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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

MARGUERITE ALPERS,

Defendant-Appellant.

Appeal No. 2015-AP-1784-CR

Circuit Court Case No.
2014-CT-1754

DEFENDANT-APPELLANT MARGUERITE ALPERS' BRIEF AND APPENDIX

On Appeal from an Order Entered in Milwaukee County
By the Honorable John Siefert

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Statement of Issues Presented for Review

Issue 1: Did the circuit court abuse its discretion when it required an ignition interlock device to be installed and maintained in Marguerite Alpers' "husband's car" as a condition of Marguerite's probation?

Answered by the circuit court: No (implied).

Issue 2: Did the circuit court violate Byron Alpers' constitutional due process rights when, without warning, as a condition of his wife Marguerite's probation, it required an ignition interlock device to be installed and maintained in his car?

Answered by the circuit court: No (implied).

Statement on Oral Argument

The issues in this case can be adequately presented in the briefs. Oral argument is not necessary.

Statement on Publication

Pursuant to Wisconsin Statutes Sections 809.23(1)(b)4. and 752.31(2)(f), publication is not warranted because this case is to be decided by a single Court of Appeals judge.

Statement of the Case

Marguerite Alpers appeals the condition of her probation requiring the installation of an ignition interlock device ("IID") in "her husband's car" (the "IID Order" or the "Order"). The IID Order was an abuse of the circuit court's discretion, as it was not adequately supported by the record, but instead based on the circuit court's own idiosyncrasies. In addition, its purpose was already achieved through less restrictive conditions of supervision. The Order also violated her husband, Byron Alpers', constitutional due process rights, as he was not a party to his wife's case, received no notice that his liberties might be affected, and due to his serious health conditions, has extreme difficulties operating the IID, and thus his vehicle. For these reasons, the IID Order should be removed.

I. Procedural Posture

On June 10, 2015, Marguerite pled guilty to operating under the influence 3rd offense in Milwaukee County Case No. 2014-CT-1754. R. 15:6; App. 7.[1] As a condition of her probation, the court, the Honorable John

[1] For the convenience of the Court, citations will be provided to both the record and the corresponding appendix page(s), when practical.

Siefert presiding, ordered that an IID be installed in "her husband's car." R. 15:27; App. 28. Neither Marguerite nor her husband, Byron, had received notice that this could be a condition of Marguerite's probation. *See* R. 15.

On July 13, 2015, Marguerite filed a "Motion to Rescind IID Order on Husband's Car" with the circuit court. R. 11. Marguerite's motion explained that Byron's medical conditions make it extremely difficult for him to use the IID, which in turn creates dangerous situations for him and Marguerite, who also suffers from numerous health issues and relies on Byron for transportation. R. 11:1-2; App. 36-37. A letter from Byron's physician was attached and incorporated into Marguerite's motion. R. 11:7; App. 42. On July 15, 2015, the circuit court denied Marguerite's "Motion to Rescind" in a single paragraph decision. R. 12; App. 1.

II. Statement of Facts

Marguerite and Byron Alpers have been married for 40 years. R. 15:16; App. 17. Each has a Master's Degree and careers in executive positions. *Id.* Prior to May 2012, when Marguerite was cited for operating a vehicle while intoxicated, she had no past criminal history. R. 15:13; App. 14. However, in the early evening on July 18, 2014, and again shortly after that in the late afternoon on August 9, 2014, Marguerite was arrested by the

Village of Shorewood Police Department for operating a vehicle while intoxicated. R. 15:9-12; App. 10-13. Both incidents occurred as Marguerite drove from a liquor store on Milwaukee's upper east side to her home in suburban Shorewood, less than a mile away. *Id.*

On June 10, 2015, Marguerite pled guilty to operating under the influence 2nd offense in Milwaukee County Circuit Court Case No. 2014-CT-1745, and to operating under the influence 3rd offense in Case No. 2014-CT-1754, stemming from the two 2014 offenses. R. 15.

During sentencing, Marguerite's counsel informed the circuit court, the Honorable John Siefert presiding, that since the two 2014 arrests, Marguerite had been diagnosed with both a brain tumor and Parkinson's disease. R. 15:17; App. 18. Counsel explained that Marguerite had not driven since her most recent arrest, and that those new health issues further impede Marguerite's ability to drive, notwithstanding the revocation of her operating privileges. R. 15:20; App. 21.

