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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-079 / 98-2215
Filed April 28, 2000

IN THE INTEREST OF Z.S., Minor Child,

Z.S., Minor Child,
Appellant.

Appeal from the Iowa District Court for Polk County, Karen Romano, District Associate Judge.

Z.S. appeals a district associate court ruling in a delinquency proceeding requiring him to register as a sexual offender pursuant to Iowa Code section 692A.2 (1997). Z.S. contends the district court abused its discretion in ruling that he had failed to rebut the presumption that he should register as a sexual offender. **REVERSED.**

J. Michael Mayer, Des Moines, for appellant.

Thomas J. Miller, Attorney, General, Chris C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Ray M. Blase, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

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SACKETT, C.J.

Appellant-Z.S., born on January 9, 1981, appeals from a juvenile court order of November 4, 1998 requiring him to register on the Iowa sex offender registry. He contends the trial court abused its discretion in ruling he failed to rebut the presumption that he, then a juvenile, should register as a sexual offender. We reverse.

In April of 1994 Z.S. was found to be a child in need of assistance because of mental and emotional disorders. He was placed in his father's custody and ordered to have counseling.

In August of 1996 Z.S., then fifteen years of age, was accused of committing the delinquent act of sexual abuse in the second degree, in violation of Iowa Code sections 709.1(3) and 709.3(2) (1995), by sexually abusing his brother, a child under twelve years of age. Z.S. admitted he committed the offense. The juvenile court found Z.S. committed the delinquent act of sexual abuse in the second degree.

Z.S.'s custody was transferred to the department of human services. He entered a program for male sex abuse perpetrators in a group home under the auspices of the Children and Families of Iowa. He spent two years in the home and was discharged in March of 1998. After discharge Z.S. received after-care counseling through Children and Families of Iowa.

At a June 1998 delinquency review hearing Z.S., then seventeen years old, was placed in his mother's custody. His younger brother, who he had abused, lived in her home. A second hearing was held to address the issue of whether Z.S. should be required to register on the sex offender registry.

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Following the hearing the juvenile court made oral findings and determined Z.S. was required to register.

Z.S. contends the juvenile court abused its discretion in finding he was not entitled to the exception afforded juvenile offenders in Iowa Code section 692A.2. He contends the court ignored the evidence of experts in adolescent sexual abuse treatment who indicated he was at a low risk of re-offending and was not a candidate for registration as a sexual offender. The State claims the juvenile court did not abuse its discretion because it based its decision on solid reasons in the record.

Juvenile delinquency proceedings are reviewed de novo. *In re S.M.D.*, 569 N.W.2d 609, 610 (Iowa 1997).

Iowa Code 692A.2(1) describes persons required to register on the state's sex offender registry as follows:

> A person who has been convicted of a criminal offense against a minor, sexual exploitation, or other relevant offense, or a sexually violent offense in this state . . . shall register as provided in this chapter . . .

Iowa Code § 692A.1

Iowa Code section 692A.2(4) provides,

> A person who is convicted, as defined in 692A.1, of either a criminal offense against a minor, sexual exploitation, a sexually violent offense, or an other relevant offense as a result of delinquency in juvenile court shall be required to register as required in this chapter *unless the juvenile court finds that the person should not be required to register under this chapter . . .*

Iowa Code § 629A.2(4) (emphasis added). Thus, although the statute begins with the general requirement that all offenders in the specified group of crimes be required to register, it allows a juvenile court to excuse registration in some cases

according to its discretion. *In re S.M.M.,* 558 N.W.2d 405, 407 (Iowa 1997). The statute prescribes who is covered by the registration requirement; the only discretion the juvenile court has is deciding who will be excused. *See id.* The statute is a regulating or remedial statute and not punitive. *See id.* The burden is on Z.S. to prove he is entitled to an exception. *See id.*

In general, an abuse of discretion occurs only when the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Atley,* 564 N.W.2d 817, 830 (Iowa 1997). Iowa Code chapter 692A gives no guidance as to what factors courts need to consider in deciding whether to require a juvenile who has been found guilty of a defined act to register on the sex offender's registry.

To address Z.S.'s complaints, we first look at the evidence presented at the hearing. That hearing took place on November 4, 1998. Z.S was eighteen the following January. From the evidence presented we find the following facts. A case permanency plan prepared by Anita Vogelesgang indicated Z.S. had slipped back into old patterns of behavior. An earlier report by Vogelesgang acknowledged Z.S. had behavioral problems, was disrespectful, did not take responsibility for problems at home, was self-centered, and did not predict or understand the consequences of his behaviors on family members. She also noted Z.S. had made a minimal effort to obtain employment. However, Vogelesgang recommended that Z.S. not be required to register as a sex offender.

Z.S.'s after-care therapist, Carolyn Zeller, was of the opinion that Z.S. was at low risk for repeating sexual abuse. Zeller testified she based her assessment

on the fact Z.S. committed one offense and that he lacked the pattern of behavior of an abuser. She administered and applied the New York Assessment to Z.S. The New York Assessment was defined as an imperative designed assessment tool utilized to provide a second opinion or a balance to a subjective clinical opinion. The test has to do with various issues that culminate in determining a risk factor or a score in terms of high risk, low risk or moderate risk. Z.S. fell in the low risk category on the assessment tool. Zeller said the only factors in Z.S.'s profile that indicated he would re-offend were that he began as a juvenile and his victim was younger than he was.

