STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001596-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KAYDEN R. YOUNG,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

The issue presented to this Court is whether a circuit court, when imposing sentence upon an individual after revocation of probation, is required to issue a superseding order requiring the individual to comply with the § 301.45 even if the court previously determined, under Wis. Stat. § 301.45(1m)(a)1m., that the individual satisfied all of the requirements to be declared exempt from sex offender registration?

In a published decision, the court of appeals analyzed, as a matter of first impression, how Wis. Stat. § 301.45(1m)(a)1m., the underage sexual activity exception, interacts with Wis. Stat. § 973.048(2m), which requires sentencing courts to order an individual convicted of a statutorily defined "sex offense" to register as a sex offender, "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)." *See State v. Kayden R. Young*, 2024 WI App 65, __Wis. 2d __, __N.W. __. (Pet. App. 3-18).

In Young's case, the circuit court dismissed a charge that Young knowingly failed to comply with the reporting requirements of the sex offender registry after it determined that Young was not required to register because the court had already declared Young exempt under Wis. Stat. § 301.45(1m)(a)1m.

The court of appeals reversed, holding that even if the circuit court already found Young exempt under § 301.45(1m), that *whenever* a court sentences a person convicted of a "sex offense," it must order the person to comply with § 301.45 unless the court redetermines, after the person files a new motion, that the person again satisfies the underage sexual activity exception. (*See* Pet. App. 14-16, ¶¶25-29).

This Court should accept review, reverse the court of appeals' decision below, and order the charge against Kayden R. Young to be dismissed because the circuit court has already determined that he is not required to register as a sex offender under § 301.45(1m)(a)1m.'s underage sexual activity exception.

CRITERIA SUPPORTING REVIEW

This Court has never directly addressed the underage sexual activity exception to Wis. Stat. § 301.45, Wisconsin's Sex Offender Registration statute. In *State v. Cesar G.*, this Court held that a juvenile court has discretion to stay a disposition requiring a juvenile to register as a sex offender. 2004 WI 61, ¶40, 272 Wis. 2d 22, 682 N.W.2d 1. *Cesar G.*, however, turned on the juvenile court's clear statutory authority to stay a disposition, including an order to register as a sex offender. *Id.*, ¶¶15-16. No parallel provision exists with respect to a circuit court's authority to stay sex offender registration. *See* Wis. Stat. §§ 301.45(1m), 973.048.

In *State v. Joseph E.G.*, 2001 WI App 29, ¶11, 240 Wis. 2d 481, 623 N.W.2d 137, the court of appeals explained that the legislature enacted the underage sexual activity exception "[t]o craft a narrow exception to mandatory registration for sex offenders in cases of factually consensual sexual contact between two minors who, but for the age of the younger child, would have broken no law." Only after the circuit court exercises its discretion and determines (1) that factually consensual contact has occurred, (2) that the offender presents no danger to the public, and (3) that the purposes of § 301.45 are not undermined by excusing registration, may a circuit court exempt an individual from being required to register under § 301.45. *Id.* Again, no authority exists for a court to stay an order to comply with § 301.45. If a court declared an offender exempt under § 301.45(1m), the person is not obligated to comply with Wisconsin's sex offender registration scheme.

The issue in Young's case is whether, how, and when an order issued pursuant to Wis. Stat. § 973.048(2m) supersedes a previously issued underage sexual activity exemption under Wis. Stat. § 301.45(1m)(a)1m. Review by this Court is warranted because a decision from this Court will develop and clarify the law and because the court of appeals' decision and publication leaves open a question of law that is likely to recur unless resolved by this Court. *See* Wis. Stat. § (Rule) 809.62(1r)(c)3.

Specifically, the court of appeals statutory interpretation of Wis. Stat. § 973.048(2m) acknowledges that the legislature did *not* use the word "whenever," and instead chose to use the word "if" with regard to when a court is required to order an individual to register as a sex offender under § 301.45. (*See* Pet. App. 10-11, ¶17). The court admitted that "had the legislature used the word 'whenever' instead of 'if' at the very beginning of this provision, our interpretation would presumably be beyond reproach." (*See* Pet. App. 10-11, ¶17). While the court found it "difficult" to ascribe any other meaning to "if" other than "whenever," the alternative meaning advocated by Young is easy to understand.

Young argued below that § 973.048(2m) was triggered when the circuit court placed him on probation and then subsequently ordered that he was exempt from the requirement to register as a sex offender because he met the requirements for the underage sexual activity exception. Because no statutory provision requires the court's order exempting Young from registering under § 301.45(1m)(a)1m. to be superseded by a subsequent sentencing order, the court of appeal's interpretation of § 973.048(2m)'s "if" as necessarily meaning "whenever" is not "beyond reproach." Thus, instead of "whenever," "if" simply means "if."

Furthermore, the court of appeals' forward-looking application of § 973.048(2m) results in confusion and a lack of clarity the court purported to resolve. (*See* Pet. App. 9-10, 16-17, ¶¶13-15, 30-31).