In response, the court cut off and admonished Marguerite's counsel, drawing upon his personal experience as a City of Milwaukee Police Officer:

> Counsel, don't ever tell a policeman -- or a retired policeman that because you revoked somebody's license they can't drive.
>
> All you need to do is drive out on the street in my old squad area at midnight, and half the people on the road have license privileges that

> are revoked; but they're still driving.
>
> Okay. So that -- that all -- that argument does not wash. Now, if you cut somebody's hand off that they can't grab the steering wheel, then they can't drive.
>
> If you put a breath interlock device on their car, it's -- you make it much, much harder for them to drive because they'll have to find somebody that's sober that can learn the pulse codes.
>
> But even then people continue to drive. So it's not -- Not having a paper license never stopped anybody, in my view, from driving who wanted to drive. Okay.

R. 15:20-21; App. 21-22.

Marguerite's counsel further attempted to explain to the court why an additional IID order (or cutting off Marguerite's hand, for that matter), would not fulfill the aims of sentencing: "At age sixty-six, she has rides. She has a pool of drivers, including her husband who is … no longer working. She doesn't have the need to drive …." R. 15:21; App. 22.

The circuit court again interrupted Marguerite's counsel to continue its personal critique of OWI penalties:

> When was the last time one of the circuit court judges in Milwaukee County sent somebody to jail for driving after revocation -- drunk driving relationship, drunk driving related?
>
> Did I hear never? I'm not aware of any, you know.
>
> Now, I'm glad that she won't drive because she's law abiding. But, again, the fact that we have criminal penalties for driving after revocation for people whose licenses are revoked for drunk driving, there's -- there's the reality on paper, and then there's the reality in the courtroom, which is nobody goes to jail in this county for that.

> There are very very few. So the best way, my view Counsel, is not just talking about paper licenses and paper threats of being arrested for driving after revocation but making it real by getting rid of cars or putting breath interlock devices on them even before they're required.

R. 15:21-22; App. 22-23.

Following the court's ruminations, Marguerite attempted to explain why she was at a low risk to reoffend:

> I will not drive. Part of it is because of my Parkinson's, I have dizzy spells. And I haven't driven since those incidents.
>
> My license was -- has been revoked back in the fall.
>
> And my husband fortunately for me has retired, so he's driven me. I have friends that drive me to AA. And I will not drive.

R. 15:24; App. 25.

Following Marguerite's comments, the court sentenced Marguerite to the maximum term of six months jail time in the case ending 1745. R. 15:25; App. 26. The court further revoked her right to have a license for one year, and imposed the statutory 18-month requirement that Marguerite maintain an IID on any vehicle she operates and any vehicle titled or registered in her name. *Id.*; Wis. Stat. § 343.301.

The court withheld sentence in the case ending 1754, placed Marguerite on probation for two years, and ordered numerous conditions of probation, including 45 days jail time. R. 15:26-27; App. 27-28. Pursuant to statute, the court also revoked her driver's license for two years and ordered

"a two year driving -- ignition interlock device requirement [on any vehicle owned or operated by Marguerite] to begin once she applies for and has a driver's license." R. 15:27-29; App. 28-30. In addition, the court imposed the following condition of probation:

> Install breath interlock device on husband's car immediately upon release from jail.
>
> …
>
> And so, Counsel, you know, you say, well, she doesn't have a driver's license, yeah, well, she's got hands; and she's got physical access to his keys; and I want to make sure that she doesn't drive once she's out of the House of Corrections.
>
> I want to make sure that she can't physically make that car start if she's drunk.
>
> So a condition of probation will be that she install a breath interlock device on her husband's car upon her release from the House of Correction and that it remain on for the entire period of probation.

R. 15:26-27; App. 27-28. The court also ordered that corrections officers "physically check to see that the breath interlock device is on the car as soon as she gets out of the House of Correction." R. 15:28; App. 29.

No evidence was presented prior to Marguerite's sentencing regarding whether Marguerite owned a car, whether Byron owned a car, whose name any car they might have owned was titled and registered in, which car(s) Marguerite was driving during the offenses, or whether Marguerite even had access to any car that Byron might have owned. *See* R. 15. Further, Byron

was never given the opportunity to address the court at sentencing, where, for example, he might have explained that his asthma and anxiety could make it difficult for him to use an IID, whether he took precautions to prevent Marguerite from being able to drive his car, how an IID might impact his liberty to move about freely, or what physical and emotional distress he might endure as a result of the IID. *Id.*

Marguerite was taken into custody immediately following the sentencing hearing. R. 15:31; App. 32. Pursuant to the court's order, Byron Alpers installed an IID in his vehicle in order to secure Marguerite's release from the Milwaukee County House of Corrections. R. 11:1-2; App. 36-37.

The IID requires Byron to blow into it and then instantly inhale his breath both in order to start his car and approximately every five to ten minutes while driving.[2] After Byron installed the IID, he discovered that it aggravates his asthma. R. 11:2, 11:7; App. 37, 42. As a result, Byron is frequently unable to successfully use the IID. *Id.* When this occurs, Byron could be forced to either cancel or substantially delay trips. R. 11:2; App. 37.

[2] A more comprehensive explanation of how IIDs work can be found on Pages 5-7 of the Wisconsin Department of Transportation's FAQs about IIDs, found online at http://wisconsindot.gov/Documents/about-wisdot/who-we-are/dsp/iid-faq.pdf (last accessed October 27, 2015). The relevant pages are also included in the attached Appendix, pp. 43-45.

Because Byron is Marguerite's main source of transportation, Byron's difficulties using the IID due to his asthma could also lead Marguerite to miss or delay medical or treatment-related appointments. *Id.* Thus, in addition to causing Byron physical distress, emotional distress, and inconvenience, the IID also puts both Byron and Marguerite in serious danger if Byron is unable to transport Marguerite in the event of a medical emergency, or if he becomes stranded far from home in freezing weather. *Id.*

Argument

I. The circuit court abused its discretion when it ordered Marguerite Alpers to install an IID in "her husband's car" as a condition of probation.

A sentencing court has discretion to impose "reasonable and appropriate" conditions of probation on a "person convicted of a crime." Wis. Stat. § 973.09(1)(a). Conditions of probation are reviewed under "the erroneous exercise of discretion standard to determine their validity and reasonableness measured by how well they serve their objectives: rehabilitation and protection of the state and community interest." *State v. Stewart*, 2006 WI App 67, ¶ 11, 291 Wis. 2d 480, 713 N.W.2d 165.

A court's discretion is exercised erroneously if its decision is not based on the facts in record. *State v. St. George*, 2002 WI 50, ¶ 37, 252 Wis.

2d 499, 643 N.W.2d 777. In addition, "judges should not abuse their discretion by imposing probation conditions on convicted individuals that reflect only their own idiosyncrasies." *State v. Oakley*, 2001 WI 103, ¶ 13, 245 Wis. 2d 447, 629 N.W.2d 200, *opinion clarified on denial of reconsideration*, 2001 WI 123, ¶ 13, 248 Wis. 2d 654, 635 N.W.2d 760. Finally, a condition of probation may be struck down as an abuse of discretion even if it serves the purposes of probation, but if it is unduly restrictive because the same purposes are already "functionally accomplished by a more narrowly drawn" condition. *Stewart*, 2006 WI App 67, ¶¶ 20-21.

In the present case, the IID Order failed to connect the facts in the record to the goals of probation, but instead reflected the trial court's own idiosyncrasies. In addition, the goals it presumably sought to fulfill were already accomplished through other more narrowly tailored conditions. As a result, the IID Order was neither reasonable, nor appropriate, and was thus an abuse of the circuit court's discretion, and should be rescinded.

A. The IID Order was not based upon the facts in the record, but instead reflected the circuit court's own idiosyncrasies.

The circuit court appeared to fashion the IID Order based on concerns that Marguerite would otherwise drive under the influence again, and thus

reoffend.[3] Accordingly, while the Order was presumably intended to both protect the community and rehabilitate Marguerite by preventing her from reoffending, it was not supported by the record.

At sentencing, the court provided no analysis or explanation based on the factual record of the case regarding why Marguerite might be a greater risk to reoffend during probation than other OWI defendants, so as to warrant the additional IID requirement. *See* R. 15. In fact, the record lacked any evidence suggesting that Marguerite had continued to drive or to drink, much less to excess, following the revocation of her license. *Id.* In addition, the record arguably suggested that Marguerite was at less risk of reoffending due to her recently diagnosed brain tumor and Parkinson's disease, coupled with her compliance with bail conditions and her performance in treatment. R.

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[3] The court's apparent concern that absent the IID Order, Marguerite would reoffend, is reflected by the following quote, previously included in the "Statement of Facts" section:

> Counsel, don't ever tell a policeman -- or a retired policeman that because you revoked somebody's license they can't drive.
>
> All you need to do is drive out on the street in my old squad area at midnight, and half the people on the road have license privileges that are revoked; but they're still driving.
>
> Okay. So that -- that all -- that argument does not wash. Now, if you cut somebody's hand off that they can't grab the steering wheel, then they can't drive.
>
> If you put a breath interlock device on their car, it's -- you make it much, much harder for them to drive because they'll have to find somebody that's sober that can learn the pulse codes.

