

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2020AP118CR

LEONARD D. KACHINSKY,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POST-CONVICTION MOTION ORDERED
AND ENTERED IN WINNEBAGO COUNTY CIRCUIT COURT, THE
HONORABLE GUY D. DUTCHER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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Defendant-Appellant

TABLE OF CONTENTS

ISSUES PRESENTED;...1

INTRODUCTION.....2

ARGUMENT.....14

I. THE RESTRAINING ORDER AT ISSUE IN THIS CASE WAS
 AMBIGUOUS AS TO WHETHER THE CONDUCT IN COUNT ONE
 VIOLATED THE ORDER. THUS, AS APPLIED TO THE FACTS OF THIS
 CASE, PROSECUTION OF KACHINSKY BASED UPON THAT ORDER
 VIOLATED DUE PROCESS.....3

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A
 MATTER OF LAW FOR THE JURY TO FIND KACHINSKY GUILTY OF
 VIOLATION OF A RESTRAINING ORDER AS CHARGED.....7

A. *Standard of Review and Applicable Law*.....7

B. *Application to Facts of Case*.....7

III. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION
 IN TOTALLY BANNING KACHINSKY FROM POSTING ON SOCIAL
 MEDIA AND FROM ENTERING THE MUNICIPAL BUILDING WHERE
 HE WAS A RESIDENT.....9

A. *Standard of Review*.....9

B. *Erroneous Exercise of Discretion*.....10

1. *Reliance Upon Misinformation*.....10

2. *Erroneous Application of the Law and Overly Broad
 Conditions*.....10

CONCLUSION13

CASES CITED

Wisconsin End-User Gas Ass'n v. Public Service Com'n of Wisconsin,
218 Wis.2d 558, 581 N.W.2d 556 (Wis. App. 1998).....5-6

WISCONSIN STATUTES CITED

Sec. 809.19(8)(b) and (c)14

Sec. 809.19(12).14

OTHER AUTHORITIES CITED

<https://www.jsonline.com/story/communities/southwest/news/west-allis/2020/03/30/coronavirus-west-allis-police-close-hobby-lobby-non-essential-covid-19/5090170002/>4

<https://www.jsonline.com/story/money/2020/04/01/coronavirus-essential-business-hobby-lobby-closings/5104667002/>.....5

<https://www.jsonline.com/story/news/politics/2020/03/23/wisconsin-gov-evers-order-what-nonessential-essential-wisconsin-businesses/2898162001/>4

<https://thesaurus.yourdictionary.com/necessary>. Last visited May 25, 2020.....4

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ISSUES PRESENTED

I. WAS THE HARASSMENT RESTRAINING ORDER VOID FOR VAGUENESS AS APPLIED TO THE FACTS OF THIS CASE?

The trial court answered this question in the negative.

II. WAS THE EVIDENCE SUFFICIENT FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT KACHINSKY INTENTIONALLY VIOLATED THE HARASSMENT RESTRAINING ORDER?

The trial court answered this question in the affirmative.

III. DID THE TRIAL COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY DENYING KACHINSKY'S MOTION TO MODIFY THE CONDITIONS OF PROBATION TO ALLOW KACHINSKY TO MAKE SOCIAL MEDIA POSTINGS NOT REFERING TO M.B. AND TO ENTER THE MUNICIPAL BUILDING WHEN M.B. WAS NOT PRESENT?

The trial court answered this question in the negative.

INTRODUCTION

First, Kachinsky believes the limited reference to proceedings in Winnebago County Case No. 18 CF 509 in his brief-in-chief was necessary to give context to this matter. It explained, for example, why the criminal complaint alleging an incident on July 2, 2018 was not filed until April 22, 2019. It also provided a frame of reference for Judge Dutcher's sentencing remarks.

Second, the reference to other proceedings and matters not in the trial record was part of Kachinsky's testimony (61:150) or offer of proof in his post conviction motion (53: 19-20; App. 124-125). They were offered to refute certain sentencing comments by Judge Dutcher. Unfortunately, Judge Dutcher did not address that issue in his decision denying the post-conviction motion.

Finally, the State referenced the name of M.B. on page 3 of its brief and did not redact her name in App 104-108 of the State's appendix. Kachinsky asks the court to take whatever action it deems appropriate to insure compliance with confidentiality rules.

ARGUMENT

I. THE RESTRAINING ORDER AT ISSUE IN THIS CASE WAS AMBIGUOUS AS TO WHETHER THE CONDUCT IN COUNT ONE VIOLATED THE ORDER. THUS, AS APPLIED TO THE FACTS OF THIS CASE, PROSECUTION OF KACHINSKY BASED UPON THAT ORDER VIOLATED DUE PROCESS.

This case was about Kachinsky posting a copy of Chapter 27 of the Village Personnel Manual (28; App. 105) on the panel above his desk following a wedding on June 29, 2018 (61:90-91, 140) which M.B. discovered upon arriving for work on July 2, 2018 (61:60). The applicable section of the restraining order was that “all communications between respondent and petitioner shall be limited to what is necessary to perform the functions of the Village of Fox Crossing Municipal Court. Communications related to the personal relationship or personal rapport between the respondent and petitioner are not included in the operation of the Court and are prohibited.” (61 52-53).

The state argued (pages 9-10 of State’s brief) that Kachinsky’s argument that application of the injunction to Kachinsky’s conduct was unconstitutionally vague and ambiguous was a collateral attack upon the restraining order. It was not. See page 20 of Kachinsky’s brief-in-chief. For example, the portion of the order prohibiting communications regarding the personal relationship or personal rapport is very clear and understandable as applied to almost any conceivable situation. It prohibited Kachinsky from wishing M.B. a happy birthday, a Merry

Christmas or a good workout at the gym. Kachinsky did not argue that that portion of the order was unconstitutionally vague.

But limiting communications to what is “necessary to perform the functions of the Village of Fox Crossing Municipal Court” was not clear as to routine office matters nor did it provide fair notice of Kachinsky of what communications outside of the prohibition on personal relationship and rapport were impermissible.

“Essential” is the closest word in the English language that is a synonym for “necessary.” <https://thesaurus.yourdictionary.com/necessary>. Last visited May 25, 2020. The issue of what is an “essential” business has daunted Wisconsin

since Governor Evers issued his safer at home order on March 23, 2020. See

<https://www.jsonline.com/story/news/politics/2020/03/23/wisconsin-gov-evers-order-what-nonessential-essential-wisconsin-businesses/2898162001/>

Implementation of that order permitting only “essential” businesses to remain open required numerous clarifications and refinements that set forth exactly what

business was “essential” and what was not. For example, the status of Hobby

Lobby was unclear for over a week after the order was issued. See

<https://www.jsonline.com/story/communities/southwest/news/west-allis/2020/03/30/coronavirus-west-allis-police-close-hobby-lobby-non-essential-covid-19/5090170002/>

and other articles that contain the appropriate search

terms reveal. This issue played out over the entire country when other governors

issued similar orders. See

<https://www.jsonline.com/story/money/2020/04/01/coronavirus-essential-business-hobby-lobby-closings/5104667002/>

This illustrated the vagueness of the terms “essential” and its synonym “necessary.” It required considerable clarification by authorities as to what “essential” meant in several contexts before the order became enforceable.

Unlike businesses in Wisconsin, Kachinsky did not have any clarification of what “necessary” meant in Judge Stengel’s order other than the prohibition on communications regarding personal relationship and personal rapport. To apply the prohibition on a communication that was not regarding personal relationship and rapport and simply reminded M.B. of what Chapter 27 of the Personnel Manual provided and what it applied to violated due process because of the lack of fair warning.

The State did not challenge Kachinsky’s argument that in order for a restraining order to be the basis for a prosecution it must be clear, understandable and not ambiguous (see pages 15-18 of Kachinsky’s brief and authorities cited therein). Exact words contained in court orders matter. Judge Dutcher’s claim it did not (61: 642; .62: 2-5; App. 139-142) do not bind this court. Interpretation of a document by this court is subject to *de novo* review. *Wisconsin End-User Gas Ass'n v. Public Service Com'n of Wisconsin*, 218 Wis.2d 558, 581 N.W.2d 556, 559 (Wis. App. 1998) . Words or phrases in a document are ambiguous when they are reasonably susceptible of more than one meaning. *Wisconsin End-User*

Gas Ass'n v. Public Service Com'n of Wisconsin, 218 Wis.2d 55, 581 N.W.2d 556, 560, (Wis. App. 1998). That was clearly the case here as to “communications necessary to perform the functions of the Fox Crossing Municipal Court.”

The explicit prohibition on communication regarding personal rapport or personal relationships was the only meaningful definition of “necessary” that the order provided. There is no dispute that Kachinsky’s conduct avoided that prohibited conduct. The State also did not dispute Kachinsky’s testimony and argument that he had a responsibility as M.B.’s supervisor to insure her knowledge and understanding of the Fox Crossing Personnel Manual.

For purposes of a vagueness as applied analysis, the focus should be on the actual conduct engaged in by Kachinsky: the posting the Chapter 27 Poster with certain terms highlighted for emphasis. Kachinsky’s motives were irrelevant as long as his conduct complied with the order. On its face, the posting of the Chapter 27 Poster simply communicated a desire that M.B. understand what sexual harassment meant.

In this case, the term “necessary” was unconstitutionally vague because it contained no objective standards. For example, it was clear that M.B., if left to her own devices, would have preferred Kachinsky never be in the court office or communicate with her except on the bench during court sessions. However, such laissez-faire supervision would have constituted neglect by Kachinsky of his

statutory duties. Such a policy was also not required by terms of the restraining order.

. No person of reasonable intelligence could read the restraining order and think it clearly prohibited posting a copy of a chapter of the Village's written personnel policies. It is no answer to say that defining "necessity" should be left up to a jury. Violating the order was a crime. Due process required that Kachinsky have fair warning before risking criminal penalties and arrest. That did not occur. Even without the consideration of other evidence as in (II) below, the restraining order as applied to communications that simply reminded M.B. of Village policies in an unobtrusive way was ambiguous, uncertain, not clearly understandable by an ordinary person and could not support a conviction. The conviction on Count One should be vacated.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW FOR THE JURY TO FIND KACHINSKY GUILTY OF VIOLATION OF A RESTRAINING ORDER AS CHARGED

A. Standard of Review and Applicable Law

The State agreed with Kachinsky on the standard of review and the State's proof requirements (p. 12-13 of State's brief)

B. Application to Facts of Case

The State's theory was that displaying the Chapter 27 Poster violated the harassment injunction because it was not a necessary communication between

Kachinsky and M.B. for the functioning of the court. As in (I) above, Kachinsky believes the proper analysis is the communication itself and not the alleged inconsistent motives. The State claimed that Kachinsky's testimony and argument that he was "educating" M.B. was inconsistent with Kachinsky's statement to police that Kachinsky's intent was to "subtly suggest to M.B. that she might want to reassess her thinking" (page 13 of State's brief). Viewed analytically under the circumstances of this case, those motives are essentially the same. It was a rephrasing without a significant difference in meaning. Highlighting "sexual" was an educational tool as M.B.'s application of the term "sexual harassment" to her situation was, by any objective view, inaccurate and concerning. See pages 23-24 of Kachinsky's brief-in-chief..

However, the record established as a matter of law that reasonable doubt existed regarding the claim that the communication was not necessary for the operation of the court. M.B. had made a complaint to Fox Crossing which Fox Crossing characterized as a founded sexual harassment complaint sometime before November 2017 when it disclosed the finding in circuit court pleadings (61: 151).. M.B. was the only possible source of information for the complaint. Further, at a hearing during February 2018, M.B. had stated she considered a voicemail to be sexual harassment when it used the term "body language." (61: 150) . M.B. felt that Kachinsky was sexually harassing her though she claimed that she did not accuse him of that (61: 82-83). Despite the lack of specific instances or a pattern

of conduct by Kachinsky that constituted sexual harassment, M.B. insisted she was a victim of sexual harassment and objected to a statement to the contrary as part of an agreement for Kachinsky to resign (61: 90-91, 139). This was not a matter of “he said/she said.” The facts claimed by M.B., even if true, did not constitute sexual harassment.

The ignorant or intentional misunderstanding by M.B. as to what constituted sexual harassment under the Village Personnel Manual impeded the effective functioning of the court.

The evidence was insufficient to conclude beyond a reasonable doubt that Kachinsky violated the order because his communication of posting a page from the Personnel Manual was not “necessary.” Further, the vagueness of the order as a matter of law meant that there was insufficient evidence of an intent to violate the restraining order. Even a seasoned legal professional cannot know what an order prohibits if the order itself is unclear and vague. The conviction must be vacated.

III. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN TOTALLY BANNING KACHINSKY FROM POSTING ON SOCIAL MEDIA AND FROM ENTERING THE MUNICIPAL BUILDING WHERE HE WAS A RESIDENT.

A. Standard of Review

The State agreed with Kachinsky on this issue (pages 26-27 of State’s brief).

B. Erroneous Exercise of Discretion.

1. Reliance Upon Misinformation.

The first piece of inaccurate information was the court's claim that M.B. did not overreact as Kachinsky had stated during his allocution (61: 237).. Judge Dutcher did not address Kachinsky's offer of proof in the post conviction motion hearing. The court should have acknowledged it in some fashion other than labelling the motion as "ridiculous" and "absurd" (62: 3-5; App. 140-142)

The second area of inaccurate information was regarding Judge Dutcher's claim that Kachinsky was grooming M.B. for an extramarital affair. Neither the court nor the State addressed that either (see page 16 of State's brief).

. The court's findings of fact led to the conditions of probation that Kachinsky challenged as an erroneous exercise of discretion. The court declined to modify them because Kachinsky "knows no boundaries (62:7; App. 147) rather than addressing the merits of Kachinsky's proposal to more carefully tailor them to evils the court should have been trying to prevent..

2. Erroneous Application of the Law and Overly Broad Conditions.

The court's sentencing remarks were remarkable for their almost total lack of comment upon the offense of conviction. The State did not address that issue.

At the post conviction motion hearing, the court further showed its failure to apply judicial reasoning to the issues presented by its criticism of Kachinsky for even bringing the motion (62:3; App. 140) and its use of derogatory adjectives regarding Kachinsky's arguments rather than a reasoned analysis (62: 3-5; App. 140-142). The State did not attempt to defend Judge Dutcher's remarks (pages 16-17 of State's brief).

The State was concerned that Kachinsky was aware of M.B.'s working hours, her vehicle and where she usually parked it. Those matters that anyone with a sense of situational awareness who recently worked with someone for a period of over two years would know and remember. They simply illustrated the feasibility of a less restrictive order that prohibited Kachinsky's presence in the Municipal Building during hours when M.B. was not present. A total ban was not warranted or necessary.

The amended JOC also prohibits posting on social media. The State claimed it was necessary to prevent harassment of M.B. (page 18 of State's brief) However, neither the State nor M.B. presented any examples of posts that were harassing. The August 2019 Facebook post (53: 27 App. 132) did not concern the charges in this case nor was is harassing or demeaning to M.B.

There was no rehabilitative purpose served by a total ban on lawful posts on social media by Kachinsky. "Harassing" posts were already forbidden by the restraining order in 18 CV 102. . Exercise of Kachinsky's right to freedom of

expression should not have been curbed unless absolutely necessary for a lawful purpose and then only to the extent needed to promote that purpose. Use of social media to communicate about matters has supplanted more traditional means such as letters to the editor and other modes of communication suggested by the State (p. 18 of State's brief).

If the court believed curbs on Kachinsky social media posts were still needed, it could have taken up Kachinsky on its suggestion that it simply ban posts or comments "that directly or indirectly mention M.B. or any former co-workers." This is sufficiently definite to avoid any serious argument that it was vague and failed to give Kachinsky sufficient notice of the behavior he was to refrain from. It was carefully phrased so that circumvention of it was difficult, if not impossible. It is an undue infringement on Kachinsky's First Amendment rights and contrary to the court's goal that Kachinsky not think about M.B. to impose unnecessary restrictions on Kachinsky's use of social media. Curbs on social media use cause a sense of isolation which is contrary to the court's rehabilitative aims.

The trial court erroneously imposed excessive social media restrictions and banned Kachinsky from entering the Municipal Building at any time as a condition of probation. It did not provide a sufficient rationale for doing so. It should have not done so at all or simply prohibited presence in the Municipal Building when M.B. was present and direct or indirect comments about M.B. or former co-workers in social media as suggested above.

CONCLUSION

For the reasons stated above and in his brief-in-chief, the undersigned requests that this court reverse the trial court's amended judgment of conviction and order denying post conviction motion and remand this matter to the trial court with instructions to vacate the judgment of conviction or to modify the conditions of probation regarding posting on social media and access to the Fox Crossing Municipal Building. The court should also direct that a judgment of acquittal be entered on Counts 2 and 3 which were not done in the court below.

Dated this 1st day of June 2020



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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 2848 words, including certifications.

Dated this 1st day of June 2020



LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 1st day of June 2020



LEN KACHINSKY