

FILED
05-06-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP001596-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KAYDEN R. YOUNG,

Defendant-Respondent.

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

BRIEF OF
DEFENDANT-RESPONDENT

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Respondent

TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	7
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	7
INTRODUCTION	8
STATEMENT OF THE CASE AND FACTS.....	12
ARGUMENT	17
I. The Standard of Review	18
II. Wisconsin’s Sex Offender Registration Scheme.....	18
A. The underage sexual activity exception: Wis. Stat. § 301.45(1m).....	20
B. Discretionary sex offender registration under Wis. Stat. §§ 301.45(1g)(e) and 973.048.	23
III. The Circuit Court Properly Granted Young’s Motion to Dismiss.	27
A. This Court should deem the state to have forfeited its appellate argument based on Wis. Stat. § 973.048(2m).	27
B. The circuit court properly interpreted Wis. Stat. § 301.45(1m)’s underage sexual activity exception.	30

C. If this Court decides to reach the merits of the state's appellate argument based on § 973.048(2m), the argument must be rejected. 31

CONCLUSION..... 34

CASES CITED

In re Guardianship of Willa L.,
2011 WI App 160, 338 Wis. 2d 114,
808 N.W.2d 155..... 27

In re Joseph E.G.,
2001 WI App 29, 240 Wis.2d 481,
623 N.W.2d 481 22

State ex rel. Kalal v.
Circuit Court for Dane County,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 18

State v. Guarnero,
2015 WI 72, 363 Wis. 2d 857,
867 N.W.2d 400 18

State v. Ndina,
2009 WI 21, 315 Wis. 2d 653,
761 N.W.2d 612 27, 28

State v. Rogers,
196 Wis. 2d 817, 539 N.W.2d 897
(Ct. App. 1995) 27

STATUTES CITED

51.20(13)(ct)1m	19
301.45	7, passim
301.45(b)	22
301.45(1d)-(1p)	19, 23
301.45(1d)(b).....	19, passim
301.45(1g)	17, 19, 20, 31
301.45(1g)(a).....	17, passim
301.45(1g)(a)-(g)	19
301.45(1g)(b).....	19
301.45(1g)(bm), (c), (d), (dd), (dh), (dj), (dp), (dt), (f), and (g)	19
301.45(1g)(dL)	20
301.45(1g)(e).....	10, passim
301.45(1m)	7, passim
301.45(1m)(a)	9, 20, 23
301.45(1m)(a)1m	7, passim
301.45(1m)(a)1m.a.-d.....	9, passim
301.45(1m)(a)1m.d.	12, 29
301.45(1m)(b)	15, passim
301.45(1m)(bm)	22, 31

301.45(1m)(d)1	22
301.45(1m)(e).....	23
301.45(1m)(e)1.-7.	23
301.45(1p)	20, 23
301.45(2)-(4)	7, passim
301.45(2m)	10
938.34(15m)(am)	19
939.345(3)	19
939.615	20
942.08	24, 26
942.09	24, 26
943.01	24, 25, 26
943.15	24, 25, 26
948.01 (6)	21
948.02(1)	21, 25
948.025	21, 25
948.085	25
948.085(2)	21
948.095	25
971.17(1m)(b)1m	19
973.048	10, passim

973.048(1m)	10, passim
973.048(1m)(a)	11, 24, 25, 26
973.048(2m)	8, passim
973.048(3)(a)-(g)	10, 24
980.01(5)	23, 24

ISSUE PRESENTED

In Marathon County Case No. 2013CF875, Kayden Young moved the circuit court, pursuant to the underage sexual activity exception set forth in Wis. Stat. § 301.45(1m)(a)1m., to determine that he was not required to register as a sex offender under Wis. Stat. § 301.45. The circuit court proceeded under § 301.45(1m) and determined that Young was not required to register as a sex offender or otherwise comply with the sex offender reporting requirements set forth in § 301.45.

Did the circuit court properly interpret the applicable statutes when, in this 2019 case, it granted Young's motion to dismiss a charge that Young knowingly failed to register as a sex offender under Wis. Stat. §§ 301.45(2)-(4)?

The circuit court granted Young's motion to dismiss, and this Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Young does not request oral argument, but would welcome the opportunity if this Court determines oral argument would be helpful. While the issue presented concerns the application of well-established rules of law, publication may be appropriate because this case presents a factual

situation different from that in any prior opinions concerning the underage sexual activity exception.

