10 AB

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

RECEIVED
FEB 16 2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2016AP1416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY DAVIS,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Janet C. Protasiewicz, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-5266 ext. 2
E-mail: michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ARGUMENT.....1

I. Mr. Davis Was In Custody In Connection With This Case Until He Was Received At Dodge Correctional Institution; Therefore He Is Entitled to 23 Additional Days of Sentence Credit. 1

II. Prohibiting the Consumption of Alcohol as a Condition of Probation is Not Reasonably Related to Either Rehabilitation or a Community Interest and is Therefore an Erroneous Exercise of Discretion.....1

CONCLUSION.....4

CERTIFICATION AS TO FORM/LENGTH 6

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12).....6

CASES CITED

State v. Brad Miller, 2005 WI App 114, 283 Wis. 2d 465, 701 N.W.2d 215.....3,4

State v. Eugene Miller, 175 Wis. 2d 204, 499 N.W.2d 123(Ct.1995).....1,2,3

State v. Stewart, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165.....4

STATUTES CITED

Wisconsin Statutes

§ 973.155(1).....1

ARGUMENT

I. Mr. Davis Was In Custody In Connection With This Case Until He Was Received At Dodge Correctional Institution; Therefore He Is Entitled to 23 Additional Days of Sentence Credit.

The State, in its Response, agrees that Mr. Davis is entitled to an additional 23 days of sentence. (State's Br. at 7). The State reasons, much like Mr. Davis did in his opening brief, that he is entitled to this additional credit because he remained "in custody" pursuant to Wis. Stat. § 973.155 until he was received at the state correctional facility. (State's Br. at 14). Because the parties agree, Mr. Davis will not make further argument as to this issue. This court should adopt the reasoning of the parties and reverse the circuit court's denial of the additional 23 days of sentence credit.

II. Prohibiting the Consumption of Alcohol as a Condition of Probation is Not Reasonably Related to Either Rehabilitation or a Community Interest and is Therefore an Erroneous Exercise of Discretion.

The State contends that the circuit court's order that Mr. Davis maintain absolute sobriety, and thereby refrain from the consumption of alcohol, as a condition of supervision was both "reasonable and appropriate." (State's Br. at 15). To support its position, the State compares the facts in this case to those in ***State v. Eugene Miller***, 175 Wis. 2d 204, 207, 499 N.W.2d 215 (Ct. App. 1993).

In that case, when sentencing the defendant for burglary and theft, the circuit court ordered that as a condition of probation the defendant refrain from making telephone calls to unknown women without the permission of his probation agent. ***Id.*** at 207-208. The defendant had been

previously convicted in 1988 and 1999 of making harassing, sexually explicit phone calls to unknown women. ***Eugene Miller***, 175 Wis. 2d. at 207-208. This court held that although that conduct was not subject of the conviction for which the circuit court was sentencing him, Miller needed to be rehabilitated from that conduct. ***Id.*** at 209-210. Accordingly, this court concluded that the order prohibiting Miller from making telephone contact with unknown women without the consent of his agent was rationally related to his rehabilitation. ***Id.***

The case at hand, however, is distinguishable. Unlike the defendant in Miller, where his recent criminal record and a presentence report demonstrated his rehabilitative need, here, the record does not show a history of alcohol abuse. The state claims that this assertion is "wrong" and "false." (State's Br. at 15-16). Mr. Davis acknowledged in his opening brief that at sentencing the state presented a supplemental report, which alleged that the suspect in this case "abuses alcohol and/or drugs." (31:7). However, as previously argued, this information is vague. There was no allegation or supporting evidence that alcohol was a part of this offense, or any other of Mr. Davis' offenses.

In ***Eugene Miller***, the sentencing court had available to it the defendant's criminal history and a presentencing report describing the defendant's need for rehabilitation from that conduct. 175 Wis. 2d at 207-208. Here, however, the sentencing lacked additional facts to conclude that refraining from the consumption of alcohol was rationally related to Mr. Davis' rehabilitative needs. Notably, the sentencing court did not order, as a condition of supervision, that Mr. Davis participate in any alcohol or other drug abuse assessment or treatment. Accordingly, it is reasonable to conclude that the sentencing court did not identify any rehabilitative needs related to substance abuse.

