

RECEIVED**01-24-2020****CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT II

Case No. 2019AP2149 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDIN L. MCCONOCHIE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an
Order Determining Postconviction Motion Entered in
the Green Lake County Circuit Court, the Honorable
Mark T. Slate, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
hagopians@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	1
POSITION ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT	5
The condition of probation that banishes Mr. McConochie from portions of three counties and that will take effect six years after he has been back in the community is an unconstitutional infringement of his right to travel and association	5
A. Introduction and standard of review	5
B. The banishment condition impinges Mr. McConochie's constitutional rights of travel and association	7
C. The banishment condition is not narrowly drawn and is unduly restrictive of Mr. McConochie's liberties	9
1. The breadth of the restricted area	9

2. The delayed timing of the banishment.....	12
CONCLUSION.....	17

CASES CITED

<i>Brandmiller v. Arreola</i> , 199 Wis. 2d 528, 544 N.W.2d 894 (1996)	7, 8
<i>City of Milwaukee v. Burnette</i> , 2001 WI App 258, 248 Wis. 2d 820, 637 N.W.2d 447	8
<i>Ervin v. State</i> , 41 Wis. 2d 194, 200, 163 N.W.2d 207 (1968)	7, 8
<i>Predick v. O'Connor</i> , 2003 WI App 46, 260 Wis. 2d 323, 660 N.W.2d 1	6, 9, 16
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	8
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	7
<i>State v. Fearing</i> , 2000 WI App 229, 239 Wis. 2d 105, 619 N.W.2d 115	14
<i>State v. Nienhardt</i> , 196 Wis. 2d 161, 537 N.W.2d 123 (Ct. App. 1995)	9, 15, 16

State v. Stewart,
2006 WI App 67, 291 Wis. 2d 480,
713 N.W.2d 1656 passim

**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Constitution

First Amendment..... 7

Wisconsin Constitution

Article I, § 4..... 8

Wisconsin Statutes

752.31(2)(f) 1
809.30 4
973.09(1)(a)..... 6
973.09(3)(a)..... 14
973.10(1) 14

ISSUE PRESENTED

Does a condition of probation that banishes Mr. McConochie from portions of three counties, areas in or near where his family has long resided, unconstitutionally infringe his rights of travel and association where the condition extends beyond where the offenses occurred and takes effect six years after he will have been living in the community without the condition in effect?

The circuit court denied Mr. McConochie's postconviction motion seeking to eliminate the condition as unconstitutional because it is not narrowly tailored and is unduly restrictive of his rights of travel and association.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is appropriate given that this is an appeal to be decided by one judge pursuant to Wis. Stat. § 752.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Brandin L. McConochie is age 33 and a lifelong resident of Green Lake County. (28:1; 45:7; App. 101-03). At age 12, he and his family moved there from neighboring Columbia County. (45:7). His mother

and stepfather still live in Green Lake County and own homes there. (38:14; 45:5-7). His father, grandparents and other relatives and friends are buried at Salemville Cemetery in Green Lake County. (38:13; 45:8). Yet, in 2026, six years after his projected release into the community on extended supervision in another case, Mr. McConochie will be banished from a section of Green Lake County and portions of neighboring Columbia and Marquette counties. (28; 45:4; App. 102-03). The circuit court ordered the banishment as a condition of probation that Mr. McConochie will serve on three misdemeanor convictions in this case once he completes a sentence imposed in another case. (28; App. 102-03). That sentence expires in 2026 at the earliest. (45:4).

In this case, Mr. McConochie was convicted of three counts of lewd and lascivious behavior as a repeater. (28; 38:3, 7-8; App. 101). The charges stemmed from three incidents occurring over two days in August of 2018, in which Mr. McConochie pulled his vehicle alongside Amish buggies and exposed his genitals. (1; 37:5-18). Two occurred in the Town of Kingston and the other in the Town of Marquette, both of which are located in the southwest portion of Green Lake County. (1:1-4; 37:6-9, 17). Within a week of the initial report, police determined that McConochie, who was wearing an ankle bracelet, was the offender based upon GPS coordinates obtained from the Department of Corrections. (1:3-5; 37:18-19). Mr. McConochie was on extended supervision, which was subsequently

revoked, and is subject to lifetime GPS monitoring. (17; 38:10-11).

