STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP740-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEANTHONY K. MULDROW,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE JEROME L. FOX, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Page(s)

Statutes

Other Authorities

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision may be warranted. The issue raised in this appeal is whether a circuit court is required to advise a defendant of lifetime GPS monitoring before accepting a guilty or no contest plea to certain sexual assaults. The issue has not been addressed in a published Wisconsin decision and is likely to recur.

SUPPLEMENTAL STATEMENT OF THE CASE

DeAnthony K. Muldrow was convicted based on guilty pleas to one count of sexual assault of a child under sixteen and one count of third-degree sexual assault. (22; 43.) After sentencing, Muldrow filed a postconviction motion to withdraw his guilty pleas. (47.) Muldrow alleged that the plea colloquy was inadequate under *State v. Bangert*[1] because the court did not inform Muldrow that his pleas subjected him to lifetime GPS monitoring. (47:9-11.) Muldrow further alleged that no one informed him of the lifetime GPS consequences of his pleas. (47:10.) Muldrow requested a *Bangert* hearing at which the State would bear the burden to prove that Muldrow entered a knowing, voluntary and intelligent plea despite the alleged defect in the court's plea colloquy. (47:9-11.)

The postconviction court summarily denied the motion on the ground that lifetime GPS monitoring is not punishment and, hence, was not a mandatory component of the plea colloquy. (57; 59:3-8.) Muldrow appeals. (61.)

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[1] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

ARGUMENT

Muldrow is not entitled to withdraw his guilty pleas based on the court's failure to advise him of lifetime GPS monitoring.

A. Applicable law and standard of review.

Under the Fourteenth Amendment guarantee of due process, a state trial court may accept a plea of guilty or no contest only when it has been made knowingly, voluntarily and intelligently. *See Brady v. United States*, 397 U.S. 742, 747 n.4 (1970); *State v. Bangert*, 131 Wis. 2d 246, 257-61, 389 N.W.2d 12 (1986). In relevant part, this means that at the time of the plea, the defendant must be aware of the nature of the crime charged, the constitutional rights being waived and the direct consequences of the plea. *See Brady*, 397 U.S. at 755; *Bangert*, 131 Wis. 2d at 260, 265–66. Direct consequences are those that have a direct, immediate, and largely automatic effect on the range of a defendant's punishment. *State v. Brown*, 2004 WI App 179, ¶¶ 4, 7, 276 Wis. 2d 559, 687 N.W.2d 543.

To ensure that a plea of guilty or no contest satisfies this constitutional standard, a trial court must address the defendant personally at the plea hearing concerning the defendant's understanding of the nature of the charges, the constitutional rights being waived, and the potential punishment. *See* Wis. Stat. § 971.08(1)(a); *Bangert*, 131 Wis. 2d at 266-68. Wisconsin Stat. § 971.08 provides in relevant part:

> (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.

Wis. Stat. § 971.08.

In *Bangert*, the Wisconsin Supreme Court established a two-step, burden-shifting procedure for evaluating a defendant's challenge to the constitutional validity of a plea of guilty or no contest stemming from an alleged defect in the plea colloquy:

> The initial burden rests with the defendant to make a *prima facie* showing that his [or her] plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures as stated herein. . . . Where the defendant has shown a *prima facie* violation of Section 971.08(1)(a) or other mandatory duties, and alleges that he [or she] in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274 (citations omitted).

If a plea withdrawal motion alleges a *prima facie* violation and that the defendant did not know or understand information that should have been provided at the plea hearing, the trial court must hold an evidentiary hearing. *State v. Brown*, 2006 WI 100, ¶¶ 36, 39-40, 293 Wis. 2d 594, 716 N.W.2d 906.

This Court determines the sufficiency of the plea colloquy and the necessity of an evidentiary hearing, questions of law, independently of the trial court but benefitting from its analysis. *State v. Hoppe*, 2009 WI 41, ¶ 17, 317 Wis. 2d 161, 765 N.W.2d 794.

B. Lifetime GPS monitoring is not punishment and, thus, is not a mandatory component of a valid plea colloquy.

Muldrow contends that lifetime GPS monitoring is punishment and, hence, a direct consequence of his guilty pleas. (Muldrow's Br. 10-12.) Because the plea-taking court failed to inform him of lifetime GPS monitoring, and because he alleges that he did not otherwise know about lifetime GPS monitoring, Muldrow asks this Court to reverse the order denying his plea withdrawal motion and remand for further proceedings. (Muldrow's Br. 9-11, 15.)[2]

The circuit court correctly concluded that GPS monitoring is not punishment and, thus, not a mandatory component of a valid plea colloquy. (59:8.) Wisconsin Stat. § 301.48 requires the Department of Corrections ("DOC") to maintain lifetime GPS monitoring of certain serious sex offenders like Muldrow. There are no cases in Wisconsin addressing whether lifetime GPS monitoring under Wis. Stat. § 301.48 constitutes punishment. However, in a similar context, the Wisconsin Supreme Court held that the sex

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[2] Muldrow appears to contend that the GPS monitoring law applies only to his conviction of sexual assault of a child under sixteen as charged in count one. (Muldrow's Br. 10.) If that is his position, then he appears to have abandoned any claim for withdrawal of his plea to third-degree sexual assault as charged in count two. *Reiman Assoc., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (appellate court deems as abandoned any issues not briefed or argued on appeal).

offender registration requirement is not punishment for plea withdrawal purposes because its underlying intent is not to punish sex offenders.

In *State v. Bollig*, 2000 WI 6, ¶ 1, 232 Wis. 2d 561, 605 N.W.2d 199, the defendant pled no contest to attempted sexual assault. At the time he entered his plea, he was not informed that he would be required to register as a convicted sex offender and would be subject to criminal charges if he did not comply with the registration requirement. *Id.* ¶¶ 6, 9. Bollig moved to withdraw his plea on the ground that the registration requirement constituted punishment and, thus, the court was required to advise him of the requirement before accepting his plea. *Id.* ¶ 9.

The Wisconsin Supreme Court held that Wisconsin's sex offender registration requirement does not constitute punishment. *Bollig*, 232 Wis. 2d 561, ¶ 27. The court based its holding on the underlying intent of sex offender registration:

> Courts that have determined that sex offender registration is not punitive have held that the underlying intent is public protection and safety. Registration statutes assist law enforcement agencies in investigating and apprehending offenders in order to protect the health, safety, and welfare of the local community and members of the state. Courts have concluded that the remedial goal of protecting the public outweighs any punitive effect of registration, including any infringement on the rights of the offender.

Id. ¶ 20 (citations omitted).

The court concluded that, "Wisconsin's registration statute does not evince the intent to punish sex offenders, but rather reflects the intent to protect the public and assist

law enforcement." *Id.* ¶ 21. The supreme court recognized that sex offender registration imposed significant hardships on sex offenders. However, those hardships did not negate the important civil, regulatory intent of protecting the public:

> Although we recognize that sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment, the punitive or deterrent effects resulting from registration and the subsequent dissemination of information do not obviate the remedial and protective intent underlying those requirements.

Id. ¶ 26. "Simply because registration can work a punitive effect," the court said, "we are not convinced that such an effect overrides the primary and remedial goal underlying Wis. Stat. § 301.45 to protect the public." *Id.* The court concluded that "[b]ecause the duty to register is not punishment; it does not represent a direct consequence of Bollig's no contest plea. Rather, it is a collateral consequence, and Bollig does not have a due process right to be informed of collateral consequences prior to entering his plea." *Id.* ¶ 27.

Like sex offender registration, the GPS monitoring statute has the non-punitive goal of reducing ongoing risks to Wisconsin citizens. That purpose is reflected in the legislative history and in the operation of the statute itself. For example, correspondence to Wisconsin legislative staff during the drafting process reflects that the number one reason for the statute was its potential to reduce recidivism:

> The most important benefits of GPS monitoring of sex offenders are as follows:
>
> 1. Reducing overall recidivism rates by letting offenders know they are being watched (public safety).

Drafting file, 2005 Wis. Act 431, Legislative Reference Bureau, Madison, Wis., https://docs.legis.wisconsin.gov/2005/related/drafting_files/wisconsin_acts/2005_act_431_ab_591/03_asa1_ab591/05s0194df.pdf.[3]

The law's operation supports the stated rationale. Unlike criminal punishments, the GPS tracking terminates if the registrant simply chooses to move out of state. Wis. Stat. § 301.48(7m). Also, unlike a criminal sentence, the monitoring may cease based on physical incapacitation. *See* Wis. Stat. § 301.48(7)(d) and (e) (providing for termination of monitoring in the event of physical incapacitation where the registrant "is not a danger to the public").

The non-punitive intent is further confirmed by other provisions of the statute. The statute provides that DOC shall create exclusion and inclusion zones "if necessary to protect public safety." Wis. Stat. § 301.48(3)(c). Whether to grant a petition to terminate lifetime tracking requires the court to determine whether the petitioner is "a danger to the public." Wis. Stat. § 301.48(6)(g). The court may grant a petition to terminate "if it determines after a hearing under par. (g) that lifetime tracking is no longer necessary to protect the public." Wis. Stat. § 301.48(6)(h).

Muldrow does not dispute that the intent of GPS monitoring, like the intent of sex offender registration, is to protect the public and assist law enforcement. He attempts to distinguish GPS monitoring from the sex offender registry on the ground that any comparison "improperly conflates paperwork requirements with a 24/7 attached electronic device on one's person that requires recharging,

[3] That portion of the drafting file on which the State relies can be found at page 8 of the Supplemental Appendix to this brief.

maintenance and periodic inspections." (Muldrow Br. 13-14.) GPS monitoring, like sex offender registration, can work a punitive effect. But the adverse consequences for sex offenders do not override the Legislature's remedial goal of public protection through lifetime GPS tracking. As a result, GPS monitoring is no more punishment than is Wisconsin's sex offender registry. Under the holding and rationale of *Bollig*, it cannot be said that GPS monitoring is a direct consequence of a guilty plea or a mandatory component of a valid plea colloquy. *Bollig*, 232 Wis. 2d 561, ¶ 27.

Muldrow does not argue that the intent of the GPS monitoring provisions in Wis. Stat. § 301.48 is to punish sex offenders. Implicitly he concedes that the intent of the GPS law is not punitive. (Muldrow's Br. 11-12.) He instead urges this Court to find that lifetime GPS monitoring constitutes punishment under the two-part "intent-effects" test used in ex post facto cases such as *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. The unstated premise of Muldrow's argument is that if lifetime tracking has a punitive *effect* for ex post facto purposes, it necessarily constitutes punishment for purposes of a valid plea colloquy.

Muldrow cites no authority for the proposition that the "intent-effects" test in ex post facto cases governs plea withdrawal. It is hardly a self-evident proposition, as the test for determining what is punishment for ex post facto purposes is different than the test for when a consequence is punishment for purposes of a valid plea colloquy. *Compare Bollig,* 232 Wis. 2d 561, ¶¶ 20-27, *with Radaj*, 363 Wis. 2d 633, ¶¶ 13-14.

Restitution provides a good illustration of that difference. Many federal and state courts have held that restitution is punishment under an ex post facto analysis and that the ex post facto clause prohibits the retroactive

application of statutes imposing new or expanded restitution obligations.[4] But this Court held in *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995), that a trial court need not address restitution during a plea colloquy even though restitution has a punitive effect.

The *Dugan* Court "beg[a]n by rejecting Dugan's unspoken notion that the consequences of a sentencing proceeding (whether they be incarceration, a fine, restitution, probation, or conditions of probation) can or should be exclusively catalogued as either punishment or rehabilitation." *Id.* at 619. "Instead," the court said, "such consequences represent a blend of both concepts." *Id.*

Restitution, the court concluded, is no different. *Id.* at 620. Restitution "is commonly considered as a rehabilitative tool to the offender and as a compensatory tool to the