INTRODUCTION

This case concerns the underage sexual activity exception to otherwise mandatory sex offender registration. *See* Wis. Stat. §§ 301.45(1m)(a)1m., (1g)(a). More specifically, the issue presented concerns an underlying question of whether a circuit court has the statutory authority to grant a *temporary* exception from an otherwise mandatory requirement to register.

Below, the state argued that Wis. Stat. § 301.45(1m) authorized the circuit court to grant Young a temporary exception and thereafter exercise its discretion to deny Young the exception previously granted. The circuit court rejected the state's argument, and its own prior position, after concluding there was no legal authority to support a "temporary" underage sexual activity exception.

On appeal, the state now disavows any argument that § 301.45(1m) allows for a "temporary" exception. (State's Brief 10: "Therefore, the State assumes solely for the purposes of this appeal, that courts lack the ability to grant a temporary exemption under section 301.45(1m)."). Instead, the state now relies entirely on a statutory provision never cited or discussed below by either party and never presented to the circuit court: Wis. Stat. § 973.048(2m).

This Court should reject the state's arguments for three main reasons. First, the state forfeited its Wis. Stat. § 973.048(2m) argument by not first raising it in the circuit court. This Court should not reverse on grounds never presented to the circuit court.

Second, this case is squarely controlled by Wis. Stat. § 301.45(1m), which authorized the circuit court to determine whether Young satisfied the underage sexual activity exception to his otherwise mandatory requirement to register as a sex offender. After the circuit court determined that Young satisfied each of the four criteria set forth in Wis. Stat. § 301.45(1m)(a)1m.a.-d., Young was no longer required to comply with the reporting requirements in Wis. Stat. §§ 301.45(2)-(4). *See* Wis. Stat. § 301.45(1m)(a) ("A person is not required to comply with the reporting requirements under this section if any of the following applies[.]"). The subsequent revocation of Young's probation and the state's current reliance on § 973.048(2m), which concerns discretionary sex offender registration and simply recognizes the process set forth in § 301.45(1m) through which the court previously determined that Young satisfied the exception, do not change the fact that Young is not required to register as a sex offender.

Third, the state's belated reliance on Wis. Stat. § 973.048(2m) is seriously flawed on its merits. The state's entire appellate argument regarding § 973.048(2m) spans two pages of its brief-in-chief. (State's Br. 10-11). The state argues that § 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. (State’s Br. 10). From there, the state leaps to the conclusion that a sentencing after revocation automatically “resets the registration requirement, thereby revoking any earlier exceptions granted under section 301.45(1m).” Finally, the state posits that, “[u]nder those circumstances, the person would have to file a *second* motion under section 301.45(1m) seeking *another* exception.” (State’s Br. 11). (Emphasis Added).

However, subsection 973.048(2m) has no direct application to this case. Only by reading this provision completely out of its statutory context, ignoring the full statutory scheme, and inserting words into the statutes, can § 973.048(2m) be interpreted to “reset” and “revoke” the underage sexual activity exception previously granted to Young by the circuit court. (See State’s Br. 11). No provision required Young to file a “second motion” to obtain “another exception.”

As will be further explained below, subsection 973.048 is a sentencing provision that concerns a circuit court’s *discretionary* authority to require a defendant convicted of a *non-sex* offense to register as a sex offender under Wis. Stat. § 301.45. See Wis. Stat. § 973.048(1m), (3), (4), and (5); see *also* Wis. Stat. § 301.45(1g)(e). Read in proper context of section 973.048 and section 301.45, subsection (2m) merely clarifies that a circuit court’s discretionary authority does *not* extend to a defendant, like Young, convicted of a statutorily defined “sex offense.” See Wis. Stat.

§ 973.048(2m). Because Wis. Stat. § 973.048(1m)(a), which immediately precedes subsection (2m), broadly defines the category of cases that are potentially suitable for *discretionary* registration, subsection (2m) simply reminds circuit courts that no such discretion exists when it comes to defendants, like Young, who are automatically required to register upon conviction for a statutorily defined “sex offense.” *See* Wis. Stat. §§ 973.048(1m)(a) *contra* (2m). Stated differently, Wis. Stat. § 973.048(2m) is procedural and informative and not substantive.

Moreover, subsection 973.048(2m) itself explicitly recognizes the substantive rule that a defendant convicted of a “sex offense” is automatically and mandatorily required to register “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).” Neither Wis. Stat. § 973.048 or § 301.45 contains any language supporting an argument that an underage sexual activity exception previously granted is “reset” and “revoked” if a defendant returns to court for sentencing after revocation of probation. Had the state presented its § 973.048(2m) argument below, the circuit court would have been correct to reject it. Should this Court reach the state’s forfeited appellate argument, this Court should do the same.

