COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1482-CR **Cir. Ct. No. 2003CF7178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD HOPKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

¶1 FINE, J. Floyd Hopkins appeals from a judgment entered on his guilty plea to a reduced charge of misdemeanor theft, *see* WIS. STAT. § 943.20(1)(a), and from the trial court's order denying his motion for postconviction relief. He claims that conditions of probation imposed by the trial court deprived him of his right to bear arms and his right to drink alcohol. The

Milwaukee County district attorney's office, representing the State on appeal in this case, *see* WIS. STAT. § 978.05(5) (district attorney represents the State in appeals decided by one court of appeals judge under WIS. STAT. § 752.31(3)), contends that the trial court erred and that we should reverse. This is not a case between private litigants and we are not bound by the district attorney's concession. *See* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626, 629 (1987). We affirm.

I.

¶2 Hopkins rented a car from a commercial rental company and did not return it when he was obligated to do so. Hopkins was originally charged with a Class G felony. The case was plea-bargained, however, to misdemeanor theft. Hopkins was also charged with burglary in another case, but because one of the witnesses did not show up for trial when expected, the assistant district attorney told the trial court that he would be plea-bargaining both cases, reducing the felony burglary to a misdemeanor trespass-to-dwelling charge.[1]

[1] There is no evidence in the Record that the witness had been subpoenaed, and, at sentencing in the case on appeal, the assistant district attorney told the trial court that the witness had over-slept after attending a late-night Green Bay Packer game, and, apparently, would have been available after all because, according to the assistant district attorney, the witness "called in and actually called in right when we [the assistant district attorney and the defense attorney] were in the middle of resolving this case." Nevertheless, the assistant district attorney told the trial court that he believed it "was fair" not "to take the [plea-bargain] proposal off the table," because, among other things, the assistant district attorney believed that the witness had showed a "lack of interest." One of the reasons witnesses are subpoenaed to court is because they may not want to come to court. Our system is entitled to every person's evidence. ***United States v. Nixon***, 418 U.S. 683, 709–710 (1974). The district attorney has the power to issue subpoenas "to require the attendance of witnesses." WIS. STAT. § 885.01(2).

(continued)

¶3 The trial court accepted Hopkins's pleas (he pled no-contest in the burglary/trespass-to-dwelling case). In the rental-car-theft case involved in this appeal, the trial court sentenced Hopkins to a stayed term of nine months in the Milwaukee County House of Correction, and put Hopkins on probation for three years with, as material, the following conditions of probation: (1) that he maintain "absolute sobriety," and (2) that he be "forbidden from having guns." Hopkins argues that these conditions were not reasonably related to his crimes, noting that his lawyer told the trial court during the sentencing hearing that Hopkins "indicated to me that he has no alcohol or drug issues" and that he was "an avid hunter."

II.

¶4 WISCONSIN STAT. § 973.09(1)(a) permits sentencing courts to "impose any conditions [of probation] which appear to be reasonable and appropriate." Sentencing, of course, including selecting conditions of supervision, is within the trial court's reasoned discretion. ***State v. Miller***, 2005 WI App 114, ¶11, ___ Wis. 2d ___, ___, 701 N.W.2d 47, 51–52 (extended supervision). This is a broad grant of discretion. ***State v. Oakley***, 2001 WI 103, ¶12, 245 Wis. 2d 447, 460–461, 629 N.W.2d 200, 205–206, *motion for reconsideration denied*, 2001 WI 123, 248 Wis. 2d 654, 635 N.W.2d 760 (*per curiam*). Although, as Hopkins argues, neither his failure to return the rental car nor the burglary/trespass-to-

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In the rental-car matter, the district attorney's brief on appeal represents that its office "amended the charge to misdemeanor theft because Mr. Hopkins eventually returned the vehicle to" the rental-car agency. The assistant district attorney, however, told the trial court that Hopkins rented the car on "November 25th" and "*was arrested* on January 15th *in it*." (Emphasis added.) This is hardly the voluntary return of the car as represented to us in the district attorney's concession-of-error brief on appeal. The criminal complaint alleges that Hopkins was supposed to return the car on November 27, 2003.

dwelling incident may have involved either alcohol or guns, conditions need not "directly relate to the defendant's criminal conduct in the underlying conviction" as long as they are reasonably related to either ensuring that the defendant not commit more crimes or the defendant's general rehabilitation. ***Miller***, 2005 WI App 114, ¶11, ___ Wis. 2d at ___, 701 N.W.2d at 51–52 ("Whether a condition of extended 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.").

