STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP001784-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MARGUERITE ALPERS,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A POST-CONVICTION MOTION TO RESCIND AN ORDER FOR INSTALLATION OF AN IID DEVICE, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT ADMITTING ERROR

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ISSUES PRESENTED

1) Did the trial court properly exercise its discretion when it ordered Ms. Alpers, as a condition of probation in an OWI 2nd case, to place an IID on what was characterized as her husband's car?

   Trial Court answered: Yes

   State's Position on Appeal: No

2) Did the Trial Court's order that Ms. Alpers, as a condition of probation in an OWI 2nd case, place an IID on what was characterized as her husband's car violate her husband's constitutional rights?

   Trial Court answered: This issue was not presented in the trial court.

   State's Position on Appeal: This issue is not properly before this court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. See Wis. Stat (Rule) 809.22(1)(b). Further, the case can be resolved by applying well-established legal principles to the facts of the case, and—as a matter to be decided by one judge—is not eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)2, 4.

STATEMENT OF THE CASE

On July 18, 2014, Ms. Alpers was arrested for Operating a Motor Vehicle while under the influence of an Intoxicant (OWI), 2nd offense, and Operating a Motor Vehicle while having a Prohibited Alcohol Concentration (PAC), 2nd offense. Her conduct came to the attention of law enforcement after a criminal defense attorney saw her pull out of a parking spot at a liquor store; he followed her, and saw that she was driving slowly and was unable to maintain her position in the lane of traffic. (R15:9-10) He got her attention and got her to stop, but remained sufficiently concerned when she drove away again, that he called police. (R15:10) The responding police officers who spoke with her noticed various signs associated with intoxication, including that she was having a hard time standing and needed to use the door to maintain her balance (R15:10-11) Ms. Alpers admitted drinking alcohol, and admitted that she had been drinking alcohol while she was driving. (R15:11).

After additional investigation, Ms. Alpers was arrested for OWI. Her blood alcohol concentration (BAC) was .21 (*Id*.) Those offenses were charged in in Milwaukee County case number 14CT001745. (R15:9-11).

About three weeks later, on August 9, 2014, an officer saw Ms. Alpers leaving the same liquor store: he observed that she stumbled to her car, and as she drove from the store, she was speeding and twice crossed the center line. (R15:12) She was stopped, and after additional investigation, was again arrested for OWI. (*Id*.) Her BAC in this instance was .193. (R15:13). As a result, she was charged with a second set of charges of OWI 2nd PAC 2nd, in case number 14CT001754. (R15:11-13).

The two cases came to resolution on June 10, 2015, at which time Ms. Alpers pled guilty to the OWI 2nd offense, as charged in 14CT1745, and to an amended charge of OWI 3rd in 14CT001754. (R15:4, 6-9). The Honorable John Siefert presided over the plea hearing and found her guilty of those charges. (*Id*.)

At sentencing, which followed immediately, State recommended that the court sentence Ms. Alpers to 60 days in the House of Correction in 14CT001745, and 5 months in the House of Correction, in 14CT001754, with no position as to whether those jail terms should be concurrent or consecutive. (R15:4) Ms. Alpers, in contrast, recommended that the court impose a probation term. (R15: 23)

During their sentencing remarks, Ms. Alpers and her attorney addressed the continued driving. Ms. Alpers's attorney advised the court that,

> She has not driven since the most recent offense.
>
> ***
>
> She has rides. She has a pool of drivers, including her husband……
>
> ***
>
> She doesn't have the need to drive

(R15:20)

Ms. Alpers, herself, told the court,

> I will not drive. I have dizzy spells. 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.

(R15:24)

There was no evidence presented at sentencing as to whether Ms. Alpers owned a car, whether her husband [Byron Alpers] owned a car, whether they owned a car in common as marital property, whose name any car that either *did* own was titled in, whether Mr. and Ms. Alpers lived together, what car(s) she was driving during these offenses, who owned them, or whose name those cars were registered in. (R15: 9-24)

In imposing sentence, Judge Siefert opined that license revocation does not prevent a person from driving and that the penalties for operating after revocation were too minor to be deterrence. (R15:20-21) Instead, he indicated that breath interlock devices were more appropriate to deal with the potential of repeated intoxicated driving.

> …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 on their car, it's – you make it much, much harder for them to drive because they'' have to find somebody that's sober that can learn the pulse codes.

(R15:21).

He continued,

> The best way, my view Counsel, is not 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 needed.
>
> ***

> Breath interlock devices that keep cars from starting if anybody's been drinking, those are at least somewhat real.

(R15:22).

Following the parties' remarks, Judge Siefert ordered that Ms. Alpers serve six months in the HOC and pay a $350 fine and costs, revoked her license for 1 year, and entered an 18 month IID order, for the OWI 2nd charge in 14CT001745. As to the OWI 3rd in 14CT001754, Judge Siefert withheld sentence and placed Ms. Alpers on probation for 2 years, consecutive to the OWI 2nd sentence. As conditions of that probation, Judge Siefert ordered, that she not drive while drunk; that she install a breath interlock device on her husband's car; and that she serve 45 days of condition time, concurrent.[1] (R15:26-27)

In imposing the interlock order as a condition of probation, Judge Siefert said,

> 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 she doesn't drive once she's out of the House of Correction.
>
> I want to make sure that she can't physically make that car start is 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…..

(R15:26-27)

Post-conviction, Ms. Alpers moved the court to remove the order that she place an IID on her husband's car. (R11) The motion, premised on Byron Alpers's medical condition, alleged that the IID posed a potentially dangerous situation because its

[1] The court also ordered fines, costs, and a 2 year IID requirement to go into effect when Ms. Alpers applied for her license, which were not conditions of her probation.

interaction with Byron Alpers's asthma could create dangerous medical situations or cause Ms. Alpers to be late for or miss required appointments. (R11) Judge Siefert denied the motion on those grounds by written order on July 17. (R12)

This appeal follows.

STANDARD OF REVIEW

Sentencing lies within the circuit court's discretion, and appellate review is limited to considering whether discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

Wis. Stat. § 973.09(1)(a) permits sentencing courts to impose any conditions of probation which appear to be reasonable and appropriate. Whether a condition of supervision is reasonable and appropriate is determined by how well it serves the dual goals of supervision: rehabilitation of the defendant and the protection of a state or community interest. *State v. Miller*, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 474, 701 N.W.2d 47, 51–52.

Conditions of probation are reviewed under the erroneous exercise of discretion standard. *State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct.App. 1995); *State v. Koenig*, 2003 WI App 12, ¶ 7, 259 Wis. 2d 833,656 N.W.2d 499. Under that standard, this court will uphold a circuit court's 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 (citation omitted).

ARGUMENT

I. THE TRIAL COURT'S ORDER IN 14CT001754 THAT MS. ALPERS PLACE AN IID ON THE VEHICLE WAS NOT SUPPORTED BY THE RECORD.

A circuit court has broad discretion to craft conditions of probation. Circuit courts are granted broad discretion in determining conditions of probation, *State v. Miller*, 283 Wis. 2d at 474, ¶11. A condition is reasonably related to the goal of rehabilitation if it helps the convicted individual conform his or her conduct to the law. *State v. Oakley*, 2001 WI 103, ¶ 21, 245 Wis. 2d 447, 629 N.W.2d 200.

It is the State's position that, with proper findings, the trial court lawfully could have ordered Ms. Alpers to install an IID in a vehicle she owns, or which she owns jointly with another. The record here shows that within a very short time span, Ms. Alpers twice drove under the influence of an intoxicant. (R15:9-13) She had a very high BAC on both occasions. Once, her physical impairment was so great that a defense attorney followed her and summoned police; the other time, she was staggering as she walked from a liquor store, got into her car and drove away. (*Id*.) That level of impairment, the close proximity in time of the two offenses, her high BAC in both, and the fact that the earlier arrest did not curb her drinking and driving, reasonably would warrant a judge in the opinion that Ms. Alpers's problem with drinking—and drinking and driving—was greater than that of other defendants. It would similarly warrant a belief that Ms. Alpers posed a greater risk to reoffend and a greater risk to the community.

Judge Siefert expressed concern, in broad terms, that Ms. Alpers would reoffend, notwithstanding that she would not have a driver's license. (R15:26) He opined that the likely penalties for Operating after Revocation of her license were insufficient to prevent repeated drunk driving (R15:20-23), and that the best way to prevent Ms. Alpers from driving drunk again was to have an IID installed before it was otherwise required. (R15:22) He expressed, again in broad terms, that because Ms. Alpers would remain physically capable of driving, she would remain at risk of driving drunk again.

