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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Case No. 2021AP1596-CR

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STATE OF WISCONSIN,  
Plaintiff-Appellant,  
v.  
KAYDEN R. YOUNG,  
Defendant-Respondent.

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APPEAL FROM AN ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS ENTERED IN THE MARATHON  
COUNTY CIRCUIT COURT, THE HONORABLE  
MICHAEL K. MORAN, PRESIDING

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**BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT**

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## INTRODUCTION

In 2014, Young was convicted of second-degree sexual assault of a child. The court withheld sentence and placed Young on probation. Pursuant to Wis. Stat. § 973.048(2m), the court was also required to order Young to register as a sex offender unless it also found that the underage sexual activity exception of Wis. Stat. § 301.45(1m)(a)1m. applied.

Young filed a motion seeking the underage sexual activity exemption and the court granted it on a temporary six-month basis to see how Young performed on probation. Several weeks later, Young's probation was revoked and he was returned to court for sentencing. The court imposed a bifurcated sentence and ordered Young to register as a sex offender.

A few years later, in 2019, Young was charged in a separate case with failing to comply with his registration requirements. Young filed a motion to dismiss arguing that, in 2014, the court granted his motion to except him from the registration requirement. He argued that, because the court lacked the authority to grant a temporary exception, he is permanently exempt from the registration requirement.

The circuit court agreed. It held that it lacked the authority to grant a temporary exception. The court concluded that, because it granted Young's exception motion, the exception is permanent. Thus, the court dismissed the charge of failing to comply with the reporting requirements.

The court erred. Section 973.048(2m) required the court to order Young to register as a sex offender both when it placed him on probation and when it sentenced him for violating Wis. Stat. § 948.02(2) after his probation was revoked. Therefore, this Court should reverse.

## ISSUE PRESENTED

Did the circuit court erroneously grant Young's motion to dismiss the charge of failing to register as a sex offender?

This Court should answer, "yes."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

## STATEMENT OF THE CASE

This appeal challenges the order dismissing the sex offender registry violation charge against Young in the underlying criminal case—Marathon County Case Number 2019CF1242. However, this issue is affected by the fact that, in a separate criminal case—Marathon County Case Number 2013CF875, Young was excepted from the sex offender registration requirement after being placed on probation. After his probation was revoked, the court imposed the registration requirement at sentencing. Therefore, a brief background on both cases will be helpful.

### *Background on Marathon County Case Number 2013CF875*

According to CCAP,<sup>1</sup> on May 6, 2014, Young was convicted of second-degree sexual assault of a child in

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<sup>1</sup> <https://wcca.wicourts.gov/caseDetail.html?caseNo=2013CF000875&countyNo=37&index=0&mode=details> (last visited Feb. 4, 2022). Unless otherwise noted, the facts contained in the background for Case Number 2013CF875 are taken from CCAP. See *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (court may take judicial notice of CCAP records).

Marathon County Case Number 2013CF875. The court<sup>2</sup> withheld sentence and placed Young on probation for four years. Pursuant to section 973.048(2m), the court was also required to order Young to register as a sex offender for life<sup>3</sup> unless it also found that the underage sexual activity exception pursuant to section 301.45(1m)(a)1m. applied.

On May 9, 2014, Young filed a motion seeking the underage sexual activity exception. (R. 32:1–2.) After a hearing on the motion was held, the court granted Young a temporary six-month exception “to see how he does on probation.” A follow up hearing was scheduled for November 24, 2014.

Several weeks later, Young violated the terms of his probation. (R. 32:2.) At the November 24, 2014, follow up hearing, the court noted that Young was facing revocation and, as a result, refused to make a final determination on his exception motion until those proceedings were finalized.

Young’s probation was eventually revoked and, at the November 2015 sentence hearing after revocation, the court sentenced Young to a total of 11.5 years’ imprisonment. The court also ordered Young to register as a sex offender.

*Case underlying the instant appeal—Marathon  
County Case Number 2019CF1242*

In October 2019, the Department of Corrections informed the Marathon County district attorney’s office that Young was non-compliant with his registration reporting requirements. (R. 2:2.) As a result, Young was charged with failing to comply with those requirements in the case underlying the instant appeal—Marathon County Case Number 2019CF1242. (R. 2:1.)