STATEMENT OF THE CASE AND FACTS

While this appeal concerns the circuit court's order dismissing a charge that Young knowingly failed to register as a sex offender, filed in Marathon County Case No. 2019CF1242, the factual basis for the court's order originates in Marathon County Case No. 2013CF875.¹ The Honorable Judge Michael K. Moran presided over all proceedings in both cases.

In Case No. 2013CF875, Young pled no contest to second degree sexual assault of a child under the age of 16. At the time of the offense, Young was 17 years old and the victim was 14 years old.

On May 6, 2014, the court withheld sentence and placed Young on probation for four years. On May 9, 2014, Young filed a motion with the circuit court, pursuant to Wis. Stat. § 301.45(1m)(a)1m., requesting an underage sexual activity exception to the requirement that he comply with the Wisconsin sex offender registry. On May 19, 2014, the court held a hearing and determined that Young satisfied the requirements for the exception, including that it "is not necessary, in the interest of public protection, to require [Young] to comply with the reporting requirements under this section." *See* Wis. Stat. § 301.45(1m)(a)1m.d. (*See also* State's Br. 5-6). As noted by the state, however, the

¹ As does the state, Young relies on "CCAP" for any facts specific to Marathon County Case No. 2013CF875 not otherwise contained in the record on appeal in this case. (*See* State's Br. 5).

court attempted to grant Young a “temporary” six-month exception “to see how he does on probation.” (State’s Br. 6).

Young was subsequently revoked from probation, and on November 4, 2015, the court sentenced Young to 11 years and six months imprisonment, consisting of five years and six months initial confinement and six years extended supervision. At the sentencing after revocation hearing, the court ordered Young to “[c]omply with the Sex Offender Registration Program.” (See State’s Br. 6).

After serving the initial confinement portion of his sentence in Case No. 2013CF875, Young was released to extended supervision. Shortly thereafter, on November 7, 2019, the state charged Young with knowingly failing to comply with the sex offender registration requirements set forth in Wis. Stat. § 301.45(2)-(4). (2:1-2).

In response, Young filed a motion to dismiss the charge. (32:1-4; App. 3-6). Young argued that Wis. Stat. § 301.45(1m) does not allow for the “temporary” exception the circuit court attempted to order in Case No. 2013CF875. (32:3; App. 5). Instead, Young argued that because the court determined that Young satisfied the criteria under Wis. Stat. § 301.45(1m)(a)1m., he was under no subsequent obligation to register as a sex offender or comply with Wis. Stat. §§ 301.45(2)-(4). (32:3; App. 5).

The state filed a response to Young's motion to dismiss. (36:1-2; App. 7-8). The state conceded that on May 19, 2014, the circuit court made the requisite factual findings under Wis. Stat. § 301.45(1m)(a)1m. and granted Young's motion for an "underage sexual activity exception", albeit "temporarily." (36:1; App. 7). The state next argued, however, that "at the sentencing [after revocation] hearing, the Court, in its discretion, determined that at that time the fourth factor was not met and that it was not in the interest of public protection to allow [Young] not to register." (36:2; App. 8). The state supported its position by arguing that "[r]equiring that the exemption be permanent no matter what transpires after a sentence is not good public policy and would lead to results that [are] contrary to the protection of the community." (36:2; App. 8).

At the hearing on Young's motion to dismiss, the court focused on whether any legal authority supported the court's attempt to temporarily, rather than permanently, grant Young's motion for the underage sexual activity exception:

The court: Do you feel that the Court had the authority to do this? Are you saying that?

The state: I do, Judge. Under the statute, the statute does not indicate that the Court can't do that. There is no --

The court: Does it say a court can do that?

The state: *It does not*, Judge. I think it's within the discretion of the Court under that factor four, which is discretionary for the Court.

(40:4; App. 12). (Emphasis added).

In response, Young argued that under paragraph (1m)(b), a motion for an underage sexual activity exception may be filed before sentencing “to see if these factors are met, and that’s what was done here. The hearing was held and Your Honor found that the four factors are met.” (40:6-7; App. 14-15). Further, Young argued that the statute says “a person is not required to comply with these reporting requirements under this section if the four factors apply, and because Your Honor found that these four factors apply, he has to be exempt.” (40:7; App. 15).

