

STATE OF MICHIGAN
COURT OF APPEALS

In re TMK.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

TMK,

Respondent-Appellant.

UNPUBLISHED

December 16, 2021

No. 353469

Wayne Circuit Court

Family Division

LC No. 16-523899-DL

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as on leave granted¹ the circuit court’s order denying his application to set aside his juvenile adjudication for second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). On appeal, respondent argues that (1) the circuit court erred when it sua sponte altered its initial oral ruling granting respondent’s application to set aside his juvenile adjudication for CSC-II without factual or legal support, (2) the circuit court abused its discretion when it denied respondent’s application to set aside his juvenile adjudication for CSC-II, and (3) on remand, this matter should be reassigned to a different circuit court judge.² We conclude that, although the

¹ After this Court denied respondent’s delayed application for leave to appeal on July 24, 2020, *In re [TMK]*, unpublished order of the Court of Appeals, entered July 24, 2020 (Docket No. 353469), the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted, *In re [TMK]*, 955 NW2d 477 (2021), and cited to *People v Rosen*, 201 Mich App 621, 623; 506 NW2d 609 (1993).

² Although respondent asserts in his statement of the questions presented that the circuit court failed to produce a record from which an appellate court can conduct a meaningful review, respondent fails to provide an analysis in support of this assertion. “A party abandons a claim

circuit court's decision to alter its initial oral ruling did not constitute error in and of itself, remand is appropriate because the circuit court made an error of law, and thereby abused its discretion, when it denied respondent's application to set aside his juvenile adjudication for CSC-II. On remand, this matter must be reassigned to a different circuit court judge.

I. FACTUAL BACKGROUND

In April 2017, when respondent was 16 years old, he pleaded no contest to one count of CSC-II and was adjudicated responsible for the offense. In exchange for his no-contest plea, petitioner dismissed two additional counts of CSC-II, three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a. These charges arose from allegations that respondent engaged in sexual conduct with a nine-year-old when respondent was 14 years old.

In October 2019, respondent filed an application to set aside his juvenile adjudication for CSC-II. In December 2019, the circuit court held a hearing regarding respondent's application. The circuit court stated that the statutory prerequisites for setting aside a juvenile adjudication were met, the circumstances and behavior of respondent justified setting aside respondent's juvenile adjudication, and doing so was consistent with the public welfare. Nonetheless, the circuit court admonished respondent for his actions and stated that respondent was fortunate to have the ability to improve his life and move forward while the victim did not possess that same ability.

Before entering a written order, the circuit court held an additional hearing regarding respondent's application to set aside his juvenile adjudication. The circuit court indicated that it had held the mistaken belief that it was required to grant respondent's application if the statutory prerequisites for setting aside a juvenile adjudication were met, and it would have denied respondent's application if it had known that it had discretion to do so. The circuit court then found that the circumstances and behavior of respondent did not justify setting aside respondent's juvenile adjudication, and doing so was contrary to the public welfare. On that same date, the circuit court entered a written order denying respondent's application to set aside his juvenile adjudication. This appeal followed.

II. ANALYSES

Although the circuit court's decision to alter its initial oral ruling did not constitute error in and of itself, remand is appropriate because the circuit court made an error of law, and thereby abused its discretion, when it denied respondent's application to set aside his juvenile adjudication for CSC-II. On remand, this matter must be reassigned to a different circuit court judge.

It is within a circuit court's discretion to grant or deny an application to set aside a conviction. *People v Van Heck*, 252 Mich App 207, 210 n 3; 651 NW2d 174 (2002). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and

when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Accordingly, respondent has abandoned this argument on appeal.

principled outcomes.” *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018) (quotation marks and citation omitted). “A trial court also necessarily abuses its discretion when it makes an error of law.” *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015).

A. ALTERATION OF THE CIRCUIT COURT’S INITIAL ORAL RULING

As an initial matter, the circuit court’s decision to alter its initial oral ruling granting respondent’s application to set aside his juvenile adjudication for CSC-II did not constitute error in and of itself. “[A] court speaks through its written orders and judgments, not through its oral pronouncements.” *In re Baham*, 331 Mich App 737, 747 n 6; 954 NW2d 529 (2020) (quotation marks and citation omitted; alteration in original). Because the circuit court never entered a written order granting respondent’s application to set aside his juvenile adjudication for CSC-II, the circuit court was empowered to alter its initial oral ruling. Furthermore, the circuit court explained that its initial oral ruling was based upon the mistaken belief that it lacked the discretion to deny respondent’s application to set aside his juvenile adjudication for CSC-II. As properly recognized by the circuit court, it is within a circuit court’s discretion to grant or deny an application to set aside a conviction. See *Van Heck*, 252 Mich App at 210 n 3. Accordingly, the circuit court’s decision to alter its initial oral ruling did not constitute error in and of itself.

