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STATE OF WISCONSIN

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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Case No. 2017AP1739-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. LANDRY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING A MOTION FOR POSTCONVICTION
RELIEF, ENTERED IN THE CIRCUIT COURT FOR
KENOSHA COUNTY, THE HONORABLE
CHAD G. KERKMAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Does the record support the circuit court's discretionary decision to order that Defendant-Appellant Timothy L. Landry register as a sex offender?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will adequately address the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

Landry contends that the circuit court did not adequately explain its decision to make him register as a sex offender. He is wrong. The court's sentencing decision focused on the serious nature of Landry's crimes and the need to protect the public, particularly women, from him. These reasons also supported the circuit court's decision to require Landry to register as a sex offender, and this Court should affirm.

STATEMENT OF THE CASE

Early in the morning of August 1, 2013, Landry showed up drunk at the residence of AD, a former girlfriend. (R. 1:1.) AD was wearing a t-shirt and underwear. (R. 1:1.) Landry told AD that he wanted to talk, and she let him in. (R. 1:1.)

As they were talking, Landry said that he wanted to have sex with AD. (R. 1:1.) She refused and told him to go home. (R. 1:1.) In response, Landry removed his penis from his shorts and told her to "suck his dick." (R. 1:1.) He then

grabbed AD by her shirt and pushed her head towards his penis. (R. 1:1–2.) AD pulled away, and Landry pulled her shirt off. (R. 1:2.) AD covered herself with a blanket and again told Landry to go home. (R. 1:2.)

Instead, Landry pushed AD onto the couch and ripped her underwear off. (R. 1:2.) AD screamed for Landry to stop, but he held her down by placing his forearm on her stomach. (R. 1:2.) Landry put his finger in AD’s vagina and sucked on her breasts. (R. 1:2.) After they heard AD’s son wake up, Landry told her, “I’m gonna leave before you try and call rape on me.” (R. 1:2.)

Police tried to contact Landry to get him to turn himself in, but he refused. (R. 1:2.) On September 1, 2013, police arrested Landry after he left the scene of a traffic accident. (R. 31:3.) The State charged Landry with second-degree sexual assault and false imprisonment for assaulting AD, and with hit and run for leaving the accident. (R. 1; R. 31:1, 3.)

On March 12, 2014, while Landry was out on bail and subject to a no-contact provision with AD, he pulled his car behind AD’s car while she was getting gas. (R. 5:1; 31:3.) He yelled at her, “you’re a bitch” and “you’re a ho” and then left. (R. 31:3.) The State charged him with felony bail jumping for these actions. (R. 31:1, 3–4.)

The State and Landry reached an agreement to resolve all three cases. Landry agreed to plead no contest to the bail jumping and hit-and-run charges. (R. 80:2–3; 13.) The State agreed to amend the sexual assault and false imprisonment charges to two counts of fourth-degree sexual assault, and Landry pleaded no contest to those charges as well. (R. 80:2–3, 13.)

When sentencing Landry, the court discussed the three primary sentencing factors: the need to protect the public, the gravity of the crimes, and Landry’s character.

(R. 81:30.) It described the effect the crimes had on AD, noting that she had developed Post-Traumatic Stress Disorder, been in therapy, and dropped out of college because of the assault. (R. 81:29–30.)

The court discussed Landry’s lengthy criminal history and highlighted his past convictions involving domestic abuse. (R. 81:30.) It also considered an incident in which police caught Landry having sex in a parked car and he exposed his penis to them, asking “if they liked” it. (R. 81:30–31.)

Based on this criminal history and Landry’s current crimes, the court determined, “I believe you do have some sort of issue with women and with respect in general. I don’t believe you’re taking responsibility for this sexual assault.” (R. 81:31.) And, considering the severity of the assault and the need to protect the public, the court told Landry, “Evidently women in this community need to be protected from you given your history of domestic violence and the sexual assault that you committed.” (R. 81:33.)

The court required Landry to register as a sex offender “[g]iven the serious nature of the sexual assault and the effect it’s had on [AD].” (R. 81:35.) It gave Landry concurrent nine-month jail sentences on the sexual assaults, a consecutive three-year probation term on the bail jumping, and a \$700 fine for the hit and run. (R. 81:33.)

Landry moved for postconviction relief, asking the court to vacate the sex offender registration requirement. (R. 60.) He complained that the court failed to specifically find under Wis. Stat. § 973.048(1m)(a) that his crimes were sexually motivated and that registration was in the interest of public protection. (R. 60:4, 6.) Landry, though, conceded that the assaults were sexually motivated. (R. 60:4.) He also argued that registration was not required to protect the

public under the statutory factors listed in section 973.048(3). (R. 60:4, 7–10.)

