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STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP00740-CR

DeANTHONY K. MULDROW,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT TWO AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN MANITOWOC COUNTY CIRCUIT COURT BY THE HONORABLE JEROME L. FOX PRESIDING

MULDROW'S REPLY BRIEF

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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 parties essentially agree that the standard of review is that the court reviews this independently without deference to the trial court. See pages 7-8 of Muldrow's brief-in-chief and p. 7 of State'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.

The State did not challenge the sufficiency of Muldrow's pleadings. Like Muldrow, the State concentrated on whether lifetime GPS tracking is punishment or a mere collateral consequence of Muldrow's plea and whether the court must inform the defendant of it during a plea colloquy.

1. *This court should not limit the test of whether a statute is punitive or remedial to the simple question of whether it affects the term of imprisonment or fine.*

The State proposed that this court limit its analysis to whether or not lifetime GPS tracking affects the term of imprisonment or fine (p. 12-13 of State's brief). The State admitted that its test seems too simple. It cited no authority from Wisconsin or foreign jurisdictions where that test was utilized. While such a simple test may ease the burden on trial courts in conducting a plea colloquy, it fails to recognize that for many offenses, such as the second degree sexual assault of a child at issue in this case, the consequence of a conviction in addition to a term of imprisonment or fine may result in what has the practical effect of punishment in depriving the defendant of a substantial degree of liberty . In answer to such problems, for example, the courts and the legislature required that a plea colloquy include warnings about immigration consequences even though only a small percentage of persons entering a plea in Wisconsin courts would be

affected by it. Sec. 971.08(1)(c), Wis. Stats. See *State v. Vang*, 2010 WI App 118, ¶¶ 7-14, 328 Wis. 2d 251; 789 N.W.2d 115, See also *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895 and *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 citing *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

In many respects, lifetime GPS tracking is as onerous as deportation from the United States. See the description of the day-to-day requirements of it as described by Judge Griesbach in *Bellau v. Wall,* 132 F. Supp. 3d 1085 (E.D,. Wis. 2015). *rev'd* 811 F.3d 929 (reproduced in pages 5-8 of Muldrow's brief-in-chief). The State's simple solution of limiting the court's analysis to the term of imprisonment and fine is no solution at all if the law is to be fair and provide reasonable notice to those that are subject to it.

2. *The intent-effect s test rather than a fundamental purpose test is the appropriate analysis to determine whether a statute is punitive or remedial.*

As a fallback position, the State proposed a "fundamental purpose" test (p. 14 of State's brief). It cited *State v. Dugan*, 193 Wis.2d 610, 534 N.W.2d 897 (Wis. App. 1995). *Dugan* held that restitution did not amount for punishment for plea withdrawal purposes. While the State correctly pointed out that restitution was intended, in part, to promote rehabilitation (p. 15 of State's brief), restitution did not impose the daily physical reminders and requirements of GPS tracking. The analogy is inapplicable.

The State also contended that the *Bollig* case, which held that the sex offender registry requirement attached to some offenses was not punishment for plea withdrawal purposes, meant that only a very limited intent- effect analysis was necessary (pp. 16-17 of State's brief). This court's discussion of the intent-effect analysis in *Bollig* was rather brief and did not examine the requirements of the sex offender registry program (SORP) in great detail. However, Bollig's argument was primarily that the public information available regarding those subject to SORP was the equivalent of shaming and the primary punishment inflicted by SORP. SORP requires reports periodically and upon the occurrence of certain events. However, SORP's reporting requirements are not nearly as instrusive as the 24/7 requirements of GPS tracking. A more detailed explanation by the court was not required.

The State further argued that that the test of whether a statutory provision is punitive should be different for plea withdrawal rather than an *ex post facto* analysis (p. 18 of State's brief). However, the issue it cited, restitution, is one that it argued was not punishment. Muldrow agrees with the State that restitution was not punishment (see page 3 above) but lifetime GS tracking is much different in its daily consequences to the offender. The "fundamental purpose" test, if adopted, does not take into account how statutes that are arguably simply for public protection from prior offenders can in effect constitute deprivation of liberty that should constitute punishment with direct mandatory notice to a defendant for plea withdrawal purposes.

The test of whether a statute is punitive notwithstanding purported legislative intent for public protection should determined by a seven part test well ingrained in Wisconsin jurisprudence:

> ¶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.

While *Radaj* concerned an *ex post facto* issue regarding the DNA surcharge, there is no reason for the test of punitive effect to be different for plea withdrawal. The availability of a less drastic remedy than withdrawal of a plea in *ex post facto* cases is not a sufficient difference to change the basic analysis. The Court of Appeals did not find that GPS tracking was punishment under either the fundamental purpose or intent-effects test. *State v. Muldrow*, 2017 WI App 47, ¶2, 377 Wis.2d 223, 900 N.W.2d 859. However, as argued below, Muldrow disagrees.

The statutory scheme in Wisconsin is different from that in *People v. Cole*, 817 N.W.2d 497 (Mich. 2012) and the other cases cited by Muldrow in his brief-in-chief (pp. 15-16). However, those differences do not change the daily burden lifetime GPS tracking places upon an offender who theoretically has finished his sentence.

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 in Muldrow's brief-in-chief1). 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

1 The other references that follow are in Muldrow's brief-in-chief.

acknowledged a split of authority on the issue[2] (App. 140), he found the cases holding lifetime GPS monitoring punitive more persuasive. So should this court.

The Court of Appeals and the Seventh Circuit, (*Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) disagreed with Judge Griesbach. 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

2 Those cases are discussed below.

laws improperly conflated 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.

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 tracking requirement 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*.

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 those stated 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 3rd day of January 2018

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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 2227 words, including certifications

Dated this 3rd day of January 2018

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 3rd day of January 2018

LEN KACHINSKY