¶5 Although Hopkins had apparently not been previously convicted of any crimes other than, as phrased by the assistant district attorney, "two prior convictions for bail jumpings" in 1993, the trial court perceived a vein of anti-social activity running through Hopkins's recent life: "a pattern that's starting to evolve that, you know, while it is not, you know, who you truly are, it's becoming who you are." Significantly, Hopkins had previously not returned a rental car in Racine County, although he was not charged for that incident. The assistant district attorney also told the trial court that Hopkins, a licensed plumber, was suspected of taking property during his work on other plumbing jobs. Although Hopkins tried to explain away the burglary/trespass-to-dwelling matter as not really being criminal, he agreed during his plea colloquy with the trial court that the facts alleged in the burglary complaint were "true and accurate." Additionally, as the trial court noted in its decision and order denying Hopkins's motion for postconviction relief, although Hopkins asserted in that motion that the trial court had relied on inaccurate sentencing information, specifically, the assistant district attorney's representation that, as the trial court quoted it in its decision, "'six or seven other people where [the defendant] did work at where property came up

missing,'" Hopkins "has not demonstrated that the prosecutor's statements were untrue." (Brackets by trial court.)

¶6 There are two questions presented by this appeal. First, whether the condition of "absolute sobriety" was within the trial court's discretion. Second, whether the condition that Hopkins not have any guns during his probationary period also was within the trial court's discretion. The answer to both questions is "yes."

¶7 First, although there is nothing in the Record that may indicate that any of Hopkins's earlier anti-social acts, either charged or not charged, were related to alcohol, the trial court was certainly within its discretion in concluding that Hopkins was on the verge of spiraling out of control. As a licensed plumber, Hopkins is, at least on the surface, a skilled member of one of the professions. Nevertheless, he was, increasingly, as we have seen, falling into a pattern of anti-social activity, which was even more alarming because, as the assistant district attorney noted, Hopkins was "a person who shouldn't be here because of his background and livelihood." The plea and sentencing hearings revealed both Hopkins's lack of judgment and also his reluctance to accept responsibility for his acts because he tried to minimize them and explain them away. It needs no citation of authority to recognize that alcohol, even in modest quantities, interferes with judgment and dulls a sense of responsibility. Prohibiting Hopkins from using alcohol during his probationary period is, therefore, well within the trial court's responsibility to both help Hopkins get on the right track, and also to protect society from a continuation of his "pattern" of anti-social acts.

¶8 Second, Hopkins's gun-possession argument is founded upon his flawed view that private citizens have an unlimited right to bear arms. They do

not. First, the Second Amendment to the United States Constitution has never been applied to the states. *See* ***Presser v. Illinois***, 116 U.S. 252, 265 (1886) (The Second Amendment "is a limitation only upon the power of Congress and the National Government, and not upon that of the States."); ***Bach v. Pataki,*** 408 F.3d 75, 84–86 (2d Cir. 2005) (explaining why, until the United States Supreme Court rules otherwise, courts are bound by ***Presser***). Moreover, the Second Amendment has never been interpreted to prevent federal regulation of gun-possession. *See* ***United States v. Miller***, 307 U.S. 174, 178 (1939) (sawed-off shotgun); ***Lewis v. United States***, 445 U.S. 55, 65 n.8 (1980) (collecting cases).

¶9 Second, article I, section 25 of the Wisconsin Constitution also permits reasonable regulation of gun-possession. *See* ***State v. Cole***, 2003 WI 112, ¶¶26, 28, 264 Wis. 2d 520, 540, 542, 665 N.W.2d 328, 338, 339 (upholding prohibition of carrying a concealed weapon against a contention that the prohibition violates article I, section 25); ***State v. Hamdan***, 2003 WI 113, ¶¶6, 39, 41, 264 Wis. 2d 433, 443, 459, 461, 665 N.W.2d 785, 790, 798, 799 ("Article I, Section 25 does not establish an unfettered right to bear arms.") (person may possess a gun for protection).

¶10 As a probationer, Hopkins may naturally have truncated those freedoms enjoyed by those not on probation. *See* WIS. STAT. § 973.09(1)(a). As with preventing Hopkins's use of alcohol during his probationary period because he demonstrated that his judgment was flawed and that alcohol can exacerbate impaired judgment, the trial court acted well within its direction when it was concerned that Hopkins might graduate from non-violent, albeit intrusive, anti-social acts to things more serious. Further, as an "avid hunter" Hopkins is now on notice that he is at risk to permanently lose the right to possess any gun if he is convicted of any felony. *See* WIS. STAT. § 941.29. Indeed, the rental-car and

burglary/trespass-to-dwelling cases were originally charged as felonies. Beyond his appellate brief's mere assertion, Hopkins has not demonstrated *why* forbidding Hopkins from having a gun during his probationary period is "not reasonably related to his rehabilitation." Indeed, at the very least, Hopkins's taste of not being able to have a gun may spur him to mend his ways and become a wholly law-abiding member of our community.

By the Court.—Judgment and order affirmed.

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