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[4] *See, e.g., United States v. Schulte*, 264 F.3d 656, 661-62 (6th Cir. 2001); *United States v. Richards,* 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Siegel,* 153 F.3d 1256, 1260 (11th Cir. 1998); *United States v. Edwards,* 162 F.3d 87, 89-91 (3d Cir. 1998); *United States v. Rezaq,* 134 F.3d 1121, 1141 n.13 (D.C. Cir. 1998); *United States v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997); *United States v. Thompson,* 113 F.3d 13, 15 n.1 (2d Cir. 1997); *United States v. Williams,* 128 F.3d 1239, 1241 (8th Cir. 1997); *Eichelberger v. State*, 916 S.W.2d 109, 112 (Ark. 1996); *In the Matter of Appeal in Maricopa Cnty., Juvenile Action No. J-92130*, 677 P.2d 943, 946-47 (Ariz. Ct. App. 1984); *People v. Zito*, 10 Cal. Rptr. 2d 491, 494 (Cal. Ct. App. 1992); *State v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000); *Spielman v. State*, 471 A.2d 730, 734-35 (Md. 1984); *People v. Slocum*, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995); *State v. McMann*, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995); *State v. Short*, 350 S.E.2d 1, 2 (W. Va. 1986); *but see United States v. Nichols,* 169 F.3d 1255, 1279-80 (10th Cir. 1999); *United States v. Newman,* 144 F.3d 531, 542 (7th Cir. 1998).

victim." *Id*. "However, by appropriating the offender's money or property to pay the victim, restitution can also be said to work a punitive effect." *Id*. "Thus," the court held, "*simply saying a sentencing provision works a punitive or rehabilitative effect begs the question before us as to what warnings must be included in a valid plea colloquy*." *Id*. (emphasis added). "Rather, recognizing that both concepts are at work, we must decide the fundamental purpose of the sentencing provision at issue." *Id*.

The court held "that the primary and fundamental goal of restitution is the rehabilitation of the offender" rather than punishment. *Id*. at 620-21. It observed that the potential Class C penalties for Dugan's crime of aggravated battery were "'a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.'" *Id*. at 621 (quoting Wis. Stat. § 939.50(1), (3)(c)). The court noted that "[t]hese potential punishments were set out in the ch. 939, STATS., 1991-92, subchapter entitled 'Penalties'" and that "[n]owhere in this subchapter is restitution enumerated as a potential penalty or punishment for any classification of crime or forfeiture." *Dugan*, 193 Wis. 2d at 621. The court said that "[i]f the legislature had truly intended restitution to constitute 'potential punishment' for purposes of the plea colloquy statute, § 971.08, STATS., it would have formally included such among the 'Penalties' in the sections of the criminal code devoted to that specific topic." *Id*.

Dugan illustrates that whether a statute may have a punitive effect for ex post facto purposes does not mean that the statute imposes punishment that the court must discuss at a plea colloquy. Rather, whether a law imposes punishment for plea withdrawal purposes depends on "the fundamental purpose of the [] provision at issue." *Dugan*, 193 Wis. 2d at 620.

Under *Dugan*'s rationale, the plea-taking court was not required to inform Muldrow of lifetime GPS monitoring. As with restitution, the fundamental purpose of the GPS statute is not punitive. Like the restitution statute in *Dugan*, the GPS monitoring statute is not included in the "penalties" subchapter of chapter 939. Because GPS monitoring is not "potential punishment" under Wis. Stat. § 971.08, the court did not err when it failed to advise Muldrow that he would be subject to lifetime GPS monitoring if convicted. *Dugan*, 193 Wis. 2d at 624.[5]

Muldrow apparently has no quarrel with the court's failure to inform him during the plea colloquy that he would be subject to electronic monitoring while on extended supervision. (Muldrow's Br. 14.) ("Muldrow understands the legality of a GPS device during his conditional liberty while on ES.") Thus, Muldrow's position appears to be that, although GPS monitoring is not punishment when it is a condition of extended supervision, it becomes punishment once he has been discharged. Muldrow fails to explain why GPS monitoring constitutes punishment in one context but not the other.

Finally, Muldrow relies for support on *People v. Cole*, 491 Mich. 325, 817 N.W.2d 497 (2012). (Muldrow's Br. 14-15.) Muldrow's reliance on *Cole* is misplaced. *Cole* neither controls nor provides persuasive authority for the

[5] Even if the ex post facto test of "punishment" were relevant, Muldrow cannot win for the reasons explained in *Belleau v. Wall*, 811 F.3d 929, 937-38 (7th Cir. 2016). There the Seventh Circuit held that Wisconsin's GPS statute is not an ex post facto law because it is not punishment. *Id.* at 937. The court found that the aim of the statute is to prevent sex offenders from continuing to molest children. *Id.* The court explained that, while having to wear the monitor is a bother, it no more is punishment for ex post facto purposes than being placed on a sex offender registry. *Id.*

proposition that Wisconsin's lifetime GPS monitoring statute constitutes punishment.

