

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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11-24-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2014 AP 1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC L. NIGL,

Defendant-Appellant.

**On Appeal from the Judgment of Conviction Entered in
Winnebago County Circuit Court, the Honorable Barbara H.
Key, Presiding and the Order Denying Postconviction Relief
Entered in Winnebago County Circuit Court, the Honorable
Scott C. Woldt, Presiding**

Winnebago County Circuit Court Case No. 2012CF833

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. For a juvenile, adjudicated prior to the decision in Cesar G., does the Automatic Registration Requirement for the Sex Offender Registry apply, if the Juvenile Court never actually exercised discretion and considered the best interest of the child?

The trial court answered: No.

The post-conviction motion court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Nigl does requests publication of the opinion in this case. A published opinion in this case would help clarify the law regarding the status of persons with juvenile adjudications prior to 2004, where the issue of the possible stay of the sex offender registration requirement was never addressed by the juvenile judge. It appears that this is an issue of first impression in Wisconsin.

However, the evidence is documentary in nature, and there is no dispute about what evidence was submitted, but rather turns on the interpretation of law, and therefore, oral argument is not necessary nor requested.

STATEMENT OF THE CASE AND FACTS

The Defendant-Appellant, Eric L. Nigl, (hereinafter, Nigl) was charged with Sex Offender Registry Violation pursuant to §301.45(6)(a)1, Stats., in a complaint filed on December 3, 2012 (1:2-3; App.103-104). The complaint alleged that Nigl "is required to register as a sex offender subsequent to his conviction for First Degree Sexual Assault of a Child in Winnebago¹ Case 98JV566, date of conviction 4/20/99." (1:2; App.103)

The defense filed a Motion to Dismiss (9:1-7) on September 19, 2013. This motion argued, as grounds: "The juvenile asserts that the dispositional order must include the registry requirement before a juvenile is subjected to the registry requirement." (9:1)

The Motion to Dismiss was heard before the trial court on September 23, 2013. (39:3-6; App.105-108). The trial court denied the motion in an oral ruling. (Id.)

The case proceeded to a court trial on September 25, 2013, and Nigl was found guilty by the trial court on the one count. (40:1-16 and 15:1-2; App.101-102). Nigl was

¹

It was actually an Outagamie County juvenile case, but that error in the complaint is not at issue on this appeal. (See, 11:1-4)

sentenced to 63 days jail, which was a time served sentence.
(Id.)

Nigl timely filed a Notice of Intent to Seek Post-Conviction Relief on September 26, 2013. (16:1). Appellate counsel was appointed, and subsequently, a Post-Conviction Motion was filed on February 26, 2014. (18:1-4) The postconviction motion asked the court to reconsider its original oral ruling. It also added an additional argument that applying the automatic application of the registry requirement, specifically to Nigl, would be improper based upon the fact that the law at the time of the juvenile disposition was undeveloped regarding the authority of the juvenile court to issue a stay of the automatic registration requirement. (Id.).

A briefing schedule was ordered by the trial court. The defense filed a Brief on March 31, 2014. (21:1-5) The State filed a Response Brief on April 4, 2014. (22:1-2) And, the defense filed a Reply Brief on April 21, 2014. (23:1-3)

A hearing was held on the post-conviction motion on May 8, 2014. Before the hearing started, Judge Key, who presided over the pretrial motion and the court trial, recused herself, and a new judge was appointed through

Specific Judicial Assignment. (24:1-2). This judge also recused himself, and another judge, the Hon. Scott C. Woldt, was appointed. (25:2)

Finally, on July 14, 2014, a hearing was held on the post-conviction motion before the Hon. Scott C. Woldt. Both sides essentially relied upon the arguments in the several briefs that were filed, as accurately and fully stating the positions of the parties. (41:3-4; App.109-110)

Having considered the written submissions of the parties, the trial court denied the motion on the record (Id.) and entered in a written order dated July 25, 2014. (29:1). This appeal followed with a timely Notice of Appeal, filed on August 8, 2014. (30:1-2).

The factual basis for the single issue on appeal is as follows:

The dispositional order in Nigl's juvenile case was entered on 3/22/1999. (11:1-4) At that time he was 13½ years old. No mention of whether the adjudication would require Nigl to register as a sex offender was made in the adjudication. The Dispositional Order expired on 04/20/2000. (Id.)