After recognizing the "fairly unique" nature and procedural posture of Young's case, the court sought to clarify the limits of its holding. (*See* Pet. App. 16-17, ¶30).

First, the court noted that it construed Wis. Stat. § 973.048(2m) "as requiring circuit courts to *address* sex offender registration both when placing a person on probation and when imposing a sentence (including a sentence after revocation of a prior probation order that addressed sex offender registration)." (*See* Pet. App. 16-17, ¶30) (emphasis added). In other words, because the court of appeals interpreted "if" to mean "whenever," § 973.048(2m) requires circuit courts to "address" sex offender registration every time it places a person on probation or imposes a sentence.

Second, the court explained that "if in a particular case the circuit court and the parties do not *again* address sex offender registration at a sentencing after revocation of probation, any order regarding sex offender registration entered when probation was ordered remains valid and effective." (*See* Pet. App. 16-17, ¶30) (emphasis added). The import of this caveat is unclear. The court appears to assert that while § 973.048(2m) is mandatory, if a circuit court fails to "again address sex offender registration," then the original "order" remains in place. In other words, had the circuit court simply remained silent at Young's sentencing after revocation of probation, then the court's original order declaring Young exempt from § 301.45 would have remained "valid and effective." On the other hand, because the circuit court ordered

Young to register as a sex offender after previously exempting him, Young is and was required to register as a sex offender.

Third, the court posits that "[a]s sex offender registration is neither part of a sentence nor a condition of probation, any failure at a sentencing after revocation to revisit the prior order based on the parties' or the court's opting not to do so – intentionally or otherwise – gives no reason for anyone to later use that omission as a means to collaterally attack the earlier, permanent order." (*See* Pet. App. 16-17, ¶30). Again, it is entirely unclear what this second caveat means. Does it mean that if a circuit court fails to comply with the court of appeals interpretation of § 973.048(2m) at a sentencing after revocation of probation, then no remedy or relief exists for the defendant or the state to challenge an earlier order exempting a defendant from having to register as a sex offender? Does the court's reference to a potential collateral attack apply only to a defendant seeking relief from an earlier order? Or is the state also barred from seeking an order requiring a defendant to register so long as the "parties" or the court's opting not to do so?

Finally, the court of appeals explains that its decision does not leave Young "without recourse." (*See* Pet. App. 17, ¶31). The court explains that Young may file a "second motion seeking application of the underage sexual activity exception" at any time. While the relevant statutes do support a conclusion that a person seeking an exemption may file a motion at any

time, there is no statutory support for the court of appeals' conclusion that he *must* file a *second* motion. By interpreting "if" to necessarily mean "whenever," the court rewrote the relevant statutes to require a second motion after the circuit court has already exercised its discretion to grant an underage sexual activity exception under § 301.45(1m)(a)1m.

In contrast, Young's position and the circuit court's decision below raise none of these messy questions. Sections 301.45(1m)(a)1m. and 973.048(2m) set forth a procedure for someone who would otherwise be required to register as a sex offender to file a motion to be declared exempt based on underage sexual activity. If an individual files such a motion, and the circuit court complies with the statute and finds that the individual established clear and convincing evidence that registration is not required, the individual is exempt. This exemption would only apply to the requirement to register based on the specific conviction at issue.

This Court should accept review, reverse the court of appeals' decision below, and order the charge against Kayden R. Young to be dismissed because the circuit court has already determined that he satisfied all of the requirements set forth in § 301.45(1m)(a)1m.'s underage sexual activity exception and therefore could not be charged for failing to comply with the registry requirements.

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 exempting Young 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

[1] As the parties and the court of appeals did below, Young relies on CCAP (Consolidated Court Automation Programs) for any facts specific to Marathon County Case No. 2013CF875 not otherwise contained in the record on appeal in this case. In response to the approach of the parties, the court of appeals took judicial notice of the CCAP records available on the Wisconsin Circuit Court Access website. (*See* Pet. App. 5, ¶4, n.3).

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.

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."

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; Pet. App. 19-22). Young argued that Wis. Stat. § 301.45(1m) does not allow for a "temporary" exception. (32:3; Pet. App. 21). 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; Pet. App. 21).

The state filed a response to Young's motion to dismiss. (36:1-2; Pet. App. 23-24). 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." (36:1; Pet. App. 23). 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; Pet. App. 23). 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; Pet. App. 23).

At the hearing on Young's motion to dismiss, the court focused on whether any legal authority supported a temporary, rather than permanent, 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; Pet. App. 28). (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; Pet. App. 30-31). 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; Pet. App. 31).

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; Pet. App. 34-36).

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; 42; Pet. App. 42-43). The state appealed.

