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 REPLY BRIEF

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

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

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STATEMENT OF ISSUE

WAS MULDROW ENTITLED TO WITHDRAW HIS 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.

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 and Applicable Law

Muldrow agrees with the matters set forth by the State on pages 2-4 of its brief with expands upon what Muldrow stated in his brief-in-chief (p. 8-9). The parties also agree upon the basic legal framework regarding motions by a defendant to withdraw his/her plea (p. 3-4 of State's brief and p, 9-10 of Muldrow's brief).

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.

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.[1]

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

1 Upon reflection, Muldrow recognizes that third degree sexual assault does not trigger GPS monitoring under the applicable statutes and agrees with the State's comments in footnote 2 of its brief.

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), *Brown* 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. The State (wisely) did not make the same contention in its brief although it did try to distinguish the statutory framework in the *Cole* case from Wisconsin's lifetime GPS statute..

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.

The State criticized Muldrow for not citing authority that the "intent-effects" test applied to plea withdrawal (p. 8 of State's brief).While there appears to be no direct authority, the language in *Brown* about "direct consequences" appears to apply since GPS monitoring is a mandatory consequence of class 1 and 2 child sex offenses. Sec. 301.48(1)(cm) and (cn) and Sec. 301.48(2), Wis. Stats. The requirement for mandatory GPS is triggered by judicial action placing an offender on probation or imposing a sentence for applicable offenses. The GPS consequence of a conviction of an offense is as certain as if it was pronounced by a judge at sentencing. What elevates GPS monitoring to a level well above the sex offender registry upheld as not being punishment in *Bollig* (pp. 5,6 and 8 of State's brief) is the much higher degree of intrusiveness of GPS monitoring compared to the sex offender registry (see description reproduced from the federal district court decision in *Belleau* on pp. 5-7 of Muldrow's brief).

Lifetime GPS amounts to punishment for child sex offenses. It differs from GPS restrictions imposed as a condition of probation or extended supervision which are forms of conditional liberty and not punishment *per se.* See *State v. Tarrell*, 74 Wis.2d 647, 247 N.W.2d 696, 700-701 (Wis., 1976). 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. (Muldrow App. 138-147). Judge Griesbach was unable to find that the legislative intent was punitive (Muldrow 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[2] (Muldrow App. 140), he found the cases holding lifetime GPS monitoring to be punitive as more persuasive. So should this court.

Doe v. Bredesen, 507 F.3d 998, 1007 (6th Cir., 2007), just like *Bowling*, 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*.

2 Those cases are discussed below.

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; Muldrow App. 130) and the Seventh Circuit opinion in *Belleau v.Wall*, 811 F.3d 929 (7th Cr. 2016) . See also the Seventh Circuit decision in *Mueller v. Raemisch*, 730 F.3d 1128 (7th Cir. 2014) which reached the same conclusion as *Bollig* 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 (*Belleau*, 811 F.3d at 932-935). It also considered the incremental effect of the GPS compared to other regulatory schemes such as the sex offender registry program *Belleau,* 811 F.3d at 937. It also cited a California study that determined that the offense recidivism for GPS parolees was half that of those not subject to it *Belleau,* 811 F.3d at 936. 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. *Belleau,* 811 F.3d at 937-938. The concurring opinion of Judge Flaum also emphasized the danger to children posed by sex offenders. *Belleau*, 811 F.3d at 937-938. He also was optimistic that the GPS technology would become less intrusive over time. *Belleau,* 811 F.3d at 943.

Further, Judge Flaum rejected the idea that GPS was similar to branding or shaming and thus punitive in effect. *Belleau,* 811 F.3d at 943.

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), Wis. Stats., there is no assurance that another state might enact reciprocal laws similar to what most sex offender

registry statutes provide. See, for example, Sec. 301.45(1g), (1h) (f) and (g), Wis. Stats.

Similarly, the availability of relief to Muldrow if he is determined to no longer be a danger to the public (p. 7 of State's brief) does not mean that lifetime GPS is something other than punishment. It simply permits the punishment to be less than a lifetime one. In that respect, it is no different than criminal statutes that permit parole or extended supervision even when a life sentence is imposed. See, for example, Sec. 973.014, Wis. Stats. Similarly, it is strictly speculation that there would be significant improvements in technology that might make wearing electronic bracelets less intrusive as suggested by Judge Flaum in his concurrence 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 Muldrow 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 if applied retroactively. 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).

The State sought to distinguish *Cole* from this case because the electronic monitoring provisions in Michigan law were in the statutory chapter regarding sentencing (p.p. 11-13 of State's brief). As previously noted, electronic monitoring is mandatory upon performance of the judicial act of sentencing to class 1 and 2 child sexual assault offenses. See also definition of level one and level two child sex offenses that require facts in addition to the bare elements of the offense. Sec. 301.48 (1(cm) and (cn), Wis. Stats. Also discussed in legislative drafting notes (State App. 104 and 110). . While Wisconsin's approach is more subtle by mandating electronic monitoring in Chapter 302 rather than Chapter 973 of the Statutes, the practical effect of the requirement, to a much greater degree than the sex offender registry, is a major deprivation of liberty and thus serves as punishment. Simply because it also serves public protection by partially incapacitating an offender from committing new offenses (see State App. 107-110) does not mean it is not punishment. Incarceration also serves an incapacitation function but is still considered punishment.

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 and in his brief-in chief, 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 7th day of September 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 2422 words, including certifications

Dated this 7th day of September 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 7th day of September 2016

LEN KACHINSKY