STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP00740-CR

DeANTHONY K. MULDROW,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN MANITOWOC COUNTY CIRCUIT COURT, BRANCH THREE, THE HONORABLE JEROME L. FOX PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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DEFENDANT-APPELLANT'S BRIEF

STATEMENT OF ISSUE

WAS MULDROW ENTITLED TO WITHDRAW HIS NO GUILTY PLEA TO COUNT ONE BECAUSE NEITHER THE COURT NOR HIS ATTORNEY ADVISED HIM THAT HIS PLEA WOULD SUBJECT HIM TO LIFETIME GPS?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Muldrow) believes that the briefs of the parties will fully meet and discuss the issues on appeal. Publication may be warranted. The lifetime GPS requirement and its status as punishment or a strictly collateral matter has not been the subject of any published or unpublished Wisconsin cases. It has been addressed by several other states and by the federal courts in the Seventh Circuit as will be explained in the argument below. Accordingly, publication may be useful for the general administration of justice.

STATEMENT OF THE CASE

This case was commenced on August 27, 2009 by the filing of a Probable Case Statement and Judicial Determination (1). On September 3, 2009, the State filed a criminal complaint (2) charging the defendant-appellant (Muldrow) with two counts of sexual assault of a child under 16 years of age and one count of felony bail jumping contrary to Sec.948.02(2) and 946.49(1)(b), Wis. Stats. respectively. Muldrow's initial appearance was on September 14, 2009 (25). He waived his preliminary exam on September 14, 2009(15). The State filed an information (5) that alleged as follows:

Count	Date of Offense	Offense
1	August 25, 2009	Sexual Assault of a Child Under 16 Years of Age
2	August 25, 2009	Third Degree Sexual Assault

3	August 26, 2009	Sexual Assault of a Child Under 16 Years of Age
4	August 26, 2009	Third Degree Sexual Assault
5	August 26, 2009	Felony Bail Jumping

Muldrow pleaded not guilty at the arraignment on October 5, 2009 (26). Further proceedings were held on December 17, 2009; January 8, 2010; and February 12, 2010 (28-32). On June 24, 2010 (33), Muldrow pleaded guilty to Counts 1 and 2 of the information in exchange for the remaining counts being dismissed and read-in (33: 2-3). The parties entered into a stipulation that the court approve an 18 year deferred adjudication agreement (DJA) on Count One (18) and a one year concurrent sentence on Count Two. Judge Jerome Fox sentenced Muldrow as requested by the parties and approved the DJA (33: 14; 22; App. 101-102).

On December 14, 2014, the State moved to vacate the DJA (35). On April 6, 2015, the court granted the motion and placed Muldrow on probation for ten years subject to various conditions (45; 43; App. 103-104). After sentencing, Muldrow filed a notice of intent to pursue post-conviction relief (42) and the undersigned attorney was appointed to represent Muldrow.

On November 2, 2015, Muldrow filed a motion to withdraw his guilty pleas (47; App. 106-124). After a hearing on February 1, 2016 (58), the court considered the matter after an exchange of briefs (55 and 56) and rendered an oral decision on March 11, 2016 (59; App. 125-130). Judge Fox entered a written

order denying the motion on March 21, 2016 (57; App. 105). Muldrow subsequently filed a notice of appeal on April 11, 2016 (61) directed at both the judgment of conviction and the order denying his post-conviction motion .

STATEMENT OF FACTS

Prior to entering his guilty pleas on June 24, 2010, Muldrow completed a plea questionnaire and waiver of rights form (17). The form set forth Muldrow's age, educational attainment and mental status. It also outlined Muldrow's constitutional rights. It set forth the terms of the plea agreement and indicated the elements of the offenses in an attachment. The maximum penalties for each count were also set forth on the form. The plea questionnaire indicated (on the front page) that the court was not bound by any plea agreement or recommendations and could impose the maximum penalties (17: 1). The form also informed Muldrow that he was subject to loss of certain civil rights (17: 2). It did not address the issue of lifetime GPS.

