FILED
04-27-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1642-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. KING, JR.,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes the petition for review filed by Defendant-Appellant-Petitioner Peter J. King, Jr., concerning a supervision condition that restricts King's internet access.

King predicates his arguments on language from *Packingham v. North Carolina*.[1] That United States Supreme Court case examined a statute that imposed a speech ban—permanently barring all registered sex offenders in the state from accessing commercial social networking websites—"with one broad stroke," "enact[ing] [a] complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."[2] But the sweeping statutory prohibition applied there bears no resemblance to the individualized, fact-based determination here. So the Court's comments on the use of the internet in the exercise of First Amendment rights in that context add little or nothing to the applicable analysis in this one.

Rather, the case that governs the analysis of King's claim is this Court's decision in *State v. Rowan*,[3] which emphasizes that the constitutional inquiry is highly fact-driven and looks closely at the circuit court's "individualized determination that the condition was necessary based on the facts in [the] case."[4] *Rowan* thus upheld a supervision condition permitting otherwise unconstitutional suspicionless searches where the circuit court "determined [it] was necessary for Rowan specifically" and "articulate[d] carefully

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[1] *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

[2] *Id.* at 1737, 1738.

[3] *State v. Rowan*, 2012 WI 60, 341 Wis. 2d 281, 814 N.W.2d 854.

[4] *Id.* ¶ 9.

the specific factual basis" for the condition.[5] The court of appeals, applying *Rowan* to evaluate whether King's supervision condition was not overly broad and was reasonably related to sentencing purposes, took note specifically of the circuit court's findings about King's crimes and history of defying internet-related probation conditions.[6]

King essentially frames this case as *Packingham* in miniature: a case where the same sort of restrictions are at issue (no access to social media), just on a smaller scale (one guy). Invoking *Packingham*'s language, he asserts that the court of appeals' decision "does not address or explain how . . . permitting King to be barred [by his agent] from access to sites *Packingham* identifies such as 'Amazon.com, Washingtonpost.com and Webmd.com' or 'Facebook, LinkedIn and Twitter' is a condition narrowly tailored . . . or is reasonably related to the goal of public protection." (King's Pet. 19.) King, not the State, bears the burden of showing cause for the modification.[7] But he does not address or explain how the circuit court can reasonably expect a person with King's track record of relentless crimes and probation violations to use a computer or smartphone solely to access these innocuous sites. Moreover, at least two of those prior violations related specifically to misuse of a Facebook account with a false name.

The bottom line is that under *Rowan* the legal analysis is driven by King's own history. *In this case*, permitting King to be barred from those sites is not overly broad. *In this case* the condition is reasonably related to the goal of public protection because *in this case* King has shown that even

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[5] *Id.* ¶¶ 15, 16.

[6] *State v. King*, 2020 WI App 66, ¶¶ 59–66, 394 Wis. 2d 431, 950 N.W.2d 891.

[7] *State v. Hays*, 173 Wis. 2d 439, 448, 496 N.W.2d 645 (Ct. App. 1992).

when he is prohibited from using the internet, upon pain of return to prison, he not only uses it but uses it in a way that puts others at risk.

There is no need for this Court to take this case to "develop and clarify the law" on supervision conditions. The court of appeals answered the questions King raised about *Packingham* in a published opinion that applied the well-settled legal standard for appellate review of conditions of extended supervision. The court's analysis and conclusion are fully consistent with those of most jurisdictions that have considered this question since *Packingham*. The petition does not satisfy the criteria. Review is therefore not warranted.

STATEMENT OF THE CASE[8]

King was convicted of using a computer to facilitate a child sex crime.

As relevant to this petition, a jury convicted King of child enticement and using a computer to facilitate a child sex crime. (Pet-App. 101.) The jury heard evidence that King had a prior conviction for sexual assault of a 13-year-old girl and that child pornography had been found in his possession. (Pet-App. 104.)

King was sentenced to a prison sentence and a consecutive probation sentence.

On the charge of using a computer to facilitate a child sex crime, the circuit court sentenced King to initial confinement and extended supervision. (Pet-App. 103–04.) On the charge of child enticement, the circuit court withheld sentence and placed King on probation for ten years, to be served consecutive to his prison sentence. (Pet-App. 104.)

