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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The court should strike down the condition of probation banishing Mr. McConochie from portions of three counties, which does not take effect until six years after he is back living in the community, because it is an unconstitutional infringement of his rights of travel and association.

The state repeatedly argues that the circuit court reasonably exercised its discretion when it imposed the geographical restriction as a condition of probation. (State's brief, pp. 2, 4). The state's emphasis on the court's authority under Wis. Stat. § 973.09(1)(a) to impose conditions that are "reasonable and appropriate" obscures what is at issue here. Mr. McConochie is challenging the geographical restriction not as a violation of the court's discretion under § 973.09(1)(a) but as a violation of his constitutionally-guaranteed rights of travel and association. This court is not reviewing the circuit court's exercise of discretion. Rather, "[w]hether a particular condition violates a defendant's constitutional right is a question of law which this court reviews de novo." *State v. Stewart*, 2006 WI App 67, ¶12, 291 Wis. 2d 480, 713 N.W.2d 165, citing *State v. Lo*, 228 Wis. 2d 531, 534, 599 N.W.2d 659 (Ct. App. 1999).

The state cites *State v. Trigueros*, 2005 WI App 112, 282 Wis. 2d 445, 701 N.W.2d 54, as an example where this court has upheld “broad restrictions placed on offenders.” (State’s brief, p. 3). There, the condition ordered no contact with the drug community. *Id.* at ¶3. It was not a geographical restriction – a banishment – as ordered here. Indeed, here the circuit court also ordered as a condition of probation that Mr. McConochie have no contact with the Amish community, a condition that he does not challenge. *Trigueros* would be more apt if the court had banished the defendant from Milwaukee County, where the crime was committed, but it hadn’t. At issue here is a banishment, not a mere no contact provision, and the banishment is not limited to the southwest corner of Green Lake County where the offenses were committed but extends into two neighboring counties.

The banishment condition cannot survive this court’s review unless it is narrowly drawn and is not unduly restrictive of Mr. McConochie’s liberties. *Stewart*, 291 Wis. 2d 480, ¶21. The state has not shown that the restriction satisfies that standard, for three reasons.

First, although the state argues that a no contact condition alone is insufficient (brief, pp. 5-6), it does not explain why it was necessary for the restriction to extend beyond Green Lake County where the offenses were committed. Indeed, in *Stewart*, this court struck down a geographical restriction, in part, because it extended beyond where

most of Stewart's acts of abusing his family and exposing himself to neighbors had occurred. *Id.* at ¶16. This court wrote that, although the condition "certainly promotes the purposes of protecting the victims in this case and rehabilitating Stewart," the circuit court "could have fashioned a more narrowly drawn condition banishing Stewart from his residence and the immediate neighborhood surrounding it." *Id.* Likewise, here, the court could have limited the area to the southwest corner of Green Lake County where the offenses occurred. In fact, 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), but it then drew the restricted area to extend into neighboring Marquette and Columbia counties.

Second, the state fails to recognize that the other cases in which this court has affirmed banishment conditions did *not* involve the circumstance here where the condition extends beyond the county or municipality where the acts were committed and includes an area where the individual has resided, worked or had other significant ties.

The state cites *Predick v. O'Connor*, 2003 WI App 46, ¶8, 260 Wis. 2d 323, 660 N.W.2d 1, in which the court of appeals affirmed an injunction prohibiting O'Connor from entering Walworth County. O'Connor had harassed the Predick family for a decade. *Id.* at ¶1. Prior restraining orders, injunctions and a contempt order had not curbed her

behavior. *Id.* at ¶¶2-7. Significantly, O'Connor had "twice used a vehicle as a dangerous weapon *in Walworth County*" (*id.* at ¶19; emphasis added), once running the family's car off the road and on another occasion attempting to side-swipe the mother as she jogged along the road. *Id.* at ¶1. The restricted area was limited to the county where the acts were committed, a county where O'Connor neither lived nor worked. *Id.* at ¶19; *see also State v. Nienhardt*, 196 Wis. 2d 161, 169, 537 N.W.2d 123 (Ct. App. 1995) (defendant was banished from Cedarburg where she had stalked the victim and where she did not live and had no reason to be other than to buy cigarettes).¹

Those cases present circumstances much different from here, where the restricted area extends beyond where the crimes were committed and is where or near where Mr. McConochie and his family have long resided. It prevents him from living 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 and other family members. The condition is not narrowly tailored.

Third, as to what is perhaps even the greater concern with the condition, which is that it will not

¹ The state also cites *State v. Simonetto*, 2000 WI App 17, 232 Wis. 2d 315, 606 N.W.2d 275, but that case did not involve a geographical restriction. Rather, the condition ordered that the defendant not "go where children may congregate," which the circuit court said would include schools, day care centers, playgrounds, etc. *Id.* at ¶1.

take effect until six years after Mr. McConochie has been returned to the community, the state offers little response. (State's brief, p. 6-7). It notes that the circuit court said Mr. McConochie could at that time ask the court to remove the condition. But, of course, at that point, Mr. McConochie would have no right to the assistance of counsel. With respect to the argument that the court lacks the authority to order, as it did, that the probation agent may change or eliminate the condition, the state offers no response at all. (*See* McConochie's brief-in-chief, pp. 14-15).

Perhaps the state has offered little defense to the timing of the condition because it really can't be defended. The condition is not narrowly tailored because by 2026, when it would first come into effect, it likely will be unnecessary and may be highly disruptive. At that point, Mr. McConochie would have completed six years of extended supervision without the banishment condition. Having the condition kick in at that point would serve no purpose. Yet it may require him to move or quit a job, either of which would impede rather than further his rehabilitation. As argued in his brief-in-chief, the appropriate solution is to remove the banishment condition because it is an unlawful infringement of his rights of travel and association.

CONCLUSION

Mr. McConochie respectfully requests that the court reverse the circuit court order denying his postconviction motion seeking to eliminate the banishment condition and remand with directions that the circuit court enter an amended judgment of conviction removing that condition.

Dated this 12th day of March, 2020.

Respectfully submitted,

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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 1,206 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 12th day of March, 2020.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender