COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP446-CR **Cir. Ct. No. 2002CF909**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH W. GROTHMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Amended judgment reversed and vacated; original judgment reinstated.*

¶1 NETTESHEIM, J.[1] Kenneth W. Grothmann appeals from an amended judgment of conviction extending his probation for an additional year. The trial court ordered the extension because the Department of Corrections (Department) had failed to undertake active probation supervision of Grothmann following the entry of the original judgment of conviction. Instead, due to an administrative foul-up, the Department's supervision of Grothmann did not commence until after this court upheld Grothmann's conviction in a prior direct appeal. We reverse the amended judgment and direct the reinstatement of the original judgment.

FACTS AND PROCEDURAL HISTORY

¶2 While unusual, the history of this case is not in dispute. Following the denial of his motion to suppress, Grothmann entered guilty pleas on November 4, 2004, to three counts of misdemeanor possession of cocaine and one count of misdemeanor possession of drug paraphernalia. The trial court imposed and stayed sentences on all counts and placed Grothmann on probation subject to various conditions, including a ninety-day period of confinement in the county jail and continuing alcohol and drug treatment with the Veteran's Administration. In compliance with the trial court's order of probation, Grothmann reported to, and registered with, the Department.

¶3 The next day, November 5, 2004, Grothmann filed a notice of intent to seek postconviction relief, followed by the filing of a motion for bail pending appeal on November 8 and a notice of appeal on November 11. The trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

conducted a hearing on Grothmann's motion for bail pending appeal on November 24. At this hearing, Grothmann asked the trial court to stay execution of the entire judgment of conviction. The trial court denied this request, but did choose to stay execution of the county jail confinement imposed as a condition of probation. The court also set out conditions of bail pending Grothmann's appeal, imposing the same conditions that also applied to Grothmann's probation, save the county jail confinement. Finally, the court set a review date of March 30, 2005, to monitor the case.

¶4 At this point the Department's foul-up comes into play. The Department was laboring under the mistaken belief that the trial court had stayed execution of the full judgment of conviction, not just the period of confinement imposed as a condition of probation. As a result, the Department did not undertake the active supervision of Grothmann during the pendency of Grothmann's appeal. However, as ordered by the trial court, Grothmann did continue with his alcohol and drug treatment with the Veteran's Administration while his appeal went forward.

¶5 The appellate record in this case does not reveal that the review proceeding scheduled for March 30, 2005, took place. Instead, we take judicial notice that this proceeding was rescheduled a number of times, and the trial court did not again address the case until after this court issued its August 24, 2005 opinion affirming Grothmann's convictions and the supreme court's November 11, 2005 denial of Grothmann's petition for review of our opinion.

¶6 With the appellate process completed, the trial court issued a December 12, 2005 order directing that Grothmann commence serving the county jail confinement imposed as a condition of probation. In response, the Department

sent a memo to the court noting that although the order directed Grothmann to serve the confinement time, the order did not set a date for the start of Grothmann's supervision on probation. The Department recommended that the court order Grothmann's probation to commence on December 12, the same date the court ordered Grothmann to commence serving the confinement time.

¶7 The Department's memo marked the first time the trial court learned that the Department had not been actively supervising Grothmann during the appellate process. As a result, the court called for a hearing on the matter. At the opening of the hearing on January 6, 2006, the court identified the issue as: "Does [the lack of active supervision] prevent the court from extending probation so that Mr. Grothmann is under supervision for the full term the court anticipated?" The Department representatives attending the hearing explained that Grothmann's supervising agent had mistakenly interpreted the trial court's grant of a stay of the county jail confinement as a stay of the entire judgment pending appeal. After hearing from all the interested parties, the court directed the State and Grothmann to file legal memoranda on the question and adjourned the matter.

¶8 At the adjourned hearing on February 7, 2006, the trial court ruled that Grothmann's probation should be extended by one year. In support, the court recalled some of its sentencing remarks, particularly those that spoke to the depth and severity of Grothmann's addiction, the concomitant need for supervision, and the safety of the public. The court acknowledged that Grothmann had not committed any further violations of the law nor violated the conditions of probation and that he was continuing with his treatment with the Veteran's Administration. Nonetheless, the court concluded that Grothmann remained "a prime candidate to abuse illegal drugs once again." The court stated that the purpose of the sentence was "to have state intervention to monitor what he does, to

assist him in being a safe citizen. This just isn't a safe citizen for his benefit, it's a safe citizen for the rest of the community." Ultimately, the court concluded that the lack of supervision by the Department had frustrated the purpose of the sentence. The court directed the entry of an amended judgment of conviction extending Grothmann's probation for an additional year. Grothmann appeals.