(R15:22, 26). The court's order for installation of an IID as a condition of probation was thus designed to protect the community—which is a valid interest at sentencing—and to keep Ms. Alpers from reoffending—which is certainly the goal of rehabilitation.

The problem with Judge Siefert's order, though, is two-fold.

First, nothing in the sentencing transcript establishes whose car the IID was to be installed in. Judge Siefert--perhaps because Ms. Alpers said that she no longer drives and her husband drives her—referred to "her husband's car." (R15: 26) But nothing in the sentencing record supports the conclusion that the car belonged to Ms. Alpers's husband: the car in which he drives her could be a family member's car, a neighbor's car, or a rental vehicle. Even were the court to be correct in the assumption that Ms. Alpers's husband owned the car, nothing in the record establishes that Ms. Alpers had an ownership interest in the vehicle.[2] The record therefore was not sufficient to allow Judge Siefert to conclude that Ms. Alpers had the authority to install an IID in the car. Absent a finding that Ms. Alpers had the actual authority to install the IID, the court's authority was limited to ordering her—as a condition of probation—not to reside with someone who had a vehicle without an IID.

Second, because the facts about the car are sparse, Judge Siefert could not conclude the order was necessary. The record does not demonstrate what car(s) Ms. Alpers was in when she committed her offenses; certainly, the connection between rehabilitation, community protection and the installation of an interlock device would be stronger if the car which was the subject of the order had been the one used in the criminal activity. Neither does the record support the court's

[2] All property of spouses is marital property, except that which is classified otherwise by the marital property statutes, and all property of spouses is presumed to be marital property. *See,* Wis. Stat. § 766.31(1) and (2). Generally, each spouse has an undivided one-half interest in each item of marital property. *See,* Wis. Stats. § 766.31(3). However, certain exceptions exist to the notion that property acquired after marriage is marital property. *See,* Wis. Stat. § 766.31(7). Because there is nothing on the record to demonstrate when or how the car was acquired

assumption that Ms. Alpers actually had access to "her husband's car:" there is no information as to where that car was generally kept, where the keys were kept, or how many sets of keys there were.

Absent information that Ms. Alpers had the authority to install the device and that the order was necessary, the State believes the order that Ms. Alpers install an IID in "her husband's car" was improper.

II. THE ISSUE OF WHETHER BYRON ALPERS'S RIGHTS WERE VIOLATED IS NOT PROPERLY BEFORE THIS COURT.

Ms. Alpers's second contention on appeal is that the court's order that Ms. Alpers place an IID device on her husband's car violates his due process rights . In support of the argument, Ms. Alpers complains that (1) her husband is the person "chiefly aggrieved and punished by the Order (sic);" and the order "practically ordered Byron to install an IID on his car." (Brief of Defendant-Appellant, p. 19)

It is the State's position that this issue is not properly before this court. Ms. Alpers did not raise this issue at sentencing. (See, R15, generally) Neither did she raise it in her post-conviction motion to remove the IID order, which was premised solely on issues relating to Byron Alpers's health conditions: specifically, that the order might "cause him to terminate or significantly delay trips in locations or in weather that could be life-threatening;" and could "be expected to cause Marguerite to be late for or miss medical or treatment-appointments;" and might "also cause her to violate the electronic monitoring order." (R11:2) The issue therefore has not been preserved in this matter.

Neither is it correct to say that Byron Alpers is primarily aggrieved and punished by the trial court's order. Arguably, a person always suffers some consequences when his or her spouse is sentenced in a criminal case: joint property may be forfeited; communal assets may be required to pay fines, costs, or restitution; family income may be implicated if the defendant is ordered not to engage in a profession or is

incarcerated. That a person feels effects of his or her spouse's criminal conduct does not create an actionable claim. The IID order here served the goals of rehabilitation of Ms. Alpers and the protection of the community, valid state interests. Had the necessary factual underpinnings been of record, the order would have been lawful and appropriate, notwithstanding its impact on Byron Alpers.

CONCLUSION

The State believes that the trial court erred in ordering Ms. Alpers to install an IID device on "her husband's car," because the record does contain facts necessary to sustain that order. The State, on that basis, therefore joins Ms. Alpers in asking that the IID order be reversed.

Dated this _____ day of November, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,702.

_____ _____

Date

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

_____ _____

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