After considering the record and the arguments of the parties, the court issued its decision:

I can certainly tell you that I will not do the stay again for any case whether it helps or doesn’t help because I don’t feel that I have the authority to do it. Reviewing this and reviewing the statutes, I have to have authority and I think that the light’s on or the light’s off on this, and with much reluctance and with much feeling like -- I still have the belief that his age and all the equities at the time would have been weighed in favor by clear and convincing evidence that the exception would have been -- or the exemption would be appropriate. I feel that the exemption would be appropriate and I don’t have the

authority, I think, to stay it, and therefore, if I don't think I have the authority to stay it, again, I don't think that I can proceed in this case and have the Court of Appeals tell me I don't have the authority to stay it, and it doesn't do anybody any good.

I think we have to look at statutes from a perspective of what can we do and what can't we do? ... Imposing and staying the sex offender registry in this kind of situation, that day is gone, so that's not going to happen and I don't think I have the authority to do it unless I'm expressly given that authority, and therefore, I'm going to grant the defense motion at this time and I'll dismiss.

(40:10-12; App. 18-20).

In other words, the circuit court concluded that it had no authority to “temporarily” stay Young’s requirement to register as a sex offender and that because Young satisfied the criteria set forth on Wis. Stat. § 301.45(1m)(a)1m.a.-d., he was permanently not required to register as a sex offender. Upon concluding there is no basis for the state’s charge that he knowingly failed to register as a sex offender, the court dismissed that charge in this case.² (41; App. 26). The state appealed.

² To be clear, Young’s position and the circuit court’s decision are based on the undisputed fact that no other legal basis exists that would separately require Young to comply with Wis. Stat. § 301.45. In this sense, Young’s underage sexual activity exception is “permanent” with respect to Case No. 2013CF875.

ARGUMENT

While Young and the state clearly disagree about whether the circuit court was correct to grant Young's motion to dismiss, there appears to be substantial agreement about the law and facts that control the outcome of this appeal.

First, based on his second degree sexual assault of a child conviction, Young was initially required to register as a sex offender under Wis. Stat. § 301.45(1g)(a), unless the circuit court determined that the underage sexual activity exception applied. *See* Wis. Stat. §§ 301.45(1g), (1m).

Second, Young filed a motion under Wis. Stat. § 301.45(1m)(b) and the court proceeded as directed under the statute and determined that Young satisfied the criteria set forth in Wis. Stat. §§ 301.45(1m)(a)1m.a.-d. and ordered that he was not required to register as a sex offender.

Third, the circuit court has no authority to grant a "temporary" underage sexual activity exception under Wis. Stat. § 301.45(1m).

Thus, the sole dispute in this case is which statutory provision controls: Wis. Stat. § 301.45(1m) or § 973.048(2m). For the reasons set forth above and as argued below, this Court should hold that § 301.45(1m) controls and the circuit court was correct to grant Young's motion to dismiss.

I. The Standard of Review

To decide whether the circuit court properly granted Young's motion to dismiss, this Court must engage in statutory interpretation, which presents a question of law this Court reviews independently, but on which an appellate court benefits from the discussions of the circuit court. *State v. Guarnero*, 2015 WI 72, ¶12, 363 Wis. 2d 857, 867 N.W.2d 400.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is generally "given its common, ordinary, and accepted meaning." *Id.* Because "[c]ontext" and "structure of the statute in which the operative language appears" are "important to meaning," "statutory language is interpreted in the context in which is it used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd results." *Id.*, ¶46. Further, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.*

II. Wisconsin's Sex Offender Registration Scheme

Individuals who are required to register as sex offenders in Wisconsin fall into two categories: (1) individuals who are automatically or mandatorily required to register based on conviction, adjudication, disposition, or some other prescribed status, and (2)

individuals who are required to register because a court exercised its discretion and determined that the interests of the public require registration. *See* Wis. Stat. §§ 301.45(1g)(a)-(g).³

For the mandatory category of cases, circuit courts have no discretion to determine whether an individual is required to register as a sex offender. For example, “a person convicted or adjudicated delinquent on or after December 25, 1993, for a sex offense,” as defined by § 301.45(1d)(b), “shall comply with the reporting requirements under this section.” Wis. Stat. §§ 301.45(1g), (1g)(a). Similarly, any person in prison or on community supervision on or after December 25, 1993, for a “sex offense,” must automatically register. Wis. Stat. § 301.45(1g)(b). The list goes on. *See* Wis. Stat. §§ 301.45(1g)(bm), (c), (d), (dd), (dh), (dj), (dp), (dt), (f), and (g).