[8] These facts are taken from the circuit court's order and the court of appeals' decision included in the petitioner's appendix.

King's convictions were affirmed on direct appeal.

King appealed, seeking to reverse his conviction on the grounds of improperly admitted evidence. (Pet-App. 104.) The court of appeals affirmed. (Pet-App. 104.)

King was revoked twice for internet violations during the extended supervision that immediately followed his prison sentence.

King served his initial confinement and was released in December 2009 to complete extended supervision. (Pet-App. 104.) As conditions of his supervision, he was to have no use of or access to an internet-enabled computer; this condition was amended to permit access at limited locations for the purpose of completing online job applications. (Pet-App. 103–04.) King's extended supervision was revoked in October 2011 for having a Facebook account, possession of computers, possession of internet services, possession of a blackberry phone, and viewing sexually explicit websites. (Pet-App. 104.) He served a revocation sentence and was released again in May 2012. (Pet-App. 105.) He was revoked a second time and served another revocation sentence for, among other things, "being in possession of two computers, accessing the internet, possessing sexually explicit pictures, having a profile on sugardaddyforme.com . . . possess[ing] a cellphone that had . . . internet capabilities and g[iving] his [DOC] agent false information." (Pet-App. 105.) He completed this portion of his sentence in July 2016. (Pet-App. 105.)

King was revoked for internet-related violations during his probation term.

King started the ten-year probation term that was ordered consecutive to the prison sentence. (Pet-App. 105.) The rules of supervision for King's probation limited his internet access just as before. (Pet-App. 105.) King's supervision was revoked less than 18 months later for "having

an active Facebook account using a false name; accessing the Internet regularly; and possessing a computer and cell phone." (Pet-App. 105.) He also lied to his agent about social media access and refused to disclose the username and password for his computer. (Pet-App. 105–06.) "[P]ornography was found on the computer, but the State could not determine whether the persons in the pornographic images were under the age of eighteen." (Pet-App. 106.)

King was sentenced after revocation.

The court sentenced King to four years of initial confinement and four years of extended supervision, with the following extended supervision condition: "no use or access to a computer [or cell phone] that has internet access, either be it at residence or place of employment [and] any computer access is to be reported to agent." (Pet-App. 106.)

King moved to vacate the internet-restricting condition and modify his sentence.

King brought the postconviction motion that underlies this petition. He moved for sentence modification and argued that the condition restricting his access to the internet violated his First Amendment rights and must be vacated. (Pet-App. 193.)

The circuit court denied the motion in all respects except that it agreed to consider proposals from the parties to modify the Internet restriction. (Pet-App. 193.)

The circuit court subsequently issued a written order that stated the rules of extended supervision regarding access to the internet and devices capable of accessing the internet:

> 1. The defendant may possess device(s) capable of accessing the internet only with the express permission of the defendant's agent.
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> 2. The defendant may access the internet only to the extent and manner as approved by the

> defendant's agent. However, the agent shall not withhold permission for the defendant's access through public devices for purposes of obtaining employment or performing any legitimate government functions such as filing taxes or renewing driver's license or license plates, etc.
>
> 3. If the possession of devices or access to the internet is approved, the defendant shall provide his agent with the name or number of every electronic mail account he uses, the internet address of every website he creates or maintains, every internet user name he uses, and the name and address of every public or private internet profile he creates, uses, or maintains.

(Pet-App. 194.)

The court of appeals affirmed on appeal, and this petition follows.

King appealed, renewing his arguments that *Packingham* constituted a new factor and that it required vacating his internet restriction condition of supervision because it was unconstitutional. (Pet-App. 108.)

Applying the two-part test set forth in *State v. Rowan*, 2012 WI 60, ¶¶ 4, 10, 341 Wis. 2d 281, 814 N.W.2d 854 the court of appeals addressed whether the challenged condition was unconstitutional because it was "overly broad" or failed to "reasonably relate[ ] to the person's rehabilitation." (Pet-App. 109.) Before that, however, the court considered whether, as King argued, the holding in *Packingham* alone compels the conclusion that the condition is overly broad. (Pet-App. 112.)