The circuit court denied Landry’s motion. (R. 64; 82.) It noted that the parties were not contesting whether the crimes were sexually motivated, but only whether registration was necessary to protect the public. (R. 82:6–7.) The court said that it had made several findings at sentencing to support this conclusion. It specifically pointed to its comments that (1) Landry had “some sort of issue with women and with respect in general,” (2) women in the community needed to be protected from Landry because of his criminal history, and (3) it was ordering him to register as a sex offender due to the serious nature of his crime and the effect it had on AD. (R. 82:6–7.)

Landry appeals. (R. 67.)

STANDARD OF REVIEW

A circuit court’s decision to require a defendant to register as a sex offender under Wis. Stat. § 973.048 is reviewed for an erroneous exercise of discretion. *See State v. Jackson*, 2012 WI App 76, ¶ 7, 343 Wis. 2d 602, 819 N.W.2d 288.

This Court will affirm a circuit court’s discretionary decision if the court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *State v. Muckerheide*, 2007 WI 5, ¶ 17, 298 Wis. 2d 553, 725 N.W.2d 930. This Court also considers the circuit court’s postconviction explanations when its sentence is challenged. *State v. Helmbrecht*, 2017 WI App 5, ¶ 13, 373 Wis. 2d 203, 891 N.W.2d 412.

The defendant bears a “heavy burden” of establishing that a circuit court erroneously exercised its sentencing discretion. *See State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d

685, 786 N.W.2d 409. And a reviewing court will search the record for reasons to affirm a circuit court's sentencing decision. *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

ARGUMENT

The record supports the circuit court's decision to require Landry to register as a sex offender.

- A. The circuit court had the discretion to require Landry to register as a sex offender if it concluded his crimes were sexually motivated and that registration was in the interest of protecting the public.**

A circuit court has discretionary authority under Wis. Stat. § 973.048 to order sex-offender registration when a defendant is sentenced for a crime enumerated in that statute. *State v. Martel*, 2003 WI 70, ¶ 16, 262 Wis. 2d 483, 664 N.W.2d 69. Landry was convicted of fourth-degree sexual assault, a crime under chapter 940 and one that allows a court to order registration. See Wis. Stat. §§ 940.225(3m), 973.048(1m)(a).

To require a defendant to register as a sex offender, the court has to conclude that the defendant's underlying conduct was sexually motivated and that registration would be in the interest of public protection. Wis. Stat. § 973.048(1m). The statute adopts Wis. Stat. § 980.01(5)'s definition of sexually motivated. Under section 980.01(5), an act is sexually motivated if it is done "for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim."

Section 973.048(3) lists illustrative factors for a court to consider when determining whether registration is in the interest of public protection. The enumerated factors are the ages of and relationship between the defendant and the

victim, whether the crime caused the victim bodily harm, whether the victim suffered from a mental illness or deficiency, and the defendant's likelihood of committing future violations. Wis. Stat. § 973.048(3)(a)–(e). The court is also allowed to consider any other factor it deems relevant. Wis. Stat. § 973.048(3)(g).

B. The record supports findings that Landry's crimes were sexually motivated and registration was in the interest of public protection.

This Court should affirm the circuit court's decision to require that Landry comply with the sex offender reporting requirements. The court did not explicitly make the specific findings required by Wis. Stat. § 973.048(1m) when it ordered Landry to register. Nonetheless, a review of the record supports the circuit court's decision to require registration.

The record shows that Landry's fourth-degree sexual assault convictions were sexually motivated. There is no other way to view them. By pleading to fourth-degree sexual assault, Landry admitted he had sexual contact with AD without her consent. Wis. Stat. § 940.225(3m). And the complaint, which served as the factual basis for Landry's pleas, shows that Landry's actions were motivated by his desire for sex with AD. (R. 1; 80:8.) Moreover, Landry does not dispute that his offenses were sexually motivated. (Landry's Br. 14.) Thus, this Court should conclude that the record supports a determination that Landry's crimes were sexually motivated.

In addition, the circuit court's sentencing comments support a determination that requiring Landry to register was in the interest of protecting the public. As the circuit court explained postconviction, it made three comments at

sentencing that support this finding. *See Helmbrecht*, 373 Wis. 2d 203, ¶ 13.

