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 Milisauskas, Presiding.

REPLY 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

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Statutes

ARGUMENT

I. Judicial estoppel does not apply, and Mr. Petersen has not forfeited his right to challenge the impermissible supervision conditions.

A. Mr. Petersen has not taken inconsistent positions with regard to the challenged condition of extended supervision and should not be judicially estopped from raising the issue on appeal.

The State claims that Mr. Petersen has been judicially estopped from raising a challenge to the condition of extended supervision. State's br. at 12. While the State cites to *State v. English-Lancaster*, 2002 WI App 74, 252 Wis. 2d 388, 642 N.W.2d 74, the State does not cite to or otherwise engage with the three required elements of judicial estoppel. Because the State's argument that Mr. Petersen is judicially estopped is underdeveloped, this Court should not further engage with the argument. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that when a party's brief fails to adequately develop an argument, the Court will not "serve as both advocate and judge").

However, even if this Court finds that the State has sufficiently developed its argument regarding judicial estoppel, the State has entirely failed to show how the facts of this case meet the elements of judicial

estoppel. The three elements that must be met in order to invoke judicial estoppel are:

> First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the court to adopt its position—a litigant is not forever bound to a losing argument.

State v. Petty, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996).

The State fails on the first element. Mr. Petersen has not taken inconsistent positions on the condition of his extended supervision. Mr. Petersen's trial counsel indicated to the court that he believed it appropriate to place safeguards on Mr. Petersen's social media use. He stated that Mr. Petersen "shouldn't use social media *until* he can demonstrate that he can use it responsibly without harassing other people." (35:19) (emphasis added). This statement is not clearly inconsistent with Mr. Petersen's current position that a condition totally barring him from social media use without permission, which can only be granted by the court, is not a reasonable or narrowly tailored infringement on his First Amendment rights.

Mr. Petersen's trial counsel only agreed that Mr. Petersen's social media use should be monitored or otherwise restricted until the administering authority determined that Mr. Petersen could use social media without safeguards. Conditions of supervision are

administered by the Department of Corrections, not the circuit court. *State v. Williams-Holmes*, 2023 WI 49, ¶ 14, 408 Wis. 2d 1, 991 N.W.2d 373. Mr. Petersen's trial counsel advocated for a condition that put reasonable safeguards on his ability to use social media—not a complete and total ban, with approval only granted by the circuit court.

Additionally, Mr. Petersen's trial counsel made a wholly probationary recommendation, with conditional jail time. (35:12-13). Probation and its conditions are administered by the Department of Corrections. Wis. Stat. § 973.10(1). Counsel's statement that Mr. Petersen should not use social media until able to do so responsibly—taken in the context of his entire sentencing recommendation—clearly envisioned that the entity determining the point at which Mr. Petersen can responsibly use social media would be the Department, not the court.

B. Mr. Petersen has not forfeited his right to appellate review as a postconviction motion is the proper forum for challenging an unconstitutional condition of extended supervision.

The State claims that Mr. Petersen has forfeited the right to appellate review of this condition because he did not object at the time of sentencing to the condition. However, a postconviction motion challenging the constitutionality of a condition is the appropriate mechanism. *See State v. Fisher*, 2005 WI App 175, ¶ 14, 285 Wis. 2d 433, 702 N.W.2d 56; *State*

v. Koenig, 2003 WI App 12, ¶¶ 5-6, 259 Wis. 2d 833, 656 N.W.2d 499.

The State alleges that Mr. Petersen did not bring the constitutionality of the condition before the trial court. This is incorrect. The State acknowledges in its brief that a condition of extended supervision that impinges on a constitutional right is unconstitutional if it is overly broad or unreasonable. State's br. at 17. Mr. Petersen alleged and continues to allege that the condition is both overbroad and an unreasonable impingement on his First Amendment rights.

II. The trial court erroneously exercised its discretion by imposing a condition that is overbroad, unreasonable, and, therefore, unconstitutional.

A. The trial court erroneously exercised its discretion by imposing a condition that is both overbroad and unreasonable.

The State's own arguments lend support for the unreasonableness and overbreadth of the "no social media" condition of extended supervision. At the hearing on the postconviction motion, Mr. Petersen raised the issue of the meaning of social media and how it can be interpreted differently. The State argues that social media is only "interactive social media sites such as Facebook and Twitter (now "X")," but also that social media includes "social media sites that enable him to interact with other persons." State's br. at 18.

While Facebook and Twitter are commonly understood to be "social media," there also exist other websites that are not typically referred to as "social media" but that allow their users to interact with each other on comments and message boards and in private messages. Sites such as YouTube (cited by the State as a "presumably" acceptable site) allows users to comment on videos and reply to other's comments. The State's definition of "social media" would mean that Mr. Petersen is entirely barred from accessing wide swaths of the internet because those sites allow for interaction between users even if Mr. Petersen was not intending to interact with other users.