At the beginning of the plea hearing on June 24, 2010, Assistant District Attorney (ADA) Douglass Jones agreed with Muldrow's attorney, Thomas Gerlman, as to the terms of the agreement between the parties (33: 2-3). Judge Fox conducted a colloquy with Muldrow regarding his guilty pleas (33: 4-6). The colloquy did not address the issue of lifetime GPS. As noted above, on April 6, 2015, the court revoked the DJA (45; 43; App. 103-104). The court did not

conduct a colloquy with Muldrow that his counsel's stipulation to revocation of the DJA would subject him to lifetime GPS.

At the hearing on Muldrow's post conviction motion, Muldrow and the State agreed that the court take judicial notice of the conditions of GPS as set forth in the district court decision in *Belleau v. Wall* (58: 11-12; see below). Among the conditions Belleau endured was the following:

> Belleau was released from the Brown County Jail on the morning of July 7, 2010, before the DOC agents arrived. He was located at a nearby bus stop, and without any warrant or other court order, the DOC agents quickly escorted him back to the jail where they proceeded to attach a 2.5 x 3.5 x 1.5 inch GPS tracking device to him with a black neoprene rubber strap that is wrapped around his right ankle. In doing so, the agents were acting under the authority of the statute alone. Under that same authority, Belleau is now required to wear the device 24 hours per day, seven days a week, for the rest of his life. If he "intentionally tampers with, or blocks, diffuses, or prevents the clear reception of, a signal transmitted by" the device, he is guilty of a Class I felony, punishable by three-and-a-half years in prison and a $10,000 fine. Wis. Stat. §§ 946.465, 939.50.
>
> The GPS tracking device Belleau is required to wear is an ExacuTrack One, which was provided by BI Incorporated, the vendor with which the DOC contracts for the tracking hardware and software it uses to comply with Section 301.48. The device is powered by rechargeable batteries that are designed to last about three years, but must be charged for approximately one hour in each 24-hour period. To charge the batteries, Belleau must connect one end of a charging cord to the device and plug the other end into an electrical outlet. Since he is not allowed to remove the device from his ankle, he must remain close by while the batteries are being charged. The device is waterproof and can be submerged to a depth of fifteen feet, allowing showering and bathing without removal, but it can rub against and cause discomfort and occasional blistering to

the skin of his ankle. It also makes dressing more difficult. On occasion, GPS technicians go to Belleau's house to change the batteries or service the unit. Repairs have taken as long as an hour.

Though relatively small, the device creates a noticeable bulge under the wearer's pants leg and can become visible if his pants leg raises up, such as when the wearer sits or bends down. Several people have indicated to Belleau that they noticed the device and inferred that he is a sex offender. At least one has brandished a gun and warned him to stay away, while others have simply stopped talking to him. Because it is plainly visible if he wears shorts, he does not wear shorts in public. The device does not allow DOC monitors to listen in on Belleau's conversations, but they can transmit messages to him. DOC monitors can send messages such as "call your officer now"; low battery, recharge unit"; "report to the office immediately"; and "remember your appointment" to the person wearing the device. The only message Belleau has received, however, is a non-verbal low battery alert. In any event, if received in public, these messages can also convey the fact that Belleau is wearing a monitoring device and invite closer scrutiny.

Belleau is considered by the DOC a "maximum discharge" registrant subject to GPS monitoring. Maximum discharge registrants are those who have completed and been discharged from their sentences and/or commitments, and thus DOC has no direct authority over them by virtue of any court judgment or order. Maximum discharge registrants have their locations tracked and recorded in real time, but their current locations are not monitored in real time, other than when real time alerts are received for tampering, a low battery, when the registrant leaves the State, or in those limited instances where a maximum discharge registrant has an exclusion zone and enters and remains in that zone. Typically, the DOC's GPS Monitoring Center monitors maximum discharge registrants retroactively every 24 hours. This is done at night, where a DOC employee ("Operator") assigned a set of maximum discharge registrants views a Bing computer map using Total Access software, which displays points showing the locations and movements of a particular person over the last 24 hours.

Although the law requires the DOC to create "for each person who is subject to global positioning system tracking" individualized inclusion zones, which the person is prohibited from leaving, and exclusion zones, which he is prohibited from entering except to pass through, "if necessary to protect public safety," Wis. Stat. § 301.48(3)(c), maximum discharge registrants like Belleau are generally not given exclusion zones and are not required to remain in inclusion zones.

It is undisputed that Belleau does not currently have any exclusion zones. However, DOC Administrative Directive #13-08 states: "Exclusion zones may also be imposed if deemed appropriate by the GPS Specialist and approved by the Sex Offender Programs Director, i.e. school zones, parks, daycares, etc." This Directive applies to maximum discharge registrants. If an exclusion zone is created for a maximum discharge registrant like Belleau, an alert will be generated at the DOC's GPS Monitoring Center and an Operator will notify a GPS Specialist if he remains in the exclusion zone beyond the time needed to pass through. But because DOC has no direct authority over maximum discharge registrants, its agents could not take Belleau into custody or order that he be taken into custody solely because of entry into an exclusion zone. The Specialist may instead contact the registrant by telephone, proceed to the location to investigate, or ask law enforcement to do so.

Section 301.48 also requires the DOC to determine the cost of the GPS tracking system for each person subject to the law and to assess a fee based on the ability of the person to pay that cost, considering his financial resources, present and future earning capacity, the needs and earning capacity of his dependents, and any other obligations or relevant factors. The DOC is then tasked with collecting from the person the entire cost or such portion of it that it determines he can pay. Wis. Stat. § 301.48(4). Despite the fact that Belleau's income was limited to a Social Security check, he was notified in September 2011 that he would have to pay a $240 per month GPS tracking fee. Based on Mr. Belleau's income, his tracking fee has subsequently been determined to be $50 per month.

*Belleau v. Wall, (*Eastern District of Wis. 12 CV 1198) dtd 9-21-2015 App. 133-135). Since Muldrow has not yet completed his sentence in the above matter, these conditions have not been imposed. However, there is no reason to believe that conditions of GPS monitoring will be appreciably different from those of Belleau once Muldrow completes his probationary term imposed on Count One or any sentence imposed on that count should Muldrow's probation be revoked.

Further facts will be stated in the argument below.

ARGUMENT

MULDROW'S PLEA COLLOQUY WHICH FAILED TO INFORM HIM THAT HIS PLEAS WOULD SUBJECT HIM TO LIFETIME GPS WAS DEFICIENT. HE WAS ENTITLED TO WITHDRAW HIS PLEA ABSENT PROOF THAT IT WOULD HAVE HAD NO EFFECT ON HIS ENTRY OF HIS PLEAS.

A. Standard of Review

The standard of review for a motion by a defendant to withdraw his plea was recently reiterated by the Wisconsin Supreme Court:

> "A decision to grant or deny a motion to withdraw [a plea] is within the discretion of the trial court." *State v. Rhodes*, 2008 WI App 32, ¶ 7, 307 Wis.2d 350, 746 N.W.2d 599. "A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard." *Jenkins*, 303 Wis.2d 157, ¶ 30, 736 N.W.2d 24 (citing *State v. Kivioja*, 225 Wis.2d 271, 284, 592 N.W.2d 220 (1999)). All that "this court need find to sustain a discretionary act is that 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." Id. (quoting *Loy v. Bunderson*, 107 Wis.2d 400, 414–15, 320 N.W.2d 175 (1982)).

State v. Lopez, 2014 WI 11 ¶ 60, 353 Wis.2d 1, 843 N.W.2d 390.

B. As a matter of law, Judge Fox's colloquy with Muldrow was defective because it failed to advise him that he was subjecting himself to lifetime GPS as a direct consequence of his pleas.

The paramount principle at a plea hearing is that a guilty plea must be knowingly, voluntarily, and intelligently entered. *State v. Hampton*, 2004 WI 107 ¶21, 274 Wis. 2d 379, 683 N.W.2d 14. If a defendant files a motion that (1) identifies a failure by the circuit court to comply with Sec. 971.08 Wis. Stats. or a court-mandated plea hearing procedure, and (2) alleges that the defendant did not understand the information at issue, then the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. *State v. Bangert*, 131 Wis. 2d 244, 274-275, 389 N.W.2d 12 (1986). Notably, the second *Bangert* prong is satisfied by a conclusory allegation that the defendant did not know or understand. *State v. Hampton*, 2004 WI 107, P57, 274 Wis. 2d 379, 683 N.W.2d 14. Neither *Bangert* nor *Hampton* require that the ultimate outcome of the case in terms of a not guilty finding or the sentence imposed be affected. Only the defendant's decision making process as to whether or not to enter a plea or go to trial is at issue.