For the discretionary category of cases, Wis. Stat. § 301.45 requires some individuals to register and comply with Wis. Stat. § 301.45’s reporting requirements if a circuit court exercises its discretion and determines that registration is in the public interest. For example, Wis. Stat. § 301.45(1g)(e) covers a person who “[i]s ordered by a court under s. 51.20(13)(ct)1m., 938.34(15m)(am), 939.345(3), 971.17(1m)(b)1m. or 973.048(1m) to comply with the reporting requirements under this section.” *See also*

³ For the court’s convenience, a copy of Wis. Stat. §§ 301.45(1d)-(1p) is included in the appendix to this brief. (*See* App. 28-29).

Wis. Stat. §§ 301.45(1g)(dL) (required to register if “placed on lifetime supervision under s. 939.615”); (1g)(em) (required to register based on a finding of need of protection or services and ordered to comply by a court).

Finally, the statute provides for two types of judicially determined “exceptions” to the “registration requirement.” *See* Wis. Stat. §§ 301.45(1g), (1m), and (1p). Only the first type is relevant to this case: § 301.45(1m)’s “underage sexual activity exception.” The other exception concerns “privacy-related offenses,” which has no application to Young’s case. *See* Wis. Stat. § 301.45(1p).

A. The underage sexual activity exception:
Wis. Stat. § 301.45(1m).

The underage sexual activity exception to Wisconsin’s sex offender registry is set forth in Wis. Stat. § 301.45(1m). *See also* Wis. Stat. § 301.45(1g) (“*Except as provided in subs. (1m) and (1p), a person shall comply with the reporting requirements under this section if her or she meets one or more of the following criteria.*”). (Emphasis added). Under § 301.45(1m)(a), “[a] person is not required to comply with the reporting requirements under this section if any of the following applies.” Subdivision 1m. sets forth four criteria that must each be satisfied to qualify for the underage sexual activity exception:

- (a) The person meets the criteria under sub. (1g)
 - (a) to (dd) based on any violation, or on the solicitation, conspiracy or attempt to commit

any violation, of s. 948.02(1) or (2), 948.025, or 948.085(2).

- (b) The violation, or the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2) did not involve sexual intercourse, as defined in s. 948.01 (6), either by the use or threat of force or violence or with a victim under the age of 12 years.
- (c) At the time of the violation, or of the solicitation, conspiracy or attempt to commit the violation, of s. 948.02 (1) or (2), 948.025, or 948.085 (2), the person had not attained the age of 19 years and was not more than 4 years older or not more than 4 years younger than the child.
- (d) It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.

Wis. Stat. §. 301.45(1m)(a)1m.a.-d.

In summary, the underage sexual activity exception set forth in § 301.45(1m)(a)1m. applies if (1) the person committed one of four enumerated “sex offenses:” first or second degree sexual assault of a child, repeated sexual assault of the same child, or sexual assault of a child placed in substitute care; (2) the sex offense did not involve sexual intercourse by the use or threat of force or violence or a victim under the age of 12 years; (3) there is no more than a four year age difference between the person, who must

be under 19 years old, and the victim; and (4) the circuit court determines that it is not necessary, “in the interest of public protection,” to require the person to register as a sex offender.

The legislature enacted the underage sexual activity exception “[t]o craft a narrow exception to mandatory registration for sex offenders in cases of factual consensual sexual contact between two minors who, but for the age of the younger child, would have broken no law.” *In re Joseph E.G.*, 2001 WI App 29, ¶11, 240 Wis.2d 481, 623 N.W.2d 481. “In such a case, the circuit court has the discretion to excuse the offender from registration if it determines that factually consensual contact has occurred, the offender presents no danger to the public, and the court is satisfied that the purposes of § 301.45 are not undermined by excusing registration.” *Id.*

The statute sets forth a detailed procedure to be followed if a person “believes that he or she is not required under par. (a) to comply with the reporting requirements under this section.” Wis. Stat. § 301.45(b). First, “[i]f a person believes” they satisfy the criteria for the exception, “the person may move a court to make a determination of whether the person satisfies the criteria specified in par. (a).” Wis. Stat. § 301.45(1m)(b). Second, if a motion is filed under § 301.45(1m)(b), a “court shall hold a hearing.” Wis. Stat. § 301.45(1m)(bm). Third, before deciding the motion, the “court may request the person to be examined by a physician, psychologist or other expert approved by the court.” Wis. Stat. § 301.45(1m)(d)1.

Fourth, at a hearing on the motion, the person has the “burden of proving by clear and convincing evidence that he or she satisfies the criteria specified in par. (a).” Wis. Stat. § 301.45(1m)(e). In determining whether the person has established that “[i]t is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section,” the court “may consider” the seven factors set forth in Wis. Stat. § 301.45(1m)(e)1.-7.