In 2004, the Wisconsin Supreme Court ruled on the issue of the availability of a stay of the automatic registration

requirement for juveniles, in State v. Cesar G., 2004 WI 61, ¶40, 272 Wis.2d 22, 682 N.W.2d 1. When this was decided, Nigl was already almost 19 years old and out of the jurisdiction of the juvenile court, and the Dispositional Order had already been expired for four years.

There is no dispute that Nigl never took any action to ask for the registration requirement to be stayed. There is no dispute that the State proved at trial that Nigl had been adjudicated of violating §948.02(1), Stats. (40:6 and 11:1-4) There is no dispute that the State proved at trial that during the time periods alleged, Nigl had not provided the information required under §301.45(2) and (4), Stats. (40:7-10)

Further reference to the record and facts will be provided as needed in the argument.

ARGUMENT

I. For a Juvenile, Does the Automatic Registration Requirement for the Sex Offender Registry Still Require the Juvenile Court to Actually Exercise Discretion and Consider the Best Interest of the Child?

The State proceeded with this case on the assumption that the statutory language in §301.45(1g), Stats., automatically requires a person, such as Nigl, who was adjudicated under §948.02(1), Stats., to register as a Sex

Offender. There is no dispute, that for an adult conviction, the requirement to register operates automatically.

However, Nigl argues that in juvenile court, there is no automatic operation of law, as all dispositions require the juvenile court to actually exercise discretion and to determine the best interests of the child. If the juvenile court did not actually exercise any discretion, it would be fundamentally unfair to Nigl to allow the automatic operation of law to require him to register based upon a juvenile adjudication.

A. Standard of Review

The determination of fundamental fairness is a matter of discretion to be determined by the trial judge on a case by case basis. Michelle T. v. Crozier, 173 Wis.2d 681, 698, 495 N.W.2d 327 (1993). Generally, a reviewing court will "[n]ot reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." Prahl v. Brosamle, 142 Wis.2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

In the first place, there must be evidence that discretion was in fact exercised. Discretion is not

synonymous with decision-making. Rather, the term contemplates a process of reasoning. McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). Further, a trial court erroneously exercises discretion when its decision is based on a misapplication or erroneous view of the law. Datronic Rental Corp. v. DeSol, Inc., 164 Wis.2d 289, 292, 474 N.W.2d 780 (Ct. App. 1991).

To determine whether the trial court properly exercised discretion the reviewing court looks first to the trial court's on-the-record explanation of the reasons underlying its decision. The reviewing court then determines if that explanation shows the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law. Burkes v. Hales, 165 Wis.2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

B. THE JUVENILE COURT WAS NOT AWARE OF THE AVAILABILITY OF A STAY OF THE AUTOMATIC SEX OFFENDER REGISTRATION REQUIREMENT AND THEREFORE COULD NOT PROPERLY EXERCISE DISCRETION ON WHETHER TO STAY REGISTRATION

In 1999, when Nigl was adjudicated as a juvenile, neither the juvenile court, nor anybody else, was aware that in 2004, the Wisconsin Supreme Court would decide Cesar G..

The availability to a juvenile of the right to move for

a stay of sex offender registration was first clearly identified for automatic registration adjudications in 2004, in State v. Cesar G., 2004 WI 61, ¶40, 272 Wis.2d 22, 682 N.W.2d 1, where the Wisconsin Supreme Court interpreted §938.34(16) as giving courts discretion to stay the automatic mandatory sex offender registration requirement. The Wisconsin Supreme Court stated "The policies the State urges that favor a mandatory registration requirement in non-juvenile cases simply do not apply in juvenile cases where a circuit court has the flexibility to tailor a juvenile's disposition to achieve the multiple goals of the Juvenile Justice Code." Id., at ¶37. What might be mandatory in adult criminal court, is not mandatory in juvenile court.

The requirement for the juvenile court to consider the best interest of the child in exercising its discretion on whether to stay sex offender reporting was discussed in State v. Jeremy P., 2005 WI App 13, 275 Wis.2d 366, 692 N.W.2d 311. The Wisconsin Court of Appeals in Jeremy P., at ¶16 stated:

Moreover, if one considered mandatory sex registration by juveniles to be punishment, the supreme court's decision in Cesar effectively attaches a "best interest of the child" consideration to

that punishment by permitting the trial court to exercise its discretion to stay that part of the dispositional order. See 272 Wis.2d 22, ¶2. With that additional safeguard, which is unavailable to adults in the mandatory registration class, the traditional concerns with, and consideration of, the best interests of the child remain an important aspect of this part of the juvenile code.

