STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP002153-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THATCHER R. SEHRBROCK,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

Mr. Sehrbrock pled guilty to robbery with use of force, as a party to the crime. There was no evidence that he had driven during the offense, and no evidence that he had a history of driving while intoxicated. At sentencing, the circuit court withheld sentence and placed Mr. Sehrbrock on probation with a condition that an ignition interlock device (IID) be installed on any vehicle that Mr. Sehrbrock operates for the next seven years. Postconviction, Mr. Sehrbrock challenged the imposition of the IID condition, arguing that it was unreasonable, as well as harsh and excessive. The circuit court denied the motion and the court of appeals affirmed.

1. Is a condition of probation "reasonably related" to the goals of rehabilitation and the protection of the public if it is not related to the crime of conviction or a specific area of past criminality or conduct the defendant has engaged in?

The circuit court denied Mr. Sehrbrock's postconviction motion. The court of appeals affirmed in a split decision.

2. Can a condition of probation be harsh and excessive?

The circuit court denied Mr. Sehrbrock's postconviction motion without deciding whether the IID requirement was harsh and excessive. The court

of appeals affirmed while assuming without deciding that the harsh and excessive framework applied.

CRITERIA FOR REVIEW

Dissenting from the majority opinion in this case, Judge Taylor noted: "[t]here is no similar factual scenario in any Wisconsin appellate case where an IID has been imposed as a condition of probation for a non-vehicular crime, much less when there is no history of the defendant driving or operating a vehicle while intoxicated." *State v. Sehrbrock*, No. 2022AP2153-CR, Slip. Op. (WI App. August 8, 2024) (App. 27-28). Nevertheless, the majority upheld the IID requirement, noting that there is no requirement that a condition of probation address a specific area of past criminality if it is not directly related to the crime of conviction. *Id.*, ¶33. (App. 17).

Mr. Sehrbrock's case presents this Court with an opportunity to develop and clarify the law regarding conditions of probation. Specifically, whether a condition of probation is reasonably related to the defendant's rehabilitation or protection of the public if it is not tailored to the crime of conviction or the defendant's past behavior—a question which is not factual in nature, has statewide impact, and is likely to recur unless resolved. The Court may also use this case to clarify that the harsh and excessive framework applies to conditions of probation. Review is therefore warranted under Wis. Stat. § 809.62(1r)(c)2-3.

STATEMENT OF THE CASE AND FACTS

On November 28, 2020, 17-year-old Thatcher Sehrbrock wore a mask and entered a gas station with Avery Bence. (2:1-2). Bence sprayed the store clerk with pepper spray and took several packs of cigarettes, after which a struggle ensued. (2:2-3). After Bence called for help, Mr. Sehrbrock threw several drinks at the clerk. (2:2-3). He and Bence then fled the scene on foot. (2:2-3).

A complaint charging Mr. Sehrbrock with robbery with use of force, as a party to the crime, was filed on April 26, 2021. (2). Pursuant to a plea agreement, Mr. Sehrbrock pled no contest to that charge on January 7, 2022. (19; 47). After a colloquy, the circuit court accepted Mr. Sehrbrock's plea and ordered that a presentence investigation report (PSI) be prepared. (47:3-15).

The PSI was filed prior to sentencing and, as relevant, set forth Mr. Sehrbrock's version of the offense, criminal history, and substance abuse needs. (22). Mr. Sehrbrock informed the PSI writer that he was intoxicated at the time of the offense and made a bad decision. (22:3). Further, he had sought out treatment after this offense and was no longer drinking alcohol. (22:11, 15, 17). Notably absent from the PSI was any mention of Mr. Sehrbrock having either civil or criminal convictions for operating while intoxicated. (22:5-6).