In the end, “[a] person is not required to comply with the reporting requirements under [Wis. Stat. § 301.45]” if the court determines that the person satisfies the underage sexual activity criteria listed in Wis. Stat. §§ 301.45(1m)(a)1m.a.-d. Wis. Stat. § 301.45(1m)(a).

B. Discretionary sex offender registration under Wis. Stat. §§ 301.45(1g)(e) and 973.048.

As set forth in Wis. Stat. § 301.45(1g)(e), one type of discretionary sex offender registration is provided for in Wis. Stat. § 973.048(1m).⁴ Like the other bases for discretionary registration set forth in § 301.45(1g)(e), § 973.048(1m) allows for discretionary registration, in some circumstances, if a circuit court finds that the underlying conduct was “sexually motivated,” as defined by Wis. Stat. § 980.01(5), and

⁴ As with Wis. Stat. §§ 301.45(1d)-(1p), a copy of Wis. Stat. § 973.048 is also included in the appendix to this brief. (See App. 30-31).

that sex offender registration would be “in the interest of public protection.” *See* Wis. Stat. § 973.048(1m)(a).

Paragraph 973.048(1m)(a) addresses discretionary sex offender registration for defendants convicted of certain *non*-sex offenses:

Except as provided in sub. (2m), if a court imposes a sentence or places a person on probation for any violation, or for the solicitation, conspiracy, or attempt to commit any violation, under ch. 940, 944, or 948 or s. 942.08 or 942.09, or ss. 943.01 to 943.15, the court may require the person to comply with the reporting requirements under s. 301.45 if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45.

Wis. Stat. § 973.048(1m)(a). (Emphasis added).

In determining whether it would be “in the interest of public protection to have the person report under s. 301.45,” the court may consider five enumerated factors, and “any other factor that the court determines to be relevant to the particular case.” *See* Wis. Stat. § 973.048(1m)(a) and (3)(a)-(g).

To summarize, Wis. Stat. §§ 301.45(1g)(e) and 973.048(1m) concern discretionary sex offender registration for defendants convicted of conduct not statutorily defined as a “sex offense” under Wis. Stat. § 301.45(1d)(b). More specifically, only offenses listed in chapters 940, 944, or 948 or section 942.08 or 942.09

or sections 943.01 to 943.15, are subject to a determination that the conduct was “sexually motivated” or that the public would be protected by requiring the individual to register as a sex offender. *See* Wis. Stat. §§ 973.048(1m)(a) and 301.45(1g)(e).

As explicitly referenced in Wis. Stat. § 973.048(1m)(a), subsection (2m) clarifies that circuit courts have no such discretion, outside of Wis. Stat. § 301.45(1m)’s underage sexual activity exception, to decide whether someone convicted of a statutorily enumerated “sex offense” is required to register as a sex offender. Subsection 973.048(2m) provides:

If a court imposes a sentence or places a person on probation for a violation, or for the solicitation, conspiracy or attempt to commit a violation, of s. 940.22(2), 940.225(1), (2), or (3), 944.06, 948.02(1) or (2), 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, 948.095, 948.11 (2) (a) or (am), 948.12, 948.13, or 948.30, of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies, or of s. 940.30 or 940.31 if the victim was a minor and the person was not the victim's parent,⁵ 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).

⁵ This list of enumerated offenses is the same list set forth in Wis. Stat. § 301.45(1d)(b)’s definition of “sex offense.”

Read in context with § 301.45, and specifically in light of § 301.45(1g)(a)'s mandatory registration provision compared to § 301.45(1g)(e)'s discretionary registration provision, § 973.048(2m) reminds circuit courts that a person convicted of a statutorily defined "sex offense" is automatically required to register as a sex offender *unless* the court determines the person satisfies § 301.45(1m)'s underage sexual activity exception.

Recall, paragraph 973.048(1m)(a) states: "*Except as provided in sub. (2m)*, if a court imposes a sentence or places a person on probation for *any* violation, or for the solicitation, conspiracy, or attempt to commit *any violation*, under *ch. 940, 944, or 948* or s. 942.08 or 942.09, or ss. 943.01 to 943.15, the court *may* require the person to comply with the reporting requirements under s. 301.45..." (Emphasis added). By referencing subsection (2m), which in turn references § 301.45(1m)'s underage sexual activity exception, the circuit court is reminded that "any violation" under chapters 940 or 948 does not include enumerated sex offenses. Thus, the import of this subsection is to remind courts that the discretionary authority granted in section 973.048 does not extend to "any" statutorily defined sex offense even though all sex offenses are included within chapters 940 and 948. *See* Wis. Stat. §§ 301.45(1d)(b), 973.048(1m)(a), 973.048(2m).