The court of appeals concluded that *Packingham* "does not control [the] analysis." (Pet-App. 114.) First, it concluded that the case did not concern a supervision condition and did not contain any language that directly answered the question of whether internet restrictions "are constitutionally permissible if a person is still on government supervision as

part of the sentence." (Pet-App. 114.) Second, it examined cases interpreting *Packingham* in the context of a condition of supervision[9] and found that many have "declined to extend the holding in *Packingham* to the question of the constitutionality of conditions of supervised release (such as extended supervision) that restrict the supervisee's access to the internet." (Pet-App. 114–16.) It cited cases from five federal appellate courts holding that *Packingham* did not extend to conditions of supervised release.[10] Third, it considered the three cases on which King relied and found them easily distinguishable. (Pet-App. 116–17.)

The court rejected King's characterization of the internet restriction as a "blanket ban," noting that the condition does permit access with agent approval, that courts have recognized such a requirement as a reasonable condition of supervision, and that Wisconsin courts have upheld "supervisory conditions that require agent approval prior to an exercise of constitutional rights." (Pet-App. 120–22.)

Based on the circuit court's findings at the sentencing after revocation and postconviction hearings, which detailed

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[9] King's Petition characterizes the court's listing of opinions as an "acknowledge[ment] [of] a split of authority," (King's Pet. 9), but the list consists only of a dozen state and federal cases that reject his argument that *Packingham* is relevant to supervision conditions.

[10] In addition to the five he cited (the 5th, 8th, 9th, 11th and the D.C. Circuits), the 4th and 2nd Circuits have ruled similarly. In a case involving a condition that required a defendant "to obtain the approval of his probation officer or the court before using certain electronic devices," the Fourth Circuit held that "the district court did not abuse its discretion in determining that this supervised release condition was not unconstitutional after *Packingham*." *United States v. DeBolt*, 838 F. App'x 785, 786 (4th Cir. 2021). *See also United States v. Savastio*, 777 F. App'x 4, 7 (2d Cir. 2019) (distinguishing the facts from *Packingham* on the grounds that "Savastio . . . remains subject to supervised release").

King's dismal record of noncompliance with internet restrictions (Pet-App. 124–26), the court of appeals concluded that the circuit court had "an ample basis to find that King has not been deterred by those restrictive conditions" and concluded that the internet restriction condition was not overly broad. (Pet-App. 127–28.)

In light of its conclusion that *Packingham* did not apply to persons under supervision while serving a sentence, the court of appeals also concluded that the case did not constitute a new factor for purposes of sentence modification.

King petitioned this Court for review. This Court ordered the State to respond to the petition.

CRITERIA FOR REVIEW

King argues that his petition warrants review under Wis. Stat. § (Rule) 809.62. (King's Pet. 2.) The State disagrees.

There is no need for this Court to help develop or clarify the law because the court of appeals did so by applying well-established, controlling precedent in a published decision. Wis. Stat. § (Rule) 809.62(1r)(c); *see State v. King*, 2020 WI App 66, 394 Wis. 2d 431, 950 N.W.2d 891.

The court discussed and properly applied *Rowan*, 341 Wis. 2d 281, ¶¶ 9, 14–15, noting that an analysis of constitutionality required an "individualized determination that the [extended supervision] condition was necessary based on the facts in this case," and thus conducted its analysis "in light of the history and actions of this particular convicted sex offender." (Pet-App. 123.) Because the court of appeals correctly resolved this issue in a published opinion, its decision has already clarified the law in a decision with statewide impact.

The court of appeals decision does not conflict with controlling opinions of this Court. Wis. Stat. § (Rule)

809.62(1r)(d). On the contrary, its analysis is consistent with this Court's reasoning in *Rowan*. It expressly cited and applied precedent from this Court in reaching its decision. Its conclusion that the supervision condition King challenges is constitutional is neither inconsistent with nor precluded by the holding in *Packingham*.

King asserts that review is imperative because internet restrictions requiring a supervisee to obtain agent approval are "draconian," "do nothing but set up supervisees to fail," and "violate [constitutional] rights." (King's Pet. 2.) But his view has been rejected by at least seven of the eight federal appellate circuit courts that have addressed this question. The reliance on agents to monitor internet restrictions has been widely accepted by the courts.

The court of appeals has answered the questions King poses in his petition. He has not satisfied any of the criteria for review by this Court.

