

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The State mis-characterizes the argument of Nigl, by labeling it as an attempt to have a retroactive application of the rule announced in the case of State v. Cesar G., 2004 WI 61, 272 Wis.2d 22, 682 N.W.2d 1, for a juvenile to obtain a stay of the requirement for sex offender registration. Brief of Plaintiff-Respondent, page 1. The rule announced by the Wisconsin Supreme Court, in Cesar G., interpreted the statutes and ruled "The policies the State urges that favor a mandatory registration requirement in non-juvenile cases simply do not apply in juvenile cases ..." Id., at ¶37.

Contrary to the State's characterization of the argument on appeal, Nigl is not arguing that the juvenile court should now conduct a hearing to determine if he should be granted a stay. Rather, he is arguing that since the juvenile court did not properly exercise its safeguard discretion, because it was not aware of the scope of its safeguard discretion, that the automatic operation of law did not apply to him, and therefore, he is not a person required to register.

Nigl's argument is that the first element of the crime he was convicted of did not exist. No retroactive

application is necessary for this argument. The State argues that "Nigl was required to register" Brief of Plaintiff-Respondent, page 3. However, that is just an assumption based upon the automatic operation of law, after his juvenile adjudication for a qualifying crime. The State correctly cites the elements for the crime, and the first one is "(1) Nigl was a person required to provide information under the sex offender registration statute;" Brief of Plaintiff-Respondent, page 4. See Wis.J.I. - Criminal 2198 (2013).

Nigl is simply arguing that he is not a person required to register, as his juvenile adjudication was silent as to that requirement, and most importantly, because there is nothing that is automatic in juvenile court.

The State next tries to argue that Nigl forfeited his right for a stay of the sex offender registration requirement. Brief of Plaintiff-Respondent, page 7-13. Forfeiture is the failure to make the timely assertion of a right. State v. Ndina, 2009 WI 21, ¶29, 315 Wis.2d 653, 761 N.W.2d 612. Nigl is arguing that since neither he, nor the juvenile court, nor anybody else at that time, knew that a stay was available, that it would be fundamentally unfair for him to be deemed to have forfeited the right to ask for

a stay.

More importantly, the juvenile court could not have properly exercised its safeguard discretion, since the juvenile court was not aware that the Cesar G., case would be decided five years later. Without knowing the proper legal standard, it would be impossible to properly exercise discretion. 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). Without the proper exercise of the juvenile court's safeguard discretion, nothing is automatic in juvenile court, and thus, the automatic operation of law does not apply to Nigl. Without the automatic operation of law, Nigl is not a person required to register, and he never was one.

Since Nigl was never a person required to register as a sex offender, there was nothing for him to seek an exemption from, and he had nothing to move for a stay from. Since Nigl was never a person required to register, he could not have forfeited any rights he had, known or unknown, to move to stay the registration.

Since the State has mis-characterized Nigl's argument to somehow want to re-open the juvenile case and then

litigate whether he would be granted a stay under current law, it is not surprising that they seem to want to know more about the juvenile disposition. Brief of Plaintiff-Respondent, page 10, n.5. But that is not the issue on appeal. The issue is whether Nigl was a person required to register. Nigl argues that he was never a person required to register since his juvenile adjudication was silent on that point, and the juvenile court could not properly exercise its safeguard discretion.

The State again mis-characterized Nigl's argument by claiming that he is attempting to retroactively apply Cesar G., to his juvenile case. Brief of Plaintiff-Respondent, page 13-19. The State spends considerable effort arguing that "The rule decided in *Cesar G.*, cannot be applied retroactively to Nigl's juvenile adjudication." Brief of Plaintiff-Respondent, page 17. Nigl is not trying to do that. Nigl is applying the rule decided in Cesar G., to the criminal conviction on appeal, not to his juvenile adjudication. Nigl is arguing that the rule decided in Cesar G., negates an element of the crime for which he was convicted in this case, not his juvenile case.

The State continues to try to claim that Nigl somehow is trying to re-open the juvenile case. The State argues

that "He attempts to convert the criminal case into an appeal of his juvenile case when he asks this Court to review the actions of the juvenile court." Brief of Plaintiff-Respondent, page 19.

Nigl is appealing his criminal conviction and is claiming that the conviction must be vacated because the first element of the charged crime was not met. That is, he was not a person required to register. The juvenile adjudication remains intact and unchanged. Nigl is also not asking this Court to review the juvenile court's actions. Rather, he asks this court to note the date of the adjudication, and from that, conclude that since the proper legal standard was not known for another five years, that the juvenile court could not possibly have properly exercised the necessary safeguard discretion. And finally, without the safeguard discretion being exercised, then there is no automatic application of law to juveniles, such that the automatic requirement to register does not, and did not apply to Nigl. Nigl is directly challenging the assumption that the automatic application of law makes him a person required to register.

Finally, Nigl is not "ignoring" his requirement to register. Brief of Plaintiff-Respondent, page 20. There is

no "impunity" in Nigl conducting this appeal. Nigl was convicted after a court trial, received his sentence, and he appeals. As with any criminal case, the defendant has the right to appeal. The State claims that he "repeatedly moved to dismiss the criminal charge in the circuit court." Brief of Plaintiff-Respondent, page 20. It is not clear what other procedure the State thinks Nigl should have pursued, since those motions were required in order to preserve the issue for appeal.

Rather, it seems that the State is more concerned about the implication this appeal raises to other persons adjudicated as juveniles, prior to the Cesar G. decision. The State claims that "Nigl advocates for a windfall relieving him of this burden." Brief of Plaintiff-Respondent, page 23. The State then continues by arguing that "Nigl asks this Court to allow him - and presumably all juveniles adjudicated prior to *Cesar G.* - to ignore previously required registration requirements." Brief of Plaintiff-Respondent, page 23.

First, this appeal is solely about Nigl. Others similarly situated may or may not benefit. But that is how the law, and the appellate process works. If there are any other persons who might use this argument, it is a

diminishing population, as it would be cut off after the date of the Cesar G., decision.

Second, it is not a windfall, to have your conviction vacated because the first element could not, essentially as a matter of law, be proven. If an element is not proven, the conviction can not stand.

And, finally, the State is trying to argue that previously required registration requirements would be ignored. The State has this backwards. Nigl is arguing that the registration requirement never existed, so it was not previously required. And, Nigl would not be ignoring a registration requirement, because one cannot ignore something that never existed.

The State might think that it is good policy to have Nigl, and others similarly situated, to continue to register. But the requirement to register is set by the statutes. The Wisconsin Supreme Court, in Cesar G., interpreted the statutes and ruled "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." State v. Cesar G., 2004 WI 61, ¶37,

272 Wis.2d 22, 682 N.W.2d 1. The mandatory registration requirement does not apply in juvenile cases, unless the juvenile court properly exercised its safeguard discretion, which could not have happened.

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, and thus, he was never a person required to register.

Dated this 16th day of February, 2015.

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CERTIFICATION ON FORMAT

I hereby that this Reply 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 8 pages.

Dated this 16th day of February , 2015.

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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 **Reply Brief 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:

Winn S. Collins
Assistant Attorney General
P.O. Box 7857
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 16th day of February, 2015.

William J. Donarski

CERTIFICATION OF ELECTRONIC FILING

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

I further certify that this electronic submission is identical in content and format to the printed form of the Reply Brief filed on or after this date.

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

Dated this 16th day of February, 2015.

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