B. DENIAL OF RESPONDENT’S APPLICATION TO SET ASIDE HIS JUVENILE ADJUDICATION FOR CSC-II

Although the circuit court’s decision to alter its initial oral ruling did not constitute error in and of itself, the circuit court made an error of law, and thereby abused its discretion, when it denied respondent’s application to set aside his juvenile adjudication for CSC-II. MCL 712A.18e provides for the setting aside of juvenile adjudications under certain conditions. In relevant part, MCL 712A.18e(1) provides as follows:

[A] person who has been adjudicated of not more than 1 juvenile offense that would be a felony if committed by an adult and not more than 3 juvenile offenses, of which not more than 1 may be a juvenile offense that would be a felony if committed by an adult and who has no felony convictions may file an application with the adjudicating court or adjudicating courts for the entry of an order setting aside the adjudications.

The offense of CSC-II is a felony, MCL 750.520c(2), and there is no record evidence that respondent had been adjudicated responsible for any other juvenile offense or that respondent had been convicted of a felony. Accordingly, respondent was eligible to file an application to set aside his juvenile adjudication for CSC-II under MCL 712A.18e(1).

MCL 712A.18e(9) is the relevant provision to examine for purposes of the instant appeal.³ In relevant part, MCL 712A.18e(9) provides as follows:

³ The parties do not dispute that respondent was eligible to file an application to set aside his juvenile adjudication for CSC-II under MCL 712A.18e(1) or that the additional conditions set forth in MCL 712A.18e(2) through MCL 712A.18e(8) had been satisfied.

[I]f the court determines that the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application warrant setting aside the 1 adjudication for a juvenile offense that would be a felony if committed by an adult and not more than 2 adjudications for a juvenile offense that would be a misdemeanor if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult and that setting aside the adjudication or adjudications is consistent with the public welfare, the court may enter an order setting aside the adjudication. . . . [T]he setting aside of an adjudication under this section is a privilege and conditional, and is not a right.

As reflected in this passage, a circuit court may enter an order setting aside an adjudication if two conditions are satisfied. *Id.* First, the circuit court must consider the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application in order to determine whether they warrant setting aside the adjudication. *Id.* Second, a circuit court must determine whether setting aside the adjudication is consistent with the public welfare. *Id.*

"The setting aside of a juvenile adjudication of responsibility is comparable to the setting aside a conviction in the criminal context found in MCL 780.621." *In re Hutchinson*, 278 Mich App 108, 109 n 2; 748 NW2d 604 (2008). Accordingly, cases concerning motions to set aside convictions in the criminal context under MCL 780.621 may be instructive regarding cases concerning applications to set aside juvenile adjudications under MCL 712A.18e. For instance, in *People v Rosen*, 201 Mich App 621, 622-623; 506 NW2d 609 (1993), this Court considered whether the trial court erred when it denied the defendant's motion to set aside her adult conviction for possession of cocaine under MCL 780.621 based solely on the nature of the offense involved. In doing so, this Court analyzed MCL 780.621(9), which provided as follows:

If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right. [*Rosen*, 201 Mich App at 623, quoting MCL 780.621(9).]

In light of this provision, this Court determined that "[t]he nature of the offense itself does not preclude the setting aside of an offender's conviction. That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction." *Id.* This Court considered the trial court's reasoning for denying the defendant's motion to set aside her conviction. *Id.* at 622. In denying the defendant's motion to set aside her conviction, the trial court had stated as follows:

I will deny the motion, particularly in substance abuse cases or cases involving illegal substances or the trafficking [sic] of substances. I generally feel that that matter should remain on the record and that the employers should know about it. And with some exceptions-there may be some exceptions. I don't always do the same thing.

This was a fairly large case, quite a lot of cocaine involved. It was really a delivery but she was allowed to plead guilty to possession after the Court of Appeals reversed the conviction of delivery of cocaine.

As I say, there was a large amount involved and I don't believe that employers and others should be ignorant of the fact that this person they are hiring has been deeply involved in illegal substances, particularly [sic] with cocaine. Marijuana looks different. But cocaine, that's the way I feel about it. And I will deny the motion. [*Id.* at 622.]

