STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP002153-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THATCHER R. SEHRBROCK,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Dodge County Circuit Court, the Honorable Joseph G. Sciascia, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

The circuit court erroneously exercised its discretion by imposing a condition of probation that is both unreasonable, and harsh and excessive.

Mr. Sehrbrock has been upfront about his struggles with drugs and alcohol. A history of substance abuse without more, however, is insufficient to justify the seven-year IID requirement imposed as a condition of probation in this case. Under the circumstances, the condition is both unreasonable, and harsh and excessive.

A. The condition requiring an IID is not reasonably related to Mr. Sehrbrock's rehabilitation or conviction.

The seven-year IID requirement imposed as a condition of Mr. Sehrbrock's probation is neither reasonable nor appropriate. In arguing otherwise, the state points to Mr. Sehrbrock's history of substance abuse and the circuit court's comments about needing to protect the public. At no point, however, does the state assert that the condition is individualized to Mr. Sehrbrock or his offense. Nor could it, as the condition was imposed, not based on the facts of this case, but on the circuit court's own idiosyncrasies. For that reason, it must be vacated.

To be clear, this court reviews conditions of probation for an erroneous exercise of discretion. *State v. Steward*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165. Mr. Sehrbrock is under no obligation to present "clear evidence" that the circuit court had an improper motive, nor that it was biased. (Response 13, 19). Rather, he must show that the condition is not reasonable and appropriate – that it is not individualized and does not further the goals of rehabilitation or protection of the community. *State v. Oakley*, 2001 WI 103, ¶13, 245 Wis. 2d 447, 629 N.W.2d 200.

Further, while the state correctly notes that a condition of probation need not be directly related to the crime for which the defendant was convicted, it fails to acknowledge that the condition must still be "rationally related to [the defendant's] need for rehabilitation." (Response at 13); *State v. Miller*, 175 Wis. 2d 204, 210, 499 N.W.2d 215 (1993). In other words, if the condition is not related to the crime of conviction, it must address a "specific area of past criminality" in which the defendant was recently involved. *Id.* (rejecting the state's suggestion that it should permit any conditions of probation "which 'require or forbid conduct that is reasonably related to future criminality.'"). *See also State v. Rowan*, 2012 WI 60, ¶18, 341 Wis. 2d 281, 814 N.W.2d 854 (looking at the defendant's pattern of prior criminal conduct to determine that the condition was related to her rehabilitation by assisting her in conforming her conduct to the law).

The condition at issue in this case is not related to the crime of conviction or an area of past criminality – it is not tailored to Mr. Sehrbrock's needs at all. At sentencing, the circuit court's only explanation for imposing the IID requirement was that "[s]omebody who drinks as much as [Mr. Sehrbrock] drinks ought not to be on the road unless he's in a car that has ignition interlock." (48:33). It made no record as to why an ignition interlock device was necessary to advance Mr. Sehrbrock's rehabilitation or to protect the public from him, and while this court is to "look for reasons to sustain a circuit court's discretionary decision," the record in this case provides no such reasons. (See Response 10).

The state defends the circuit court by pointing to its comments at the postconviction hearing – stating that the IID requirement was meant to protect the public from Mr. Sehrbrock due to his history of alcohol use. (Response 14). The state then details that history at length. (Response 15). This argument misses the mark for several reasons.

The state's references to conduct reports from Mr. Sehrbrock's time in the jail are both misplaced and misleading. (Response 5, 10, 15, 18). Mr. Sehrbrock did not violate any jail rules related to alcohol. (39; 58). More importantly, Mr. Sehrbrock's conduct while serving his conditional jail time after being placed on probation was obviously unknown to the circuit court at the time of sentencing and thus cannot justify the condition of probation imposed.

The state's defense of the IID requirement fails for an even more fundamental reason, however. Namely, the condition at issue in this case is not related to either the crime for which Mr. Sehrbrock was convicted – robbery – or a specific area of past criminality in which he was involved. Mr. Sehrbrock has no history of drinking and driving.[1] The condition, therefore, was not individualized to Mr. Sehrbrock, nor does it advance his rehabilitation or the protection of the community from him. Further, while, as the state repeatedly points out, Mr. Sehrbrock has a history of substance abuse, the IID requirement does not address that need. Rather, as set forth in the initial brief, that need was properly addressed by several other court ordered conditions of his probation.

Finally, the state disputes Mr. Sehrbrock's claim that the cost of requiring an IID is counterproductive to his rehabilitation, not by challenging his assertion, but by arguing that "it is reasonable to expect that the circuit court … would be aware of the relevant pros and cons of IIDs." (Response 18-19). It argues that weighing those pros and cons is within the circuit court's discretion, but the state's defense falls flat. There are no facts in the record to suggest that the circuit court was aware of the cost of requiring an IID,

[1] The state asserts that Mr. Sehrbrock had "made no showing that he could be trusted to make the decision to drive only while sober," but the opposite is true. (Response 15). Despite what the state describes as "severe" alcoholism, Mr. Sehrbrock has received no citations or criminal charges for driving under the influence.

nor that he gave any consideration to the "pros and cons" of such a requirement when imposing it in this case. The circuit court's only statement at sentencing was that someone who drinks as much as Mr. Sehrbrock did should not be allowed to drive a vehicle without an IID. The circuit court gave no indication that it considered the hardship that an IID may cause an 18-year-old living in a rural community with no public transportation.

The condition of probation prohibiting Mr. Sehrbrock from operating any vehicle without an IID was not tailored to Mr. Sehrbrock, but rather – as evidenced by the circuit court's comments at the sentencing and postconviction hearings – reflected the circuit court's own feelings about alcohol and substance abuse.[2] Rather than addressing a specific area of past criminality in which Mr. Sehrbrock was involved, the IID requirement was based on the circuit court's concern about the culture of drinking and "substance abuse" in our society. (48:22-25, 29, 33; 71:9, 11-12). The circuit court erroneously exercised its discretion and the condition must be vacated.

[2] The state asserts that Mr. Sehrbrock implied that it was improper for the circuit court to impose a condition that was not requested by either party. (Response 16). That is not accurate. The fact that neither party requested the IID is relevant to Mr. Sehrbrock's claim that the condition reflects the circuit court's idiosyncrasies – a claim the state notably fails to address.

B. The condition requiring an IID for seven years is harsh and excessive.

The condition prohibiting Mr. Sehrbrock from operating any vehicle without an IID for the next seven years must be vacated for a second, independent reason – under the circumstances, it is unduly harsh and excessive.

In the circuit court, the state conceded that the condition was excessive and should be reduced. (71:6). On appeal, the state changes its tune and asserts that the condition should not be vacated or reduced. In support, however, it fails to even mention the legal criteria for evaluating a harsh and excessive claim and offers only the argument that the circuit court indicated it may be willing to remove the requirement or terminate probation early. (Response 19).

The circuit court's comments about early termination or a future sentence modification do not alter this court's analysis. Any defendant may file a motion for sentence modification at any point. Further, the circuit court is not required to grant any future motion brought by Mr. Sehrbrock, nor did it give any indication of what criteria Mr. Sehrbrock would have to meet in order to convince it that the IID requirement is no longer necessary. In short, the circuit court's comments are far from a guarantee that Mr. Sehrbrock will not have to have an IID installed on any vehicle he operates for the next seven years.

The seven-year IID requirement was imposed as a condition of probation for robbery. It was imposed on an 18-year-old with no history of driving under the influence and is more than twice as long as the IID requirement that could be imposed on a defendant convicted of operating while intoxicated third offense or above. *See* Wis. Stats. §§ 343.30(1q)(b)4. & 343.301(2m). It is also prohibitively expensive. The condition is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). It must be vacated.

CONCLUSION

For these reasons, as well as those set forth in the initial brief, Mr. Sehrbrock respectfully requests that this court reverse the circuit court's order denying his postconviction motion and vacate the condition of probation prohibiting him from operating a vehicle without an ignition interlock device.

Dated this 31st day of May, 2023.

Respectfully submitted,

Electronically signed by
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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 1,594 words.

Dated this 31st day of May, 2023.

Signed:
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