It is clear that what is a mandatory sex offender registration requirement for adults is not a mandatory registration requirement for juveniles. Before registration is required, the juvenile court must consider the best interest of the child, and exercise its discretion. For Nigl, in 1999, that never happened as the juvenile court never knew that was the standard.

There can be an argument that the juvenile court could have exercised its discretion, if only Nigl had asked it to do so. Nigl agrees with the State (22:2 - first full paragraph) that the legal standard for a juvenile court to grant a stay of the automatic registration requirement was in existence at the time of Nigl's disposition in 1999, as the Wisconsin Supreme Court simply interpreted existing statutes to arrive at the "new" procedure announced in Cesar G. Nigl agrees that the Juvenile Court "had" the discretion to stay the registration requirement at the time

of the disposition. However, Nigl asserts that it is also clear that neither the Juvenile Court, nor anybody else at the time, knew the correct legal standard. The first question is always whether discretion was in fact exercised. See McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). In this case, the juvenile court did not exercise its discretion, as it did not know it even had the discretion.

It could be argued that if the transcript of the juvenile proceeding was available discretion could be pieced together from the record. However, it is clear that the juvenile court would have been using the wrong legal standard, as the correct standard was not announced for five more years when Cesar G., was decided.

Given the standards "assumed" to be operative in 1999, the Juvenile Court would not have used the correct legal principles. A trial court erroneously exercises discretion when its decision is based on a misapplication or erroneous view of the law. Datronic Rental Corp. v. DeSol, Inc., 164 Wis.2d 289, 292, 474 N.W.2d 780 (Ct. App. 1991). Here, the juvenile court, and everybody else, was unaware that the Wisconsin Supreme Court would announce this new standard five years later, so it would have been impossible for the

juvenile court to have even considered the question under the correct legal principle.

This case is simply about whether the juvenile court that entered the dispositional order for Nigl in 1999 exercised its safeguard discretion to stay the requirement for Nigl to register as a sex offender. If the juvenile court did not even know that it had that safeguard discretion to stay the registration requirement for Nigl, it would be fundamentally unfair to Nigl for the mandatory registration requirement to apply to him since nothing is mandatory in juvenile court until the judge considers the best interest of the child and actually exercises discretion.

This appeal should not be construed as a collateral attack on the underlying adjudication. That adjudication remains intact, and nothing in it is challenged. What is challenged, is what is not in the adjudication; that is the requirement to register. Nigl is not trying to "void" the adjudication, nor is he trying to "overturn" the adjudication, nor is he trying to "challenge the validity" of his prior adjudication. See State v. Sorenson, 2002 WI 78, ¶¶34 - 37, 254 Wis.2d 54, 646 N.W.2d 354. The juvenile adjudication remains. The only question is what are the

consequences of that adjudication today.

Currently, when a juvenile is adjudicated on a statute that would require automatic registration as a sex offender for an adult, everybody is on notice that it is the juveniles burden to move for a stay pursuant to Cesar G.. It should be made clear that Nigl is not challenging the constitutionality of the current burden on the juvenile to move for a stay to avoid the automatic registration requirement. He is simply arguing that it would be fundamentally unfair to apply the current automatic mandatory registration requirement to him.

However, in State v. Jeremy P., 2005 WI App 13, ¶22 275 Wis.2d 366, 692 N.W.2d 311, it was ruled that the safeguard discretion provided to the juvenile court in Cesar G., to consider the best interest of the child before the mandatory registration requirement is effective allows it to survive a constitutional challenge.

The final result in Jeremy P., was that the court of appeals remanded the case back to the juvenile court to consider whether to stay the registration component of the dispositional order. Id., at ¶30. That result is not available to Nigl, as his dispositional order has expired fourteen years ago, and the juvenile court no longer has

jurisdiction.

The Juvenile Court never exercised discretion on whether to grant a stay because it is clear that nobody at the time even knew that such discretion was available. In order for an order or a result to be based upon the proper exercise of discretion, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. McCleary v. State, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). In this case, it seems clear that the juvenile court never actually exercised discretion in deciding if the best interests of the child would include staying the registration requirement or not. Without the juvenile court exercising its safeguard discretion by considering the best interest of the child, it would be fundamentally unfair to hold that Nigl was subject to the automatic registration requirement by the operation of law as that result negates any safeguard discretion that saves the law from constitutional attack.

