits the circuit court to order sex offender registration for a conviction under WIS. STAT. § 940.225(3m) for fourth-degree sexual assault. *See* § 973.048(1m)(a); *see also* ***State v. Martel***, 2003 WI 70, ¶17, 262 Wis. 2d 483, 664 N.W.2d 69 (explaining that § 973.048(1m) gives the circuit court discretion to order registration for any "sex offense" and certain other sexually motivated crimes). To do so, the court must make two findings: (1) "the underlying conduct was sexually motivated" and (2) requiring registration "would be in the interest of public protection." Sec. 973.048(1m)(a). The statute provides a nonexhaustive list of factors the court "may consider" when determining whether ordering registration "would be in the interest of public

protection," including, "Any other factor that the court determines may be relevant to the particular case." Sec. 973.048(3)(g).

¶8 Where the circuit court is permitted, but not required, to order sex offender registration, we review that decision for an erroneous exercise of discretion. ***State v. Jackson***, 2012 WI App 76, ¶7, 343 Wis. 2d 602, 819 N.W.2d 288. "Our analysis includes consideration of postconviction orders because a circuit court has an additional opportunity to explain its sentence when challenged by a postconviction motion." ***State v. Helmbrecht***, 2017 WI App 5, ¶13, 373 Wis. 2d 203, 891 N.W.2d 412 (2016). Landry argues that the circuit court erroneously exercised its discretion because it failed to make and sufficiently explain the two required statutory findings.

¶9 As to the first required finding—that the crimes were sexually motivated—Landry himself conceded this in the postconviction proceedings below and does so again before us. And even if he had not, his sexual motivation was never in dispute.

¶10 The second required finding is that sex offender registration "would be in the interest of public protection." Landry argues this element was also not found by the circuit court and that the circuit court "failed to offer the process of reasoning required by ***Gallion***[3]" in its consideration of this precondition. Landry maintains that "the discretionary imposition of the sex offender registry demands a

[3] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. ***Gallion*** required a specific, on-the-record explanation of the court's sentencing decision; an implied rationale is insufficient. ***Id.***, ¶¶19, 50.

thorough, separate ***Gallion*** analysis," which cannot be absorbed into the court's sentencing rationale generally.

¶11 Even assuming ***Gallion*** requires a specific, separate, on-the-record explanation, the circuit court clarified any deficiency at the postconviction hearing. The court referenced its comments during the original sentencing hearing—pointing to Landry's issue with women in general, the need for the community to be protected from him, and the serious nature of this sexual assault—and then explicitly connected this to the second required finding. The court was not merely restating its comments at sentencing; it was clarifying that those comments formed the basis of its decision to require registration.

¶12 In the end, Landry would like to see this court ***Gallion***ize imposition of the sex offender registry just like it has in some other contexts—most recently, in expungement. *See* ***Helmbrecht***, 373 Wis. 2d 203, ¶12; *see also* ***State v. Vesper***, 2018 WI App 31, ¶53, ___ Wis. 2d ___, ___ N.W.2d ___ (Hagedorn, J., concurring in part; dissenting in part) (discussing ***Helmbrecht*** among other cases and highlighting the tension between a required on-the-record explanation versus an appellate search-the-record examination). However, the crux of this case is that WIS. STAT. § 973.048(1m)(a) requires a circuit court to make two findings prior to exercising its discretion to order sex offender registration. Any way you cut it, the circuit court made those findings here, and left no doubt about its rationale during the postconviction proceedings. We see no error.

By the Court.—Judgment and order affirmed.

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