The defendant in *Cole* pled to two counts of sexual acts involving a person under the age of thirteen. *Cole*, 491 Mich. at 328. For those offenses, the Michigan Penal Code provided in relevant part that "'the court *shall sentence* the defendant to lifetime electronic monitoring'" if the defendant is sentenced to prison. *Id.* at 335-36. The plea-taking court did not inform the defendant that he would be subject to mandatory lifetime electronic monitoring if sentenced to prison. *Id.* at 328-29. At sentencing, the court imposed concurrent prison sentences and, as required by statute, the court ordered that the defendant be placed on lifetime electronic monitoring following his release from prison. *Id* at 329.

The issue was whether lifetime electronic monitoring was a direct consequence of the defendant's plea and thus a mandatory component of the plea colloquy. *Id.* at 327. Based on the plain language of the Michigan statute, the Supreme Court of Michigan held that mandatory lifetime electronic monitoring is a direct consequence of a plea because the Legislature intended electronic monitoring to be "an additional punishment" and "part of the sentence itself." *Id.* at 336. The court explained:

> First, we note that our Legislature chose to include the mandatory lifetime electronic monitoring requirement in the penalty sections of the CSC-I and CSC-II statutes, and that both statutes can be found in the Michigan Penal Code, which describes criminal offenses and prescribes penalties.
>
> Second, both electronic-monitoring provisions provide that "the court *shall sentence* the defendant to lifetime electronic monitoring . . ." MCL 750.520b(2)(d) and MCL 750.520c(2)(b) (emphasis

> added). The use of the directive "shall sentence" indicates that the Legislature intended to make lifetime electronic monitoring part of the sentence itself. Third, the CSC-II statute provides that the sentence of lifetime electronic monitoring is "[i]n addition to the penalty specified in subdivision (a)." MCL 750.520c(2)(b), and the CSC-I statute provides similarly that lifetime electronic monitoring is "[i]n addition to any other penalty imposed under subdivision (a) or (b)," MCL 750.520b(2)(d). The language "in addition to" indicates that the Legislature intended that lifetime electronic monitoring would itself be a penalty, in addition to the term of imprisonment imposed by the court.
>
> Finally, our conclusion that the Legislature intended to make lifetime electronic monitoring punishment and part of the sentence itself is reinforced by MCL 750.520n(1), which likewise includes the language "shall be sentenced," and MCL 791.285(1) and (2), which use the language "individuals . . . who are sentenced . . . to lifetime electronic monitoring" and "[a]n individual who is sentenced to lifetime electronic monitoring . . ."

Id. at 335-36.

The Michigan law evinced punitive intent because it appeared in Michigan's penal code and required courts to impose electronic monitoring in the defendant's criminal sentence. *Cole*, 491 Mich. at 335-36. Accordingly, a plain reading of the Michigan statute "compels [the] conclusion that the Legislature intended mandatory lifetime electronic monitoring to be an additional punishment and part of the sentence itself." *Id.* at 336.

Unlike the statute at issue in *Cole*, Wisconsin's GPS law evinces no intent to impose punishment or to transform GPS monitoring into a component of the defendant's sentence. In contrast to the Michigan statute, Wisconsin's law neither appears in the criminal code nor mandates that

courts impose GPS tracking at sentencing. Consequently, unlike in Michigan, lifetime GPS monitoring in Wisconsin is not a mandatory component of a valid plea colloquy.

In sum, Muldrow has not shown that the GPS monitoring provisions of Wis. Stat. § 301.48 evince punitive intent or otherwise constitute criminal punishment. Consequently, the circuit court's failure to inform Muldrow of lifetime GPS monitoring prior to accepting his guilty pleas does not establish a manifest injustice warranting plea withdrawal under *Bangert*.

CONCLUSION

For the above reasons, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated: August 30, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 3,665 words.

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SANDRA L. TARVER
Assistant Attorney General

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I hereby certify that:

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Dated: August 30, 2016.

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SANDRA L. TARVER
Assistant Attorney General

SUPPLEMENTAL APPENDIX

INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials 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.

Dated: August 30, 2016.

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SANDRA L. TARVER
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