COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP546 **Cir. Ct. No. 2003JV301**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF MITCHEL P.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MITCHEL P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Mitchel P. contests the requirement of the sentencing court that he register as a sex offender. He argues that the court erroneously exercised its discretion in two ways: First, he asserts that the court imposed an impossible burden on him by requiring him to prove to the court's satisfaction that he presented "no risk" of reoffending as a precondition to staying off the sexual offender registration list. Second, he argues that the court considered only the seriousness of the offense rather than balancing that factor against three other factors—personal accountability, the need for public protection, and rehabilitation. Our review convinces us, however, that the sentencing court did not impose the impossible burden asserted by Mitchel and that the court did indeed balance all pertinent factors. We affirm.

¶2 Mitchel was originally charged with three counts of second-degree sexual assault based on a complaint by a then fifteen-year-old victim that he used force against her in order to get her to perform acts of fellatio on him. To enhance finality and to come to a swift result for the benefit of the victim, the State agreed to reduce the charge to one count of fourth-degree sexual assault, which prohibits having sexual contact with a person without the person's consent. Because the victim here was a minor under the age of sixteen, consent is not at issue. For his part, Mitchel admitted that the sexual acts occurred but maintained throughout that the acts were consensual. The State's recommendation at sentencing included a request that the court order Mitchel to register as a sex offender. Mitchel opposed this request. Nonetheless, the court ordered it and denied reconsideration of the order. Further, in a subsequent postdisposition proceeding, Mitchel revisited the

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

issue by requesting that the registration requirement either be vacated or stayed. These requests were denied. Mitchel appeals from the disposition order, the denial of reconsideration, and the postdisposition order. We will provide further facts as necessary.

¶3 The flavor of Mitchel's appellate argument is evident from the first sentence of his brief's statement of facts, where he states that this is a "she said, he said" case. Picking up on that theme, we portray Mitchel's argument in the following manner: He was charged with forcing the victim to perform fellatio on him by slapping her, but he denies that; he says that while fellatio did occur, it was all consensual and he was not convicted of anything more. Thus, this is really a case of sexual exploration in a juvenile boyfriend-girlfriend situation, albeit illegal sexual exploration. And, as to this exploration, Mitchel did admit to a consensual sexual act with an underage girl. Thus, he did hold himself personally accountable for the consensual—but illegal—sexual encounter. Further, one of Mitchel's experts said that it was unnecessary to place him on the sexual offender registry because he does not have a history of sexually offending behavior either by case history or psychological testing. Another expert testified that Mitchel presents a low risk of sexually reoffending. So on balance, according to Mitchel, the low risk of reoffending and his mea culpa of personal responsibility for the consensual sexual act trumps the relative seriousness of the offense. From Mitchel's viewpoint, the sentencing court erroneously exercised its discretion by ruling otherwise.

¶4 But there is another way to look at this. Suppose that Mitchel's version of what happened was untruthful. And suppose that he really did force a fourteen-year-old girlfriend to perform fellatio on him by slapping her around. Suppose that he really did threaten her with harm if she told. Suppose that he

really did harass her afterward. If true, the dial on the seriousness meter goes up. And if true, Mitchel's denial that he used force and his making a joke out of the victim's harassment action in response to his threats shows a serious lapse of personal accountability. Our supreme court in ***State v. Cesar G.***, 2004 WI 61, 272 Wis. 2d 22, ¶¶49-50, 682 N.W. 2d 1, specifically ruled that a court is to consider the seriousness of the offense in deciding whether a juvenile should report on the sexual offender registry. If Mitchel is lying about what happened and the victim is telling the truth, the seriousness of the offense and his lack of personal accountability must weigh heavily against him.

¶5 Of course, this court was not present when the events occurred. This court does not know if Mitchel was telling the truth when he said that everything that happened was consensual or whether he was lying. For that matter, the sentencing court was not present either. But somebody has to make the call about whether Mitchel's version is truthful or not. When there is a dispute about what happened, and resolving that dispute will affect the seriousness of the crime, then the obligation to accept one version and reject the other falls to the sentencing court. In that regard, it is the sentencing court's responsibility to assess the credibility of the key players. As the supreme court wrote in ***Anderson v. State***, 76 Wis. 2d 361, 369, 251 N.W.2d 768 (1977), another case where there was a guilty plea but differing versions of what happened, "[c]redibility always is for the trier of fact to decide." In deciding which version to accept, the sentencing court has the ability to observe the demeanor of the juvenile and the victim; we pay deference to that ability.

¶6 Here, the sentencing court chose to disbelieve Mitchel and believe the victim. When the court made known its choice, it was no longer a "she said, he said" case. It was a sexual assault by use of force case reduced to a

misdemeanor for the reasons given by the State. And Mitchel responded to that finding by objecting that "none of that was true" except the oral sex. The court replied that it did not believe Mitchel. As we have stated, this was the sentencing court's call to make.

¶7 The disputed issue before the sentencing court at the disposition stage was whether it would be in the interest of public protection to place Mitchel on the sexual offender registry given the historical findings made. WISCONSIN STAT. § 938.34(15m)(c) states that to make that ultimate call the court *may* consider certain factors that are thereafter listed. By using the word "may" the legislature was informing the courts that they are not duty bound to consider each factor listed. The ultimate discretionary call for the court is to decide only whether the crime was sexually motivated and whether the interest of public protection convinces the court that the juvenile must report. The courts were given the discretion by the legislature to consider the factors they believed to be pertinent and give to the selected factors whatever weight they deemed necessary. One of the items listed in the statute is "the probability that the juvenile will commit other violations in the future." Sec. 938.34(15m)(c)5. In light of the facts before it, the sentencing court in this case did consider this factor but when making its initial decision at sentencing chose to discount an expert's opinion that sexual reporting was not necessary. That choice was completely within the discretion of the sentencing court as evidenced by the clear, unambiguous terms of the statute.

¶8 The later motion for a stay of the reporting requirement meets a similar fate. In this circumstance, the ***Cesar G.*** court held that the court "should" consider the seriousness of the offense and the factors listed in WIS. STAT. § 938.34(15m)(c). *See* ***Cesar G.***, 272 Wis. 2d 22, ¶52. While the supreme court's

shift from "may" to "should" appears to have resulted in a more stringent test being placed upon courts when confronted with requests for a stay, the apparent incongruence does not change the result here. The sentencing court in this case did consider each factor and remained convinced that Mitchel committed serious and violent sexual assaults that caused bodily harm to the victim. While it is true that the court had before it yet a second expert opinion describing Mitchel as presenting a low risk of reoffending, the sentencing court was not duty bound to rule that this expert opinion carried greater weight than the seriousness of Mitchel's conduct and his lack of personal accountability.

¶9 It is also true that the sentencing court dismissed the expert's opinion that Mitchel is at "low risk" to reoffend by reasoning that "low risk" does not rule out risk altogether. We agree with Mitchel that the mere possibility of a risk is not a proper ground to deny a stay in light of the statutory language, which asks judges to consider "the probability" of reoffending. *See* WIS. STAT. § 938.34(15m)(c)5. But we disagree with Mitchel that this means anything in the final analysis. The State does not have to prove that it is probable that a juvenile will reoffend as a precondition to reporting. Rather, in matters where a stay is requested, the ***Cesar G.*** court has said that the juvenile "has the burden to prove by clear and convincing evidence that, based on these factors, a stay should be granted …." ***Cesar G.***, 272 Wis. 2d 22, ¶51. Here, while it may be true that Mitchel provided expert opinion evidence showing that he probably would not reoffend, the court was not duty bound to find that Mitchel had met his burden. After all, the court's main job is to determine whether registration is "in the interest of public protection." Sec. 938.34(15m). Given the seriousness of the offense, his lack of personal accountability for that seriousness, and further evidence that Mitchel may be having illegal sexual intercourse with his new girlfriend even after these

original crimes occurred, the court was within its discretion to be concerned that Mitchel is not a law-abiding person when it comes to sexual matters and that the community needs a form of protection for now.

By the Court.— Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.