As discussed above, the court of appeals reversed the circuit court's order dismissing the state's case against Young. (Pet. App. 4-5). In doing so, the

[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.

court first declined Young's request that the court "apply the forfeiture doctrine because the State did not make before the circuit court the argument we now adopt." (Pet. App. 5, 9-10, ¶¶3, 13-15). Thereafter, the court interpreted Wis. Stat. § 973.048(2m) to mean that *whenever* a circuit court imposes sentence on a person convicted of a statutorily defined sex offense, it must order the person to comply with the § 301.45. unless the court determines "as of that time, that the defendant qualifies for the underage sexual activity exception in Wis. Stat. § 301.45(1m)(a)1m." (Pet. App. 4-5, ¶2). Because Young did not file a new motion under § 301.45(1m)(a)1m. and because the court did not again declare Young exempt, Young was required to register as a sex offender and the state's case can proceed. (Pet. App. 4-5, ¶2).

ARGUMENT

This Court should accept review and hold that once a court declares an individual exempt from the sex offender registry under § 301.45(1m)(a)1m.'s underage sexual activity exception, that order is final and is not superseded by a subsequent order issued under § 973.048(2m).

Unlike the statutory authority that gives juvenile courts the discretion to stay an order requiring an underage offender to register as a sex offender, Wis. Stat. §§ 301.45(1m)(a)1m. and 973.048(2m) provide no statutory authority to revoke,

reset, or revisit an order declaring an underage offender exempt from being required to register as a sex offender. As the court of appeals recognized in *State v. Joseph E.G.*, 240 Wis. 2d 481, ¶11, the underage sexual activity exception is narrowly crafted to exempt minors from being required to register as sex offenders in cases of factually consensual sexual contact after a court determines that the minor "presents no danger to the public" and that sex offender registration is not appropriate.

The relevant statutes, Wis. Stat. § 301.45(1m)(a)1m. and 973.048(2m), do not support the court of appeals' holding that a sentencing after revocation of probation requires the circuit court to order a person, previously declared exempt, to register as a sex offender unless the person files a new motion under § 301.45(1m).

As argued below, Young's position recognized that 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).

For the mandatory category of cases, the requirement to register is automatic and not triggered by any specific court order under § 973.048. For

example, if an individual is convicted of first-degree sexual assault, in violation of Wis. Stat. § 940.225(1), that person *must* comply with the sex offender registration statute, § 301.45, regardless of whether the circuit court separately orders the person to register. *See* Wis. Stat. § 301.45(1g)(a), (1d)(b).

For the discretionary category of cases, a circuit court must exercise discretion to decide that a person not automatically required to register must do so. *See* Wis. Stat. §§ 301.45(1g)(e), 973.048(1m). As relevant here, Wis. Stat. § 973.048 grants circuit courts the discretion to require a person to register as a sex offender "if a court imposes a sentence or places a person on probation for certain crimes "if 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 s. 301.45." Wis. Stat. § 973.048(1m)(a).

To make clear when courts have discretion to decide and when registration is automatic, Wis. Stat. § 973.048(1m) clarifies that a court's discretionary authority is limited "as provided in sub. (2m)." Under § 973.048(2m), "[i]f a court imposes sentence or places a person on probation" for [a sex offense], 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)."

Young's interpretation of § 973.048(2m) is simple and straightforward: Young was automatically required to register as a sex offender, based on his conviction for second degree sexual assault of a child, unless and until the court determined that he was "not required to comply under s. 301.45(1m)." Because Young followed that procedure after he was placed on probation, and because the circuit court determined that he engaged in factually consensual underage sexual activity, Young was not required to register as a sex offender.

The fact that Young later returned to court for sentencing after revocation of his probation did not negate the circuit court's prior orders because both the circuit court and Young already complied with § 301.45(1m)(a)1m.'s underage sexual activity exception process.

To get around this straightforward interpretation, the court of appeals held that § 973.048(2m)'s "If" means "whenever." (*See* Pet. App. 10-11, ¶¶16-17). Specifically, the court interpreted § 973.048(2m) and 301.45(1m) to mean that any subsequent sentencing hearing, including a sentencing after revocation of probation or any theoretical resentencing, mandates a resetting of any previously granted exemption because the court "shall require the person to comply with § 301.45" unless the person files a *new* motion and the court *again* grants the person an underage sexual activity exception under § 301.45(1m)(a)1m.

A plain reading of the statutes, and a plain understanding of the sex offender registration scheme is counter to the court of appeals' holding. "If" does not mean "whenever" in this context. Instead, in the case of otherwise mandatory sex offender registration, *if* a court declares an offender exempt under § 301.45(1m)(a)1m, *then* the person is exempt from having to register as a sex offender. Here, the court placed Young on probation for a sex offense, which triggered §§ 301.45(1g)(a) and § 973.048(2m)'s requirement that Young register as a sex offender "unless" the court determined that Young satisfied the requirements to be declared exempt. After Young filed a motion as directed by § 301.45(1m), the court held a hearing and determined that Young established by clear and convincing evidence that he was not required to comply with § 301.45.

CONCLUSION

For the reasons set forth above, Kayden R. Young respectfully asks this Court to grant review, reverse the court of appeals decision, and remands this case with directions to dismiss.

Dated this 29th day of November, 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,935 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 29th day of November, 2024.

Signed:
Electronically signed by
Jeremy A. Newman
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