

FILED
06-17-2024
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP581-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN JAMES PETERSEN,

Defendant-Appellant.

On Appeal from an Order Denying Mr. Petersen’s
Postconviction Motion and Judgment of Conviction,
Entered in the Kenosha County Circuit Court, the
Honorable Anthony Milisaukas, Presiding

BRIEF OF
DEFENDANT-APPELLANT

OLIVIA GARMAN
Assistant State Public Defender
State Bar No. 1105954

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

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	5
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	5
STATEMENT OF THE CASE AND FACTS.....	5
ARGUMENT	8
I. The circuit court erroneously exercised its discretion in setting a condition of extended supervision that is overly broad..	8
A. Mr. Petersen’s conduct does not justify banishment.....	11
B. The banishment in this case impermissibly violates Mr. Petersen’s constitutional rights.	12
CONCLUSION.....	15
CERTIFICATION AS TO FORM/LENGTH.....	16
CERTIFICATION AS TO APPENDIX	16

CASES CITED

Packingham v. North Carolina,
582 U.S. 98 (2017)..... 12, 14

Predick v. O’Connor,
2003 WI App 46,
260 Wis. 2d 323, 660 N.W.2d 1 11

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997)..... 12

State v. King,
2020 WI App 66,
394 Wis. 2d 431, 950 N.W.2d 891 9, 13

State v. Miller,
175 Wis. 2d 204, 499 N.W.2d 215
(Ct. App. 1993) 9, 13

State v. Miller,
2005 WI App 114,
283 Wis. 2d 465, 701 N.W.2d 47 8

State v. Nienhardt,
196 Wis. 2d 161, 537 N.W.2d 123
(Ct. App. 1995) 11

State v. Stewart,
2006 WI App 67,
291 Wis. 2d 480, 713 N.W.2d 165 9, 10

Yoder v. Palmeri,
177 Wis. 2d 756, 502 N.W.2d 903
(Ct. App. 1993) 12

**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Constitution

U.S. CONST. ammend I..... 11, 12, 14

Wisconsin Statutes

§ 809.22(2)(b) 5

§ 809.23(1)(b)1 5

§ 813.125(7) 5

§ 939.63(1)(a) 5

§ 939.63(1)(b) 5, 7

§ 939.63(1)(c) 5, 7

§ 940.30 5, 7

§ 940.32(2) 7

§ 940.32(3)(c) 5

§ 947.019(1) 5, 7

ISSUE PRESENTED

1. Is the condition of extended supervision banning Mr. Petersen from using or accessing social media overbroad?

The circuit court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Petersen does not request oral argument as he anticipates the briefs will fully address the issues presented on appeal. *See* Wis. Stat. § 809.22(2)(b). Mr. Petersen does not request publication as the issue involves application of well-settled rules of law to the facts. *See* Wis. Stat. § 809.23(1)(b)1.

STATEMENT OF THE CASE AND FACTS

The State charged Jonathan Petersen with eighteen counts of terrorist threats while using a dangerous weapon, contrary to Wis. Stats. §§ 947.019(1) and 939.63(1)(c); one count of stalking – use of a dangerous weapon, contrary to Wis. Stat. § 940.32(3)(c); one count of knowingly violate a harassment restraining order while using a dangerous weapon, contrary to Wis. Stats. §§ 813.125(7) and 939.63(1)(a); and one count of false imprisonment while using a dangerous weapon, contrary to Wis. Stat. §§ 940.30 and 939.63(1)(b). (13:1-7). According to

the amended criminal complaint, on June 13, 2022, Mr. Petersen entered a Kwik Trip gas station in Somers, WI, armed with a nine-inch long knife and what appeared to be an AR-15 firearm, but was actually a BB gun. (9:7). Mr. Petersen was 19 years old at the time. (35:13). Mr. Petersen approached an employee of the Kwik Trip, F.E.P., with whom he had issues with in the past. (9:8).

F.E.P. told officers that once she recognized Mr. Petersen entering the Kwik Trip, she attempted to conceal herself. (9:8). F.E.P. heard Mr. Petersen call out to her and, when she turned to look at him, he was pointing a long black gun at her. (9:9). As Mr. Petersen conversed with F.E.P., other store employees and patrons called police. (9:8). Once officers arrived on scene, they removed F.E.P. and ordered Mr. Petersen to drop the gun. (9:7). Mr. Petersen placed the rifle on a counter and backed away from it, holding the knife to his throat. (9:7). Once officers were able to obtain his compliance, Mr. Petersen was arrested and taken into custody. (9:7). Officers were then able to determine that Mr. Petersen was holding a BB gun, although missing the bright colored end cap signaling that it was a facsimile gun. (9:7).