Sentencing was held on April 19, 2020. After hearing from the parties and considering the required

factors, the circuit court withheld sentence and placed Mr. Sehrbrock on probation for seven years. (31; 48:5-33)(App. 29, 32-44). The court ordered conditions of probation included: one year of conditional jail time; not to consume alcohol or other intoxicants; maintain absolute sobriety; no bars, taverns, liquor stores or beer tents; and completion of programming as determined by agent. (31:2; 48:30-32)(App. 30, 41-48). Further, although it wasn't requested by either party, or the DOC, the circuit court ordered that Mr. Sehrbrock have an IID installed on any vehicle he owns or operates for the duration of his probation:

> Any other conditions that come to mind, Attorney Tienstra, that you think ought to be ordered?
>
> ATTORNEY TIENSTRA: No, Your Honor.
>
> THE COURT: How about ignition interlock? Somebody who drinks as much as he drinks ought not to be on the road unless he's in a car that has ignition interlock. I'm ordering that for the whole period of probation which will be seven years.

(31:1; 48:32-33)(App. 29, 43-44).

After sentencing, Mr. Sehrbrock, through counsel, filed a postconviction motion requesting that the court remove or modify the condition of probation requiring the IID. (51). In it, he argued that the condition was unreasonable, as well as harsh and excessive. (51).

On December 9, 2022, the circuit court held a hearing on Mr. Sehrbrock's postconviction motion. (71)(App. 46-61). While the state did not join in Mr. Sehrbrock's request that the condition be removed, it did agree that the length of the IID requirement was harsh and should be reduced. (71:6)(App. 51).

The circuit court denied the motion. (63)(App. 31). In doing so, it noted that "alcohol is a huge factor in Mr. Sehrbrock's inability to stay out of trouble," and concluded that, therefore, the IID requirement is directly related to his conduct. (71:8-9)(App. 53-54). Further, the circuit court found that the fact that Mr. Sehrbrock did not have any OWI's was not a reason not to order the IID: "[o]nce you get to the point where you're intoxicated, you have given the keys to your life to the devil. And everybody who is in contact with you is in danger because there's no telling what you're going to do." (71:9)(App. 54). In essence, the court stated that, due to his history with substance abuse, it had no reason to think that Mr. Sehrbrock would not drive while intoxicated and, for that reason, the IID requirement was necessary to protect the public. (71:9-11)(App. 54-56).

Mr. Sehrbrock appealed and the court of appeals affirmed in a split decision. *State v. Sehrbrock*, No. 2022AP2153-CR, Slip. Op. (WI App. August 8, 2024)(App. 3-28). The majority held that the IID requirement was "'reasonably related' to Sehrbrock's rehabilitation and the protection of the public." (App. 14). It also held that the requirement was not harsh

and excessive. (App. 21-22). In so holding, it concluded that a condition of probation need not be directly related to the crime of conviction or a specific area of past criminality in which the defendant was recently involved. (App. 17).

In a dissenting opinion, Judge Taylor concluded that the circuit court erroneously exercised its discretion by imposing the IID requirement in this case: "The IID probation condition in this case is simply not related to Sehrbrock's rehabilitation or protecting the public because the condition pertains conduct (intoxicated driving) that is absent from the facts in this case, absent from Sehrbrock's criminal history, and absent from his driving history." (App. 28).

This petition for review follows.

ARGUMENT

This Court should grant review and clarify the law regarding conditions of probation. Further, it should reverse the court of appeals. The circuit court erroneously exercised its discretion when it imposed a probationary condition requiring Mr. Sehrbrock to have an IID installed on any vehicle he operates for the next seven years. Mr. Sehrbrock was 17 years old at the time of the offense, 18 years old at the time of sentencing, and had no history of operating while intoxicated. The condition was not reasonably related to Mr. Sehrbrock's rehabilitation or the protection of

the public. Further, under the circumstances, it was harsh and excessive.

I. This Court should grant review and hold that a circuit court erroneously exercises its discretion by imposing a condition of probation that is not related to the crime of conviction or otherwise tailored to the defendant's recent conduct.

A. A condition of probation is not reasonably related if it is not individualized to the crime or the defendant's recent conduct.

Circuit courts have a great deal of discretion at sentencing. Even so, it is well established that the exercise of that discretion "must be set forth on the record," with reference to established considerations. *State v. Gallion*, 2004 WI 42, ¶4, 270 Wis. 2d 535, 678 N.W.2d 197; Wis. Stat. § 973.017(2),(10m). "In order to have a valid sentence there must be 'a statement by the trial judge detailing his reasons for selecting the particular sentence imposed.'" *Gallion*, 2004 WI 42, ¶¶22, 39 (judges are "required to provide a 'rational and explainable basis' for the sentence."). Further, "[t]he circuit court's proper exercise of discretion includes individualizing the sentence 'to the defendant based on the facts of the case.'" *State v. Alexander*, 2015 WI 6, ¶22, 360 Wis. 2d 292, 858 N.W.2d 662.

With respect to probation in particular, § 973.09(1)(a), Wis. Stats., "grants to the circuit court broad discretion to place a convicted person on

probation and to 'impose any conditions which appear to be reasonable and appropriate' on that probation." *State v. Heyn*, 155 Wis. 2d 621, 627, 456 N.W.2d 157 (1990). This Court has held that the reasonableness of a condition is measured by how well it serves the two dual objectives of probation: rehabilitation and protection of the community. *Id*. at 629; *See also State v. Steward*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165; *State v. Simonetto*, 2000 WI App 17, ¶6, 232 Wis. 2d 315, 606 N.W.2d 275. Circuit courts erroneously exercise their discretion when they impose conditions of probation which are not tailored to the individual or the offense for which the defendant is being sentenced, or which "reflect only their idiosyncrasies." *See State v. Oakley*, 2001 WI 103, ¶13, 245 Wis. 2d 447, 629 N.W.2d 200.

Further, while the court of appeals correctly noted that a condition of probation need not be directly related to the crime for which the defendant was convicted, it failed to acknowledge that the condition must still be "rationally related to [the defendant's] need for rehabilitation." *State v. Miller*, 175 Wis. 2d 204, 210, 499 N.W.2d 215 (Ct. App. 1993). The court of appeals rejected Mr. Sehrbrock's assertion that, in order to be rationally related to the defendant's rehabilitation, the condition must address a specific rehabilitative need of the defendant—it must address a "specific area of past criminality" or other conduct in which the defendant was recently involved. *Id*. It stated that no such requirement exists and upheld the IID condition in this case despite there being no evidence establishing that Mr. Sehrbrock has

any history of driving or operating a vehicle while intoxicated. (App. 17).

In *State v. Miller*, 175 Wis. 2d 204, the court of appeals ruled that a condition of probation need not relate to the offense for which the defendant was convicted, but rejected the state's assertion that it permits conditions which "require or forbid conduct that is reasonably related to future criminality." *Miller*, 175 Wis. 2d at 209-210. It upheld the condition at issue because the "presentence investigation report define[d] a very specific area of criminality in which Miller [had] recently been involved" and the condition was related to Miller's need to be rehabilitated from that conduct. *Id*. at 210.

In *State v. Rowan*, 2012 WI 60, 341 Wis. 2d 281, 814 N.W.2d 854, this Court reviewed a condition of supervision which allowed law enforcement to search Rowan's person, residence, or vehicle for a firearm at any time without probable cause or reasonable suspicion. The condition was found to be reasonably related to Rowan's rehabilitation because it was "designed to assist her in 'conforming [her] conduct to the law' by recognizing that her prior criminal conduct demonstrated a pattern involving guns and violent threats." *Rowan*, 2012 WI 60, ¶18.

While it is "appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized probation ...conditions are appropriate for a particular person," a

condition which does not address an identified need of the defendant—such as the one at issue in this case—does not advance those goals. *See Id*. It neither advances that defendant's rehabilitation nor protects the public from him. Imposition of such a condition therefore, constitutes an erroneous exercise of discretion.

B. The condition requiring an IID is not reasonably related to Mr. Sehrbrock's rehabilitation or the protection of the public.

Neither the parties, nor the Department of Corrections, requested that the circuit court require Mr. Sehrbrock to have an IID installed on any vehicle he operates. The circuit court imposed that condition on its own because, in its view, the fact that Mr. Sehrbrock was intoxicated at the time of the offense meant that he had "surrendered [his] decision making to the devil," and there is no telling what he will do. (71:8-9)(App. 53-54). Requiring Mr. Sehrbrock to have an IID installed on any vehicle he drives is completely unrelated to the offense and Mr. Sehrbrock's rehabilitation; it is unreasonable and inappropriate.

When imposing the IID requirement, the circuit court stated only 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)(App. 44). The court gave no explanation for why, in light of the facts of this offense, or

Mr. Sehrbrock's rehabilitative needs, an IID order was necessary. It did not tie the requirement to Mr. Sehrbrock at all. Rather, the circuit court's reasoning with respect to the IID requirement would apply to anyone who has a history of alcohol abuse.

While denying the postconviction motion, the circuit court tried to make a better record regarding the condition, but failed. At the postconviction hearing, the court simply reiterated its position that the IID requirement was reasonable because Mr. Sehrbrock had a history of alcohol abuse and has made bad decisions while drinking. (71:8-9)(App. 53-54).

The court of appeals upheld the condition, similarly relying on Mr. Sehrbrock's history of substance abuse.

Neither court explained how the IID condition addresses Mr. Sehrbrock's substance abuse need. The rationale provided could be applied to any defendant who commits a crime while under the influence, or who has a history of alcohol abuse.

The probationary condition was not tailored to Mr. Sehrbrock, his needs, or the offense for which he was being sentenced–robbery. 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)(App. 44). 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.

Looking at the facts of this case, and Mr. Sehrbrock as an individual, it becomes apparent that the seven-year IID requirement does not further the goals of probation; it does not advance Mr. Sehrbrock's rehabilitation or the protection of the community. While Mr. Sehrbrock admitted to drinking at the time of the offense, he was not driving the vehicle which brought him to the gas station. (33:3). He also has no history of operating or driving a vehicle while intoxicated. (33:5-7). Moreover, as set forth in the PSI and letters filed with the circuit court, Mr. Sehrbrock was no longer consuming alcohol and he had voluntarily sought out and attended counseling sessions for at least a year prior to sentencing. (24; 33:17).

Instead of imposing conditions tailored to Mr. Sehrbrock, the circuit court's comments at sentencing and postconviction reveal that the IID requirement was based on the circuit court's own eccentricities. The circuit court began its sentencing comments by addressing what it believed to be a cultural problem and went so far as to encourage the people in the courtroom to contact their state representative:

> We live in a substance abuse society where it is considered socially acceptable to go out and get drunk as long as you don't drive. Which is a bad

> idea. Because when you give yourself permission to get drunk, you're incapable of making a good decision.
>
> …
>
> The point is this, it's time to get serious about this problem of substance abuse. And if anybody tries to tell you that marijuana should be legalized, you should let them know that if you legalize marijuana, what you are doing is you are saying to all the 13-year-olds out there that it's really safe.
>
> Conveying that message is a huge mistake because how many other people, besides Thatcher, are going to get sucked into that and end up like this? You're telling me that substance abuse is a major reason why we're here, why he's here. And we've got people out there, including the governor, who want to legalize marijuana and let all the 13-year-olds in the world believe that it's okay. So if you want to do something to help Thatcher and others, it's still a free country, we still have the right to contact our legislative officials and let them know where we stand.

(48:22-24)(App. 33-35). The circuit court also repeatedly referred to alcohol or addiction as the "devil," even stating that when you "take a drink, you are saying to the devil, here Satan here's the keys to my life." (48:25,29,33)(App. 36,40,44). Postconviction, the circuit court continued to make references to the "devil" and again noted that society's view of alcohol is part of the problem: "Once you get to the point where you're intoxicated, you have given the keys to your life to the devil;" "the fact that you weren't sober means that you surrendered your decision making to the devil."(71:9, 11-12)(App. 54, 56-57). The circuit clearly had strong opinions about alcohol and other substances which led to imposition of an IID

requirement in a non-OWI case in which the defendant had no history of drinking and driving.

Under the facts of this case, the IID requirement is not necessary or reasonably related to the dual goals of probation. It reflects only the circuit court's idiosyncrasies. The circuit court, therefore, erroneously exercised its discretion and the condition prohibiting Mr. Sehrbrock from operating a motor vehicle without an IID should have been vacated.

II. This Court should grant review and hold that a condition of probation can be harsh and excessive.

Postconviction, and on appeal, Mr. Sehrbrock asserted that the circuit court also erroneously exercised its discretion while imposing the IID requirement because it was harsh and excessive. The court of appeals questioned whether the "'harsh and excessive' framework" applies to a particular condition of probation, but assumed without deciding that it did. (App. 21). This case presents the Court with an opportunity to clarify that a condition of probation may be harsh and excessive, and develop the law regarding how such a determination should be made, if different than the standard that already exists.

"When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion 'only where the sentence 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.'" *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). This court reviews the circuit court's conclusion that its sentence was not unduly harsh for an erroneous exercise of discretion. *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

Here, the circuit court imposed a condition requiring Mr. Sehrbrock to have an IID installed on any vehicle he operates for the next seven years. The court did not directly address Mr. Sehrbrock's harsh and excessive claim at the postconviction hearing; instead, it found that the condition was appropriate and stated that Mr. Sehrbrock could file a motion to modify in the future if he can show that he doesn't need the IID and that it's burdensome. (71:11)(App. 56). By failing to articulate the legal standard or make any findings as to why the condition is not excessive or unduly harsh, the circuit court erroneously exercised its discretion. Moreover, under the circumstances, the condition is so excessive, unusual, and disproportionate to Mr. Sehrbrock's offense as to shock the public conscience. Even the state admitted it should be modified at the postconviction hearing. (71:6)(App. 51).

The seven-year IID requirement imposed on Mr. Sehrbrock is more than twice as long as the maximum IID requirement that could be imposed on a defendant convicted of operating while intoxicated

third offense or above. Wis. Stats. §§ 343.30(1q)(b)4. & 343.301(2m). As explained, Mr. Sehrbrock has no history of OWI offenses and was not driving at the time of this offense. Consequently, ordering him to have an IID for longer than someone who has actually put the community at risk by drinking and driving on multiple occasions is harsh and excessive.

Further, the IID requirement in this case has a financial impact. IID's are expensive. According to information obtained from the Wisconsin DOT website, the annual cost of an IID in Wisconsin ranges from a low of $878 to a high of $1,260. Wisconsin Ignition Interlock Device Service Centers, available online at https://wisconsindot.gov/Documents/about-wisdot/who-we-are/dsp/iid-service-center-list.pdf. Taking the average of the two, over seven years, Mr. Sehrbrock would be paying approximately $7,483 to install, maintain, and remove the IID. This is a significant amount of money for a 19-year-old and could prevent him from having the financial means to live independently.

The cost could also prevent Mr. Sehrbrock from obtaining and maintaining employment, or attending treatment. The cost could prevent Mr. Sehrbrock from having the IID installed, or keeping it installed, thereby preventing him from driving. Mr. Sehrbrock resides in Watertown, which has no public transportation. Without public transportation or the ability to drive to and from work, it would be hard, if not impossible to find and maintain employment, or regularly attend treatment.

The probationary condition prohibiting Mr. Sehrbrock from operating a motor vehicle without an IID is harsh and excessive; it is so disproportionate to his offense as to shock the public sentiment. The condition must be vacated.

CONCLUSION

Mr. Sehrbrock respectfully requests that this Court grant review, reverse the court of appeals, and hold that a condition of probation is not reasonably related if it does not relate to the crime of conviction or recent conduct of the defendant. Further, a condition of probation may be vacated as harsh and excessive.

Dated this 6th day of September, 2024.

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 3,447 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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 this 6th day of September, 2024.

Signed:

Electronically signed by
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