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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2019-AP-2149 CR
Circuit Court Case No. 2018-CF-168

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

BRANDIN L. MCCONOCHIE,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT OF GREEN LAKE
COUNTY, THE HONORABLE MARK T. SLATE,
PRESIDING

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issue on appeal can be fully developed in briefs. Publication is not requested.

ARGUMENT

- I. Circuit courts have the discretion to order reasonable conditions of probation, including geographic restrictions in appropriate cases.

Whether to impose conditions of probation and what they are is within the reasoned discretion of the sentencing court. *State v. Agosto*, 2008 WI App 149, ¶ 12, 314 Wis. 2d 385, 760 N.W.2d 415 (citation omitted). The “court may impose any conditions which appear to be reasonable and appropriate.” Wis. Stat. § 973.09(1)(a).

This court has held that a condition of supervision is reasonable and appropriate when the condition ordered is rationally related to the defendant’s need for rehabilitation. *State v. Miller*, 175 Wis. 2d 204, 210, 499 N.W.2d 215 (Ct. App. 1993). A “condition is reasonably related to the goal of rehabilitation if it assists the convicted individual in conforming his or her conduct to the law.” *State v. Oakley*, 2001 WI 103, ¶ 21, 245 Wis. 2d 447, 629 N.W.2d 200 (citing *Miller*, 175 Wis. 2d at 210).

This court has upheld broad restrictions placed on offenders. In *Miller, supra*, 175 Wis. 2d at 208, for example, this court upheld a condition that prohibited Miller from placing a phone call to any woman not in his family without prior approval from his agent. This court found that the condition was reasonable and appropriate, and it was not overly broad and impermissibly vague. *Id.* at 212.

This court also upheld a condition that a subject have no contact with the drug community. *State v. Trigueros*, 2005 WI App 112, ¶ 12, 282 Wis. 2d 445, 701 N.W.2d 54. This court concluded that the condition was reasonably related to his crime, his rehabilitation, and the need to protect the public. *Id.*

This court has also had opportunities to examine various geographic restrictions placed on offenders on supervision. Geographic restrictions are not *per se* unconstitutional. *State v. Stewart*, 2006 WI App 67, ¶ 13, 291 Wis. 2d 480, 713 N.W.2d 165 (citations omitted). This court examines each case “on its own facts, circumstances and total atmosphere to determine whether the geographic restriction is narrowly drawn.” *Id.*

The banishment of an entire township has been struck down. In *Stewart*, a majority of the offender’s behavior took place in or near his home. *Id.*, ¶ 16. The victims were his family and neighbors, and his banishment from the entire township by the court was found to be overbroad. *Id.*

However, some geographic restrictions that were upheld have been fairly expansive. See *Predick v. O’Connor*, 2003 WI App 46, ¶ 1, 260 Wis. 2d 323, 660 N.W.2d 1 (upholding an order banishing the defendant from Walworth County); *State v. Nienhardt*, 196 Wis. 2d 161, 164–66, 537 N.W.2d 123 (Ct. App. 1995) (upholding a condition of probation banishing the defendant from the City of Cedarburg); *State v. Simonetto*, 2000 WI App 17, ¶¶ 1, 3, 232 Wis. 2d 315, 606 N.W.2d 275 (upholding a condition of

probation prohibiting the defendant from going “where children may congregate”).

II. The circuit court soundly exercised its discretion when it imposed a condition of probation requiring McConochie to avoid the geographic area encompassing the Amish community that he victimized.

At a hearing on January 31, 2019, Brandin McConochie entered no-contest pleas to three counts of the crime of lewd and lascivious behavior, which he had committed in August 2018. (38:7-8) The circuit court explained the elements of the crime and found a basis for McConochie’s pleas from the facts in the criminal complaint. (38:5-8.)

The circuit court then learned more about McConochie’s background. He had at least five previous felony convictions: three for second-degree sexual assault and two for felony bail jumping. (38:9.) He had “spent most of his 20s in the prison system.” (38:10.) He was on extended supervision at the time of the incidents, having been released from prison about a year earlier, in August 2017. (38:10.) He was a “lifetime GPS registrant”, presumably as a result of the sexual assault convictions. (38:11.) The court also knew, from the November 28, 2018, preliminary hearing, that the data from McConochie’s GPS monitor had been used by law enforcement to determine that it was McConochie who had committed the crimes. (37:19.)

By the time the court pronounced its sentence, it was aware of the “facts, circumstances and total atmosphere” of McConochie’s crimes. *Stewart, supra*, ¶ 13. As part of the sentence, the court ordered that McConochie undergo sex offender treatment and have no contact with the Amish community. (38:13,14.) It also ordered a condition of probation that prohibited McConochie from entering the approximate geographic area of the Amish community.

(38:13-14,15.) The court explained that the prohibited area was meant to “allow for the protection of the public and, namely, to make sure that the no contact provision is enforced.” (38:14.) The court set certain highways as the boundaries of the prohibited area based on where the Amish reside in this part of Wisconsin. (38:15.)

The court considered the facts of the incidents and concluded that McConochie’s crimes were “clearly targeted at Amish people.” (38:12.) The court did not think a mere no-contact order would suffice because McConochie had targeted random Amish buggies as they traveled along roadways. (38:12-13.)

At the post-conviction motion hearing on October 18, 2019, the court further explained that “the [Amish] community is the victim, not the specific individuals.” (45:23.) The court stated that the prohibited area was “very specific” and as narrow as that could be drawn (45:23.) In addition to protecting the public, the court also explained that the prohibited area was related to rehabilitation. It found McConochie’s crimes to be sexually motivated and sought to “ensure his rehabilitation” by ordering that he “not be in the area or around the community in which those activities had occurred and was directed at.” (45:23.)

The unusual nature of McConochie’s crimes demonstrates why the geographic restriction is necessary. While in a motor vehicle, McConochie publicly and indecently exposed his genitals as he paralleled Amish buggies as they traveled down the road.

The crimes’ victims were members of the Amish community who happened to be traveling down the roadway. The crimes were opportunistic and targeted toward any unfortunate occupant of an Amish buggy, rather than at a specific person or persons familiar to McConochie.¹

¹ Likewise, McConochie was not known to the Amish victims, and he was tracked down because of his GPS monitor. (37:18-20.)

Because the crimes were committed in nonstationary locations along roadways within the Amish community, a normal no-contact order is ineffective. Within the area of the Amish community, buggies are very common, and can be seen daily and often hourly on the roadways. (45:15-18.) McConochie needed to do little more than travel to the area in order to locate an Amish buggy on a road before committing his crimes. With buggies so prevalent, presumably only a short amount of time elapsed between when McConochie spotted a buggy, drove up to it, and began to commit a crime by exposing his genitals. Because the Amish buggies move about the area, there is no feasible way for McConochie, or anyone, to know ahead of time whether any buggies will be located on the same roadway that McConochie might intend to travel. To permit McConochie to travel within the area of the Amish community would be to set up the exact conditions allowing him to engage in identical criminal conduct in the future.

The circuit court explained that it needed to protect the Amish community. (38:14.) By prohibiting McConochie from the area, the Amish community will be protected, and McConochie will hopefully not be tempted to enter the area and victimize additional Amish community members.

The circuit court also addressed the fact that this condition of probation may only come into effect after McConochie's term of extended supervision lapses. (45:24.) The court specifically allowed McConochie to ask the court to lift the probation condition. (45:24.) The court explained that McConochie had the time on extended supervision—up to approximately six years—to demonstrate why the condition should be lifted. (45:24.) The circuit court was hopeful that the probation agent would also add a geographic prohibition to McConochie's extended supervision conditions but knew it did not have the authority to add the condition on its own. (45:24.) The circuit court stated,

If I could -- which obviously I can't -- I would make that restriction apply to the extended supervision time period.

But at least I can control what the defendant does or does not do during the time of probation, and to protect that community I'm going to do the best I can with the amount of time I have.

(45:24.)

Convicted felons do not enjoy the same degree of liberty as those individuals who have not been convicted of a crime. *Stewart, supra*, ¶ 12 (citation omitted). “Conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.” *Id.*

CONCLUSION

The circuit court properly ordered a condition of probation that restricted McConochie from the area of the Amish community that he victimized. The condition serves the purposes of rehabilitation and protection of the community interest. Thus, the circuit court’s order should be affirmed.

Dated this 28th day of February, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1591 words, excluding the table of contents, table of authorities, and certifications.

Dated this 28th day of February, 2020.

Andrew J. Christenson

ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 28th day of February, 2020.

Andrew J. Christenson