C. THE TRIAL COURT AND THE POST-CONVICTION MOTION COURT RELIED UPON THE AUTOMATIC SEX OFFENDER REGISTRATION REQUIREMENT TO DENY THE MOTION TO DISMISS

The trial court, for this case, denied the Motion to Dismiss. This motion was based upon the dispositional order

having no specific mention of any requirement to register. The trial court considered the evidence and stated, "if anything, the court simply did not address in the Dispositional Order the required finding that Mr. Nigl did qualify for sex offender registration." (39:6; App.108

The trial court then considered the law, and stated, "...there is the requirement here unless there's a specific finding that he should not have - - or did not have to register as a sex offender." (Id.) The trial court clearly is considering the law as an automatic operation requiring registration unless the juvenile moves for and proves the necessary factors to obtain a stay.

The trial court then went on to make a ruling "That finding was not specifically made so, as such, in the Court's view, the law would require that he does register as a sex offender." (Id.) The trial court thus denied the motion to dismiss because it considered the registration requirement as an automatic operation of law. This negated the need to consider the best interest of the child.

The post-conviction motion court also relied upon the automatic operation of law to trigger the registration requirement. That court stated, "...the law is what the law is... He had to ... comply with the Sexual Offender

Registration based upon the conviction back then.” (41:4: App.110) The post-conviction motion court then denied the motion to dismiss essentially finding that this was a “collateral issue” but also finding that there is no fundamental unfairness. (Id.)

Neither the trial court, nor the post-conviction motion court properly exercised their discretion, as they both worked under the assumption that the automatic operation of law required Nigl to register as a sex offender, merely based upon the nature of his juvenile adjudication and the silence of the juvenile court on the issue of staying the registration requirement. This is an erroneous view of the law, as it fails to take into consideration the fact that the exercise of discretion by the juvenile court in considering the best interest of the child is necessary for the automatic registration to survive constitutional attack. A trial court erroneously exercises discretion when its decision is based on a misapplication or erroneous view of the law. Datronic Rental Corp. v. DeSol, Inc., 164 Wis.2d 289, 292, 474 N.W.2d 780 (Ct. App. 1991).

Nigl was adjudicated in 1999. It wasn't until 2004 that Cesar G., was decided, and juvenile courts first learned that the automatic operation of law for the

registration requirement was only allowed if they first considered the best interest of the child on whether there should be a stay of registration. Because the juvenile court never exercised its discretion, and never considered the best interest of the child when it failed to address whether there should be a stay of registration, it would be fundamentally unfair for the automatic operation of law to require Nigl to register as a sex offender.

Since the automatic operation of law to require registration should not apply to Nigl, he should have no requirement to register, and therefore his failure to register is not a crime, and the conviction should be dismissed.

Finally, Nigl takes no position on how the automatic operation of law might apply to juveniles that were adjudicated after the Cesar G., decision. After that time, the availability of a stay, and the requirement for the juvenile court to consider the best interest of the child were known.

CONCLUSION

For all of the reasons stated above, the defendant, Eric L. Nigl, hereby requests that his conviction for failing to register as sex offender be dismissed, since the juvenile court never considered the best interest of the child, but rather, left the dispositional order silent as to the need for him to register.

Dated this 24th day of November, 2014.

By: _____
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CERTIFICATION ON FORMAT

I hereby that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a Brief produced using the following font:

Mono spaced font: **Courier New** at 12 point font, which is 10 characters per inch; double spaced; 1.5 inch margins on left side and 1.0 inch margins on other 3 sides.

The length of the brief is 17 pages.

Dated this 24th day of November, 2014.

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CERTIFICATION OF MAILING

I, William J. Donarski, hereby certify that pursuant to §809.80(3), Stats., that I deposited in the United States mail for delivery to the Clerk, by first class mail, postage prepaid the **Brief and Appendix of Defendant-Appellant**, addressed to:

Clerk of the Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

I have enclosed ten (10) copies of this document to the Court of Appeals. I have also served by U.S. mail three (3) copies of the said document upon the Wisconsin Attorney General at the following address:

Gregory M. Weber
Assistant Attorney General
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Madison, WI 53707-7857

I certify that the packages containing the said documents postage prepaid were deposited in the U.S. postal receptacle on this 24th day of November, 2014.

William J. Donarski

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial courts reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of November, 2014.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this BRIEF OF APPELLANT-DEFENDANT, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition for review filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 24th day of November, 2014.

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APPENDIX OF DEFENDANT-APPELLANT

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