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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP001391-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EFRAIN TAPIA,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction Entered in  
the Kenosha County Circuit Court and from an Order  
Denying Postconviction Relief and from an Order  
Denying Request For Reconsideration, the Honorable  
Gerad T. Dougvillo, Presiding.

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BRIEF OF  
DEFENDANT-APPELLANT

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WILL STRAUBE  
Assistant State Public Defender  
State Bar No. 1113838

Office of the State Public Defender  
735 N. Water Street - Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
straubew@opd.wi.gov

Attorney for Defendant-Appellant

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## **ISSUE PRESENTED**

Mr. Tapia's offense did not involve drugs or alcohol and he does not have a substance abuse problem. The trial court imposed conditions of extended supervision requiring that Mr. Tapia maintain absolute sobriety and submit to random tests of his blood, breath, and urine. As a result, the following issue is presented for review:

1. Did the trial court erroneously exercise its discretion when it required absolute sobriety and submission to random tests of blood, breath, and urine as conditions of extended supervision?

The trial court answered no.

## **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Counsel does not request oral argument but would welcome it if the court would find it helpful. Because this case involves the application of settled law, publication is not requested.

## **STATEMENT OF THE CASE AND FACTS**

On a February morning in 2021, Mr. Tapia was speeding because he was late to work. (16:3). When police attempted to pull him over, he panicked and began to flee before crashing into another car. (16:3-4). Mr. Tapia was arrested and resolved the case

promptly by pleading guilty to a single charge of fleeing or eluding an officer causing bodily harm, contrary to Wis. Stat. §§ 346.04(3) and 346.17(3)(b). (37:11). In exchange for his plea, the State agreed to dismiss and read in a charge of first-degree reckless endangering safety stemming from the same incident, as well as several related traffic matters. (37:2). The State further agreed to make no specific sentence recommendation and to not oppose expunction. (37:2).

At sentencing, the trial court rejected the presentence investigation (PSI) recommendation for probation and instead imposed two years of initial confinement followed by three years of extended supervision. (27:21; App. 27). As conditions of extended supervision, the Court ordered Mr. Tapia to maintain absolute sobriety and submit to random tests of his blood, breath, or urine. (20:2; App. 4).

Mr. Tapia filed a notice of intent to pursue postconviction relief. (28). Mr. Tapia, by counsel, then filed a motion to modify the conditions of his extended supervision. (41). Mr. Tapia argued that because his offense did not involve drugs or alcohol and because he does not have a substance abuse problem, the trial court erred in ordering absolute sobriety and submission to random tests of his blood, breath, and urine. (41).

After a hearing, the trial court denied the motion. (45; App. 5). The trial court stated that extended supervision provided an opportunity to make lasting changes in a person's life and that, in its

opinion, “absolute sobriety is imperative to long lasting change taking place.” (46:4; App. 34). The trial court also stated that the PSI indicated “undiagnosed mental health issues including stress, depression, anxiety, and PTSD” and noted that mixing these conditions with drugs or alcohol would “be very problematic to good decision making.” (46:4; App. 34). Finally, the trial court noted that because Mr. Tapia had been sober at the time of the offense, “the decisions that would be made when somebody is using any of those substances would be of grave concern to this Court.” (46:4-5; App. 34-35).

Mr. Tapia, by counsel, filed a motion to reconsider. (49). The motion cited to a psychological assessment from the Department of Corrections which indicated that Mr. Tapia had the lowest possible “Mental Health Code” of MH-0 and was not “reporting nor evidencing any mental health concerns.” (50:1, 2). Given the lack of any mental health needs, Mr. Tapia asked the court to reconsider its prior decision which relied, in part, on an erroneous understanding of Mr. Tapia’s mental health. (49:1). The trial court denied the request without a hearing. (51; App. 6).

Mr. Tapia filed a timely notice of appeal. (52). He appeals from the judgment of conviction, the order denying his postconviction motion, and the order denying his request for reconsideration. (52).

## ARGUMENT

- I. Because Mr. Tapia’s offense did not involve drugs or alcohol and because he has no substance abuse issues, the trial court erroneously exercised its discretion in requiring that he maintain absolute sobriety and submit to random tests of his blood, breath, and urine.**

Mr. Tapia was not under the influence of drugs or alcohol when he committed the underlying offense in this case, and he does not have a history of drug or alcohol abuse or any previous criminal convictions. Additionally, there is no evidence that drugs or alcohol contributed to or aggravated his offense in any way, nor is there any evidence that Mr. Tapia is unable to partake in the use of legal substances responsibly. Accordingly, the trial court’s requirement that he maintain absolute sobriety and submit to intrusive, random tests of his blood, breath, and urine is not tied to the facts of this case or his rehabilitative needs and does not protect state or community interests

- A. Legal principles and standard of review.

Wisconsin Statute § 973.01(5) authorizes the trial court to impose conditions upon a term of extended supervision. The trial court has broad discretion to impose conditions as long as the conditions are reasonable and appropriate. *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499. Conditions are reviewed “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.” *State v. Stewart*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165. Conditions of supervision, like other components of a defendant’s sentence, must be tied to the facts of the case before the court and not guided by a rigid, one-size-fits-all policy. *State v. Alexander*, 2015 WI 6, ¶22, 360 Wis. 2d 292, 858 N.W.2d 662 (proper exercise of discretion requires “individualizing” the sentence based on the facts of the case); *State v. Martin*, 100 Wis. 2d 326, 327, 302 N.W.2d 58 (Ct. App. 1981) (“mechanistic” sentencing policy inconsistent with appropriate exercise of discretion).