There was an active restraining order which prevented Mr. Petersen from having any contact with F.E.P. (9:9). F.E.P. told officers that she received the restraining order after meeting Mr. Petersen while the two were both employed at the same grocery store and he began exhibiting “alarming” behavior after she informed him she was not interested in a romantic

relationship. (9:10). F.E.P. described incidents when Mr. Petersen would show up at the grocery store when F.E.P. was working but he was not and another incident in which she left work to discover her vehicle had food dumped on it and F.E.P. suspected Mr. Petersen. (9:10). Additionally, after F.E.P. blocked Mr. Petersen on social media, someone with a username similar to Mr. Petersen's would make abusive comments on her posts, delete the comments, and then delete the account. (9:10). Mr. Petersen denied ever making any social media accounts to harass F.E.P. (9:10).

Mr. Petersen pled guilty to one count of stalking – use of a dangerous weapon, in violation of Wis. Stat. § 940.32(2); two counts of terrorist threats while using a dangerous weapon, in violation of Wis. Stats. §§ 947.019(1) and 939.63(1)(c); and one count of false imprisonment while using a dangerous weapon, in violation of Wis. Stats. §§ 940.30 and 939.63(1)(b). (22:1; 45:19). On February 22, 2023, the circuit court, the Honorable Anthony Milisaukas presiding, sentenced Mr. Petersen to a total of five years six months initial confinement and six years extended supervision. (30:1). As conditions of extended supervision, the court ordered no possession or consumption of any alcohol; no possession or consumption of any controlled substances, except with valid prescription; participation in any counseling deemed appropriate by the agent; no contact with any of the listed victims; and “[n]o social media.” (30:2). The court further ordered that Mr. Petersen was not

eligible for either the Challenge Incarceration Program or the Substance Abuse Program. (30:2).

Mr. Petersen, through trial counsel, filed a timely notice of intent to seek postconviction relief. (34:1). A Rule 809.30 motion for postconviction relief was filed on November 27, 2023. (48). A hearing on the motion was held on January 22, 2024, where the court granted in part and denied in part the motion. (53; 58:1). The court granted the request to make Mr. Petersen eligible for the Challenge Incarceration Program. (53). The court denied the request to make Mr. Petersen eligible for the Substance Abuse Program. (53). The court also denied the request to amend the no social media condition of extended supervision. (53). Mr. Petersen appeals the court's denial of the request to modify the no social media condition of extended supervision.

ARGUMENT

I. The circuit court erroneously exercised its discretion in setting a condition of extended supervision that is overly broad.

Circuit courts are granted broad discretion in determining the necessary conditions of extended supervision. *State v. Miller*, 2005 WI App 114, ¶ 11, 283 Wis. 2d 465, 701 N.W.2d 47. The court's discretion in imposing conditions of extended supervision is only subject to a standard of reasonableness and appropriateness. *Id.* "Whether a condition of supervision is reasonable and appropriate is

determined by how well it serves the dual goals of supervision: rehabilitation of the defendant and the protection of a state or community interest.” *Id.*

Furthermore, conditions of extended supervision may infringe on constitutional rights so “long as they are not overly broad and are reasonably related to the defendant’s rehabilitation.” *State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). A condition of supervision is reasonably related to the defendant’s rehabilitation if the condition assists the convicted individual in conforming his conduct to the law. *State v. King*, 2020 WI App 66, ¶ 22, 394 Wis. 2d 431, 950 N.W.2d 891. Where the condition is content neutral, intermediate scrutiny applies. *Id.* at ¶ 23. Intermediate scrutiny requires that the condition be narrowly tailored to serve a significant governmental interest. *Id.*

In *State v. Stewart*, the court of appeals addressed a condition of probation “banishing” the defendant from a specific town in Wisconsin. 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165. The defendant in *Stewart* was convicted for making several telephone calls that were sexual in nature to his neighbors. *Id.* at ¶ 14. The trial court, in imposing the condition banishing the defendant from the town, noted that the defendant “has literally tormented the people in close relationship in that township and especially that house repeatedly.” *Id.* at ¶ 15. The trial court concluded that it was imposing the condition as a matter of public protection for those who had been targeted by the defendant. *Id.*

On review, however, the court of appeals found that the condition was overbroad and there existed a different, more narrowly drawn condition of supervision which already served to protect the victims and facilitate the defendant's rehabilitation. *Id.* at ¶¶ 16-17. This court noted that the trial court had imposed a "no contact" condition for all of the named victims in the case. *Id.* at ¶ 17. The court of appeals found that the "banishment" condition of probation was overbroad in that it prevented the defendant from entering an entire town, when the actions he was convicted of were directed at specific individuals rather than the town writ large. *Id.* at ¶ 16. The court of appeals held that the "banishment" condition was not narrowly tailored to address the rehabilitation of the defendant and serve a significant government interest because there was already a more narrowly drawn restriction on contact with all of the named victims. *Id.* at ¶ 17.

In the present case, the sentencing court imposed a condition of extended supervision effectively banishing Mr. Petersen from all social media. The court also imposed a "no contact" condition of extended supervision with all of the named victims in the case. Much like the defendant in *Stewart* was banished from the town to protect a handful of victims, Mr. Petersen has been effectively banished from social media to protect a handful of victims. There was no allegation that social media was used to plan or execute Mr. Petersen's criminal activity on June 13, 2022. Much like the banishment in *Stewart*, the social media ban may further Mr. Petersen's rehabilitation,

but in its current form is overbroad. The order prohibiting Mr. Petersen from having contact with F.E.P. and all of the other victims is much more narrowly tailored and addresses both Mr. Petersen's rehabilitation and the compelling state interest in protecting F.E.P. and the other victims.

While courts have previously upheld certain "banishment" conditions, *see State v. Nienhardt*, 196 Wis. 2d 161, 537 N.W.2d 123 (Ct. App. 1995); *Predick v. O'Connor*, 2003 WI App 46, 260 Wis. 2d 323, 660 N.W.2d 1, the facts and circumstances present in this case do not justify the severe restriction on Mr. Petersen's First Amendment rights to free association.

A. Mr. Petersen's conduct does not justify banishment.

While the conduct involved in this case is threatening in nature, it does not require complete banishment from an important First Amendment space in order to protect the public or the victims. Mr. Petersen entered a gas station holding a large knife and facsimile gun. While F.E.P. did report some harassment through social media, the criminal conduct that Mr. Petersen was charged with and convicted of does not include allegations that he used social media in some way to plan or perpetuate his activity.

At the time of the offense, Mr. Petersen was 19 years old. The court sentenced Mr. Petersen to a period of five years and 6 months initial confinement. This means that Mr. Petersen will be at least 24 years old

at the time he is released to extended supervision. As the circuit court seemed to recognize at the postconviction hearing, a lot can change in that amount of time. (58:11).

B. The banishment in this case impermissibly violates Mr. Petersen's constitutional rights.

While the First Amendment rights of those on supervision or in prison are subject to limitations, they do not simply disappear by virtue of the conviction or sentence. *See Yoder v. Palmeri*, 177 Wis. 2d 756, 760, 502 N.W.2d 903 (Ct. App. 1993) (noting that first amendment rights of inmates are subject to limitations). Although social media use was limited in 1997, the United States Supreme Court recognized almost 30 years ago that the internet generally, and chat rooms (the precursor to modern social media) specifically, are popular and pervasive First Amendment spaces. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (noting that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”). “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

Social media has become ingrained in our society and is used for more than simply keeping up

with friends and acquaintances. *See id.* at 104-05 (“On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose.”).

While courts can and should craft conditions of extended supervision that ensure the protection of the community, the conditions must be reasonably related to the defendant’s rehabilitation. *See State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993). Where a condition of supervision impinges on a defendant’s constitutional rights and is content neutral, intermediate scrutiny is applied. *State v. King*, 2020 WI App 66, ¶ 23, 394 Wis. 2d 431, 950 N.W.2d 891. In order to meet this test, the restriction must be narrowly tailored to serve a significant governmental interest. *Id.*

The condition at issue in this case is not narrowly tailored to serve a significant governmental interest. While protection of F.E.P. or other named victims may be a significant governmental interest, the complete ban on social media is not narrowly tailored to that interest. The circuit court has, in essence, completely deprived Mr. Petersen of a ubiquitous means of communicating with others and expressing himself. If this were the only way to ensure

Mr. Petersen did not continue to harass F.E.P., the condition may have been narrowly tailored. However, the circuit court also imposed a condition that prohibits Mr. Petersen from having any contact with F.E.P. and other victims. The condition imposed on Mr. Petersen does not provide any alternative method or avenue for Mr. Petersen to be able to access or use a First Amendment-protected space. “In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” *Packingham*, 582 U.S. 108.

At the hearing on the postconviction motion, the circuit court noted that it imposed the condition banishing Mr. Petersen from social media “based on the facts that the State gave [the court]. He was involved with victims in social media usage that was disturbing, creating fake accounts using comments and deleting them.” (58:12). The court did not consider that it had also imposed a condition prohibiting Mr. Petersen from any contact with F.E.P. or the other victims. That the condition of supervision completely banning Mr. Petersen from accessing or using social media in any way is necessary to aid in his rehabilitation or to protect the victims is not a conclusion that a reasonable judge would reach under the facts and circumstances here.

Under the circumstances present here, a complete ban on access or use of social media impermissible infringes on Mr. Petersen’s constitutional rights, and constitutes an erroneous exercise of discretion.

CONCLUSION

For the reasons stated above, Mr. Petersen asks that this court reverse and remand with instructions that the circuit court vacate the condition of extended supervision banishing him from using social media.

Dated this 17th day of June, 2024.

Respectfully submitted,

Electronically signed by

Olivia Garman

OLIVIA GARMAN

Assistant State Public Defender

State Bar No. 1105954

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

garmano@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 2,336 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 17th day of June, 2024.

Signed:

Electronically signed by

Olivia Garman

OLIVIA GARMAN

Assistant State Public Defender