

FILED
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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THEODORE J. POLCZYNSKI,

Defendant-Appellant.

PETITION FOR REVIEW

Petition for Review of Court of Appeals Decision,
Dated and Filed January 3, 2024, in
Court of Appeals District II, Case No. 2023AP900-CR

NATHAN M JUROWSKI
State Bar No. 1073590

1121 Milwaukee Avenue, Suite 103
South Milwaukee, WI 53172
(262) 215-9656
nj@jurowskilaw.com

Attorney for Defendant-Appellant

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ISSUES PRESENTED

- I. The court of appeals failed to answer the legal question of whether Polczynski's constitutional rights were violated due to the sentencing conditions prohibiting ownership in a business or operating as a general contractor.**
- II. Specific legal criteria should be established to determine the circumstances under which an individual may be deprived, at sentencing, the constitutional right to ownership in a business or to operate as a general contractor; absent this guidance, this issue is likely to recur in different cases.**

STATUTORY CRITERIA FOR GRANTING REVIEW

Petition for review is warranted for the following statutory reasons:

A real and significant question of federal and state constitutional law is presented. Rule 809.62(1r)(a).

This petition for review demonstrates a need for the supreme court to consider establishing a policy within its authority. Rule 809.62(1r)(b).

A decision by the supreme court will help clarify the law and the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court. Rules 809.62(1r)(c) and (c) 3.

STATEMENT OF CASE

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).

On October 21, 2022, Polczynski plead No Contest to two amended counts (R64) 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 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).

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) 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); “[y]ou will have to divest yourself of any business...” (R97:26 ¶¶ 13-14; see also R97:26 ¶¶ 13-17); “[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); “...you abuse other people for your own benefit.” (R97:24 ¶¶ 18-19).

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).

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

On November 23, 2022, 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 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).

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), but denied the request to limit the prohibition on business ownership to just general contracting (R71:1-2).

A Notice of Appeal was filed on May 22, 2023, followed by a timely filing of Polczynski’s Initial Brief on August 14, 2023, arguing that:

The conditions restricting Polczynski’s ability to own a business or operate as a general contractor are unduly harsh.

[and]

The court erroneously exercised its discretion by imposing probation conditions that reflect its own idiosyncrasies.

Brief of Appellant.

The Respondent filed its Brief on October 26, 2023, and Polczynski filed his Reply on November 9, 2023.

On January 3, 2024, the court of appeals filed its unpublished decision, affirming the Trail court's Judgment. Polczynski now petitions the supreme court for review of the court of appeals' decision.

ARGUMENT

The court of appeals decision leaves open the question of whether the particular conditions of probation – prohibiting Polczynski from owning a business or operating as a general contractor – violate Polczynski's constitutional rights. Further, Polczynski argues there exists a need for the establishment of clearer guidance outlining the circumstances under which trial courts may deprive one's constitutional right to business ownership or to operate as a general contractor.

- I. The court of appeals failed to answer the legal question of whether Polczynski's constitutional rights were violated due to the sentencing conditions prohibiting ownership in a business or operating as a general contractor.**
- II. Specific legal criteria should be established to determine the circumstances under which an individual may be deprived, at sentencing, the constitutional right to ownership in a business or to operate as a general contractor; absent this guidance, this issue is likely to recur in different cases.**

Court of Appeals Decision

In its decision, the court of appeals relies on the discretion given to trial courts at sentencing, holding that “[s]entencing courts have wide discretion and may impose any conditions of probation ... that appear to be reasonable and appropriate.” COA Dec., ¶17 (citing *State v. Stewart*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165; *see also* WIS. STAT. § 973.09(1)(a)).

The court further cites *Stewart* in holding that “we review a challenge to the conditions of probation ‘under the erroneous exercise of discretion standard to determine their validity and reasonableness measured by how well they serve their objectives: rehabilitation and protection of the state and community interest.’” *Id.*

Further in its decision, the court addresses specific factual and procedural concerns *infra*, but fails to address the constitutional and public policy concerns raised on appeal by Polczynski, necessitating this petition for review.

Specific Concerns Raised by Court of Appeals

The court of appeals found that Polczynski did not present specific alternatives to the contested conditions of probation before, during or after the sentencing hearing. COA Dec., ¶17. However, Polczynski contends that these alternatives were offered after sentencing, both in his Motion for Relief Pending Appeal (R92:3-4) and at the corresponding Postconviction Motion Hearing¹. Polczynski further argues that the timing issue is ancillary and should not preclude the reviewing court from deciding constitutionality or public policy.

¹ A transcript for the May 15, 2023, hearing was not requested and is presently unavailable for this petition as the substantive issues raised therein are ancillary to this appeal.

The court of appeals' analysis of whether Polczynski's proposed conditions are 'direct, simple and reliable' (COA Dec., ¶18) does not fall within the scope of review outlined in *Stewart infra*, is otherwise unsupported by cited legal authority, and does not shed light on the core questions presented herein.

Finally, the court of appeals relies on *State v. Schwind*, 2019 WI 48, to hold that, but-for the court staying the period of incarceration, Polczynski would have been precluded from running a business or functioning as a general contractor; and, therefore, Polczynski is not entitled to additional mercy from the court. See COA Dec., ¶18. This analysis conflates the indirect consequences of losing one's liberty (e.g. loss of gainful employment), for which the court is not responsible, and the direct conditions of probation herein, over which the court has authority to exercise control.

Schwind is further distinguishable from the present case in that probation is itself mercy from potential incarceration, and that early discharge from probation would be undue mercy upon mercy. *Id.* However, Polczynski is not asking for additional leniency, but instead to be relieved from the undue weight of the unconstitutional conditions placed upon him.

Basis For Petition For Review

Further application of the holdings in *Stewart* should have triggered a constitutional analysis and *de novo* review that was not taken up here by the court of appeals.

In addition to the analysis *supra*, the court in *Stewart* went further by holding that "conditions may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." *Stewart*, 291 Wis. 2d 480, ¶12. Polczynski acknowledges that "[c]onvicted felons do not enjoy the same degree of liberty as those individuals who have not been convicted of a crime." *Id.* However, "[w]hether a particular condition violates a defendant's constitutional right

is a question of law which this court reviews *de novo*.” *Stewart*, 291 Wis. 2d 480, ¶12.

Polczynski contends that, by prohibiting his ownership in a company or operating as a contractor, the court has violated his constitutional rights, which should have been reviewed *de novo*.

As a business owner and general contractor, Polczynski has a statutorily recognized right to property ownership, which can only be impaired via due process of law – which 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, 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” holding² do so in the scope of reviewing the length of appellants’ sentences and not one’s property interests. 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.

Because the court of appeals fails to take up the question of constitutionality, Polczynski respectfully requests the supreme court review this decision and find the offending conditions of probation unconstitutional. Additionally, because no clear standard exists for whether a sentencing court may restrict an individual’s right to ownership in a

² 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." *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

business or to operate as a general contractor, Polczynski respectfully requests the supreme court review this decision.

Dated this 2nd day of February, 2024.

Respectfully submitted,

Electronically Signed by Nathan M. Jurowski

State Bar No. 1073590

1121 Milwaukee Avenue, Suite 103
South Milwaukee, WI 53172
(262) 215-9656
nj@jurowskilaw.com

Attorney for Defendant-Appellant