First, the court said, based on Landry’s criminal history and the severity of his assault of AD, that he had “some sort of issue with women and with respect in general. I don’t believe you’re taking responsibility for this sexual assault.” (R. 81:31.) The court’s determinations that Landry has negative attitudes toward women in general and lacked remorse in this case support a conclusion that Landry was likely to commit future sexual violations and thus, registration was necessary to protect the public. *See* Wis. Stat. § 973.048(3)(e).

Second, the court, again relying on Landry’s record and the severity of his current assault, said that “[e]vidently women in this community need to be protected from you given your history of domestic violence and the sexual assault that you committed.” (R. 81:33.) This too supports a conclusion that Landry might commit future crimes and that registration was necessary to protect the public.

Third, when the court actually imposed the registration requirement, it told Landry it was doing so “[g]iven the serious nature of the sexual assault and the effect it’s had on [AD].” (R. 81:35.) The serious nature of the assault is reasonably interpreted as a finding that Landry might commit future crimes. And the nature of the assault and the effects that it had on AD were both appropriate “other factor[s] that the court determines may be relevant to the particular case.” Wis. Stat. § 973.048(3)(g).

These three comments from the circuit court all support a conclusion that requiring Landry to register as a sex offender was necessary to protect the public. The circuit court properly exercised its discretion.

C. Landry has not demonstrated that the circuit court erroneously exercised its discretion.

This Court should also reject Landry's argument that the circuit court erroneously ordered him to register as a sex offender.

Landry argues that *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, should apply to the circuit court's exercise of discretion to impose sex offender registration. (Landry's Br. 8–13.) Specifically, he contends that specific findings that the crime was sexually motivated and that registration is necessary to protect the public, and the rationales for those findings, must be reflected in the court's sentencing comments. (Landry's Br. 9, 12–13.) In addition, Landry notes that the Wis. Stat. § 973.048(1m) factors are different than the three primary sentencing factors, suggesting that consideration of the latter will not encompass the former. (Landry's Br. 9.) And, he contends, because this Court recently extended *Gallion's* rationale to a circuit court's expungement decisions, extending *Gallion* to sex offender registration makes logical sense. (Landry's Br. 11–12.) See *Helmbrecht*, 373 Wis. 2d 203, ¶ 13.

This Court should decline to address these arguments because they are forfeited. Issues not presented to the circuit court will not be considered on appeal. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Landry never argued in circuit court that *Gallion* should apply to the court's discretionary registration determination. (R. 60; 82.) Instead, Landry argued only that the court erred by ordering registration. (R. 60:4–12; 82:2–5.) His *Gallion* argument is thus forfeited.

Moreover, even assuming *Gallion* applies, the circuit court’s decision did not violate it.¹ Landry contends that *Gallion* required the circuit court to specifically articulate why it concluded that each of the two requirements in Wis. Stat. § 973.048 were met. (Landry’s Br. 8–13.) But *Gallion* does not force the court to recite “magic words.” *Gallion*, 270 Wis. 2d 535, ¶ 49. A sentencing court does not need to address all the sentencing factors on the record. *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The court’s obligation to state its reasons for its sentence “does not require that the sentencing court enumerate all of the factors that might have been considered in reaching the decision.” *State v. Grady*, 2007 WI 81, ¶ 41, 302 Wis. 2d 80, 734 N.W. 2d 364. And *Gallion* did not abrogate the independent appellate review doctrine, which says that “[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed.” *Id.* ¶ 33 (quoting *McCleary*, 49 Wis. 2d at 281); *Gallion*, 270 Wis. 2d 535, ¶ 18 n.6.

Thus, none of Landry’s complaints about the circuit court’s ordering him to register as a sex offender require reversal. The court did not need to specifically say it was finding that Landry’s conduct was sexually motivated and that registration was needed to protect the public. It is enough that the court’s sentencing comments and the rest of the record support those conclusions. And while Landry is correct that the regular sentencing factors are not the same as those for registration, there is significant overlap. Both

¹ The State acknowledges that it has admitted in *State v. Kline*, No. 2017AP15-CR (Wis. Ct. App., Dist. II), that *Gallion* applies to the circuit court’s decision to order discretionary sex offender registration. (Landry’s Br. 13 n.4.)

sentencing and registration take protecting the public into account. And it certainly was not inappropriate for the court to consider the severity of Landry's assaults when deciding that he should register. The circuit court did not violate *Gallion*.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Landry's motion for postconviction relief.

Dated March 26, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,508 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 26th day of March, 2018.

AARON R. O'NEIL
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