

FILED
04-08-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
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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 REPLY BRIEF

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To: Court and Counsel

Counsel for appellant Howell hereby replies to respondent State's brief and presents the following:

In appellant's brief, hereinafter AB, counsel raised 2 issues. First, counsel pointed out, due to Mrs. Howell's statutory rights as the existing guardian of her grandchild, J.R., this guardianship was protected by basic Due Process and so could not be terminated absent notice and a hearing. AB 4-6. Secondly, counsel argued the probation condition at issue violated the governing statute because it was neither reasonable nor appropriate. AB 6-7.

In respondent State's brief, hereinafter RB, the State presents responses neither on point nor logical.

Discussion

The State responds to appellant's Due Process argument by citing and discussing cases holding probation conditions may be unconstitutional. RB 6-7. But appellant's argument does not contest the substantive constitutionality of the probation condition, it merely contests the procedural constitutionality

of the manner in which the condition was imposed, *i.e.*, without the notice and hearing mandated by basic Due Process. It is settled where a respondent fails to contest an appellant's argument, this Court may find the issue conceded. *Charolais Breeding Ranches, Ltd. v. FPC Securities, Corp.*, 90 Wis.2d 97, 107, 279 N.W.2d 493 (Ct.App.1979). See also *Schlieper v. Department of Natural Resources*, 188 Wis.2d 318, 322, 525 N.W.2d 99 (Ct.App.1994) (same).

The State makes 2 one sentence statements unsupported by any authority before closing its constitutional argument. RB 7. The State says appellant "was given notice of her plea and sentence and was given an opportunity to be heard." RB 7. This is completely inconsistent with the facts. The record clearly shows the condition terminating Mrs. Howell's guardianship over her grandson was not included in the plea agreement (85:12-14, 16, 41-43) and the court below entertained no argument at sentencing over this condition. (93:56-58). See AB 4-5.

Secondly, the State says the "statute does not require that the Court advise a defendant of potential terms or conditions of probation." RB 7. The State cites no case so interpreting §973.09(1)(a), *Wis. Stats.* But even if there were such a case, this statement is irrelevant. This statute does clearly require a court ordering probation to "stat[e] in the order the reasons therefor." And the court below did state its reasons at sentencing. (93:56-58).

Turning now to the State's response, RB 7-10, to counsel's statutory argument, AB 6-7, it is settled any discretionary decision is governed by a rule first set down in *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971) ("the term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a *logical* rationale . . ." Emphasis added.).

There is no logic in finding the public will be protected by terminating Mrs. Howell's existing guardianship of her grandson, J.R., when he is no longer in appellant's custody and so cannot be harmed by appellant.

Conclusion

"When dealing with matters of family relations, the criminal law is a blunt instrument and should be used judiciously. *U.S. v. Van Engel*, 809 F.Supp. 1360, 1372 (E.D.Wis. 1992)." *State v. Gimino*, 2013 WI App 55, ¶56. 347 Wis.2d

550, 830 N.W.2d 723 (conc. opn. per Sherman, J.)(unpublished). The criminal law has not been used judiciously here.

Counsel submits the State's arguments are erroneous and prays the Court for an order either remanding for a hearing complying with Due Process or vacating as much of the probation condition which has terminated appellant Howell's guardianship of her grandson, J.R.

Dated: April 8, 2022

Respectfully submitted,

Timothy A. Provis

Electronically signed by

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Attorney for Appellant

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CERTIFICATION

I hereby certify this brief conforms to the rules contained in s. [809.19 \(8\) \(b\)](#) and [bm](#) and [\(c\)](#) for a brief produced with a proportional serif font. The length of this brief is 653 words.

So Certified,

Timothy A. Provis

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