COURT OF APPEALS
DECISION
DATED AND RELEASED

July 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 97-0073-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUWAINE G. H.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

BROWN, J. The trial court found Duwaine G.H.[1] guilty of physical abuse of a child and battery and sentenced him to five years of imprisonment and two years of probation. As Duwaine has a history of initiating violence and the current charges involved his wife and stepson, the court imposed

[1] The underlying charges involve domestic violence directed at Duwaine G.H.'s stepson, who is a minor. Thus, to protect the minor's identity, we have not provided the appellant's full name.

a condition of probation prohibiting him from having contact with his wife unless she and his probation agent give prior written consent.[2] In this appeal, Duwaine argues that this condition wrongfully impairs his constitutional rights to marriage and free association. We disagree.

A sentencing court has broad authority to impose conditions of probation which serve rehabilitative and public interest objectives. *See* ***State v. Miller***, 175 Wis.2d 204, 208, 499 N.W.2d 215, 216 (Ct. App. 1993). A sentencing court's discretion indeed permits it to impose conditions impairing the defendant's constitutional rights provided that the conditions are not "overly broad" and are "reasonably related" to the defendant's rehabilitation. *See* ***id.***

For a variety of reasons, Duwaine asserts that this prior written consent condition does not pass either of these limitations. Whether the condition is constitutionally valid presents a question of law on which we owe no deference to the sentencing court. *See* ***id.***

In his briefs, Duwaine makes the claim that "[t]here is no doubt that the condition in this case impinges upon [his] constitutional rights." We will therefore begin our analysis with a brief discussion of what the constitutional right to marriage (and the related right to associate with one's spouse) entails.

In ***Zablocki v. Redhail***, 434 U.S. 374 (1978), the Court reviewed many of its earlier decisions and confirmed that that the "right to marry is of fundamental importance for all individuals." The Court also noted that its more recent decisions had recognized that the right to marry had the "same level of

[2] The trial court also ordered that Duwaine could not have contact with his stepson or any other minor children. Duwaine does not challenge these conditions.

importance as decisions related to procreation, childbirth, child rearing and family relationships." *See* ***id.*** at 386. Nonetheless, despite the Court's recognition of marriage as having fundamental importance to people's personal lives, it acknowledged that the state has the power to prescribe regulations governing the marital relationship. *See* ***id.***

Turning to the merits of the condition ordered in this case, we observe that it only addresses one aspect of the whole marital relationship. The condition only affects Duwaine's ability to have personal contact with his wife. Of course, this is certainly a key component of any marriage, but the sentencing court did not, for example, attempt to void Duwaine's marriage.

With this basic understanding of the state's authority to regulate the marital relationship, we now examine Duwaine's specific charge that the condition is overly broad and that it is not rehabilitative.

In support of the claim that the condition is overly broad, Duwaine first notes that it prohibits all forms of contact—in person, oral and written. Duwaine suggests that it could be better tailored to prohibit only "abusive contact." He also notes that it has no time limitation; it is not designed to end if he responds well to probationary supervision. Last, he asserts that the trial court abdicated too much authority to the probation agent who will have "unlimited discretion" to decide if Duwaine and his wife can have any contact.

We agree with the State, however, that it is not a misuse of discretion to determine that the prohibition of all contact is needed to protect his wife's safety. The record reveals that this specific incident of domestic violence began with a relatively innocent dispute between Duwaine and his stepson concerning his stepson's destruction of a greeting card that Duwaine received and

his stepson's messy room. This background establishes that it is difficult to predict what will lead Duwaine to exhibit violence. Hence, a trial court could reasonably conclude that a total prohibition of contact is necessary because Duwaine's past behavior shows that it takes very little to cause an escalation toward violence.

With regard to the time factor and the vesting of too much discretion with the probation agent, the State responds that these matters will best be decided by a probation agent sometime in the future. The State argues that the trial court could not successfully "micro-manage" the probation agent by making the condition as highly detailed as Duwaine suggests it should be.

We agree with the State. In addition to probation, the court sentenced Duwaine to five years of imprisonment. Thus, for the trial court to have developed detailed guidelines, the court would have had to predict how Duwaine was going to respond to confinement and what his feelings towards his wife and family would be after that time. We agree with the State that such analysis will be best performed in the future by the probation agent who will be assigned to his case. *See* WIS. ADM. CODE § DOC 328.04(2)(d) (granting agents discretion to develop rules "supplemental" to those imposed by a court).

Next, we consider Duwaine's charge that the condition is not reasonably related to his rehabilitation. Here, he notes that his wife has stated her present intention to remain with Duwaine and therefore it can be expected that the two will have contact while he is incarcerated. But Duwaine explains that this period of contact will be abruptly drawn to a close once he starts probation. Duwaine suggests that such changes in his family relationships "cannot be said to be reasonably related to [his] rehabilitation." In support of this argument,

Duwaine directs us to an administrative rule which recognizes how "the ultimate successful reintegration of an inmate into the community depend[s] upon the maintenance of family and community ties." *See* § DOC 309.10.

Duwaine's argument presumes too much. As we noted above, this probation condition will take effect possibly five years in the future. We cannot predict (nor could the trial court) how Duwaine's wife will feel towards him at that time. All we know right now is that she has been his victim. The known facts support the condition.

In addition, Duwaine's analysis presumes that his probation agent will, for some reason, doggedly withhold his or her consent for Duwaine to have contact with his wife. But the administrative rule which Duwaine relies on to support his argument demonstrates that the probation agent will in fact want to try to reach the goal announced in § DOC 309.10. *See* § DOC 309.10; *see also* ch. DOC 328 app. (describing how § DOC 328.04 is designed to eliminate "arbitrary exercise of agent discretion."). In this proper light, we see that this condition does serve Duwaine's rehabilitative needs. It ensures that his home life remains violence free—a precondition to any successful family relationship. And as Duwaine recognizes, a criminal defendant's reintegration into society depends upon successful family relationships.

In conclusion, we reject Duwaine's challenge to this probation condition. It is not overly broad and is reasonably related to Duwaine's rehabilitation.

By the Court.—Judgment and order affirmed.

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