ARGUMENT

I. The court of appeals correctly concluded that King's supervision condition restricting internet access is constitutional.

A. Relevant legal principles.

It is King's burden to show that an extended supervision condition should be vacated. *State v. Hays*, 173 Wis. 2d 439, 448, 496 N.W.2d 645 (Ct. App. 1992).

The test set forth for analyzing the constitutionality of conditions of probation has two parts: "[C]onditions of probation may impinge upon constitutional rights as long as they [1.] are not overly broad and [2.] are reasonably related to the person's rehabilitation." *Rowan*, 341 Wis. 2d 281, ¶ 10. A condition is reasonably related to the person's rehabilitation "if it assists the convicted individual in

conforming his or her conduct to the law." *Id.* "It is also appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized probation conditions are appropriate for a particular person." *Id.*

B. The condition the circuit court imposed restricting King's access to internet-enabled devices is not overly broad.

King argues that the condition should be vacated because it is overly broad and therefore violates two aspects of his rights under the First Amendment, his right to free speech and his right to freedom of association.[11] (King's Pet. 10, 24.)

He cites persuasive authority from New Jersey, Washington, Illinois, and the Third Circuit for the proposition that *Packingham* stands for a robust First Amendment right to internet access that is not compatible with probation agent control over access. (King's Pet. 16–17.) As noted, these jurisdictions have not been persuasive to the majority of courts. He has not shown that the court of appeals' decision, which mirrors most jurisdictions' views of this issue, is an incorrect application of the *Rowan* test, misperceives

[11] King makes a separate argument that the condition violates his right to freedom of association. (King's Pet. 24–25.) The United States Supreme Court has "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). For purposes of the analysis of the constitutionality of the condition of supervision, the State does not see a need to distinguish the First Amendment rights at issue. *See Weber v. City of Cedarburg*, 129 Wis. 2d 57, 68, 384 N.W.2d 333 (1986) (noting that "[f]reedom of association is an implied incident of the first amendment guarantees").

Packingham, or is based on incorrect facts. What King is asking this Court to do is accept review, reject the majority rule, and hold that *Packingham* gives him a First Amendment right to internet access without an agent's permission.

He argues that "the takeaway" from *Packingham* is the Court's understanding of "the inadequacy of legacy modes of communication such as print media, broadcast television or radio, and land-line phones as pertaining to exercise of First Amendment rights." (King's Pet. 20.) But King cannot point to any statement that changed the law on conditions of supervision.

The court of appeals properly concluded that the condition was not unconstitutional. This claim does not warrant this Court's review.

II. The court of appeals correctly concluded that sentence modification was not warranted.

A. Principles of law.

A circuit court has inherent authority to modify a defendant's criminal sentence based upon a showing by the defendant of a "new factor." *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828. To prevail, the defendant must show the following: (1) a "new factor" exists; and (2) the "new factor" justifies sentence modification. *Id.* ¶¶ 33, 37–38, 78. A "new factor" is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Id.* ¶¶ 40, 52 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law," reviewed *de novo*. *Id.* ¶ 33.

B. *Packingham*'s holding was not highly relevant to King's sentencing and is therefore not a new factor.

King argues that he is entitled to sentence modification on the grounds that *Packingham's* holding was overlooked by the parties at the time of his sentencing. (King's Pet. 25.) He acknowledges that the "narrow factual holding" of *Packingham* does not concern conditions imposed as a part of a sentence on supervisees. (King's Pet. 25.) However, he contends that "[t]he evolution of the law regarding the First Amendment and the Internet was highly relevant." (King's Pet. 26.) He does not address or explain the numerous jurisdictions that have rejected his reading of *Packingham* and have continued to affirm internet restriction conditions that are supervised by agents, just as King's is. His view that *Packingham* represented a sea change in the law regarding the internet has, in short, little to support it. Because many jurisdictions agree that *Packingham* does not mean what King thinks it means, it is not highly relevant to his sentence and therefore is not a new factor.

This claim does not warrant this Court's review.

CONCLUSION

This Court should deny the petition for review.

Dated this 27th day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 3,312 words.

Dated this 27th day of April 2021.

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SONYA BICE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 27th day of April 2021.

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SONYA BICE
Assistant Attorney General