

FILED
08-14-2023
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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case Nos. 2023AP900-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THEODORE J. POLCZYNSKI,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal from the Judgment of Conviction of the Waukesha
County Circuit Court, Case No. 2019CF811
The Honorable Paul F. Reilly, Presiding

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ISSUES PRESENTED

- I. Are the conditions restricting Mr. Polczynski's ability to own a business or operate as a general contractor unduly harsh?**

Answered by the Circuit Court: **No.**

- II. Did the Court erroneously exercise its discretion by imposing probation conditions that reflect its own idiosyncrasies?**

Answered by the Circuit Court: **No.**

STATEMENT ON ORAL ARGUMENT

Mr. Polczynski does not request oral argument as he believes the briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

STATEMENT ON PUBLICATION

Publication of this opinion is not necessary for the following reasons: the issue asserted is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient; and the issues are decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent.

STATEMENT OF CASE AND FACTS

On May 31, 2019, Theodore J. Polczynski was charged with two felony counts of Theft by Contractor, in amounts between \$10,000 and \$100,000, in violation of Wis. Stats. §779.02(5), in Waukesha County 2019CF881, for acts alleged to have occurred on about April 13, 2018 and April 21, 2018 (R1:1-5; App. 6).

On October 21, 2022, Mr. Polczynski plead No Contest to two amended counts (R64; App. 11) of Misdemeanor Theft of Movable Property, Less Than \$2,500, Wis. Stats. §943.20 (1)(a). At sentencing, November 22, 2022, the Honorable Paul F. Reilly sentenced Mr. Polczynski to nine (9) months consecutive on each count, imposed and stayed for a period of two (2) years-probation, with the following relevant conditions, *inter alia*:

No ownership interest in any business and agent must approve all employment activities.

Must disclosed and provide banking information to agent.

May no longer be a general contractor.

(R69:2; App. 13).

The sentencing Court supported its sentence by stating “[y]ou don’t get it”...“you’re a criminal, and I’m treating you as a criminal.” (R97:23 ¶¶ 15; App. 38) The Court further stated that “one of the conditions is you may not be a general contractor any longer...” (R97:24 ¶¶ 11-12; see also R97:26 ¶¶ 21-22; App. 39 and 41); “[y]ou will have to divest yourself of any business...” (R97:26 ¶¶ 13-14; see also R97:26 ¶¶ 13-17; App. 41); “[y]ou’re going to be an employee, not a person who takes anyone else’s money other than from your own employer, because you’re not to be trusted...” (R97:24 ¶¶ 14-16; App.

39); “...you abuse other people for your own benefit.” (R97:24 ¶¶ 18-19; App. 39).

Citing deterrence as a factor, the Court indicated its intent to “send a message to other general contractors who skirt the lines and take one person’s money and use it for something else.” (R97:24-25; App. 39-40).

The Court further cites Mr. Polczynski’s character and rehabilitative needs (R97:25; App. 40); but that the predominant factor the Court was considering was punishment, indicating that Mr. Polczynski’s four to five years of ongoing behavior could have ceased earlier than it did (R97:25 ¶¶ 12-25; App. 40).

On November 23, 2022, Mr. Polczynski, through trial counsel, filed a letter memorandum requesting the following relief from the Court’s imposed conditions:

Include the oral allowance for a 3-month period for Mr. Polczynski to wind down or otherwise divest his current business interests in the judgment of conviction.

Qualify the prohibition on business ownership to limit it to general contracting arena.

(R70:1; App. 45).

On November 23, 2023, the Court responded by granting a 3-month stay of the relevant conditions – also reflected in the Amended Judgment of Conviction (R76:2; App. 4), but denied the request to limit the prohibition on business ownership to just general contracting (R71:1-2; App. 47 and 48).

Mr. Polczynski now seeks relief from the original and amended Judgment of Convictions requiring he have no ownership interest in any business and that he may no longer be a general contractor.

ARGUMENT

The charges and convictions in this case stem from transactions with three separate clients of Mr. Polczynski (R1) with total restitution remaining at sentencing of \$7,321.25¹ (R76:2; App. 4). In exchange, the sentencing Court deprived Mr. Polczynski of his livelihood, which Mr. Polczynski challenges as unduly harsh, unconscionable and personally subjective.

Sentencing is committed to the trial court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. On appeal, the Court's review is limited to determining whether the circuit court's discretion was erroneously exercised. *See Gallion*, 2004 WI 42, 270 Wis. 2d 535, ¶17, 678 N.W.2d 197. Accordingly, the Court reviews the sentence challenged as unduly harsh and unconscionable for an erroneous exercise of discretion. *See State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507.

I. By stripping Mr. Polczynski of his livelihood, the Court's sentence was unduly harsh as excessive, unusual, and disproportionate to the offense committed, so as to shock the judgment of reasonable people.

¹ The estimated total damages are \$28,000, of which, by the date of sentencing, Mr. Polczynski had repaid \$21,000 (R97:3-4).

A sentence is unduly harsh "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." *Grindemann*, at ¶31.

As a business owner and general contractor, Mr. Polczynski has a statutorily recognized right to property ownership, which can only be impaired via due process of law – which Mr. Polczynski acknowledges he was afforded due process of law at the sentencing hearing. *See Schmidt v. State*, 68 Wis. 2d 512, 519, 228 N.W.2d 751 (1975).

Here, Mr. Polczynski's right to quiet enjoyment in his property has been infringed, and arguably an improper taking has occurred as interpreted through *Portsmouth Harbor Land & Hotel Co. v. United States*. *See Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 378, 43 S. Ct. 135 (1922). Unfortunately, the majority, if not all, of the cases which cite *Grindemann's* "shock the public sentiment" holding do so in the scope of reviewing the length of appellants' sentences and not one's property interests.² As such, there appears no clear standard, outside this Court's interpretation, of what would "shock public sentiment" in relation to deprivation of property rights in a criminal sentence. In lieu, Mr. Polczynski offers the following argument.

As stated *supra*, the basis of Mr. Polczynski's conviction stems from violating the trust of three separate clients, with Mr. Polczynski having satisfied 75 percent of the \$28,000 in restitution by the date of sentencing (R97:3-4). Despite the relatively few victims, as well as

² Results of Shepardized search on August 14, 2023, of *State v. Grindemann*, 2022 WI App 106, HN17, holding *inter alia*, "A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."

Mr. Polczynski's ongoing good-faith efforts to satisfy restitution, the sentencing Court deprived Mr. Polczynski of his livelihood.

At sentencing, one of the victims directly requests that restrictions be placed on Mr. Polczynski's ability to become a contractor again, depriving him of the ability to victimize other people (R97:6 ¶¶18-25). The State cites a Racine case with similar circumstances, but which was ultimately dismissed (R97:10-11). However, given that this was a purported first offense, there was no indication that Mr. Polczynski's offending behavior would continue after this conviction necessitating the conditions at issue.

It is clear based on the record that the offending behavior is Mr. Polczynski's handling of financial transactions, and not his business ownership or acting as a general contractor – i.e. the permanent deprivation of his statutorily protected property rights. These blanket restrictions are overly broad and more narrowly tailored restrictions can be drawn to further the protection of the public without unduly restricting Mr. Polczynski's liberties as proscribed in *State v. Stewart*. See *State v. Stewart*, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165.

Specific examples of more narrowly drawn restrictions might include the utilization of an independent third-party for the administration of all financial transactions with clients and the transparent reporting of these financial transactions through this independent third-party to the Department Agent administering Mr. Polczynski's sentence in this matter. This suggested third-party screening and transparent reporting conditions would prevent continued irreparable harm to Mr. Polczynski, as well as preventing substantial harm to other parties and preventing harm to the public interest.

The presence of these nominally intrusive alternatives, which are more narrowly tailored to the underlying offenses and which

would equally advance the sentencing interests identified by the Court, demonstrate that the current conditions are 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. Dictating to an individual that they shall be an employee and not an owner in a business should shock one's conscience.

II. Erroneous Exercise of Discretion by Imposing Conditions Reflecting Court's Own Idiosyncrasies

It is within the broad discretion of the trial court to impose appropriate conditions on probation as long as the conditions are reasonable and appropriate. *State v. Carrizales*, 191 Wis. 2d 85, 93, 528 N.W.2d 29, 31 (Ct. App. 1995); see Wis. Stat. § 973.01(5) ("the court may impose conditions upon the term of extended supervision"). The conditions of probation are reasonable and appropriate when they serve the goals of: (1) the rehabilitation of the offender; and (2) the protection of the community. *State v. Simonetto*, 2000 WI App 17, P6, 232 Wis. 2d 315, 606 N.W.2d 275. A trial court has the discretion to tailor individualized probation conditions; however, it should not erroneously exercise its discretion "by imposing probation conditions on convicted individuals that reflect only [its] own idiosyncrasies." *State v. Oakley*, 2001 WI 103, P13, 245 Wis. 2d 447, 629 N.W.2d 200.

Here, as argued *supra*, more individualized alternative conditions of probation existed which, objectively, would have accomplished the same sentencing goals (i.e. punishment (R97:25) and deterrence (R97:24-25)). By failing to consider these objective alternatives, the Court imposed its own subjective, harsher restrictions, thereby reflecting only its own idiosyncrasies on this issue.

Relatedly, the discussion in *State v. Rowan* is instructive in that it held that the individualized conditions of probation were “necessary based on the facts in [that] case...” *State v. Rowan*, 2012 WI 60 ¶4, 341 Wis. 2d 281, 814 N.W.2d 854 (2012). And that the applicable two part test required that the condition not be overly broad. *Id.*

Here, the sentencing Court failed to identify why the imposed conditions were necessary in light of viable, less intrusive alternatives. Similarly, the practical effect of these conditions has an overly broad impact when more individualized conditions could have been imposed to accomplish the same sentencing goals.

CONCLUSION

Based on the foregoing, Mr. Polczynski respectfully requests this Court find that the relevant conditions of probation – i.e. no ownership interest in any business and agent must approve all employment activities; and may no longer be a general contractor – are unduly harsh, unconscionable and personally subjective; and that this matter be remanded to the Circuit Court directing that Mr. Polczynski be relieved from said conditions.

Dated this 14th day of August, 2023.

Respectfully submitted,

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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 2,010 words.

Dated this 14th day of August, 2023.

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APPENDIX CERTIFICATION

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 rulings 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 of 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 14th day of August, 2023.

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