STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUNIOR L. WILLIAMS-HOLMES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Kenosha County Circuit Court, the Honorable Bruce Schroeder, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

ARGUMENT

I. The circuit court lacked statutory authority to retain authority over the women and children Mr. Williams-Holmes may live with during his term of supervision.

The circuit court was authorized to set a term of supervision limiting Mr. Williams-Holmes' living options. But the court overstepped its statutory authority by seeking to exercise ongoing control concerning *how* that condition is carried out for the entire five-year period Mr. Williams-Holmes is on supervision. Therefore, this court should reverse.

At times in its brief, the state mischaracterizes Mr. Williams-Holmes' argument. The state frames Mr. Williams-Holmes' argument as: "he just wants to modify the condition so the court no longer has a say in whether he resides with women or nonbiological children." (Respondent's Brief at 10.) This is obviously incorrect. The circuit court retains a significant say in who Mr. Williams-Holmes can live with by presumptively barring him from living with any women or nonbiological children. Even if this court grants the requested relief, he would still be presumptively barred from living with these individuals. He would only be able to obtain an exception with the permission of his supervising agent. Thus, the state is incorrect to argue that the court will have no say if relief is granted.

The state's primary argument is that the circuit court is not actually *administering* the terms

of supervision by retaining ongoing control over who Mr. Williams-Holmes can live with. (Respondent's Brief at 8.) But if this isn't the administration of supervision, what is it? Ordinarily, after the court sets the terms of supervision, its role terminates unless a change in the conditions is sought. *State v. Horn*, 226 Wis. 2d 637, 650, 594 N.W.2d 772 (1999); Wis. Stat. § 973.09(3)(a); Wis. Stat. § 302.113(7m)(a).

But here, the court has not simply set a condition of probation and stepped aside to allow the Department of Corrections (DOC) to monitor compliance with the condition. Rather, the circuit court has designated itself as the sole authority to decide which specific women and children Mr. Williams-Holmes will be permitted to live with for the entire five-year-period he is on court-ordered supervision. This authority plainly encompasses the day-to-day administration of probation, which the statutes have conferred exclusively on the executive branch. *State v. Burchfield*, 230 Wis. 2d 348, 349, 602 N.W.2d 154 (Ct. App. 1999).

Even if this court characterizes the circuit court's condition as something other than "administering" probation, neither the circuit court nor the state have identified any statutory authority for this condition, which gives the court ongoing supervision and decision-making authority over who an offender can live with. The only statutes the state cites in support of its position are Wis. Stat. § 973.09(3)(a) as to terms of probation, and Wis. Stat. § 302.113(7m)(a) as to terms of extended supervision. But neither of these provisions grant the court this extraordinary ongoing authority.

Section 973.09(3)(a) permits a court to modify terms of probation for cause. But the state and the circuit court have not argued that the circuit court is seeking to *modify* a condition; rather, they have construed this provision to confer authority to play an ongoing role in the day-to-day administration of probation. But this is inconsistent with *Horn* and *Burchfield*, recognizing that after the court sentences a defendant or places him on supervision "the adversary system has terminated," and the person does into the control or custody of the DOC. *Horn*, 226 Wis. 2d at 650. Moreover, the state's interpretation has entirely stripped away the requirement that modifications be "for cause," by arguing that this statute gives the court unlimited authority to make everyday determinations about an individual's supervision.

As to terms of extended supervision, the state fails to address the significant limitation on the court's authority to modify conditions. Section 302.113(7m)(a) permits a defendant or a supervision agent to petition the court to modify a term of extended supervision. The statute does not confer on the circuit court an independent basis to modify those condition. The court orders the conditions when it imposes the sentence, but then it has no authority to change those conditions in the absence of a petition from the defendant or the agent. *See* Wis. Stat. §§ 302.113(7m)(a), 973.01(5). So the state's citation to this statute to support the circuit court independently deciding who an offender can live with has no support. The state cites no authority for the circuit court making day-to-day decisions about who a defendant may live with.

The unpublished case the state cites—*State v. Luckett*, No. 2009AP2679-CR (WI App Apr. 21, 2010)—did not involve the specific challenge made here. (Resp. App. 3.) That case involved a substantially similar supervision condition, but that defendant argued that the entire condition was improper and unconstitutional, and that he should be free to live with women and children with no restriction. No. 2009AP2679-CR, slip op., ¶ 2. Here, Mr. Williams-Holmes is only challenging that portion of the condition that requires court approval, instead of agent approval. Therefore, in addition to being non-binding, *Luckett* is not even applicable.

The state insists the circuit court was correct to rely on *State ex rel. Taylor v. Linse*, but that case is not helpful in resolving the issue in this case. 161 Wis. 2d 719, 469 N.W.2d 201 (1991). In *Linse*, the defendant's agent ordered a condition of probation, prohibiting the defendant from traveling to a particular area. *Id.* at 722. The defendant asked the court to modify the condition under Wis. Stat. § 973.09(3)(a), and the court granted the modification, finding the condition conflicted with the defendant's probation. *Id.* The DOC appealed, arguing that the court could not modify the DOC-imposed condition. The court of appeals affirmed, holding that section 973.09(3)(a) allowed the court to modify both DOC-imposed and court-imposed conditions of probation. *Id.* at 725.

Linse does not support the circuit court's attempt to put itself in the role of DOC agent, making routine decisions about who an offender can and cannot live with for the entire term of supervision. *Linse* recognized only that the court—on the motion

of a party—could modify a term of supervision ordered by the DOC. *Linse* does not permit a court to make *sua sponte* changes to the defendant's term of supervision. And as noted above, even if this court interpreted section 973.09(3)(a) to permit the court to *sua sponte* modify conditions of *probation*, there is no similar statutory basis to permit the court to make those changes to terms of extended supervision, which can only be modified after the defendant or an agent files a petition.

The state sarcastically "commend[s]" Mr. Williams-Holmes for knocking down a straw man by distinguishing *State v. Gray*, 225 Wis. 2d 39, 590 N.W.2d 918 (1999) (Respondent's Brief at 11), but it was the circuit court—not Mr. Williams-Holmes—that has relied on *Gray* as authority for its position. The state has not offered any basis for this court to conclude that *Gray* supports the circuit court's attempt to exercise ongoing authority over who Mr. Williams-Holmes may live with while he serves his term of supervision.

Finally, although the state concedes at the outset that this case involves a legal issue to be reviewed de novo, it urges this court to find that this condition was within the "wide discretion" of the circuit court to set terms of supervision. (Respondent's Brief at 12.) This appeal has nothing to do with the circuit court's discretion. Mr. Williams-Holmes has not challenged the court's discretionary authority to limit his ability to live with women or nonbiological children. The circuit court simply erred by empowering itself, instead of the DOC, to make the day-to-day decisions about which women or nonbiological children Mr. Williams-Holmes can live

with. This court should order the modification of the term of supervision because the circuit court lacked statutory authority to make these routine decisions about Mr. Williams-Holmes' supervision.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Williams-Holmes requests that the court reverse and remand with instructions that the judgment of conviction be amended to require agent permission, not court permission, before he may live with women or children not related to him by blood.

Dated this 19th day of October, 2021.

Respectfully submitted,

Electronically signed by
Dustin C. Haskell

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,362 words.

Dated this 19th day of October, 2021.

Signed:

Electronically signed by
Dustin C. Haskell
DUSTIN C. HASKELL
Assistant State Public Defender