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<sup>2</sup> The Honorable Michael K. Moran.

<sup>3</sup> See Wis. Stat. § 301.45(5)(b)1m.

In July 2021, Young filed a motion to dismiss the charge. (R. 32.) He argued that, under section 301.45(1m), a court must either grant or deny a motion for sex offender registration exception and, therefore, the court did not have the authority to order a temporary exception. (R. 32:3.) Young further argued that, because the court granted his motion (albeit on a temporary basis) in May 2014, he is permanently excepted from the registration requirement. (R. 32:3.)

At a hearing on the motion to dismiss, the court<sup>4</sup> began by noting that a conviction of second-degree sexual assault requires lifetime registration unless an exemption applies. (R. 40:8.) The court explained that, when it placed Young on probation, it “was not necessarily inclined to make him register [for] the rest of his life.” (R. 40:8.) Thus, it gave Young an “opportunity to prove” that he was “worthy” of the underage sexual activity exception by granting him a temporary exception. (R. 40:8.) However, the court added that, upon further reflection, it did not believe that it had the authority to grant a temporary exception. (R. 40:11.) Instead, it believed that the exception must either be granted or denied. (R. 40:10–11.) The court concluded that, because it granted Young’s exception, and because it lacked the authority to grant the exception on a temporary basis, Young is permanently excepted from the registration requirement. (R. 540:12.) Thus, the court dismissed 2019CF1242.

This appeal follows.

### **STANDARD OF REVIEW**

Whether section 973.048(2m) required the circuit court to order Young to register as a sex offender when it sentenced him for a violation of second-degree sexual assault of a child presents a question of statutory interpretation that this Court

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<sup>4</sup> Also the Honorable Michael K. Moran.

reviews independently. *State v. Hinkle*, 2019 WI 96, ¶ 14, 389 Wis. 2d 1, 935 N.W.2d 271.

## ARGUMENT

### **The circuit court erroneously granted Young's motion to dismiss.**

After withholding sentence and placing Young on probation for a violation of second-degree sexual assault of a child in Case Number 2013CF875, the court granted Young's motion to except him from the registration requirement. A short time later, Young's probation was terminated and Young was returned to court and sentenced to a total of 11.5 years. He was also ordered to register as a sex offender. However, at the later hearing on the motion to dismiss in Case Number 2019CF1242, the court concluded that, because it previously granted Young's motion to except him from the registration requirement, it lacked the authority to order him to register after imposing sentence. Thus, the court concluded that, because Young was not required to register as a sex offender, the charge for failing to register must be dismissed.

The circuit court is wrong. Section 973.048(2m) required the court to order Young to register as a sex offender when it sentenced him after revocation in Case Number 2013CF875.

#### **A. Section 973.048(2m) requires circuit courts to order sex offender registration when the court places a person on probation or imposes sentence for second-degree sexual assault of a child.**

Section 973.048(2m) provides, in relevant part:

If a court imposes a sentence or places a person on probation for a violation . . . of [second degree sexual assault of a child], . . . the court shall require the person to comply with the reporting requirements under s. 301.45 unless the court determines, after a



hearing on a motion made by the person, that the person is not required to comply under s. 301.45 (1m).

Section 301.45(1m) is a narrow exception crafted for sex offenders in cases of factually consensual sexual activity between two minors who, “but for the age of the younger child, would have broken no law.” *State v. Joseph E.G.*, 2001 WI App 29, ¶ 11, 240 Wis. 2d 481, 623 N.W.2d 137. It provides that a person convicted of second-degree sexual assault of a child is not required to comply with the sex offender reporting requirements so long as four criteria are met:

- 1) The person had not attained the age of 19 and was not more than 4 years older than the child;
- 2) The child was at least 12-years-old;
- 3) The sexual intercourse did not involve the use or threat of force or violence;
- 4) It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements.

Wis. Stat. § 301.45(1m)(a)1m.

If a person believes that he meets the requirements for the underage exemption, he may file a motion with the court. Wis. Stat. § 301.45(1m)(b). Once the motion is filed, the court “may” request that the person be examined by a psychologist or other expert. Wis. Stat. § 301.45(1m)(d)1. If the person refuses to undergo an examination, the court is required to deny the motion “without prejudice.” Wis. Stat. § 301.45(1m)(d)1.

If no examination is required, or if the person agrees to be examined, a hearing on the motion must be held. Wis. Stat. § 301.45(1m)(bm). At the hearing, the person who filed the motion has the burden of proving by clear and convincing evidence that he satisfies the four criteria specified in paragraph 301.45(1m)(a)1m.

**B. The circuit court based its decision to grant Young's motion to dismiss on an erroneous interpretation of the law.**

In granting Young's motion to dismiss in Case Number 2019CF1242, the circuit court noted that it granted Young's motion to except him from registering as a sex offender when it placed him on probation in Case Number 2013CF875. (R. 40:8.) The court then found that it lacked the authority to make that exception temporary. (R. 40:11.) Thus, the court concluded that, because it granted the exception when it placed Young on probation, and because that exception cannot be temporary, it lacked the authority to order Young to register as a sex offender when it sentenced him after revocation in November 2015. (R. 40:11.)

However, the plain language of section 973.048(2m) requires courts to order registration when it "imposes a sentence or places a person on probation" for a violation of second-degree sexual assault of a child. Thus, the court not only had the authority to order Young to register as a sex offender when it sentenced him after revocation, it was statutorily required to do so. Young was therefore required to register as a sex offender beginning in November 2015. Because he violated his registration requirements in 2019, his motion to dismiss was erroneously granted. (R. 2:3.)

If a person receives an imposed and stayed sentence and is then placed on probation for a violation of second-degree sexual assault of a child, the court is required to order lifetime sex offender registration. Wis. Stat. § 301.45(5)(b)1m. If the court grants the person's section 301.45(1m) motion, the exemption appears to be final under those circumstances.<sup>5</sup>

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<sup>5</sup> For purposes of this appeal, a court's authority to grant a temporary exemption is not at issue. Therefore, the State assumes, solely for purposes of this appeal, that courts lack the ability to grant a temporary exemption under section 301.45(1m).

However, in cases such as this, where the court withholds sentence before placing the person on probation, and when the person is later revoked resulting in a sentence after revocation, the court is obligated under section 973.048(2m) to order registration. That's because, if the person violates probation resulting in revocation, the DOC is required to bring the person back to court "for sentence." Wis. Stat. § 973.10(2)(a). In those instances, the court is required to order registration a second time by virtue of the sentence. That is, the court's requirement to order registration when it imposes sentence after revocation resets the registration requirement, thereby revoking any earlier exceptions granted under section 301.45(1m). Under those circumstances, the person would have to file a second motion under section 301.45(1m) seeking another exemption.

Importantly, there is nothing in the statute prohibiting the defendant from filing a successive motion. In fact, the statute outlines the procedure for filing a motion under section 301.45(1m) after the sentence hearing occurs. *See* Wis. Stat. § 301.45(1m)(b). And, as noted in Section A. above, if the person filing the motion refuses to undergo an examination by a psychologist, the court is required to deny the person's motion "without prejudice." Wis. Stat. § 301.45(1m)(d)1. Thus, a person is not limited to filing a single motion under section 301.45(1m), thereby demonstrating that the registration decision can be revisited.

In sum, the circuit court erred when it concluded that it lacked the authority to order Young to register as a sex offender after imposing sentence. Instead, section 973.048(2m) required the court to order Young to register as a sex offender for life when it sentenced him after revocation in Case Number 2013CF875. Thus, the court erred when it granted Young's motion to dismiss in Case Number 2019CF1242.

## CONCLUSION

This Court should reverse the circuit court's order granting Young's motion to dismiss and remand for further proceedings.

Dated this 7th day of February 2022.

Respectfully submitted,

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### **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,172 words.

Dated this 7th day of February 2022.

Electronically signed by:

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### **CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on February 7, 2022 to:

Kathryn Elizabeth Yanke  
Office of the State Public Defender  
500 North 3rd Street, Suite 310  
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Dated this 7th day of February 2022.

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**Case No. 2021AP1596-CR**

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## APPENDIX CERTIFICATION

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 Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's 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.

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Assistant Attorney General

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I further certify that a copy of the appendix was mailed on February 7, 2022 to:

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