B. The trial court erroneously exercised its discretion by requiring that Mr. Tapia maintain absolute sobriety and submit to random testing.

The conditions imposed on Mr. Tapia are not tied to the facts of this case or his rehabilitative needs and do not protect state or community interests. If Mr. Tapia had been using drugs or alcohol at the time he offended, the trial court could have reasonably concluded that avoiding drugs or alcohol would help him make better decisions in the future. But that is not the case here. Mr. Tapia was not under the influence of drugs or alcohol when he committed the underlying offense or any prior offense.

Wisconsin courts have upheld absolute sobriety and related conditions when there is evidence that the

defendant previously *abused* drugs or alcohol. *State v. Davis*, 2017 WI App. 55, ¶13, 377 Wis. 2d 678, 907 N.W.2d 488. But again, that is not the case here. In the PSI, Mr. Tapia described only occasional social usage of alcohol and marijuana.<sup>1</sup> (16:17). The PSI writer, using the COMPAS risk assessment tool, therefore rated his substance usage risk as “unlikely.” (16:20). Nothing suggests Mr. Tapia’s substance use led to problems for him or anyone around him and, because this case represents his first criminal offense, nothing indicates he is unable to use legal substances responsibly.

The distinction between a defendant who has abused drugs or alcohol or who has committed crimes while using drugs or alcohol, and one who socially uses legal substances is an important one. Drug or alcohol *abuse* may lead to aggressive behavior or excessive risk taking, but common sense and experience tell us that social drinking, such as having a glass of wine with dinner or a beer at a tailgate, is unlikely to lead to criminal activity. Indeed, the Bureau of Justice Statistics<sup>2</sup> has noted that “most alcohol consumption does not result in crime: the vast majority of those who consume alcohol do not engage in criminal behavior.” Bureau of Justice Statistics, *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol*

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<sup>1</sup> Mr. Tapia lived in Illinois where marijuana use is not criminal. (2:1; 16:1).

<sup>2</sup> The Bureau of Justice Statistics is an arm of the United States Department of Justice and is the principal federal agency responsible for measuring crime and the correlates of crime.

*Involvement in Crime*, 1 (1998). And without any facts in the record to tie Mr. Tapia's alcohol use to problematic behavior, the trial court's decision to require absolute sobriety and submission to random tests of his blood, breath, and urine was not a valid exercise of discretion.

The trial court's stated reasons for the conditions are neither tied to the facts of the case nor indicative of a proper exercise of discretion. First, the court noted that "absolute sobriety is imperative to long lasting change taking place." (46:4; App. 33). But this statement does not draw from any facts related to Mr. Tapia and instead appears to express the court's opinion that absolute sobriety is *always* an appropriate condition of extended supervision. This sort of mechanistic, one-size-fits-all approach to sentencing fails to individualize the sentence to the offender and does not reflect an appropriate exercise of discretion.

Second, the court reasoned that absolute sobriety would aid Mr. Tapia in addressing his mental health needs. But at the time of sentencing, Mr. Tapia had never been diagnosed with any mental health disorders. (16:14) And as Mr. Tapia explained in his motion to reconsider, his psychological assessment performed by the Department of Corrections indicates he is neither "reporting nor evidencing any mental health concerns." (50:2) Regardless, because there is no evidence that Mr. Tapia had mental health issues that were tied to substance use, or that his drug and

alcohol use exacerbated any symptoms, the court's reasoning is simply not tied to the facts of the case.

Finally, the trial court expressed that because Mr. Tapia was sober at the time of the offense, "the decisions that would be made when somebody is using any of those substances would be of grave concern to this Court." (46:5-6; App. 34-35). But it is not clear *why* the trial court had grave concerns about the decisions Mr. Tapia would make while using legal substances. Again, there was *no evidence* in the record of drug or alcohol abuse and *no evidence* that Mr. Tapia ever engaged in any criminal activity while under the influence of any substance. Mr. Tapia used marijuana and alcohol socially, but did so responsibly. The fact that Mr. Tapia's single offense happened while he was *not* using drugs or alcohol does not support the conclusion that absolute sobriety would aid his rehabilitation or protect the community. And the general assertion that *any* defendant's rehabilitation could be aided by sobriety is not a proper exercise of discretion, but rather the opposite: a mechanistic sentencing that ignores the facts of the case and is not individualized to the defendant.

## CONCLUSION

For the reasons stated in this brief, Mr. Tapia respectfully requests that this Court vacate the conditions of extended supervision requiring him to maintain absolute sobriety and submit to random tests of his blood, breath, and urine.

Dated this 20<sup>th</sup> day of October, 2023.

Respectfully submitted,

*Electronically signed by Will Straube*

WILL STRAUBE

Assistant State Public Defender

State Bar No. 1113838

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

straubew@opd.wi.gov

Attorney for Defendant-Appellant

### **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 1,723 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 20<sup>th</sup> day of October, 2023.

Signed:

*Electronically signed by Will Straube*

WILL STRAUBE

Assistant State Public Defender