COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1784-CR **Cir. Ct. No. 2014CT001754**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARGUERITE ALPERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed*.

¶1 BRENNAN, J.[1] Marguerite Alpers appeals from the circuit court's order denying her motion to rescind that portion of the court's prior order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

imposing as a condition of probation that an ignition interlock device ("IID") be placed on "her husband's car." Alpers argues that: (1) the circuit court erroneously exercised its discretion when it initially ordered that the IID be placed on "her husband's car"; and (2) the order violates Alpers's constitutional rights.[2] Because the State concedes that the circuit court's order is not supported by the record, and our review of the record affirms that the circuit court erroneously exercised its discretion, we reverse. We note that the effect of our decision is solely to remove the condition of IID on "her husband's car." Our decision does not remove the additional probation condition that requires Alpers to install an IID on "any vehicle operated/owned by the defendant." We need not address Alpers's constitutional argument because we decide the case on other grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Cases should be decided on the narrowest possible grounds).

BACKGROUND

¶2 On July 18, 2014, Alpers was arrested for operating a motor vehicle while under the influence of an intoxicant ("OWI") 2nd and operating a motor vehicle while having a prohibited alcohol concentration ("PAC") 2nd.[3] Her conduct came to the attention of law enforcement after a concerned citizen saw her pull out of a parking spot at a liquor store; the citizen followed Alpers and saw that she was driving slowly and was unable to maintain her position in the lane of

[2] Generally speaking, we have some concerns regarding whether Alpers has standing to bring her constitutional claim regarding the installation of the IID on "her husband's car." However, because the parties agree, and we ultimately conclude, that the circuit court did not properly exercise its discretion in entering the order, we do not address our concerns here.

[3] Operating a vehicle with a prohibited alcohol concentration, a violation of WIS. STAT. § 346.63(1)(b) is alternately referred to as "PAC" or "BAC" in the record. We use "PAC" to refer to a charged violation of the statute and "BAC" to refer to a blood alcohol concentration result.

traffic. The citizen got her attention and Alpers stopped her car, but the citizen remained sufficiently concerned when Alpers drove away that he called police. The responding police officers who spoke with Alpers noticed various signs associated with intoxication, including that she was having a hard time standing and needed to use the door to maintain her balance. Alpers admitted to drinking alcohol and admitted that she had been drinking alcohol while driving. After additional investigation, Alpers was arrested for OWI. Her blood alcohol concentration ("BAC") was .21. Those offenses were charged in Milwaukee County Circuit Court Case Number 14CT1745.

¶3 About three weeks later, on August 9, 2014, a police officer saw Alpers leaving the same liquor store. The officer observed Alpers stumbling to her car, and as she drove from the store, she was speeding and twice crossed the center line. She was stopped, and after additional investigation, was again arrested for OWI. Her BAC in this instance was .193. As a result, she was again charged with OWI 2nd and PAC 2nd in Milwaukee County Circuit Court Case Number 14CT1754.

¶4 The two cases came to resolution on June 10, 2015, at which time Alpers pled guilty to the OWI 2nd, as charged in 14CT1745, and to an amended charge of OWI 3rd in 14CT1754.

¶5 During his sentencing remarks, Alpers's attorney advised the court that: "[Alpers] has not driven since this most recent offense," that "she has rides[,] she has a pool of drivers, including her husband," and that "[s]he doesn't have the need to drive." Alpers, herself, told the court:

> I will not drive. Part of it is because of my Parkinson's, I have dizzy spells. And I haven't driven since those incidents.

> My license was -- has been revoked back in the fall.
>
> And my husband fortunately for me has retired, so he's driven me. I have friends that drive me to AA. And I will not drive.

¶6 There was no evidence presented at sentencing addressing whether Alpers owned a car; whether her husband, Byron Alpers, owned a car; whether they owned a car in common as marital property or in whose name any car that either did own was titled; whether Marguerite and Byron Alpers lived together; or what car(s) she was driving during these offenses, who owned them, or in whose name those cars were registered.

¶7 In imposing sentence, the circuit court opined that license revocation does not prevent a person from driving and that the penalties for operating after revocation were too minor to be a deterrence. Instead, the court indicated that IIDs were more appropriate to deal with the potential of repeated intoxicated driving, stating:

> Now, if you cut somebody's hand off that they can't grab the steering wheel, then they can't drive.
>
> If you put a breath interlock device on their car, it's -- you make it much, much harder for them to drive because they'll have to find somebody that's sober that can learn the pulse codes.
>
> ….
>
> [T]he best way, my view Counsel, is not just talking about paper licenses and paper threats of being arrested for driving after revocation but making it real by getting rid of cars or putting breath interlock devices on them even before they're required.