Muldrow's postconviction motion (47: 10; App. 115) stated that, "Muldrow asserts that no one informed him of the lifetime GPS consequences or his pleas and

that if they had Muldrow would not have entered his pleas. " The State never challenged this assertion or presented evidence to the contrary that would meet its. burden of proving by clear and convincing evidence that the plea was knowingly entered. *State v. Brown*, 2006 WI 100, ¶36, 40, 293 Wis. 2d 594, 716 N.W.2d 906; *Bangert*, 131 Wis. 2d at 274-75.

Sec. 971.08, Wis. Stats. requires in part as follows:

> **971.08 Pleas of guilty and no contest; withdrawal thereof**. (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

In this case, Muldrow's position is that lifetime GPS monitoring is a punishment that is associated with a level 2 child sex offense such as the offense in Count One to which Muldrow plead guilty and was ultimately adjudicated and placed on probation.

The trial court's duties in taking a guilty or no contest plea from a defendant includes the range of punishments to which he is subjecting himself by entering a plea and the direct consequences of his plea. *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906.

Notably, contrary to the remarks by Judge Fox during the post conviction motion hearing (see 58: 3), it does not limit "direct consequences" to matters set forth in any particular chapter of the Wisconsin Statutes. The placement of a statutory provision does not determine whether it is punishment or not.

Instead, the test of whether a statute is punitive notwithstanding legislative intent is determined by a seven part test:

> ¶13 In deciding whether a statute is punitive, courts apply a two-part "intent-effects" test. See Rachel, 254 Wis. 2d 215, ¶¶39-42; Kester, 347 Wis. 2d 334, ¶22. First, we ask whether the legislature's "intent" was to punish or rather was to impose a non-punitive regulatory scheme. See Kester, 347 Wis. 2d 334, ¶22. This intent inquiry is "primarily a matter of statutory construction that asks whether the legislative body[] '... indicated either expressly or impliedly a preference for one label or the other.'" Id., ¶23 (quoted source omitted). If the legislature intended the law to be punitive, our inquiry ends. Id., ¶22. If the legislature intended a non-punitive regulatory scheme, then we proceed to the second "effects" part of the test. Id.
>
> ¶14 The "effects" inquiry asks whether, despite the fact that the legislature intended a non-punitive regulatory scheme, "the effects of the sanctions imposed by the law are 'so punitive ... as to render them criminal.'" Id. (quoted source omitted). "[O]nly the 'clearest proof' will convince us that what a legislative body has labeled a civil remedy is, in effect, a criminal penalty." Id. (quoted source omitted). When determining whether a scheme is punitive in effect, we consider the following non-exhaustive list of factors:
>
> (1) whether [the law in question] involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which [the law] applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned (citation omitted).

State v. Radaj, 2015 WI App 50, ¶¶13-14, 363 Wis. 2d 633, 866 N.W.2d 758.

Lifetime GPS amounts to punishment for child sex offenses. Although *Belleau* arose out of a different context than this case, Judge Griesbach considered the issue of punishment in *Belleau* using factors similar to the *Radaj* court. (App. 138-147). Judge Griesbach was unable to find that the legislative intent was punitive (App. 138-139) rather than protection of the public or aiding law enforcement. The onerous practical effects (App. 140-147) rendered lifetime GPS a form of punishment. Although Judge Griesbach acknowledged a split of authority on the issue[1](App. 140), he found the cases holding lifetime GPS monitoring punitive more persuasive. So should this court.

Doe v. Bredesen, 507 F.3d 998, 1007 (6th Cir., 2007) relied upon precedent from sex offender registry statutes which Muldrow believes are inapplicable to the much more onerous requirements of GPS monitoring. The opinion from North Carolina in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (N.C., 2010) like Bredsen, also cited sex offender registry opinions and conducted an analysis similar to the Seventh Circuit (see comments below) but also contained a dissent by Justice Hudson which cited concerns similar to Judge Griesbach in *Belleau*.