DISCUSSION

¶9 This case presents significant competing interests of Grothmann on the one hand and the trial court on the other. At the outset of this discussion, we state our agreement with the trial court's conclusion that the purpose of the court's sentence was frustrated, at least in part, by the Department's failure to undertake its responsibility to actively supervise Grothmann.

¶10 Nonetheless, the inescapable fact is that Grothmann did all that was required of him when the trial court placed him on probation. He reported to, and registered with, the Department per the trial court's directive. Moreover, following his unsuccessful appeal, he served the period of confinement ordered as a condition of probation. The Department simply dropped the ball in this case by not undertaking the active supervision of Grothmann. As the trial court cogently stated when it learned of the Department's error, "I don't expect the defendant to jump start his own supervision. That's the state's responsibility …." Moreover, we have to consider the "can of worms" we would open if we would agree with the State and the trial court on this issue. Suppose Grothmann had violated the conditions of probation or committed further crimes during the period of the Department's "inactive" supervision. We have difficulty seeing the State, the Department, or perhaps even the trial court turning away from the prospect of

probation revocation or other sanction simply because the Department had not undertaken active supervision of Grothmann.

¶11 We understand the trial court's remark that it was "the state's responsibility" to undertake Grothmann's supervision, but we distance ourselves from that reasoning. Although no Wisconsin case has spoken directly to the kind of facts in this case, we take note that our supreme court has held that when preparing a presentence report, "a parole or probation officer acts on behalf of an independent judiciary, not as an agent of the state." ***State v. McQuay***, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990). Other states view the relationship between a court and probation departments similarly. The fundamental difference between probation and police organizations is that probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary. ***Williams v. State***, 868 A.2d 1034, 1039 (N.J. Super. 2005). Thus, when a probation officer demands a probationer's compliance with a condition of probation, he or she is acting as a representative of the judicial branch and not as a police officer. ***State v. Gaymon***, 899 A.2d 715, 720 n.4 (Conn. App. 2006). The probation process operates as an arm of the judiciary, not of the police or prosecution. ***State v. Jacobs***, 641 A.2d 1351, 1354 (Conn. 1994). Probation officers function as an enforcement arm of the judicial system. In sum, they perform services for the judiciary essential to the fair and efficient administration of justice. The probation office in each county has been aptly described as "an arm of the state judicial system." ***Passaic County Probation Officers' Ass'n v. Passaic County***, 374 A.2d 449, 452 (N.J. 1977) (citations omitted).

¶12 Federal courts that have spoken to the issue are also in agreement on this point. It is well understood that United States probation officers serve as officers of the court. ***U.S. v. Reyes***, 283 F.3d 446, 455 (2nd Cir. 2002). In his or

her capacity of confidential adviser to the court, the federal probation officer has been regarded as "the court's 'eyes and ears,' a neutral information gatherer with loyalties to no one but the court." ***Id***. It is reasonable to view the United States Probation Office itself as a legally constituted arm of the judicial branch. ***U. S. v. Inserra***, 34 F.3d 83, 88 (2nd Cir. 1994).

¶13 Thus, we reject the implication that the failings of the Department can be so readily distanced from the trial court it serves. As demonstrated above, the Department's very existence is as an adjunct of the trial court. Although the trial court had no active hand in the Department's failings in this case, the consequences of those failings are properly visited on the court.

¶15 We also observe that the extension or continuation of probation implicates a probationer's conditional liberty interests. ***State v. Pote***, 2003 WI App 31, ¶30, 260 Wis. 2d 426, 659 N.W.2d 82 (citing ***Gagnon v. Scarpelli***, 411 U.S. 778 (1973)). When the Department fails to carry out its duties as an agent of the court, and the probationer has otherwise complied with directives of the trial court, we are hard-pressed to say that the proper remedy is to jeopardize the probationer's conditional liberty interests by extending probation.

By the Court.—Amended judgment reversed and vacated; original judgment reinstated.

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