¶8 For the OWI 2nd charge in case number 14CT1745, the circuit court ordered that Alpers serve six months in jail and pay a $350 fine and costs, revoked her license for one year, and entered an eighteen-month IID order. For the

OWI 3rd charge in case number 14CT1754, the circuit court withheld sentence and placed Alpers on probation for two years, consecutive to the OWI 2nd sentence. The court ordered numerous conditions of probation, including that Alpers "[i]nstall breath interlock device on husband's car immediately upon release from jail."

¶9 Right after imposing the IID order on her husband's car as a condition of probation, the circuit court explained:

> And so, Counsel, you know, you say, well, she doesn't have a driver's license, yeah, well, she's got hands; and she's got physical access to his keys; and I want to make sure that she doesn't drive once she's out of the House of Correction.
>
> I want to make sure that she can't physically make that car start if she's drunk.
>
> So a condition of probation will be that she install a breath interlock device on her husband's car upon her release from the House of Correction and that it remain on for the entire period of probation.

¶10 Immediately after the order on "her husband's car," the court imposed further conditions on probation to include a two year ignition interlock requirement "to begin once she applies for and has a driver's license." That part of the court's order is reflected in the Judgment of Conviction as a two year probation ignition interlock condition on "any vehicle operated/owned by the defendant."

¶11 Alpers filed a postconviction motion to rescind the order that she place an IID on "her husband's car." The motion, premised on Byron Alpers's medical condition, alleged that the IID posed a potentially dangerous situation because its interaction with Byron Alpers's asthma could create dangerous medical situations or cause Alpers to be late for or miss required appointments.

Alpers did not challenge the IID condition on "any vehicle operated/owned by the defendant." The circuit court denied the motion by written order. Alpers appeals.

DISCUSSION

¶12 Alpers argues that the circuit court erroneously exercised its discretion when it ordered her to put an IID on "her husband's car." The State expressly concedes that the circuit court's decision was not properly based upon the record. Upon our review of the record, we agree with both parties' assessment of the circuit court's order. As such, for the reasons set forth below, we reverse the circuit court's order requiring Alpers to put an IID on "her husband's car."

¶13 WISCONSIN STAT. § 973.09(1)(a) permits sentencing courts to impose any conditions of probation that appear to be reasonable and appropriate. "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." ***State v. Miller***, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47.

¶14 We review a circuit court's conditions of probation for an erroneous exercise of discretion. ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995); ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 (2002). Under that standard, this court will uphold a circuit court's discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶15 Upon our review of the record, we conclude there are two problems with the circuit court's order.

¶16 First, there is nothing in the sentencing transcript to establish the particulars of "her husband's car" or her authority to install a device on it. While the circuit court referred to Alpers's "husband's car," there is nothing in the record to establish that Byron Alpers owned a car: the car that Byron Alpers drives could belong to another family member, a neighbor, or a rental company. Even if the circuit court was correct in its assumption that Byron Alpers owned a vehicle, there is nothing in the record to establish that Marguerite Alpers had an ownership interest in the vehicle. Consequently, the circuit court could not reasonably conclude—based upon this record—that Alpers had the authority to install an IID on "her husband's car."

¶17 Second, because there are so few facts about Alpers's "husband's car" in the record, the circuit court had no grounds on which to find that the order was necessary. We do not rule out the possibility that grounds could be established in some other case, on some other record, for such an order. But here the record does not show what car(s) Alpers was driving when she committed her offenses; certainly, the connection between rehabilitation, community protection, and the installation of an IID would be stronger if the car that was the subject of the order had been the one used in the criminal activity. Nor does the record show—contrary to the circuit court's finding—that Alpers even had actual access to "her husband's car." There is no information in the record setting forth where the car was generally kept, where the keys were kept, or how many sets of keys existed.

¶18 Absent information that Alpers had the authority to install an IID on "her husband's car" or that the order was necessary, we conclude that the circuit court's order directing that Alpers install an IID on "her husband's car" amounted to an erroneous exercise of discretion. As such, we reverse.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.