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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT TWO

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2021 AP 1865-CR

KIMBERLY A. HOWELL,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE MANITOWOC COUNTY
CIRCUIT COURT, HONORABLE MARK R. ROHRER, PRESIDING

APPELLANT'S BRIEF

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ISSUE PRESENTED

1. Whether the probation condition banning Mrs. Howell from continuing to serve as her grandson's guardian was constitutional and properly authorized by statute.

The court below ordered this condition at sentencing and denied a post conviction motion asking for it to be vacated.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

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STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous cases and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of the imposition of a probation condition at sentencing and of the denial of the postconviction motion asking this condition to be vacated.

2. Proceedings Below

On December 23, 2019, Mrs. Howell was arrested. (5:1). On December 26, 2019, a probable cause determination form was filed showing a court commissioner had examined the arresting officer's statements and found probable cause. (5). On that date, Mrs. Howell was released on a signature bond. (3).

On January 22, 2020, complaint number 2020 CF 60 was filed in Manitowoc County Circuit Court, charging Mrs. Howell with 3 counts of violating §948.04(1), *Wis. Stats.* (Causing Mental Harm to Child), and 2 counts of violating §948.03(2)(b), *Wis. Stats.* (Physical Abuse of Child). (2). On January 23, 2020, counsel was appointed for Mrs. Howell. (9).

On February 6, 2020, appointed counsel filed his motion to withdraw. (12). On February 7, 2020, the motion to withdraw was granted. (14). On February 28, 2020, a retained counsel gave notice of his appearance. (17).

On March 8, 2020, Mrs. Howell waived her right to a preliminary hearing. (19). On March 9, 2020, a

information, making the identical charges as in the complaint, was filed. (20).

On March 11, 2021, the parties presented a settlement agreement to the court (93:3-5). The terms of the agreement were: in exchange for the State's recommendation of a withheld sentence and 2 years probation and dismissal of counts 3 and 4 as read-ins, Mrs. Howell would enter pleas of guilty or no contest to an amended information reducing counts 1, 2 and 5 to misdemeanors. The State had no objection to Huber release. *Id.* On that date, Mrs. Howell entered a plea of no contest to the amended information. (70)(93:5-17).

After argument and Mrs. Howell's statement (93:17-44), the court proceeded to sentencing. (73) (93:45-56). At the end of sentencing, the court added a probation condition not part of the plea agreement. (93:56-57). The court ordered Mrs. Howell was prohibited from being a guardian for any child during her 2 year probationary period, including her then present guardianship over her grandchild, J.R. *Id.*

On March 15, 2021, the proper amended information was filed. (71). On that same date, trial counsel filed a Notice of Intent to Pursue Postconviction Relief (63) and a Motion to Stay the probation condition prohibiting Mrs. Howell from acting as guardian. (64).

On March 18, 2021, the court heard the motion to stay (85) and denied it by written order on March 22, 2021. (80).

Notice of Appeal was first filed on May 11, 2021 (88) by present counsel. (87).

Upon present counsel's request, the appeal was dismissed so a postconviction motion could be filed. (107). On September 3, 2021, present counsel filed a

postconviction motion, *inter alia*, challenging the constitutionality of and the statutory authority for the probation condition prohibiting Mrs. Howell from continuing as her grandson's, J.R.'s, guardian during her probationary period. (106). The court below denied the motion on October 1, 2021 (110) based in part on its correspondence filed September 23, 2021. (108).

Present counsel filed the second Notice of Appeal on October 22, 2021. (111). This Court found this Notice to be timely. (118).

3. Facts of the Offenses

The only judicially determined facts of the offenses were found when the court below accepted the parties stipulation at the plea hearing the facts recited in the complaint were sufficient to justify the no contest plea. (93:16-17). Briefly summarizing those facts, children in Mrs. Howell's care told police she had been mistreating them. (2:2-6).

ARGUMENT

I. Mrs. Howell was deprived of basic Due Process when the court below ordered the probation condition without notice or a hearing.

A. Standard of Review

Due Process errors are reviewed *de novo*. *Barbara B. v. Dorian H.*, 2005 WI 6, ¶8, 277 Wis.2d 378.

B. Additional Facts

The plea agreement here nowhere included the condition terminating Mrs. Howell's guardianship over her grandson, J.R., and the court and parties understood the facts were J.R. was neither a victim of

any of the charges nor was he even in Mrs. Howell's custody since he was in a foster home. (85:12-14, 16, 41-43 [stay motion hearing transcript]). The court heard no argument at sentencing about this condition. (93:56-57)

C. Discussion

"A fundamental guarantee of due process of law is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Brown County v. Shannon R.*, 2005 WI 160, ¶64, 76 N.W.2d 269 (footnotes with citations omitted). It is long settled "[S]tate statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254 (1980). And see *Goss v. Lopez*, 419 U.S. 565, 572-573, 95 S.Ct. 729 (1975)(citing cases).

Constitutional law provides a two part test for determining when statutory language creates a liberty interest protected by basic Due Process. See *Staples v. Young*, 149 Wis.2d 80, 84, 438 N.W.2d 567 (1989) ("Where a state regulation uses 'explicitly mandatory language in connection with requiring specific substantive predicates' for official action, a protected liberty interest is created." quoting *Hewitt v. Helms*, 459 U.S. at 472 with approval.) Explicitly mandatory language" is words "requiring that certain procedures 'shall,' 'will,' or 'must' be employed . . ." 149 Wis.2d at 85, quoting 459 U.S. at 471-472 with approval.) The second part of this test requires a showing of "specific substantive predicates for the official action [against a person]." *Id.*

Here, §48.23, *Wis. Stats.*, explicitly provides "a person appointed by the court to be the guardian of a child under this chapter has the duty and authority to make important decisions in matters having a

permanent effect on the life and development of the child and the duty to be concerned about the child's general welfare . . ." These duties are "including but not limited to" those specified in the subsections of the statute. It seems clear that, though the words shall, will or must are not included in the statute, it grants expansive authority to persons appointed as guardians limited only by the circumstances listed in the subsections of the statute, none of which are relevant here. Furthermore, the only "substantive predicates" for terminating any part of a guardian's authority are listed in subsection (4) and, again, do not apply here.

So, counsel submits the statute regulating guardianships creates a liberty interest protected by the Due Process Clause. And we all know the Due Process Clause requires, at a minimum, notice and an opportunity to be heard. See, *e.g.*, *Wengerd v. Rhinehart*, 114 Wis.2d 575, 587, 338 N.W.2d 861 (Ct.App.1983). Here Mrs. Howell was given no notice before the criminal court imposed the probation condition terminating her guardianship and no hearing before or after it was imposed. Reversal is justified on this ground alone.

II. The probation condition ordering termination of Mrs. Howell's guardianship of her grandchild, J.R., was neither reasonable nor appropriate and so violated the governing statute.

A. Standard of Review

Whether a statute has been properly applied is reviewed *de novo*. *State v. Piddington*, 2001 WI 24, ¶13, 241 Wis.2d 754.

B. Discussion

The purposes of probation conditions are "to rehabilitate the defendant and protect society without placing the defendant in prison." *State v. Gray*, 225

Wis.2d 39, ¶59, 590 N.W.2d 918, 933 (1999). It is settled at sentencing "the trial court's responsibility [is] to look at the facts in each case independently before issuing a sentence." *State v. Ogden*, 199 Wis.2d 566, 572, 544 N.W.2d 574 (1996), following §973.09(1)(a), *Wis. Stats.* The court's 3 stated reasons for this condition (93:56) nowhere recognize the basic facts J.R. was neither a victim of any of the charges nor was he even in Mrs. Howell's custody since he was in a foster home. (85:12-14, 16, 41-43 [stay motion hearing transcript]). That is to say, this condition was not protecting J.R. from Mrs. Howell since he was not in her custody and nothing in the court's stated reasons show the condition would assist in her rehabilitation. See, e.g., *State v. Handley*, 173 Wis.2d 838, 842-846, 496 N.W.2d 725 (Ct.App.1992). (where no facts in the record supported the ordered condition, judgment reversed).

Thus, the probation condition terminating Mrs. Howell's guardianship over her grandson violated the statutory rules and the judgment should be reversed on this ground as well.

Conclusion

Counsel submits the foregoing demonstrates the judgment creating the probation condition terminating Mrs. Howell's guardianship over her grandson was imposed without Due Process and furthermore was in violation of statute and so reversal and remand either for a hearing or vacation of the condition is justified.

Dated: January 12, 2022

Respectfully submitted,

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Electronically signed by

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b), (bc) & (c) for a brief produced with a proportional serif font. The length of this brief is 1,611 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated: January 12, 2022

Signature: Timothy A. Provis

Electronically signed by

Timothy A. Provis

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APPENDIX CERTIFICATION

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 Wis. Stat. §809.19(2) and that contains (1) the decision and opinion of the circuit court; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the brief; and (3) any other portions of the record necessary for an understanding of the brief.

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 first names and last initials 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: January 13, 2022

Signature: Timothy A. Provis

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