Mr. McConochie pled no contest to the charges pursuant to a plea agreement that included the dismissal of felony charges and a hate crime enhancer, as well as a joint sentencing recommendation. (38:2-3). The court followed the joint recommendation of two years' probation and ordered that the probation be served consecutive to the previously imposed sentence. (12; 28; 38:13; 44:3-6; App. 101-03, 105). As conditions of probation, the parties requested that the court order sex offender treatment, no contact with the "listed victims," and costs. (38:3). The court ordered sex offender treatment, court costs, a DNA sample and no contact with the Amish community. (38:13-14; App. 105-06). As to the last condition, the court imposed a geographical restriction that neither party had requested.

The court said it wanted to add a condition that Mr. McConochie not go into the southwest part of Green Lake County because the crime "was clearly targeted at Amish people, who live in that area of the County." (38:12; App. 104). The court added that "it's hard to say to have no contact with the victim when he's alleged to have pulled up next to random buggies on the roadway." (38:12-13; App. 104-05). After obtaining information from Mr. McConochie about whether there would be a need for him to be in the southwest part of the county, the court set the prohibited area as: "North of 33, east of 22, west of

73, you can't go south of H from 73 to B, and south of BH over to 22." (38:15; App. 107).

The area as drawn by the court accommodated Mr. McConochie's concern that he be able to go to the Village of Marquette where his mother resides. (38:14-15; App. 106-07). But it did not accommodate his concern that he be able to visit his father's grave, which he said he visited regularly, at the Salemville Cemetery. (38:13-14; App. 105-06). The court said the restriction "will allow for the protection of the public and, namely, make sure that the no contact provision is enforced." (38:14; App. 106).

Mr. McConochie filed a postconviction motion pursuant to Wis. Stat. § (Rule) 809.30 challenging the geographical restriction as an unconstitutional infringement of his rights of travel and association. (26). The motion asked the court to eliminate that condition of probation.

At the postconviction hearing, Mr. McConochie testified, among other things, that he is scheduled to be released from prison in December of 2020, and he will then be on extended supervision until August of 2026. (45:4-5). Once on probation, two housing options would not be available to him because they fall within the restricted area. (45:5-6). One is a house his mother owns that is currently leased to others but upon her death is willed to him. (45:5). The other is a house owned by his stepfather. (45:6). He testified how the restriction would increase his travel time from various locations within the county

to Cambria, where he had previously been employed and where his sister and other family members reside. (45:7-11). Mr. McConochie did not dispute that most of the Amish live within the restricted area. (45:12). A sheriff's deputy testified that all of the Amish residences in Green Lake County are located within the restricted area. (45:17).

The court denied Mr. McConochie's motion to eliminate the banishment condition. (29; 45:25; App. 112). The court did, however, clarify that the restriction did not prevent Mr. McConochie from traveling on the specified roadways, rather it prevents him from going "west, northeast, or south of those particular roadways." (45:24-25; App. 111-12). The court also amended the judgment of conviction to allow the probation agent "to change the area or eliminate it as needed." (28:2-3; App. 102-03).

ARGUMENT

The condition of probation that banishes Mr. McConochie from portions of three counties and that will take effect six years after he has been back in the community is an unconstitutional infringement of his right to travel and association.

A. Introduction and standard of review.

The geographical restriction that neither party requested but that the court imposed as a condition of Mr. McConochie's probation is a banishment. It

forbids him from entering the southwest part of Green Lake County and portions of two neighboring counties, places near where he has lived much of his life and where his family stills lives and some are buried.

An order banishing a person from a community “seems like it was taken from the script of some old Grade-B cowboy movie where the sheriff tells the bad guy to ‘get out of Dodge.’” *Predick v. O’Connor*, 2003 WI App 46, ¶1, 260 Wis. 2d 323, 660 N.W.2d 1. But, as this case demonstrates, it’s not just the stuff of Hollywood. Banishment is still used in this state and is not *per se* unconstitutional. *Id.* at ¶18. However, it will be struck down when, as shown here, the order is “not narrowly drawn and is unduly restrictive” of the person’s liberties. *See State v. Stewart*, 2006 WI App 67, ¶21, 291 Wis. 2d 480, 713 N.W.2d 165 (court of appeals struck condition of supervision banishing Stewart from a township).

When a sentencing court places a person on probation, it may impose “any conditions which appear to be reasonable and appropriate.” Wis. Stat. § 973.09(1)(a). Such conditions are reviewed under the erroneous exercise of discretion standard “to determine their validity and reasonableness measured by how well they serve their objectives: rehabilitation and protection of the state and community interest.” *Stewart*, 291 Wis. 2d 480, ¶11. But whether a particular condition violates a defendant’s constitutional right is a question of law that this court reviews *de novo*. *Id.* at ¶12.

B. The banishment condition impinges Mr. McConochie's constitutional rights of travel and association.

The rights to travel and associate are protected by the United States and Wisconsin constitutions.

The federal constitution has long been recognized to protect the right to travel as an inherent personal liberty. *Brandmiller v. Arreola*, 199 Wis. 2d 528, 537-39, 544 N.W.2d 894 (1996), citing *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969). It is considered a fundamental right. *Id.* Independent of federal law, the Wisconsin Supreme Court has recognized that the right to travel intrastate is fundamental among the liberties preserved by the Wisconsin Constitution. *Brandmiller*, 199 Wis. 2d at 539.

The freedom to move about is a basic right of citizens under our form of government, in fact, under any system of ordered liberty worth the name. It was not added to our United States Constitution by the enactment of the first ten amendments. It is inherent, not only in the Bill of Rights, but in the original document itself. It has properly been termed 'engrained in our history' and 'a part of our heritage.'

Ervin v. State, 41 Wis. 2d 194, 200, 163 N.W.2d 207 (1968).

Intertwined with the right to travel is the freedom of association guaranteed by the First Amendment to the United States Constitution and

Article I, § 4 of the Wisconsin Constitution. *Brandmiller*, 199 Wis. 2d at 538-39. The rights to worship, assemble and free speech are “sharply limited” if persons cannot freely travel about their community. *Ervin*, 41 Wis. 2d at 200. The right of association is generally broken down into two elements: (1) the right to enter into and maintain intimate human relationships; and (2) the right of expressive association, which includes political activity. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

As to the first category, this court has noted that “[t]here is no doubt but that members of our society have a constitutional right to associate with family and friends without undue restriction.” *City of Milwaukee v. Burnette*, 2001 WI App 258, ¶17, 248 Wis. 2d 820, 637 N.W.2d 447. The protection from government interference in personal relationships “reflects the realization that individuals draw much of their emotional enrichment from close ties with others.” *Roberts*, 468 U.S. at 619.

The court’s order banishing Mr. McConochie from parts of Green Lake, Columbia and Marquette counties infringes on his constitutional rights to travel and associate. He cannot enter, much less freely move about within, the restricted area. He cannot live or work in that area. He cannot live in the home in Manchester that is owned by his mother and willed to him, or in another home owned by his stepfather. He cannot visit the gravesite of his father, which he had been doing regularly with his

sister, and the graves of other family members. The condition survives constitutional challenge only if it is not overly broad and is reasonably related to Mr. McConochie's rehabilitation. *State v. Nienhardt*, 196 Wis. 2d 161, 168, 537 N.W.2d 123 (Ct. App. 1995). It fails for the reasons set forth below.

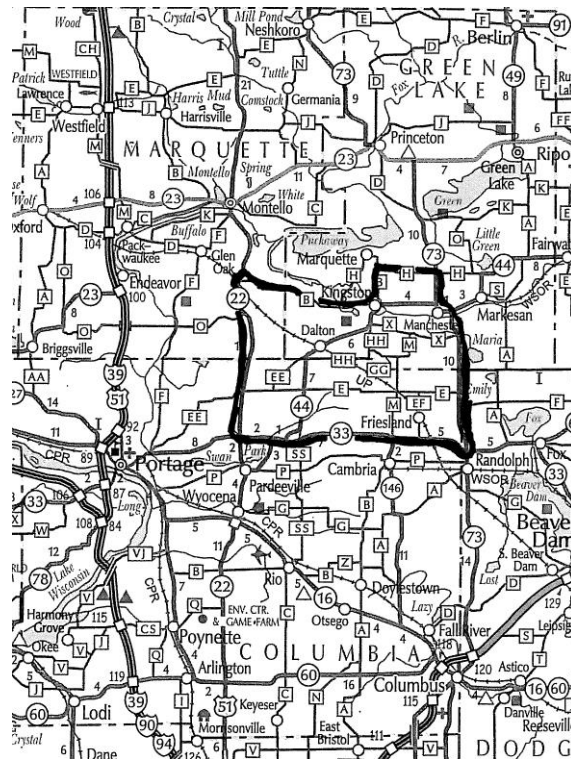
C. The banishment condition is not narrowly drawn and is unduly restrictive of Mr. McConochie's liberties.

There is "no exact formula" for determining whether a geographic restriction is not overly broad and is reasonably related to the offender's rehabilitation. *Predick*, 260 Wis. 2d at 336. Rather, "[e]ach case must be analyzed on its own facts, circumstances and total atmosphere to determine whether the geographic restriction is narrowly drawn." *Stewart*, 291 Wis. 2d 480, ¶13. Here, the restriction is not narrowly tailored because: (1) it banishes Mr. McConochie from an area extending beyond where the offenses were committed, beyond even the border of Green Lake County; and (2) given that the restriction will not go into effect until some six years after Mr. McConochie has been returned to the community, it creates obstacles that most likely will be unnecessary and disruptive to his rehabilitation.

1. The breadth of the restricted area.

At sentencing the court said its intent was to "add on a condition of probation that he not go down into the southwest part of the County" (38:12;

App. 104). The court then imposed a condition banishing him from not only the southwest part of Green Lake County but also sections of neighboring Columbia and Marquette counties. Specifically, the restricted area is: north of Highway 33, which is in Columbia County; east of Highway 22, which is in Columbia and Marquette counties; west of Highway 73, which is in Green Lake and Columbia counties; and south of Highways H and BH from Highway 73 to Highway 22, which extends from Green Lake County to Marquette County. On a map, the restricted area appears as:



The three offenses committed by Mr. McConochie all occurred in Green Lake County, two in the Town of Kingston and one in the Town of Marquette. Those two townships are in the southwest corner of Green Lake County, only a few miles apart.¹ Yet, the restricted area extends south into Columbia County and west into Marquette County.

In *Stewart*, the court of appeals held that a condition of probation banishing Stewart from Richmond Township in Walworth County was overly broad, in part because it exceeded the area where his acts of exposing himself and abusing his wife and child occurred. *Stewart*, 291 Wis. 2d 480, ¶¶14 & 16. In addition to abusing his wife and children at their home, Stewart had harassed his neighbors by standing naked and masturbating in the doorway to his barn and also while seated in a parked car. *Id.* at ¶14. The court of appeals concluded that the geographic limitation promoted the purposes of protecting the victims and rehabilitation of Stewart, but the sentencing court “could have fashioned a more narrowly drawn condition banishing Stewart from his residence and the immediate neighborhood surrounding it.” *Id.* at ¶16.

Similarly here, the court could have fashioned a more narrowly drawn condition banishing Mr. McConochie from the specific area in southwest

¹ The Village of Marquette and Town of Kingston are 4.3 miles apart, according to Mapquest.

Green Lake County where the offenses occurred and not extend the restriction into the neighboring counties where no criminal conduct occurred. Mr. McConochie recognizes the court's objective to protect the Amish community and does not dispute that Amish are concentrated in the southwest part of the county. While some Amish may also live in Columbia and Marquette counties, the deputy testified that the highest concentration – the entire Amish population in Green Lake County – lives in the southwest part of that county. (45:17).

In addition to the banishment, the court ordered as a condition of probation that Mr. McConochie “have no contact with the Amish Community.” (28:2-3; 38:13; App. 102-03, 105). As this court commented in *Stewart*, a no contact condition “already offers protection to his victims and facilitates his rehabilitation.” *Stewart*, 291 Wis. 480, ¶17. Banishing Mr. McConochie from portions of three counties even though the offenses all occurred within a small area of just Green Lake County is overly broad.

2. The delayed timing of the banishment.

Perhaps even more concerning than the geographic scope of the banishment is its timing. Because the court imposed the probation term consecutive to the previously-imposed sentence, the condition does not take effect until after the previous sentence is completed. Mr. McConochie is set to be

released to extended supervision on that sentence in December of 2020, at which point he will be on extended supervision until at least 2026. What this means is that, in all likelihood, Mr. McConochie will be in the community serving the period of extended supervision for six years before the banishment condition of probation will take effect. He will be able to live, work and travel within the restricted area for six years and then suddenly be barred from that area. Assuming Mr. McConochie has been successful on extended supervision, at that point the banishment would not only be unnecessary but likely highly disruptive.

Mr. McConochie has lived most of his life in Green Lake County, having moved there at age 12. It is only reasonable that following his release in December, Mr. McConochie would return to that area where he has a supportive family and has previously been employed. But two affordable housing options – a home owned by his mother and another owned by his stepfather – are within the restricted area. Although he could live in those homes until the completion of extended supervision, he would have to move once the banishment condition of probation kicked in. If he had a job in the restricted area, he would have to quit and find other employment. The banishment condition may well hamper Mr. McConochie's rehabilitation.

Noting that “we’re dealing with several speculative events that may or may not occur”, the court modified the condition in response to

Mr. McConochie's postconviction motion to "allow the agent to change the area or eliminate it as needed during the term of probation." (45:25; App. 112). The problem with this "solution" is that it delegates to the probation agent a determination that by statute should be made by the court.

Although under Wis. Stat. § 973.10(1) a probationer may be subject to conditions set by the court and rules set by the Department of Corrections, it is not clear that a probation agent may modify or eliminate a condition set by the court. Under Wis. Stat. § 973.09(3)(a), the court is authorized to "modify the terms and conditions" of probation "[p]rior to the expiration of any probation period ... for cause and by order"

This court has held that the statutes did not allow a court to delegate to the probation agent the decision whether to require the probationer to serve three months of a stayed jail term. *State v. Fearing*, 2000 WI App 229, ¶22, 239 Wis. 2d 105, 619 N.W.2d 115. In reaching that holding, the court of appeals wrote that "[n]owhere in this statutory scheme is DOC given the authority to impose or modify a condition of probation," *id.* at ¶17, and "DOC's authority to administer probation is not the same as the authority to impose conditions of probation." *Id.* at ¶19. Thus, while the court would have the authority to modify or eliminate the banishment condition, it appears the court may not simply delegate that authority to the probation agent.

The appropriate solution to the very real concern that by 2026 banishment will be unnecessary and an impediment to rehabilitation is to remove it. Because the utility of ordering banishment that will not start until six years after Mr. McConochie has been returned to the community is speculative at best, the condition is not narrowly tailored. It infringes fundamental rights to travel and associate when it is unclear whether there will be any purpose to the banishment some six years after Mr. McConochie has been out of custody. If in those six years on extended supervision he has not engaged in any inappropriate conduct toward the Amish, there would be no basis for banishing him from the areas where the Amish reside. Given the timing of when that condition will take effect, the banishment ordered by the court is overly broad and not reasonably related to Mr. McConochie's rehabilitation.

The banishment condition imposed on Mr. McConochie is not merely "inconvenient" as was the condition in *Nienhardt*, 196 Wis. 2d at 169. There, Nienhardt, who was convicted of nine counts of telephone harassment and on several occasions was seen near the victim's home in Cedarburg, was ordered as a condition of probation to stay out of Cedarburg. *Id.* at 164-66. When the sentencing court asked Nienhardt if there was any reason why she needed to be in Cedarburg, her only response was

that she bought cigarettes there. *Id.* at 169.² In contrast here, Mr. McConochie is a lifelong resident of or near the area that he will be banished from while on probation, a fact considered in *Stewart* when striking the banishment condition. *Stewart*, 291 Wis. 2d 480, ¶20 (“unlike the defendants in *Predick* and *Nienhardt*, *Stewart* was an established, longtime resident of Richmond township”); *contrast Predick*, 260 Wis. 2d at ¶19 (woman who was banished from Walworth County neither lived nor worked there but had repeatedly traveled there over a decade to stalk three victims).

The condition removes two housing options, affects where Mr. McConochie can work, prevents him from visiting the cemetery where family and friends are buried, and makes it more difficult to move about the area in or near where he and many of his family has resided for years. The condition is an unconstitutional infringement of Mr. McConochie’s rights of travel and association.

² The court of appeals did not “specifically address” *Nienhardt*’s constitutional challenge to the condition because the argument was undeveloped. *Nienhardt*, 196 Wis. 2d at 168.

CONCLUSION

For the reasons set forth above, Mr. McConochie respectfully requests that the court reverse the circuit court order denying his postconviction motion seeking to eliminate the condition of probation banishing him from portions of Green Lake, Columbia and Marquette counties and remanding with directions that the circuit court enter an amended judgment of conviction removing that condition.

Dated this 23rd day of January, 2020.

Respectfully submitted,

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
hagopians@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,559 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of January, 2020.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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 this 23rd day of January, 2020.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender

A P P E N D I X

**INDEX
TO
APPENDIX**

	Page
Amended Judgment of Conviction	101-103
Circuit Court's Oral Sentencing Decision	104-108
Circuit Court's Oral Ruling on Postconviction Motion.....	109-112
Order Determining Postconviction Motion	113