R. 15:20-21; App. 21-22.

15:4, 17; App. 5, 18.

Not only did the circuit court lack a basis in the record for imposing the heightened IID Order on Marguerite, but the court also lacked a basis for ordering the IID to be installed on "her husband's car." Nothing in the record indicated in which vehicle or vehicles Marguerite committed her offenses. *See* R. 15. Additionally, the record was silent regarding which vehicle was considered "her husband's car," or whether Marguerite had authority to install an IID in whichever vehicle that might be. *Id.* Finally, nothing in the record suggested that Marguerite even had access to drive "her husband's car," so as to be able to reoffend. *Id.* Accordingly, nothing in the factual history of the case suggested that the IID Order would further protect the public or rehabilitate Marguerite.

Rather than base the IID Order on the case record, the circuit court based it on its own idiosyncrasies. A trial judge may not take judicial notice of his or her own experiences pursuant to Wisconsin Statutes Section 902.01, and then substitute those experiences as evidence. *State v. Sarnowski*, 2005 WI App 48, ¶¶ 13-16, 280 Wis. 2d 243, 694 N.W.2d 498.

When the court imposed the IID Order on Marguerite, it explicitly substituted its own personal experiences for the evidence, as shown by the

court's discussion of the number of people driving with revoked licenses in the court's old squad area in the City of Milwaukee at midnight. R. 15:20-21; App. 21-22. In stark contrast, both of Marguerite's arrests occurred during daylight in the suburban village of Shorewood. R. 15:9-12; App. 10-13. Nothing in the record suggests that Marguerite would ever be present in the court's old squad area at midnight. *See* R. 15. Because the circuit court crafted the IID Order based not on the record, but as a reflection of the court's own idiosyncrasies, the court abused its discretion and the Order should be rescinded.

B. The presumed purpose of the IID Order is already accomplished through other conditions of probation.

The circuit court erroneously exercised its discretion by fashioning the IID Order in an unduly restrictive manner, when the purpose of the Order was already achieved through other conditions of probation. In *State v. Stewart*, 2006 WI App 67, ¶¶ 10, 20-21, 291 Wis. 2d 480, 713 N.W.2d 165, the court imposed a condition of probation on the defendant which banned him from entering Richmond Township, where he was an established, longtime resident. The goal of the ban was to protect specific individuals who lived in Richmond who the defendant had abused and sexually harassed. *Id.*,

¶¶ 14-15. The Court of Appeals ruled that even though the ban on entering Richmond Township furthered the goals of probation, the same goals were already achieved through the condition of probation and supervision that the defendant have no contact with the victims. *Id.*, ¶ 17. On that basis, the court struck down the geographical ban as an overbroad and unduly restrictive condition of probation. *Id.*, ¶ 21.

Similar to *Stewart*, the presumed purpose of the IID Order in the present case was already accomplished through other more narrowly tailored conditions of probation. Pursuant to Wisconsin Statutes Section 343.301, Marguerite was already required to maintain an IID on any vehicle she owns or operates for a cumulative period of three and a half years following the reinstatement of her driver's license. R. 15:25, 15:27-29; App. 36, 38-30. Thus, the presumed goal of the IID Order, preventing Marguerite from reoffending by making it more difficult for her to operate a vehicle, was already accomplished through less restrictive conditions of supervision.

At Marguerite's sentencing, the circuit court cited no justification or reasoning for imposing the more restrictive and overbroad IID Order, which vaguely required the installation of an IID in Marguerite's "husband's car." R. 15:26; App. 27. The court gave no explanation for why the mandated

conditions of supervision imposing IIDs might be insufficient. *See* R. 15. In addition, the Court provided no explanation of why it believed Marguerite might attempt to drive while her license is revoked, and thus before she is required to maintain an IID on any vehicle she operates or which is titled and registered in her name. *Id.* Finally, as discussed above, nothing in the record established which vehicle was Marguerite's "husband's car," and the court had no basis to conclude that an IID was necessary for that car. *Id.* Thus, the court abused its discretion by imposing an unduly restrictive and overbroad condition of probation, the aims of which were already accomplished by more narrowly tailored conditions.

II. The circuit court violated Byron Alpers' constitutional due process rights because the IID Order primarily punishes him, yet the court had no jurisdiction over him, and he had no notice of or opportunity to respond to the Order.

The constitutionality of a condition of probation presents a question of law, reviewed with no deference given to lower courts. *Oakley*, 2001 WI 103, ¶ 8. In the present case, the IID Order was an arbitrary government action that primarily punishes Byron, despite the fact that the circuit court had no jurisdiction over him and he had no notice of the Order or opportunity to respond to it. As a result, the IID Order violates Byron's constitutional due

process rights and should be rescinded.

Byron was not a party to Marguerite's case, and therefore not subject to the trial court's jurisdiction. Yet he is the party chiefly aggrieved and punished by the Order. While semantically speaking, the court ordered Marguerite to install an IID on her "husband's car," practically, it ordered Byron to install an IID on his car. Marguerite was taken into custody immediately following her sentencing hearing, and per the court's order, was only released from the House of Corrections after they "physically check[ed] to see that the breath interlock device is on the car." R. 15:28, 15:31; App. 29, 32. Thus, Byron was effectively ordered to install the IID on his own car.

The IID order violated Byron's substantive and procedural due process rights under the United States and Wisconsin Constitutions. *See State v. Laxton,* 2002 WI 82, ¶ 10 n.8, 254 Wis.2d 185, 647 N.W.2d 784. Substantive due process protects individuals from "certain arbitrary, wrongful government actions. The test to determine if the state conduct complained of violates substantive due process is if the conduct 'shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty." *State ex rel. Greer V. Wiedenhoeft*, 2014 WI 19, ¶ 57, 353 Wis. 2d 307, 845 N.W.2d 373, *reconsideration denied sub nom. Greer v.*

Wiedenhoeft, 2014 WI 50, ¶ 57, 354 Wis. 2d 866, 848 N.W.2d 861 (internal citations omitted). The trial court's order shocks the conscience by interfering with Byron's right under the Fifth Amendment to the United States Constitution and Sections Six, Seven, and Eight of Article One of the Wisconsin Constitution, to not be subject to penalties in a court case where he is not a party.

The IID order also violated Byron's right to procedural due process. Even if a government action "survives substantive due process scrutiny, it must still be implemented in a fair manner." *Greer*, 2014 WI 19, ¶ 62. In this case, the circuit court had no jurisdiction over Byron, as he was not a party to Marguerite's cases. Further, he had no opportunity to challenge the IID Order at sentencing, for example, by explaining to the circuit court that he keeps his car keys locked in a safe to prevent Marguerite from driving his car, or that his asthma might make it difficult for him to use the IID. *See* R. 15. Finally, Byron has no clearly defined means of appealing the order.

In addition, the IID Order exceeded the court's authority. A court may impose reasonable and appropriate conditions of probation "if a person is convicted of a crime," Wis. Stat. § 973.09(1)(a). Byron was neither convicted, nor charged, with a crime. He had no notice that his personal

freedoms were in jeopardy. Thus, he was not subject to the court's jurisdiction.

Conclusion

The circuit court abused its discretion when it imposed the IID Order as a condition of Marguerite Alpers' probation. The Order is an overbroad and unduly burdensome condition of probation based on the circuit court's own idiosyncrasies, and not on the factual record of the case. In addition, the Order chiefly punishes Byron Alpers, a non-party to the case, and is therefore a violation of Byron's due process rights. Accordingly, the IID Order should be removed.

Dated at Milwaukee, Wisconsin, this 27th day of October, 2015.

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Certifications

I. Certification as to Form and Length

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,799 words.

II. Certification of Compliance with Wis. Stat. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

III. Certification as to Mailing

I hereby certify that that I have submitted paper copies of this brief and appendix in compliance with the requirements of Wis. Stat. § 809.80(3). On October 27, 2015, ten copies of the brief and appendix were deposited in the United States mail for delivery by first-class mail to the clerk of the Court of Appeals, and three copies were deposited in the United States mail for delivery by first-class mail to the State of Wisconsin, by the Milwaukee County District Attorney.

Dated this 27th day of October, 2015.

HALLING & CAYO, S.C.

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State Bar No. 1079079

STATE OF WISCONSIN
COURT OF APPEALS
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Appeal No. 2015-AP-1784-CR

Circuit Court Case No. 2014-CT-1754

APPENDIX OF

DEFENDANT-APPELLANT MARGUERITE ALPERS

Appendix Certifications

I. Certification of Compliance with Wis. Stat. § 809.19(2)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 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 § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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.

II. Certification of Compliance with Wis. Stat. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 27th day of October, 2015.

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