The State further contends that a "condition of supervision that forces a defendant 'to live more responsibly' is 'clearly relevant to rehabilitation' and serves the public interest making a defendant less likely to commit crimes." (State's Br. at 16; citing ***State v. Brad Miller***, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47). However, the condition *must* still be related to the defendant's rehabilitation from related conduct. ***Id.*** ¶13. (Emphasis added).

In ***Brad Miller***, the defendant contended that the sentencing court's order that he pay child support obligations was an inappropriate condition of supervision because it was not related to the offense. 283, Wis. 2d ¶ 11. This court determined that the condition was appropriate because the defendant had prior convictions for failure to pay support and owed $14,000 in arrears. ***Id.*** ¶ 14. Moreover, the defendant there had 22 prior convictions and a "sketchy" work history. Accordingly, this court concluded that the condition was related to the defendant's rehabilitative need to take responsibility in his life. ***Id.***

Unlike the defendant in ***Brad Miller***, where the court had ample examples of issues relating to condition, here, the sentencing court had nothing more than a vague allegation that Mr. Davis had an "alcohol and/or drug abuse" issue. The state fails to show is *what conduct* Mr. Davis needs rehabilitating from that is *related* to alcohol use. ***Eugene Miller***, 175 Wis. 2d at 209-210. It is simply not enough that a condition of supervision generally force or encourage a more responsible life style. Here there was no information tendered by the state at sentencing that alcohol had previously played a role in any prior criminal behavior, poor decision-making or in any way impeded Mr. Davis' ability to follow rules of supervision.

The postconviction court reasoned that while there "may be no direct link between alcohol use and his crimes in

this case," the information regarding the police report is "supported by the record in case [no.] 11CF001196." (21:3-4). The postconviction court used this information to reject trial counsel's statement to the court that Mr. Davis had tested negative for drugs and alcohol. (21:3-4). It is worth restating that the record from that previous case *is not* part of the record in this case, and that information was not presented to the sentencing court.

Finally, the State argues that the condition will "protect society, especially his victim, from a continuation of his pattern of domestic abuse." (State's Br. at 17). This is nothing more than a conclusory allegation. The record does not show a link between alcohol and a "pattern of domestic violence" in this case, or in any prior case.

It seems that "absolute sobriety" has become a standard condition of probation. However, there must be some connection between the condition and rehabilitation from *conduct related* to the condition. ***State v. Brad Miller***, 283 Wis. 2d 465, ¶ 13. Here, the condition of absolute sobriety is not related to rehabilitation of Mr. Davis. Likewise, there is no evidence that prohibiting Mr. Davis, who is over the age of 21, from drinking alcohol will serve the community's interest. Therefore, the condition of absolute sobriety should be vacated as an erroneous exercise of discretion. ***State v. Stewart***, 2006 WI App 67, ¶ 12, 291 Wis. 2d 480, 713 N.W.2d 165. (A condition of supervision cannot be overly broad and that it must reasonably relate to the dual goals of rehabilitation and a community interest).

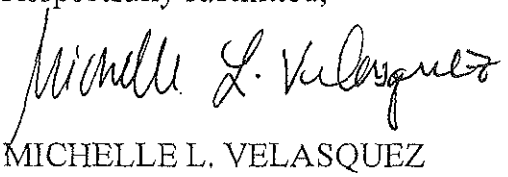
CONCLUSION

For all of the reasons set forth above and in his brief-in-chief, Mr. Davis respectfully requests that this Court enter an order reversing the circuit court's decision denying him an additional 23 days of sentence credit, as well as the order denying him relief from the condition of supervision

requiring him to maintain absolute sobriety. He respectfully requests that this Court then remand the matter to the circuit court and order that the judgment of conviction be amended to reflect 101 days of sentence credit and that the condition of supervision be vacated.

Dated this 14th day of February, 2017.

Respectfully submitted,



MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-5266 ext. 2
E-mail michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,238 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

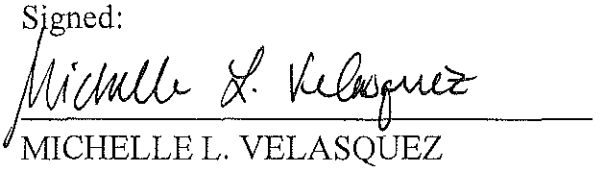
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of February, 2017.

Signed:



MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-5266 ext. 2
E-mail michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant