COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0705-CR **Cir. Ct. No. 99-CF-133**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM G. HENRIKSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Judgment affirmed; order affirmed in part, reversed in part.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. William Henriksen appeals a judgment of conviction for seven counts of felony non-support and the resulting conditions of probation. Henriksen contends that the condition limiting his sexual relations with others is too broad, that the condition of absolute sobriety has no basis in the

record, and that the court erred when it ordered interest be paid on the restitution award. Henriksen also appeals the portion of an order denying his motion for postconviction relief, which sought elimination of the alcohol condition and the interest payment. We conclude that the court erred by ordering the interest payments but the other conditions of probation are appropriate. We therefore affirm the judgment, affirm the order in part, and reverse the order in part.

Background

¶2 Henriksen's son, Mitchell, was born August 1, 1993, to Henriksen and his then-wife. Henriksen has two more children by two other women; one born in 1992 and one born in the spring of 1993. Henriksen was not married to either of these women and support of these children is not at issue in this case, although Henriksen evidently was charged in Price County with four counts of felony non-support for one of them. Henriksen's wife eventually divorced him.

¶3 In November 1996, Henriksen was convicted in Oneida County for non-support of Mitchell and spent twenty days in jail and was placed on probation. In August 1999, Henriksen was charged with four felony counts of non-support of Mitchell, contrary to WIS. STAT. § 948.22(2) (1997-98),[1] for the period from January 1998 to April 1999 and giving rise to the case presently before us on

[1] WISCONSIN STAT. § 948.22 (1997-98), states in relevant part:

> (2) Any person who intentionally fails for 120 or more consecutive days to provide … child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony. A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods.

appeal. Henriksen could not be located and a warrant was issued. He was not found until September 2002 when he was stopped in Florida for a traffic violation. Henriksen waived extradition and was returned to Wisconsin.

¶4 In November 2002, an amended Information added ten charges of non-support for the period from May 1999 to August 2002. In March 2003, Henriksen pled no contest to seven of the fourteen charges. The remaining charges, along with a charge from 1997, were dismissed and read in for sentencing. In May 2003, Henriksen was sentenced to prison on one count and received eleven years' probation on each of the remaining counts. Henriksen later filed a postconviction motion and the court clarified that his prison sentence would be five years, consisting of two years' initial confinement and three years' extended supervision. The court also clarified that the probation terms were concurrent to one another as well as to the prison sentence.

¶5 The court established multiple conditions for Henriksen's extended supervision, as clarified following the postconviction motion hearing. These conditions were extended to the probation period as well. Henriksen was prohibited "from having any sexual relations unless he has the explicit permission of his probation agent," he may not "consume any intoxicating beverages," and he was ordered to pay restitution comprised of his arrearage, accumulated interest on the arrearage as of the date of sentencing, as well as "12 percent statutory child support interest computed on the outstanding balance until the end of extended supervision or probation." Henriksen appeals.

Discussion

¶6 WISCONSIN STAT. § 973.01(5) (2001-02)[2] authorizes the sentencing court to impose conditions for an extended supervision term and WIS. STAT. § 973.09(1)(a) allows conditions to be imposed on a probation term. The court is given broad discretion to impose conditions, provided they are reasonable and appropriate. ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499. "While rehabilitation is the goal of probation, judges must also concern themselves with the imperative of protecting society and potential victims." ***Id.***

¶7 The constitutionality of conditions, however, presents a question of law that this court reviews de novo. ***State v. Oakley***, 2001 WI 103, ¶8, 245 Wis. 2d 447, 629 N.W.2d 200. Conditions of probation may impinge on constitutional rights provided they are not overly broad and are reasonably related to the person's rehabilitation. ***Krebs v. Schwartz***, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997).

A. Sexual Relations Conditions

¶8 For the first condition of probation, the court decided that Henriksen:

> may not have sexual intercourse with a woman until … the probation agent is convinced that Mr. Henriksen is ready to either accept responsibility for any offspring, [or] is ready to prevent conception, and, secondly, that the probation officer is satisfied that any potential partner of Mr. Henriksen knows of his failure to support in the past and knows of the need to protect herself.

[2] All remaining statutory references are to the 2001-02 version.

Henriksen complains these conditions violate his right to privacy and due process because they are overbroad and not reasonably related to his rehabilitation. We disagree.

¶9 There are three parts to Henriksen's condition regarding his sexual behavior, which have been narrowly tailored toward his rehabilitation. He must demonstrate to his probation agent that he is willing to (1) accept responsibility for any child he may have a part in conceiving or (2) use contraception, and he must (3) establish that any potential partner has been advised of his record.

¶10 The first condition—accepting responsibility for any children that may be conceived while Henriksen is on supervision—is much like the situation in ***Oakley***. There, a father was convicted on three counts of felony non-support for his nine children. ***Oakley***, 245 Wis. 2d 447, ¶3. He was not allowed to have additional children unless he could demonstrate the ability to support them and the nine children he already had. ***Id.***, ¶6. Oakley challenged this condition as an unconstitutional infringement on his right to procreate, ***id.***, ¶16, but the supreme court affirmed the condition. ***Id.***, ¶1. Although Henriksen is unclear whether he challenges his condition as interfering with his right to procreate or simply a right to engage in sexual activity, ***Oakley*** is instructive.

¶11 In ***Oakley***, the supreme court pointed out that when a judge "allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation," society must be protected. ***Id.***, ¶12. In addition, convicted individuals do not enjoy the same degree of freedom as individuals who have not violated the law. ***Id.***, ¶17. Had Oakley been sent to prison instead of granted probation, he would have been entirely prevented from exercising his right to

procreate as prisoners have no constitutional right to conjugal visits. ***Id.***, ¶19 n.25. As a result, Oakley's probation terms were constitutional.

¶12 Similarly, whether Henriksen claims this first condition violates his right to procreate or violates his right to engage in sexual conduct, the limitation is constitutional.[3] Requiring him to accept responsibility for any children he might produce forces him to acknowledge that his actions have consequences. *See, e.g.,* ***State v. Carrizales***, 191 Wis. 2d 85, 95, 528 N.W.2d 29 (Ct. App. 1995) (counselors view admission as first step toward rehabilitation). The condition also amounts to protection of the public. It protects women by attempting to guarantee that any woman who has a child by Henriksen will receive support for that child and not be forced to support the child alone. It protects future children by ensuring they will have support from two parents, not one. Additionally, it helps protect the public by ensuring the child will not need public assistance to survive. Again, if Henriksen were in prison, he would not be able to exercise either right at all. *See* ***Oakley***, 245 Wis. 2d 447, ¶19 n.25.

¶13 To the extent Henriksen complains the conditions prohibit him from engaging in any sexual activity, the second component of his conditions negates this argument. He may do so if he demonstrates a willingness to use contraceptives. This requirement is reasonably related to both his rehabilitation as well as protection of the public as it seeks to keep Henriksen from finding himself in the same situation with a new child as he is with Mitchell. This may amount to

[3] Henriksen complains that it will be almost impossible for his probation agent to have an objective standard for measuring his willingness to accept responsibility for children conceived or his willingness to use contraception. We do not decide cases on hypothetical conflicts. *See* ***State v. Armstead***, 220 Wis. 2d 626, 635, 583 N.W.2d 444 (Ct. App. 1998).

a constriction of a constitutional right, but it is not a denial. ***Krebs***, 212 Wis. 2d at 131.

¶14 The third component of his probation condition is that any potential sexual partner must be advised of Henriksen's record. This is reasonably related to protection of the public and is similar to conditions upheld in ***Krebs*** and ***Koenig***.

¶15 In ***Krebs***, the probationer had to introduce any potential partner to the parole agent and obtain permission before beginning a relationship with that partner. ***Krebs***, 212 Wis. 2d at 129-30. The court concluded this was reasonably related to the protection objective because it allowed the parole agent to substantiate that the potential partner was able to make an informed decision about the relationship. ***Id.*** at 132. In ***Krebs***, this condition was necessary to ensure that a potential partner with a child or grandchild knew Krebs was a sex offender. ***Id.*** In ***Koenig***, the probationer had to introduce potential partners to her parole agent and discuss her record of check theft and forgery because her partners were her victims. ***Koenig***, 259 Wis. 2d 833, ¶4.

¶16 In this case, the condition ensures that any of Henriksen's potential partners—who, if they have a child by him, may also become victims—know that his previous relationships have produced children for whom Henriksen provides no support and for whom the mothers have been solely responsible. We conclude that the conditions are not overly broad; rather, they are no more than an inconvenience. ***Krebs***, 212 Wis. 2d at 131. Because the conditions are reasonably related to Henriksen's rehabilitation, they are valid.

B. Alcohol Condition

¶17 Henriksen argues the second condition of his probation—absolute sobriety—is unreasonable because insufficient evidence supports the court's conclusion that alcohol may have had "some impact on him in the past." He complains there is no evidence that alcohol played a role in the current charges and no evidence Henriksen has a substance abuse problem.

¶18 The only mention of alcohol use in the presentence investigation is based on an interview with Joseph King, who knew Henriksen for a brief period of time in the "early to mid-90's." Henriksen was dating King's daughter and King believed Henriksen had verbally abused her. King contended Henriksen was an "extremely heavy" drinker. No one else who was interviewed for the PSI mentioned even occasional drinking by Henriksen, much less suggested he had a drinking problem. The PSI author concluded Henriksen did not have a substance problem.

¶19 Based on King's allegations and the corresponding time frame, the court inferred that Henriksen may have had a drinking problem around the time he impregnated the three mothers of his children. The court therefore concluded absolute sobriety should be a condition of Henriksen's supervision. Henriksen argues that King was someone with an axe to grind, that the absence of corroboration by other interviewees outweighs King's allegations, and that the court should have relied more on the PSI author's conclusion that alcohol had "not been a problem area" for him. We disagree.

¶20 First, King's statements were never specifically challenged when the court asked if there were errors in the PSI. Instead, counsel informed the court that the PSI was substantially accurate. The only error seems to have been a

notation that Henriksen had an OWI conviction from Tennessee when that charge had been reduced to reckless driving.[4] Second, the absence of mention of drinking by the other interviewees is not conclusive proof Henriksen has no drinking problem. It is only proof that no one else mentioned it.

¶21 Third, the trial court, sitting as fact finder, is entitled to assess credibility of and give weight to all evidence presented to it. WIS. STAT. § 805.17(2). Here, the court was struck by King's reported information. It does not appear to have been fully satisfied with the PSI, stating "with all due respect I think I need to take issue with" some of the author's conclusions. The author opined "I cannot perceive Mr. Henriksen as a criminal as much as I perceive him as unmotivated to make a life for himself and his children." The court disagreed, noting that the legislature has determined failure to support one's children is a criminal act. The court's decision to believe King's essentially unchallenged information over the PSI author's conclusion is a credibility determination we will not disturb. ***Id.***

¶22 The condition of absolute sobriety requires Henriksen to accept a degree of responsibility and accountability in place of the reckless abandon with which he has previously lived. This is reasonably related to his rehabilitation, since his irresponsible choices evidently brought him to this point in his life in the first place. Indeed, the court noted the alleged drinking problem was

[4] Henriksen's attorney cited this OWI conviction and suggested that Henriksen might have had some problems in the past. The conviction was for reckless driving because Henriksen evidently was not intoxicated. Henriksen points out this error on appeal but in any event, a review of the transcript reveals that the trial court did not rely on this conviction in setting Henriksen's conditions of probation.

> part of the same irresponsibility at a time he's hiding out from his responsibilities …. [I]f we're gonna have Mr. Henriksen become responsible, the last thing he should do is start drinking again as he apparently was doing in a highly … irresponsible time of his life.

C. Interest

¶23 The court ordered Henriksen to pay restitution comprised of his child support arrears and interest, evidently as an additional condition of probation. Restitution may be ordered pursuant to WIS. STAT. § 973.20. However, interest may not be added to a restitution order. ***State v. Hufford***, 186 Wis. 2d 461, 468, 522 N.W.2d 26 (Ct. App. 1994). While interest normally accrues on child support arrears, WIS. STAT. § 767.25(6), that is assessed through the family court's authority and related statutes, not the criminal court and restitution statutes; the State concedes as much. The portion of the order requiring Henriksen to pay interest on restitution is reversed.

By the Court.—Judgment affirmed; order affirmed in part, reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.