Mr. Petersen has not claimed that *any* restriction on his social media use is unreasonable or overbroad. Simply that the condition as it currently exists is overbroad and unreasonable. The State argues that Mr. Petersen's past history of using social media to harass F.E.P. makes a complete ban reasonable. But harassment via sites like Facebook and Twitter does not justify preventing Mr. Petersen from accessing sites like YouTube, as the State appears to concede. State's br. at 23. These examples only further justify requiring the Department to administer the condition rather than the court. If Mr. Petersen is behaving appropriately, his agent can allow more access and continue to monitor. If Mr. Petersen, however, begins to use sites like YouTube inappropriately, his agent would be in the best position to provide guardrails for Mr. Petersen.

The State further argues that the condition completely banning Mr. Petersen from all social media is reasonable because it will "increas[e] the likelihood that [Mr.] Petersen will responsibly use social media when his six years on extended supervision are done." State's br. at 20. This is not true. An individual who drives recklessly and injures others does not learn how to be a responsible driver by having their driver's license revoked, although that may be part of the punitive response to the accident. They learn how to responsibly drive by taking a driver's safety course and by learning the appropriate rules of the road and by oversight in the form of restricted driving hours or a requirement to have another licensed driver in the vehicle.

The State cites to *State v. King*, 2020 WI App 66, 394 Wis. 2d 431, 950 N.W.2d 891, as support that the complete ban on social media is reasonable, appropriate, and narrowly tailored. State's br. at 21. In *King*, this Court upheld conditions banning the defendant from possessing a device capable of connecting to the internet and accessing the internet *except with agent approval*. *Id.* at ¶ 31. The defendant in *King* had been convicted of using a computer to facilitate a child sex crime and child enticement after he messaged who he believed to be a fifteen-year-old girl online and arranged to meet up with her and her fourteen-year-old friend for the purposes of having sex with them. *Id.* at ¶¶1, 6. At the time King was arrested, he had liquor, condoms, and a camera on his person. *Id.*

As this Court noted in *King*, whether a condition of supervision is reasonable and appropriate "takes into account the particular circumstances" presented to the court in the case. *Id.* at ¶ 24. *King* makes clear that what is reasonable and appropriate in one case may not be reasonable and appropriate in every case. Mean or harassing comments on a Facebook post are of a much different character than using the internet to attempt to have sex with two teenaged girls.

Additionally, the difference between the conditions approved in *King* and the condition imposed on Mr. Petersen is obvious. The conditions that were upheld in *King* specifically allowed the defendant's agent to provide consent for internet use; Mr. Petersen's conditions do not allow for agent consent for social media use. The court in *King* provided the *agent* with the authority to administer the condition and determine what internet use was appropriate. *Id.* at ¶ 31. In Mr. Petersen's case, the court explicitly retained the authority to determine the appropriateness of the condition as a whole and any loosening of the condition. (58:12-13).

B. Modification of a condition of supervision that violates state or federal constitutions is not sufficient—the condition must be struck.

The State argues that this Court should affirm the trial court because Mr. Petersen can petition to modify the condition once he begins extended supervision. State's br. at 25. While it is true that the

statutory framework to petition the circuit court to modify a condition of supervision exists, *see* Wis. Stat. § 302.113(7m), this is not sufficient for the unconstitutional condition now before the Court. This Court has found that "the legislative history of Wis. Stat. § 302.113(7m) reveals that the drafters did not intend the statute to reach appeals seeking to invalidate a condition on constitutional grounds." *State v. Fisher*, 2005 WI App at ¶ 11.

Additionally, the State seeks to assuage any concerns over the unconstitutionality of the condition by noting that "after the completion of the confinement portion and before the commencement of the extended supervision portion of [Mr.] Petersen's sentence" either he or his agent could petition the court to modify the condition. State's br. at 25. It is unclear if the State believes there to be some period of time after the conclusion of the initial confinement portion before an inmate is released or placed on extended supervision. Once an inmate completes the initial confinement portion of his sentence, he "is entitled to release on extended supervision." Wis. Stat. § 302.113(2). There is no period of time after initial confinement is completed but before extended supervision commences. Once Mr. Petersen completes his initial confinement and is released to extended supervision, he will not be able to petition the court for review of the condition as the trial court and the State seem to suggest. Section 302.113(7m)(e)2. requires anyone released to extended supervision to wait one year before filing any request for modification of conditions.

CONCLUSION

This Court should reverse the circuit court and hold that the condition of supervision completely barring Mr. Petersen from accessing social media is an unreasonable and overbroad infringement on his First Amendment rights.

Dated this 3rd day of September, 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 1,900 words.

Dated this 3rd day of September, 2024.

Signed:

Electronically signed by
Olivia Garman
OLIVIA GARMAN
Assistant State Public Defender