Judge Fox and the Seventh Circuit disagreed with Judge Griesbach. Judge Fox's opinion was based upon the decision in *State v. Bollig*, 2006 WI 6, 232 Wis.2d 561, 605 N.W.2d 199 finding that the sex offender registry was not a punitive provision that need be included in a plea colloquy (58:8; App. 130) and the Seventh Circuit opinion in *Belleau*. See also the Seventh Circuit decision in

1 Those cases are discussed below.

Mueller v. Raemisch, 730 F.3d 1128 (7th Cir. 2014) which reached the same conclusion as *Bolling* regarding the sex offender registry.

The Seventh Circuit emphasized Belleau's history and proclivities which despite his age (73) indicated that he was might be a danger to the public (App. 156-158). It also considered the incremental effect of the GPS compared to other regulatory schemes such as the sex offender registry program (App. 158-159). It also cited a California study that determined that the offense recidivism for GPS parolees was half that of those not subject to it (App. 160). The Seventh Circuit also found that the GPS statute was not an ex post facto law as it was even less restrictive than sexually violent person commitment laws that affected persons whose crimes were prior to the enactment of the commitment laws (App. 161). The concurring opinion of Judge Flaum also emphasized the danger to children posed by sex offenders (App. 162). He also was optimistic that the GPS technology would become less intrusive over time (App. 162-163). Further, Judge Flaum rejected the idea that GPS was similar to branding or shaming and thus punitive in effect (App. 168).

The Seventh Circuit opinions in *Belleau* by Judge Posner and the concurrence by Judge Flaum deserves serious consideration but is not necessarily the final word on the critical issue of whether the Wisconsin GPS program is punitive rather than merely regulatory. The comparison with sex offender registry laws improperly conflates paperwork requirements with a 24/7 attached electronic device on one's person that requires recharging, maintenance and periodic

inspections. Detaching or disabling a GPS monitoring device is a criminal offense. The entire Seventh Circuit panel could rehear *Belleau* or the U.S. Supreme Court could grant a petition for certiorari because of the split of opinion by State and Federal courts on the issue.

When released from prison, Muldrow would subject to the same restrictions as Belleau was. Muldrow would be subject to extended supervision (ES) until his discharge date of April 5, 2022 (per DOC locator as of February 7, 2016). Muldrow understands the legality of a GPS device during his conditional liberty while on ES. But the onerous conditions of the lifetime GPS program will still exist in 2022 and beyond unless the legislature modifies the program. Even if Muldrow were to decide to avoid the program by leaving Wisconsin once he can legally do so under Sec. 301.48 (7m), there is no assurance that another state might enact reciprocal laws similar to what most sex offender registry statutes provide. It is strictly speculation that improvements would occur as suggested by Judge Flaum in *Belleau*.

There is no Wisconsin case law on the issue of whether or not lack of information by defendant entering a guilty or not contest plea as to lifetime GPS is grounds to withdraw a plea because of manifest injustice. However, over three years ago, the State of Michigan addressed the issue in *People v. Cole*, 491 Mich. 325, 817 N.W.2d 497 (2012) (also at App. 117-124). The Michigan Supreme Court concluded that lifetime electronic monitoring is a direct part of the sentence and must be explained to a defendant prior to acceptance of a plea to an offense that

subjects a defendant to lifetime GPS monitoring. At least two other state courts that have found that a lifetime GPS requirement as the result of sex offenses to be punitive and thus a violation of the ex post facto clause of the United States and state constitutions. See *Commonwealth v. Cory*, 454 Mass. 559, 911 N.E. 2d 187 (2009) and *Riley v. New Jersey State Patrol Board*, 239 N.J. 270, 98 A.3d 544 (2014).

Muldrow is subject to lifetime GPS monitoring after he is released from extended supervision (ES) because of the offenses he was convicted of. He was unaware at the time he entered his pleas that this would be a punishment to which he was subject. It is a manifest injustice that his plea to Count One should stand since Muldrow did not enter it knowing the potential penalties to which he was subject.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the Judgment of Conviction as to Count One and the order denying his post-conviction motion and remand this matter to the trial court for further proceedings.

Dated this 17th day of May 2016

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional spaced font. This brief has 4239 words, including certifications

Dated this 17th day of May 2016

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

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

Dated this 17th day of May 2016

LEN KACHINSKY