As will be argued further below, the state's argument that § 973.048(2m) sets forth an affirmative requirement to register that "resets" and "revokes" an

underage sexual activity exception previously granted has been forfeited, but if considered, must be rejected on the merits.

III. The Circuit Court Properly Granted Young's Motion to Dismiss.

A. This Court should deem the state to have forfeited its appellate argument based on Wis. Stat. § 973.048(2m).

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. Arguments raised for the first time on appeal are forfeited. *In re Guardianship of Willa L.*, 2011 WI App 160, ¶¶19-27, 338 Wis. 2d 114, 808 N.W.2d 155. Moreover, the forfeiture rule focuses “on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court. *Id.*, ¶25 (citing *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) for the proposition that “the forfeiture rule requires that, to preserve its arguments, a party must “make all of their arguments to the trial court.””).

Because forfeiture is a rule of “judicial administration,” appellate courts have discretion to address arguments raised for the first time on appeal. *Id.*, ¶23. For example, this Court may ignore forfeiture when a case presents an “important recurring issue.” *Id.* However, the “forfeiture rule promotes efficient and fair litigation.” *Id.*, ¶26. As explained by *Ndina*:

The purpose of the “forfeiture” rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from “sandbagging” opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

State v. Ndina, 315 Wis. 2d 653, ¶30.

In this state’s appeal, the state challenges the circuit court’s dismissal of Case No. 2019CF1242 on the ground that Wis. Stat. § 973.048(2m) controls and required the circuit court to require Young to register as a sex offender in spite of the court’s prior determination that he met the underage sexual activity exception to mandatory registration. The state therefore faults the circuit court for failing to apply the state’s appellate interpretation of § 973.048(2m), but the record is clear that the state failed to raise this argument below.

In response to Young’s motion to dismiss, the state filed a letter brief in which it referenced only one statute: Wis. Stat. § 301.45(1m). (36). The state argued that § 301.45(1m) provided the circuit court with authority to exercise its discretion to determine that “the exemption no longer applied” after Young’s probation was revoked. (36:1-2).

Further, at the hearing on Young's motion, the circuit court gave the state another opportunity to provide the court with "authority" upon which the state's position was based. (40:4). The state cited Wis. Stat. § 301.45(1m)(a)1m.d.'s "factor four, which is discretionary for the Court." (40:4). At no point in the circuit court did the state argue that Wis. Stat. § 973.048(2m) authorized or required the court to order Young to register as a sex offender at the time of his sentencing after revocation or that any statute requires a new underage sexual activity proceeding after Young's probation was revoked and he returned to court for sentencing after revocation.

The state clearly forfeited any argument that § 973.048(2m) authorized or required the circuit court to order Young to register as a sex offender at Young's sentencing after revocation. To encourage efficient and fair litigation, this Court should refuse to consider the state's new argument on appeal. The state has not demonstrated that this is a "recurring" issue or provided any explanation or excuse for its failure to raise this argument in the circuit court.

Nevertheless, should the court choose to ignore the state's forfeiture, the state's reliance on § 973.048(2m) should be rejected because § 301.45(1m) controls the outcome of this case and § 973.048(2m) merely reinforces the process by which a court determines whether the underage sexual activity exception applies. Further, the state's expansive interpretation of § 973.048(2m), for which it cites no persuasive or controlling authority, ignores the plain

meaning of the statutory text, and fails to interpret the text in context and within structure statutory scheme at issue here.⁶

B. The circuit court properly interpreted Wis. Stat. § 301.45(1m)'s underage sexual activity exception.

As demonstrated above, the process by which an individual, otherwise automatically and mandatorily required to register as a sex offender under § 301.45(1g)(a), can seek the underage sexual activity exception is plain and clear. Young proceeded under § 301.45(1m) and the circuit court determined that Young satisfied the criteria set forth in § 301.45(1m)(a)1m.a.-d. By law, Young was thereafter not required to comply with § 301.45. *See* Wis. Stat. §§ 301.45(1m)(a)1m., (1g). The state does not challenge the circuit court's determination that Young satisfied the criteria for the underage sexual activity exception. There is, therefore, no factual or legal basis that he knowingly failed to comply with the reporting requirements set forth in Wis. Stat. § 301.45(2)-(4).

Further, as will be argued more directly below, § 973.048(2m) does not abrogate or invalidate a circuit court's prior determination that an individual

⁶ To the extent that the court concludes that a decision concerning the specific application of the underage sexual activity exception at issue in this case is appropriate for publication, then Young would very much welcome a full and complete decision and opinion on the merits even if the court agrees the state forfeited its § 973.048(2m) argument.

satisfies the criteria for the underage sexual activity exception.

The only argument to the contrary raised below was whether the court acted lawfully when it attempted to limit or stay Young's underage sexual activity exception for six months "to see how he does on probation." The state now concedes, in this case at least, that the court had no such authority.

C. If this Court decides to reach the merits of the state's appellate argument based on § 973.048(2m), the argument must be rejected.

To review, upon his conviction for second degree sexual assault, Young was required, to "comply with the reporting requirements under [§ 301.45]" unless the circuit court determined he satisfied the underage sexual activity criteria set forth in Wis. Stat. § 301.45(1m)(a)1m.a.-d. *See* Wis. Stat. §§ 301.45(1g), (1g)(a), and (1d)(b). After he was placed on probation, Young proceeded under Wis. Stat. § 301.45(1m) and moved the court to "make a determination" that he satisfied the underage sexual activity exception set forth in Wis. Stat. § 301.45(1m)(a)1m. *See* Wis. Stat. § 301.45(1m)(b). In response, the court held a hearing, as required under § 301.45(1m)(bm) and determined that Young satisfied the criteria under § 301.45(1m)(a)1m.a.-d.

Nevertheless, the state now argues, in spite of the otherwise undisputed record and basic legal principles concerning the underage sexual activity

exception, that the circuit court was required by § 973.048(2m) to order Young to register as a sex offender at his sentencing after revocation in Case No. 2013CF875 and “revoke” the exception previously granted.

As demonstrated above, § 973.048(2m) falls within § 973.048, which generally concerns a court’s discretionary authority to require someone convicted of a *non*-sex offense to register as a sex offender. Whereas § 973.048(2m) simply reminds courts that they have no such discretion when it comes to mandatory registration for individual’s convicted of statutorily defined sex offenses, like Young, § 301.45(1m) provides the substantive and procedural authority supporting both the court’s determination that Young satisfied the criteria to obtain the underage sexual activity exception and the court’s order dismissing the charge in this case.

The plain meaning and import of Wis. Stat. § 973.048(2m) is clear. Subsection (2m) simply reminds courts that, outside of Wis. Stat. § 301.45(1m), they have no discretion to decide whether a person convicted of a “sex offense” must comply with the reporting requirements set forth in Wis. Stat. §§ 301.45(2)-(4). The state’s attempt to rely on subsection (2m) to “reset” and “revoke” the underage sexual activity exception granted to Young by the circuit court is without merit. No statutory provision or text supports the state’s theory that a sentencing after revocation “resets the registration requirement, thereby revoking any earlier exceptions

granted under section 301.45(1m).” (State’s Br. 11). Moreover, no authority supports the state’s assertion that Young had to file a “second motion under section 301.45(1m) seeking another exception.” (State’s Br. 11).

The only reasonable interpretation of these statutory provisions and the statutory scheme is that Wis. Stat. § 301.45(1m) controls the substantive and procedural requirements by which Young rightly obtained the underage sexual activity exception to his otherwise mandatory requirement to register as a sex offender. While Wis. Stat. § 973.048 provides circuit courts with discretion to require some non-mandatory offenders to register and comply with Wis. Stat. § 301.45, the provision upon which the state’s entire appellate argument relies has no direct application to Young’s case.

CONCLUSION

The circuit court properly granted Young's motion to dismiss the state's charge that he knowingly failed to register as a sex offender. The underage sexual activity exception, set forth in Wis. Stat. § 301.45(1m) does not authorize a "temporary" exception and the circuit court was correct when it determined that no such authority supported the state's argument below. Further, if this Court decides to ignore the state's forfeited § 973.048(2m) argument, this Court should reject the state's interpretation of that provision as contrary to the plain text of Wis. Stat. §§ 301.45 and 973.048 as well as inconsistent with the context and structure of the statutory scheme within which it resides. This Court should affirm.

Dated this 6th day of May, 2022.

Respectfully submitted,

Electronically signed by

Jeremy A. Newman

JEREMY A. NEWMAN

Assistant State Public Defender

State Bar No. 1084404

Office of the State Public Defender

Post Office Box 7862

Madison, WI 53707-7862

(608) 264-8566

newmanj@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,128 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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 6th day of May, 2022.

Signed:

Electronically signed by

Jeremy A. Newman

JEREMY A. NEWMAN

Assistant State Public Defender