

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 1, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1161**

**Cir. Ct. No. 2006JV5**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE EXPUNGEMENT REQUEST IN STATE V. ERIC A.:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**ERIC A.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Pierce County:  
ROBERT W. WING, Judge. *Affirmed.*

¶1 HOOVER, J.<sup>1</sup> Eric A. appeals an order denying both his petition for expungement and motion to be released from the sex offender registration requirements. We conclude the circuit court properly exercised its discretion and affirm.

## BACKGROUND

¶2 In 2006, the State filed a delinquency petition against Eric based on two counts of repeated sexual assault of a child from incidents that occurred between February 1, 2005 and April 30, 2005. The victims were Eric's sisters. At the time of the assaults, Eric was fourteen and his sisters were eleven, turning twelve during the assault timeframe, and four. According to a report attached to the petition, Eric told an officer that his sisters would disrobe, sit on top of him, and move around. Eric stated there was direct penis to vagina contact, and he reported one instance of vaginal penetration with the older sister. Eric said he sometimes ejaculated during these incidents.

¶3 At the plea hearing, Eric admitted to one count of repeated sexual assault of a child for the incidents involving his older sister. The remaining count, which involved the incidents with his younger sister, was dismissed and read in. As part of the court's disposition, Eric was required to register as a sex offender.

¶4 In 2010, Eric petitioned the court to have his adjudication expunged and moved to be released from the sex offender registration requirements. In support of his requests, Eric filed a motion asserting he had complied with the conditions of his dispositional order and he would benefit from both expungement

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and release from the registry requirements. He also asserted he has “not offended since the offense[,] ... [does] not pose any threat to society; [has] remorse for [his] actions ... and will not commit such offense again.”

¶5 The court noted the adult system only permits expungement for misdemeanors and non-serious felonies and if this offense was in adult court, it would not be subject to expungement. The court determined that because of the serious nature of the offense and the fact it would not be expunged in adult court, it was not in the public’s best interest to grant expungement or release from the registration requirements. The court denied both motions. Eric filed a motion for reconsideration, and the circuit court denied his request.

## DISCUSSION

¶6 We review the circuit court’s decision for an erroneous exercise of discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We will uphold a discretionary decision if “the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

### I. Expungement

¶7 Eric asserts the circuit court erred by not granting expungement. Expungement for a juvenile delinquency adjudication is governed by WIS. STAT. § 938.355(4m)(a), which provides:

A juvenile who has been adjudged delinquent ... may, on attaining 17 years of age, petition the court to expunge the court’s record of the juvenile’s adjudication .... [T]he court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions

of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement.

¶8 Here, the court determined that the offense was too serious, and it would be against public policy, to permit expungement. The court's order stated society would be harmed by granting expungement. These determinations are supported by the record. We cannot conclude the court erroneously exercised its discretion.

## **II. Sex offender registration**

¶9 Eric argues the circuit court erred by not releasing him from the sex offender registration requirements. WISCONSIN STAT. § 938.34(15m)(bm) provides that if a juvenile is adjudicated delinquent of certain violations, including repeated sexual assault of a child, a circuit court “shall require the juvenile to comply with the [sex offender] reporting requirements ... unless the court determines, after a hearing on a motion made by the juvenile, that the juvenile is not required to comply under s. 301.45(1m).”

¶10 WISCONSIN STAT. § 301.45(1m) carves out an exception from the mandatory sex offender registration requirement for certain underage sexual activity. To qualify for this exception, the juvenile has the burden of proving by clear and convincing evidence the following elements:

1. The person meets the criteria under sub. (1g) (a) to (dd) [adjudicated delinquent of a sex offense] based on any violation ... of s. ... 948.025 [repeated sexual assault of a child].

- 1g. The violation ... of s. ... 948.025 [repeated sexual assault of a child] ... did not involve sexual intercourse ... either by the use or threat of force or violence or with a victim under the age of 12 years.

2. At the time of the violation ... 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.
3. It is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.

*See* WIS. STAT. § 301.45(1m)(a), (e).

¶11 The legislature’s purpose behind WIS. STAT. § 301.45(1m) was “to 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.” *State v. Parmley*, 2010 WI App 79, ¶10, 325 Wis. 2d 769, 785 N.W.2d 655 (quoting *State v. Joseph E.G.*, 2001 WI App 29, ¶11, 240 Wis. 2d 481, 623 N.W.2d 137). We stated:

[T]he 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. However, if the court is concerned about whether the sexual contact was truly consensual or if the offender appears to be predatory in seeking out younger partners for sexual contacts, the circuit court can deny the juvenile’s request to be excused from the registration requirements of WIS. STAT. §§ 938.34(15)(bm) and 301.45.

*Id.* (citations omitted).

¶12 Eric argues he is eligible for release from sex offender registration because he meets all the requirements of WIS. STAT. § 301.45(1m)(a). At the outset, we note Eric asserts his offense did not involve sexual intercourse. Eric offers no record citation for this proposition. Instead, the record indicates Eric admitted to a police officer there was vaginal penetration, which pursuant to the statutory definition constitutes sexual intercourse. *See* WIS. STAT. § 948.01(6).

¶13 Regardless, the circuit court reasoned Eric's offense was too serious and public policy would not permit nonregistration. WISCONSIN STAT. § 301.45(1m)(a)3. permits a court to deny a request to be exempt from the registration requirements if the court finds nonregistration is not in society's best interest. Although Eric argues that the State failed to present evidence showing he was a danger to society, it was Eric, not the State, who had the burden of proving by clear and convincing evidence that society would not be harmed by his nonregistration. *See* WIS. STAT. § 301.45(1m)(e). The only evidence Eric offered was an affidavit saying he was remorseful and not a danger to society. We cannot conclude the circuit court erroneously exercised its discretion in denying Eric's motion.

*By the Court.*—Order affirmed.

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

