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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2021AP1596-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

KAYDEN R. YOUNG,
Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

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

In the State's brief-in-chief, it noted that, after Young was convicted of second-degree sexual assault of a child¹ in Marathon County Case Number 2013CF875, the court placed him on probation. The court then found that the underage sexual activity exception of Wis. Stat. § 301.45(1m) applied, so Young was excepted from the otherwise mandatory lifetime sex offender registration requirement.

Young's probation was soon revoked, and he was returned to court for sentencing. The court imposed a bifurcated sentence and ordered Young to register as a sex offender. Young did not object, nor did he challenge that determination on appeal.

A few years later, Young was charged in a separate case (Marathon County Case Number 2019CF1242) with failing to comply with his registration requirements. Young filed a motion to dismiss. He noted that in Case Number 2013CF875, the court granted his exception motion under section 301.45(1m)(a)1m. after he was placed on probation. He then argued that, therefore, the court was precluded from ordering him to register as a sex offender when it imposed the sentence for violating Wis. Stat. § 948.02(2). The circuit court agreed and dismissed the case.

On appeal, the State argues that the court erred. Specifically, it argues that the plain language of Wis. Stat. § 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 after revocation for violating section 948.02(2).

¹ Wis. Stat. § 948.02(2).

In his response brief, Young contends that the State forfeited its argument that section 973.048(2m) required the court to order Young to register as a sex offender when it sentenced him after revocation because it did not make that specific argument in the circuit court. (Young's Br. 9.) He also contends that section 973.048(2m) "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" and, therefore, "has no direct application to this case." (Young's Br. 9.) He argues that, rather, "this case is squarely controlled by Wis. Stat. § 301.45(1m)." (Young's Br. 10.) He also argues that "[n]either Wis. Stat. § 973.048 [n]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." (Young's Br. 11.)

For the reasons set forth below, this Court should decline to apply forfeiture in this case. And, contrary to Young's contention, this case is governed by section 973.048(2m)—the sentencing statute governing sex offender registration requirements—which required the circuit court to order Young to register as a sex offender both when it placed him on probation and when it sentenced him after revocation for violating section 948.02(2).

Forfeiture

Generally, issues not raised or considered by the circuit court will not be considered for the first time on appeal. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). But it is within this Court's discretion to disregard forfeiture and consider the merits of any issue because the rule of forfeiture is one of judicial administration and not of power. *D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson*, 2008 WI 126, ¶ 41, 314 Wis. 2d 560, 757 N.W.2d 803 (appellate courts may address a forfeited issue at its discretion when the Court deems the issue important).

Here, the State concedes that the precise issue raised in its brief-in-chief, i.e., that section 973.048(2m) required the circuit court to order Young to register as a sex offender when it sentenced him after revocation, was not argued in the circuit court. However, this court should overlook forfeiture.

As noted above and in the State's brief-in-chief, after the court sentenced Young after revocation in Case Number 2013CF875, it ordered Young to register as a sex offender. (State's Br. 6.) As also noted above, Young did not object or challenge that order on appeal. Instead, Young merely chose to ignore the order and, when he was charged with failing to register in the case underlying the instant appeal (i.e., Case Number 2019CF1242), he successfully convinced the court that it should not have ordered him to register in Case Number 2013CF875 and, therefore, he cannot be guilty of failing to register in Case Number 2019CF1242.

Young's failure to contest the court's registration order in Case Number 2013CF875, combined with the court's dismissal of the charges that he failed to register in Case Number 2019CF1242, has created a conflict in the status of Young's registration that this Court needs to resolve. That is, although the court in Case Number 2019CF1242 concluded that it should not have ordered Young to register as a sex offender when it sentenced him after revocation in Case Number 2013CF875, that conclusion had no impact on the registration order that it imposed in Case Number 2013CF875. And because Young failed to object or challenge the order on appeal, Young is still required to register as a sex offender based on Case Number 2013CF875. In fact, both

CCAP² and the Department of Corrections³ have Young listed as being required to register as a sex offender.

It is also again worth pointing out that Young is statutorily required to register as a sex offender for his lifetime.⁴ The purpose of the sex offender registration statute is to “protect the public and assist law enforcement.” *State v. Smith*, 2010 WI 16, ¶ 26, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting *State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 41, 245 Wis. 2d 310, 630 N.W.2d 164). According to the DOC, Young is only 26 years old.⁵ And according to CCAP, Young has a growing criminal history, including an open felony battery by prisoner charge,⁶ making Young’s failure to register as a sex offender particularly dangerous. Thus, given the confusion in Young’s registration status and the gravity of the consequences at issue in this case, this Court should overlook forfeiture.

Section 973.048(2m)

Addressing the merits of the State’s brief, Young contends that “the sole dispute in this case is which statutory provision controls: Wis. Stat. § 301.45(1m) or § 973.048(2m).” (Young’s Br. 17.) He then argues that subsection 973.048(2m) does not control or even apply to this case because, in his view,

² <https://wcca.wicourts.gov/caseDetail.html?caseNo=2013CF000875&countyNo=37&mode=details> (last visited June 22, 2022).

³ <https://appsdoc.wi.gov/lop/details/detail> (last visited June 22, 2022).

⁴ See Wis. Stat. § 301.45(5)(b)1m.

⁵ <https://appsdoc.wi.gov/lop/searchbasic.do> (last visited June 22, 2022).

⁶ Marathon County Case Number 2021CF34. See <https://wcca.wicourts.gov/caseDetail.html?caseNo=2021CF000034&countyNo=37&index=0&mode=details> (last visited June 22, 2022).

section 973.048 is merely 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.” (Young’s Br. 10.) He further contends that “subsection (2m) simply reminds circuit courts that no such discretion exists when it comes to [sex offenses as defined by Wis. Stat. § 301.45(1d)(b)].” (Young’s Br. 11.) Young is wrong for at least two reasons. First, this case is not about whether section 973.048(2m) or 301.45(1m) controls. Rather the question is, did section 973.048(2m) require 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 section 948.02(2) after his probation was revoked.

Second, Young’s interpretation of section 973.048 offends principles of statutory construction because it ignores the context of that statute. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory language is interpreted in the context in which it is used.”). Section 973.048 is a sentencing statute that covers *all* sex offender registration requirements, not just discretionary circumstances. That is, section 973.048, which is part of the sentencing code, “specifies when a circuit court may or must order sex-offender registration pursuant to Wis. Stat. § 301.45.” *State v. Martel*, 2003 WI 70, ¶ 9, 262 Wis. 2d 483, 664 N.W.2d 69, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835. Section 973.048(1m) provides that a sentencing court *may* require a person to register as a sex offender if the person committed certain enumerated offenses and the court determines that the underlying conduct was sexually motivated and that it would be in the interest of public protection to have the person report under section 301.45. Wis. Stat. § 973.048(1m)(a).

By contrast, section 973.048(2m) provides that, “[i]f a court imposes a sentence or places a person on probation for a violation . . . of [inter alia, section 948.02(2)], . . . 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).” Wis. Stat. § 973.048(2m). Therefore, section 973.048(2m) does more than merely act as a reminder to sentencing courts. Instead, it is a statutory directive that courts must follow when imposing a sentence or placing a person on probation for a violation of section 948.02(2). *See Smith*, 323 Wis. 2d 377, ¶ 22 (“Wisconsin Stat. § 973.048(2m) is the subsection that *requires* registration for those who are convicted of a sex offense under Wis. Stat. § 301.45.” (emphasis added)).

Here, after Young’s probation was revoked, he was returned to the circuit court to be sentenced. Because Young was convicted of second-degree sexual assault of a child in violation of section 948.02(2), section 973.048(2m) necessarily applied to Young’s case.

Young also contends that “[n]either Wis. Stat. § 973.048 [n]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.” (Young’s Br. 11.) He argues that there is “no authority [to] support[] the state’s assertion that Young had to file a ‘second motion under section 301.45(1m) seeking another exception.’” (Young’s Br. 33). Young is wrong: that is precisely what sections 973.048(2m) and 301.45(1m) provide.

As the State noted in its brief-in-chief, section 973.048(2m) provides in relevant part that:

If a court imposes a sentence or places a person on probation for a violation . . . of [948.02(2)], . . . 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).

(State's Br. 8–9.)

As the statute makes clear, *anytime* a court imposes a sentence or places a person on probation for a violation of section 948.02(2), it *must* order that person to register as a sex offender unless it later determines that the exception of section 301.45(1m) applies. Thus, in a case like this, where the defendant is both placed on probation and later sentenced after revocation, the court *must* order the defendant to register as a sex offender on both occasions unless it later determines that the person is not required to comply under section 301.45(1m). Wis. Stat. § 973.048(2m). In other words, section 973.048 makes clear that a court's determination that a person is not required to register under section 301.45(1m) after placing the person on probation is necessarily reset by operation of the statute if the court later imposes a sentence after revocation.

Section 973.048(2m) also makes clear that, if the court sentences the defendant after revocation, the defendant may file a second motion seeking the underage sexual activity exception under section 301.45(1m). Under those circumstances, the defendant need not register as a sex offender after being sentenced only if the court again “determines, after a hearing on a motion made by the person, that the person is not required to comply under s. 301.45 (1m).” Wis. Stat. § 973.048(2m).

The language of section 301.45(1m) supports the State's interpretation. That is, to be excepted from the registration requirement, one of the findings that the court must make is 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.” Wis. Stat.

§ 301.45(1m)(a)1m.d. In making that determination, courts may consider several factors, including “[t]he probability that the person will commit other violations in the future.” Wis. Stat. § 301.45(1m)(e)5. Such language is consistent with a recognition that, when considering whether a person qualifies for the underage sexual activity exception, courts will necessarily view a person who has just been placed on probation very differently than a person who has committed a crime or other wrongful acts serious enough to justify probation revocation.

Nonetheless, Young argues that, “[a]fter the circuit court determined that [he] 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).” (Young’s Br. 9.) But again, as explained above, that interpretation ignores the plain language of section 973.048(2m), which requires courts to order registration *whenever* it imposes a sentence or places a person on probation for a violation of section 948.02(2). In fact, Young’s interpretation of section 973.048(2m) necessarily adds language to the statute. That is, Young’s interpretation would require the statute to include the following italicized language:

If a court imposes a sentence or places a person on probation for a violation . . . of [948.02(2)], . . . 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). *This section does not apply at sentencing after revocation if the court determined that the person is not required to comply under s. 301.45 (1m) after placing the person on probation.*

This Court “should not read into the statute language that the legislature did not put in.” *State v. Hemp*, 2014 WI 129, ¶ 31, 359 Wis. 2d 320, 856 N.W.2d 811 (quoting *Brauneis*

v. State, Labor & Indus. Review Comm'n, 2000 WI 69, ¶ 27, 236 Wis. 2d 27, 612 N.W.2d 635). Therefore, it must disregard Young's interpretation.

CONCLUSION

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

Dated this 22nd day of June 2022.

Respectfully submitted,

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FORM AND LENGTH 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 2,406 words.

Dated this 22nd day of June 2022.

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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.

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