Based on the trial court's statements, this Court held that "[t]he record is clear that the trial court denied the motion solely because of the nature of defendant's offense itself." *Id.* at 623. Therefore, this Court reversed and remanded for further proceedings to take place before a different judge given that it was "reasonable to expect that the original judge on remand would have substantial difficulty putting out of his mind his previously expressed views regarding the expunging of the record of a drug offender's criminal conviction." *Id.* at 623-624.

As was the case in *Rosen*, the circuit court abused its discretion when it denied respondent's application to set aside his juvenile adjudication for CSC-II because the circuit court denied respondent's application based solely upon the nature of respondent's adjudication of responsibility for CSC-II. In concluding that the conditions set forth in MCL 712A.18e(9) were not satisfied, the circuit court reasoned as follows:

I said this on many occasions, with these CSC's we ignore the victim and we allow the defendant to move on and the victim can't. For one reason or another the victim just doesn't have that opportunity. There's no sheet of paper. There's no [c]ourt order that I can say please feel better; that I can say life is wonderful, you know, now you can go to college, now you can do this, now you can get a job, now you -- just ignore everything and while I respect that I have all of these letters saying he is a different person I would question all of the letters and say does everybody know that he's a different person? Does everybody know who he was at that point in time in the first place?

Notably, the circuit court failed to consider the circumstances and behavior of respondent from the date of respondent's adjudication to the filing of the application, and the circuit court failed to consider whether setting aside the adjudication was consistent with the public welfare. The circuit court did not address the evidence concerning respondent's employment, academic success, and volunteer work. Moreover, the circuit court did not address respondent's psychological evaluation and sex offender risk assessment. Instead, the circuit court's reasoning was based solely upon the nature of respondent's adjudication of responsibility for CSC-II and the manner in which such offenses generally impact victims. Although the circuit court briefly addressed the letters written by individuals in the community who advocated on respondent's behalf, the circuit court did not consider the content of the letters. Rather, the circuit court's analysis was limited to whether the authors of the letters were aware of the nature of respondent's offense. As this Court determined in *Rosen*, 201 Mich App at 623, "[t]he nature of the offense itself does not preclude the setting aside of an offender's conviction. That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction." Therefore, remand for a proper determination, after

consideration of the circumstances and behavior of respondent since his adjudication and the public welfare, is necessary.

C. REASSIGNMENT ON REMAND

This matter must be reassigned to a different circuit court judge on remand. “The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case.” *Swain v Morse*, 332 Mich App 510, 537; 957 NW2d 396 (2020) (quotation marks and citation omitted). “In deciding whether to remand to a different judge, this Court considers whether the original judge would have difficulty in putting aside previously expressed views or findings, whether reassignment is advisable to preserve the appearance of justice, and whether reassignment will not entail excessive waste or duplication.” *Id.* (quotation marks and citation omitted). “A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise.” *Id.* (quotation marks and citation omitted).

During the initial hearing regarding respondent’s application to set aside his juvenile adjudication for CSC-II, the circuit court judge emphasized the importance of following the law despite her personal feelings and expressed her intent to grant respondent’s application based upon her belief that she was required by law to do so. However, during the latter hearing regarding respondent’s application to set aside his juvenile adjudication for CSC-II, the circuit court judge denied respondent’s application based solely upon the nature of respondent’s adjudication of responsibility for CSC-II and the manner in which such offenses generally impact victims. The circuit court then addressed respondent and stated as follows: “[n]ow you will have an opportunity to appeal and I’m fine with that because if the Court of Appeals wants me to reverse that decision then I’ll send it to another judge and they can reverse it but I have to do what I feel is right.” The circuit court judge’s statements indicate that she would have substantial difficulty putting aside her previously expressed views regarding the nature of criminal sexual conduct cases. This conclusion is supported by this Court’s opinion in *Rosen*, 201 Mich App at 623-624, in which this Court determined that reassignment on remand was appropriate in light of the trial court judge’s “previously expressed views regarding the expunging of the record of a drug offender’s criminal conviction.” We acknowledge that the circuit court judge has presided over this matter since 2017 and is familiar with the underlying facts and parties such that reassignment would entail some waste and duplication. However, given the circuit court judge’s comments at the latter hearing regarding respondent’s application to set aside his juvenile adjudication for CSC-II, such waste and duplication would not be out of proportion to any gain in preserving the appearance of justice.

Reversed and remanded for further proceedings to take place before a different circuit court judge. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly