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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2023AP000900 – CR

THEODORE J POLCZYNSKI,

Defendant-Appellant.

An Appeal From a Judgment of Conviction Entered by the Honorable Paul F.
Reilly, Reserve Judge, Branch 7, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Are the conditions of probation that Polczynski not be a general contractor and that he divest in any business that he has an ownership interest unduly harsh and an abuse of discretion by the trial court to impose?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent request neither oral argument or publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT AND FACTS OF THE CASE

Theodore Polczynski was originally charged in Waukesha County Case 2019CF811 with two counts of Theft By Contractor (>\$10,000-\$100,000), contrary to Wisconsin Statutes Sections 943.20(1)(b), 943.20(3)(c), and 779.02(5). (R. 1: Criminal Complaint of Waukesha Case 2019CF811, 1.) As to count one in the criminal complaint, Polczynski was contracted in 2018 to build a detached garage for victims B.I. and K.I., and was given a \$11,000 check in order to start work on the garage. (*Id.* at 2.) When Polczynski never started work on the garage, B.I. and K.I. asked for their money back. (*Id.*) Polczynski would only give them a refund if B.I. and K.I. signed a settlement agreement, which they refused to do. (*Id.*) Law enforcement received Polczynski's bank records which showed him depositing B.I. and K.I.'s \$11,000 check into his business account for Full Service Realty. (*Id.* at 3.) The money was then used for various items including \$10,020 for payment of a previous loan. (*Id.* at 3-4.) There were also other checks written out from the bank account to law firms, banks, townships, and various other companies, but none of them appeared to go towards anything related to building B.I. and K.I.'s garage. (*Id.* at 3.)

As to count two in the criminal complaint, Polczynski was also contracted by J.B. to build a detached garage in 2018. (*Id.* at 4.) J.B. gave Polczynski a total of \$12,500 to start work on the detached garage, but Polczynski never did so. (*Id.*) J.B. indicated that he hired an attorney, Jonathan Goodman, who spoke with Polczynski about the issue. (*Id.*) Goodman indicated that Polczynski told him that he filed bankruptcy and transferred the \$12,500 that J.B. paid him to another one of his businesses. (*Id.*) Law enforcement learned that Polczynski deposited J.B.'s checks into the same Full Service Realty account that he deposited B.I. and K.I.'s checks into. (*Id.* at 4-5.) Like with B.I. and K.I., the money was used to pay previous loans and various other items, but nothing related towards building J.B.'s garage. (*Id.* at 4-5.)

In addition to Waukesha County Case 2019CF811, Polczynski had also been charged in Waukesha County Case 2018CF1400 with Felony Theft from Business Setting (>\$2500 - \$5000), contrary to Wis. Stat. §§ 943.20(1)(b) and (3)(bf), which was ultimately dismissed as part of the plea agreement. (Respondent Appendix: Criminal Complaint 2018CF1400, R-App 1.) The facts of the case were still brought up at sentencing. In 2018CF1400, Polczynski was a contractor on a house build in Salem, Racine. (*Id.* at R-App 1-2; R.97: Sentencing Transcript, 10-

11.) Polczynski eventually hired R&B Master Plumbers, owned by victim R.W., to finish some plumbing work on the house. (Respondent Appendix: Criminal Complaint Waukesha Case 2018CF1400, R-App 1-2; R.97: Sentencing Transcript, 11.) Polczynski had taken draws out from the homeowner's bank for plumbing, but never provided that to R.W. after he finished the plumbing work. (Respondent Appendix: Criminal Complaint Waukesha Case 2018CF1400, R-App 1-2.)

The total restitution amongst the three victims in Waukesha County Cases 2019CF811 and 2018CF1400 was \$28,985. As part of the plea agreement, Polczynski paid 75% of the total restitution up-front, which amounted to around \$21,500, and the State agreed to amend the two felony counts in 2019CF811 to two misdemeanor counts of Theft, contrary to Wis. Stat. § 943.20(1)(a) and (3)(a), and moved to outright dismiss Waukesha County Case 2018CF1400, with the understanding that Polczynski would still be required to pay any remaining restitution on 2018CF1400. (R. 97: Sentencing Transcript, 3-5; *See also* R.64: Amended Information.)

The parties proceeded to sentencing on November 22, 2022, in front of the Honorable Paul F. Reilly, who was acting as a Reserve Judge at the time. At sentencing, victim R.W. spoke and explained how Polczynski had done the same thing multiple times. (R. 97: Sentencing Transcript, 6.) R.W. also believed that Polczynski should be restricted as becoming a contractor as he may further victimize other people. (*Id.*) R.W. stated:

And just really hope, Your Honor, this is an example-type case where people in the future that think they can just run around and abuse a system that has been well put in place and contractors like myself who try to do a good job, [. . .] stand to prove that they're not like Mr. Polczynski and that we do things reputably and honestly and when someone gives us money to do something we do the job and if you do a job you get paid for it.

(*Id.* at 7.)

Victim K.I. spoke as well regarding the hardship and financial strain this caused her and her husband. (*Id.* at 9.) K.I. explained that Polczynski had played games throughout the pendency of the cases, including dismissing multiple attorneys any time the case would come to a jury trial or sentencing. (*Id.* at 9.) K.I. talked about how this entire time Polczynski was living in a million dollar home, and was now working with his son on social media to sell things to people. (*Id.* at 10.)

The State explained in its sentencing remarks the gravity of these offenses, and while not violent crimes, still impacted a great number of people immensely. (*Id.* at 14-15.) Further the State noted that Polczynski did not have a prior criminal record, but did have a separate case pending in Racine County in 2017 that was only dismissed after he paid full restitution of around \$15-20,000. (*Id.* at 10-11, 14.) Further, the State explained that before R.W. was the plumber for the house, there was a separate plumber who also had not gotten paid fully from Polczynski (*Id.* at 11.) The State explained that through the pendency of the case, it received numerous calls and emails from other people that hired Polczynski to do work for them, but he never completed it. (*Id.* at 13.) The State told the Court that Polczynski's bank records show that he has multiple businesses under various names, and multiple bank accounts at various banks. (*Id.* at 12.) Polczynski was consistently transferring money back and forth between his different businesses and different banks. (*Id.*)

When Polczynski spoke at sentencing, he appeared to minimize his conduct and attempt to blame the victims by saying that he issued cashier's checks to the victims, but they never picked them up. (*Id.* at 22.) He also stated that he thought it was the right thing to do at the time, but now realize it wasn't. (*Id.*)

When pronouncing sentence, Judge Reilly commented how Polczynski did not appear to truly understand the gravity of the situation, and how he was making excuses for his behavior. (*Id.* at 23.)

I need to look at the character of a person who appears before the Court when they've committed a crime. You don't even really seem to acknowledge that you committed a crime. You're saying you were doing the right thing by robbing Peter to pay Paul. You know, this is a crime like any other crime. You're a criminal, and I'm treating you as a criminal.

(*Id.*) When discussing specific conditions of probation, Judge Reilly stated:

[O]ne of the conditions is you may not be a general contractor any longer. You will have to divest yourself of any business. You'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. It's obviously, clearly evident from all the facts in this case that you abuse other people for your own benefit.

(*Id.* at 24.)

Judge Reilly then went on right after to specifically explain that deterrence is an important factor in the sentence as he needed to “send a message to other general contractors who skirt the lines and take one person’s money and use it for something else.” (*Id.*) Further, Judge Reilly noted that Polczynski used the money for himself in several instances rather than for someone’s project. (*Id.* at 24-25.)

Judge Reilly explained how rehabilitation factored into his sentencing in order to get Polczynski to stop stealing from people:

I don’t know what it will take for you to get your mind set around the fact that you need to not steal from people, because that’s what you’re doing and you have repeatedly been doing so. Nothing I’ve heard from you today indicates that you have any intent to do otherwise.

(*Id.* at 25.)

Judge Reilly did impose a nine month jail sentence on each count and stayed it for two years probation. (*Id.* at 26-27.) The specific conditions of probation at issue in this case were that he “have no ownership interest in any business and any business that [Polczynski does] have an ownership interest, [he] must divest that ownership within the next three months;” and that he “not be a general contractor in the building industry.” (*Id.* at 26.)

The defense now argues that the conditions that Polczynski divest from his businesses and not be a general contractor are unduly harsh and requests that he be relieved of those conditions of probation.

ARGUMENT

- I. **Judge Reilly properly exercised his discretion by imposing probationary conditions that Polczynski divest in any businesses and not be a general contractor as they were reasonable and appropriate based on Polczynski’s criminal conduct, and were not unduly harsh as there was a reasonable and justifiable basis in the record for the conditions.**

- a. **Relevant Law**

“Sentencing is a discretionary judicial act and appellate review is limited to determining whether there was an abuse of discretion.” *State v. Borrell*, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992), citing *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Therefore, Wisconsin appellate courts enforce “a strong public policy against interference with the sentencing discretion of the trial court.” *State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631, *cert. denied*, 510 U.S. 889 (1993), *quoting Harris*, 119 Wis. 2d at 622. This deference stems from the trial court’s inherent advantage in considering the relevant sentencing factors and the demeanor of the defendant in each particular case. *See Echols*, 175 Wis. 2d at 682. Therefore, on appeal, a trial court’s conclusion that a sentence was not unduly harsh is reviewed for an erroneous exercise of discretion. *See State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

A sentence is deemed to be unduly harsh or unconscionable if it 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. Wagner*, 191 Wis. 2d 322, 333, 528 N.W.2d 85 (Ct. App. 1995), *quoting Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Furthermore, when a defendant claims that his sentence was unduly harsh, it is the defendant’s burden to “show some unreasonable or unjustifiable basis for the sentence in the record.” *State v. Cooper*, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). If the record contains evidence that the trial court properly exercised its discretion, the appellate court must affirm. *Id.* at 40.

Circuit courts retain considerable discretion at sentencing. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. If the circuit court demonstrated a process of reasoning and came to a reasonable conclusion based on legally relevant facts and factors, this Court will not interfere with the sentencing decision. *State v. Cummings*, 2014 WI 88, ¶ 75, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted).

When fashioning a sentence, a sentencing court must consider the gravity of the offense, the need to protect the public, the defendant’s rehabilitative needs, and any applicable aggravating or mitigating factors. Wis. Stat. § 973.017(2). The sentence should reflect the minimum amount of confinement necessary that is consistent with these factors. *Gallion*, 270 Wis. 2d 535, ¶ 44. The court may also consider the following: (1) the defendant’s criminal history; (2) any history of

undesirable behavior patterns; (3) the defendant's personality and character; (4) the presentence investigation results; (5) the vicious or aggravated nature of the crime; (6) the defendant's degree of culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, education and employment history; (9) the defendant's remorse, repentance and cooperativeness; (10) the need for rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *Harris v. State*, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977). The circuit court retains considerable discretion in determining which factors are relevant and most important to its sentencing decision. *Gallion*, 270 Wis. 2d 535, ¶ 68; *State v. Grady*, 2007 WI 81, ¶ 31, 302 Wis. 2d 80, 734 N.W.2d 364.

Further, Wisconsin Statutes Section 973.09(1)(a), which governs probation and conditions, states that a “court may impose any conditions which appear to be reasonable and appropriate.” In *State v. Simonetto*, 2000 WI App 17, ¶ 6, 232 Wis. 2d 315, 319-320, 606 N.W.2d 275, 277, the Appeals Court further explained that:

[I]t is within the broad discretion of the circuit court to fashion appropriate conditions of probation in each individual case, *see State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123, 125 (Ct. App. 1995), as long as those conditions ‘appear to be reasonable and appropriate,’ § 973.09(1)(a), STATS. On review, we test the validity of conditions of probation by how well they serve the dual goals of probation: rehabilitation and protection of the community. *See Nienhardt*, 196 Wis. 2d at 167, 537 N.W.2d at 125.

Courts have found that conditions of probation can “impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.” *State v. Stewart*, 2006 WI App 67, ¶ 12, 291 Wis. 2d 480, 488, 713 N.W.2d 165, 169. “Whether a particular condition violates a defendant's constitutional right is a question of law which [an appellate] court reviews de novo.” *Id.* As also noted by the court in *State v. Lo*, 228 Wis. 2d 531, 538, 599 N.W.2d 659, 662-63 (Ct. App. 1999):

Conviction of a crime invariably leads to restrictions on—and sometimes outright denials of—a defendant's constitutional rights. The test is not whether a particular probation condition restricts [a defendant's] constitutional rights, but only whether the condition is so overbroad that it may not be said to reasonably relate to his rehabilitation.

The Court in *Lo* explained that when deciding a condition of probation is overboard, the standard is guided by that which governs overbreadth challenges to statutes:

A statute is overboard when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called “chilling-effect.”

Lo, 228 Wis. 2d at 538, 599 N.W.2d at 663 (internal citations omitted).

b. Applying Relevant Law to Polczynski’s Case

There is a strong public policy against overturning Judge Reilly’s sentencing decision, and this Court must only review the conditions of probation to determine if the conditions were unduly harsh and/or are not reasonably related to the goals of probation. In this case, Judge Reilly explained the reason for imposing such conditions on Polczynski based on the facts and circumstances of Polczynski’s conduct, and they were not unduly harsh as they reasonably related to the main sentencing goals of rehabilitation and protection of the community.

The conditions of probation were not so excessive and unusual in relation to Polczynski’s criminal conduct that it shocks the public sentiment and violates the judgment of reasonable people. Polczynski argues that it shocks one’s conscious to tell an individual to be an employee and not a business owner. Polczynski adds no further argument about why it shocks the conscious except to say that an improper taking of his property has occurred, and causes a “permanent deprivation of his statutorily protected property rights.” (Brief of Appellant, 6.)

First, the State fails to see how this is a permanent deprivation of his property rights. The conditions of probation can only be in place while he is on probation. Once he has completed probation, there is no court order saying that he is not allowed to reinvest in his businesses and be a general contractor again.

Second, it is for Polczynski to show that there is “some unreasonable or unjustifiable basis for the sentence in the record.” *Cooper*, 117 Wis. 2d at 40. Polczynski has not done so, and the record actually shows the contrary. As noted by the Court in *Lo*, when someone is convicted of a crime, it will lead to restrictions on a person’s rights, and sometimes even their constitutional rights. In this case, Judge Reilly heard from several victims about how Polczynski has

victimized individuals through being the owner of his business. Polczynski then used his position as the owner of the business and general contractor to get money from the victims, cash the checks into his business account, and then use the money from his business account for his own personal expenses unrelated to the victims' projects. This was not simply just Polczynski mishandling of financial transactions as Polczynski argues. (Brief of Appellant, 6.) The facts of each case show that Polczynski did not simply commit these crimes as individual, but used his own business and position as a general contractor to perpetrate the crimes. Additionally, the criminal complaints and facts presented at sentencing showed that Polczynski had several businesses and several bank accounts where he would move money around from each of his businesses after receiving money to complete projects. Therefore, it is clear that divesting in his business and not being a general contractor is reasonable and justifiable in Polczynski's case as that is the way he committed these crimes in the first place.

Judge Reilly explained before imposing the conditions that it did not appear that Polczynski truly understood the gravity of what he did and was making excuses. After imposing the conditions of not being a general contractor and divesting himself of any business, Judge Reilly stated that it was evident that Polczynski abused other people for his own benefit, and he should not be allowed to take anyone else's money except from his own employer. Further, Judge Reilly explained that he needed to help rehabilitate Polczynski, which is one of the factors a court must consider for sentencing. Judge Reilly reasonably believed that in order to get Polczynski to stop stealing from people, this sentence, including its conditions, was necessary as he did not know what else it would take for Polczynski to get the message. Judge Reilly then also went on to explain how one of the sentencing goals here was deterrence, and that other contractors needed to know that you cannot take someone's money and use it for something else.

Polczynski has also not demonstrated that not being a general contractor and divesting in his businesses are so overbroad that it does not reasonably relate to his rehabilitation. The conditions specifically address his rehabilitative needs since it did not appear that Polczynski otherwise understood the gravity of his crimes. While Polczynski claims that these conditions only reflect Judge Reilly's "own idiosyncrasies," and there were less intrusive means, the record made by Judge Reilly shows the contrary—the conditions were specifically crafted based

on Polczynski's individual facts and circumstances, Polczynski's own statements at sentencing, and the lawfully recognized goals of sentencing.

Furthermore, these conditions are not so sweeping that it may deter citizens from exercising their protected constitutional freedoms. What these conditions do demonstrate to the public, and Judge Reilly even explicitly commented on during his sentencing remarks, is that contractors who "skirt the lines and take one person's money and use it for something else," will know that this behavior is unacceptable and will be rightfully punished. What it does not do is cause lawfully abiding general contractors and business owners to not go into those fields in fear that they too will be forced to divest in their business or be denied a certain profession.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court find that Judge Reilly appropriately exercised his discretion when imposing conditions of probation that Polczynski not be a general contractor and divest his ownership in any businesses based on the facts and circumstances of Polczynski's cases.

Dated this 25th day of October, 2023.

Respectfully,

Electronically Signed by Melissa J. Zilavy

Melissa J. Zilavy

Assistant District Attorney

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CERTIFICATION OF BRIEF AND APPENDIX

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c), for a brief produced with proportional serif font. The length of this brief is 4,184 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (3) a copy the criminal complaint from Waukesha County Case 2018CF1400.

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 25th day of October, 2023.

Electronically Signed by Melissa J. Zilavy
Melissa J. Zilavy
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