Z.S.'s therapist for two years, Mark Cowan, a specialist in issues involving adolescent sexual perpetrators, testified. He indicated in making recommendations as to whether a child should be placed on the sex offender registry he used (1) clinical judgment based on knowledge and (2) tools developed through the primary treatment. He explained the New York Assessment tool as a second opinion or a balance to a subjective clinical opinion. His subjective opinion was that though Z.S's behavior reflected a less than desirable concern for other people, it was not directly connected to being predatory in the nature of his offenses. He testified that based on his work with Z.S. and the New York Assessment his recommendation was that Z.S. not be placed on the registry. He did not believe Z.S. was at risk of repeat offending because he had only one victim, the offense occurred several years earlier, and he had completed treatment which addressed the abuse. Cowan further testified he did not believe that Z.S. living with his mother and his victim increased Z.S.'s

risk of offending. Both Cowan and Zeller recommended against requiring Z.S. to register with the sex offender registry.

Z.S.'s mother testified. She had been involved with Z.S.'s treatment and after care. She had not noticed any behavior that caused her to be concerned that Z.S.'s younger siblings might be at risk of being sexually abused by Z.S. She said if she saw any such behavior she would report it. She said her major problems with Z.S. were "normal teenager stuff, curfew, sister-brother type things, duties in the home, chores in the home." She said he was doing well in school and was ahead of his class to graduate Z.S. testified he had a safety plan that involved looking for warning signs, taking himself out of the situation when he is alone with a child and talking to someone if he has problems.

The juvenile court disagreed with the therapists that there was no or a low risk the child will re-offend. She found that even though Z.S. successfully completed and made progress on issues regarding the abuse and other behavioral problems, she was concerned about Z.S.'s lack of responsibility and lack of follow-through on a safety plan. The court gave substantial weight to reports submitted by the State, indicating Z.S. was unwilling to take responsibility, especially with respect to following his safety plan; did not respect his mother; had difficulties abiding by his mother's and probationary rules; and had not found employment. The court expressed concern about Z.S.'s testimony that his safety plan was to look for warning signs, take himself out of the situation when he is alone with a child and talk to someone if he has problems. The court believed this plan was inadequate. The court also consider the fact the victim was Z.S.'s younger brother aggravated the offense. The juvenile judge

concluded, "I cannot draw the conclusion that [Z.S.] is a young man who should not be required to register on the sex offender registry."

The sex offender registry is a regulatory statute aimed at promoting public safety. *State v. Pickens*, 558 N.W. 2d 396, 398 (Iowa 1997). Consequently our focus of inquiry is whether the public needs to know about Z.S. because he may present a danger to society. Focusing on this issue forces us to note the inconsistency in the juvenile court's decisions. The juvenile court's order returning Z.S. to the home where his victim lives would cause us to believe that the juvenile court did not find Z.S.'s victim at risk for again being abused. However, the juvenile court's decision to require Z.S. to register would cause us to believe that the court was of the opinion that Z.S. may again abuse and society needs to be protected.

This is an assessment of projected future conduct. While we have long recognized that we may use past behavior in predicting future conduct, this is only one factor. So comes the very difficult and perhaps impossible job of predicting future conduct. The opinions of the experts most closely associated with Z.S. are he should not be required to register. His attitudes about following rules are relevant as to whether he will follow his safety plan. Yet, his counselors, who qualify as experts in this field, are of the opinion the fact he may not follow rules or be respectful does not prove that he will again commit sexual crimes.

It appears that the legislature recognizing the stigma that comes from being included on the sexual abuse registry sought to provide a safety net for

juveniles who committed the crimes but did not appear to be a danger as the predictors were not that they would again offend.

The experts, in rendering an opinion, appropriately considered the following factors:

1. The nature of the offense;
2. The status of the victim;
3. The status of Z.S.;
4. Z.S.'s attitude and his ability to obey rules;
5. Z.S.'s safety plan and his attitude towards following it.
6. Clinical judgments.
7. Assessment tools, specifically the New York Assessment.

There was no evidence presented that Z.S. was likely to re-offend. The experts testified in their opinion there was a low risk he would. The only two risk factors Z.S. has are he abused as a juvenile and his victim was younger than he was.

Z.S. conquered emotional and mental disabilities. He has been returned to the home where his victim lives. He is in school. There is no evidence he uses drugs. He has behavioral problems.

The juvenile court in deciding the case considered the first five factors. The court did not consider factors six and seven.

As a fact finder, the juvenile court is at liberty to accept or reject opinion testimony. *Miller v. International Harvester Co.*, 246 N.W. 2d 298, 302 (Iowa 1976). Under our de novo review we have the same liberty. To affirm the juvenile court we must discount the opinions of all the experts as the juvenile court did. We must also assume the juvenile court made the wrong decision in returning Z.S. to live in his family home. Being unable to do so, we reverse the

district court's direction that Z.S. register as a sexual offender under Iowa Code section 692A.

REVERSED.