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DISTRICT III

June 27, 2023

To:

Hon. Edward F. Vlack III
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Kristi Severson
Clerk of Circuit Court
St Croix County Courthouse
Electronic Notice

Joshua Bert Sherin
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP562-CR

State of Wisconsin v. Joshua Bert Sherin (L. C. No. 2004CF343)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joshua Sherin, pro se, appeals from a postconviction order denying his motion to modify the rules of his extended supervision (ES). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

In 2005, the circuit court sentenced Sherin to a combined seventeen years' initial confinement followed by eighteen years' ES based on his convictions for one count of second-degree sexual assault of a child and one count of failure to provide required information

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

for the sex offender registry. The conditions of ES imposed by the court included a prohibition against using or possessing “any alcohol, illegal drugs, drug paraphernalia, or controlled substances.”

In 2021, as his release date was approaching, Sherin filed a petition pursuant to WIS. STAT. § 302.113(7m), seeking to remove the requirement of absolute sobriety from his court-imposed conditions of ES. Sherin asserted that the absolute sobriety condition was overbroad and bore no relation to his rehabilitation because he has no substance abuse issues and his convictions were not connected to alcohol or drug use.

The State opposed the petition, arguing that the absolute sobriety condition served the interests of both public safety and Sherin’s rehabilitation because: (1) Sherin is a pedophile; (2) studies show that pedophiles cannot be cured of their attractions—they can only try to control their impulses; and (3) alcohol and drugs lower inhibitions and the ability to control impulses. *See generally State v. Rowan*, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854 (holding that an ES condition is reasonably related to an offender’s rehabilitation if it assists the offender in conforming his or her conduct to the law).

The circuit court issued a form order denying the petition without a hearing. The court checked a box on the form indicating that the requested modification “would not meet the needs of the department and the public and/or would not be consistent with the objectives of the person’s sentence.” *See* WIS. STAT. § 302.113(7m)(c) (setting forth criteria for modifying court-imposed conditions of supervision). The court added a handwritten notation that there was “no valid reason to remove [the] absolute sobriety condition.”

In this appeal, Sherin contends that the circuit court erroneously exercised its discretion when it denied his petition without a hearing because its decision was not based upon the evidence and was not narrowly tailored to his rehabilitative needs or the protection of the public. Sherin again points out that he was not drinking when he committed the offenses of conviction and that neither his COMPAS² report nor his DOC's inmate classification report identified any substance abuse problems or treatment needs. Sherin further argues that the practice of routinely imposing absolute sobriety conditions on all offenders is outdated and that the DOC now imposes such conditions only upon offenders who have substance abuse problems or whose crimes of conviction were linked to substance abuse. In addition, Sherin notes that the State did not submit to the court copies of any of the studies about pedophiles to which it referred in its circuit court brief.

“Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate.” *State v. King*, 2020 WI App 66, ¶20, 394 Wis. 2d 431, 950 N.W.2d 891 (citation omitted). Extended supervision serves two objectives: rehabilitation of the defendant and protection of the public while the defendant remains subject to a criminal sentence. *State v. Miller*, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47. A reviewing court measures a particular condition of supervision against these purposes in determining whether it is reasonable. *King*, 394 Wis. 2d 431, ¶21. Conditions of ES need not “directly relate to the defendant’s criminal conduct in the underlying conviction” as

² “COMPAS” refers to the Correctional Offender Management Profiling for Alternative Sanctions tool used by the Department of Corrections (DOC).

long as they are reasonably related to either ensuring that the defendant not commit more crimes or the defendant's general rehabilitation. *Miller*, 283 Wis. 2d 465, ¶11.

As a threshold matter, the State contends that we should affirm on the grounds that the appellate record does not contain the original sentencing transcript. As the State correctly notes, “[i]t is the appellant’s burden to ensure that the record is sufficient to address the issues raised on appeal.” See *Lee v. LIRC*, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). Without the sentencing transcript, the State argues that we cannot determine what the objectives of Sherin’s 2005 sentences were. Sherin responds that the sentencing hearing was held nearly two decades ago and that his modification motion sought a hearing precisely to update the circuit court about his current circumstances.

We agree with the State that the lack of a sentencing transcript impairs this court’s ability to assess the reasonableness of the absolute sobriety condition. In particular, we are unable to determine whether the circuit court’s primary objective in imposing Sherin’s sentences was to punish Sherin, to rehabilitate him, to protect the public, or something else. In addition, although we can see that the presentence investigation report (PSI) recommended absolute sobriety as a condition of ES, we do not know whether the State also recommended that condition or whether Sherin opposed the condition at the sentencing hearing.

When an appeal is brought upon an incomplete record, we assume that the missing material would support the circuit court’s ruling. *Suburban State Bank v. Squires*, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Here, we will assume that the court could reasonably have relied at sentencing upon the PSI’s recommendation of an absolute sobriety condition, taking into account: (1) Sherin’s unexplained placement while a juvenile at a series of

residential treatment facilities that dealt with both severe behavioral problems and substance abuse; and (2) a self-reported incident described in the PSI in which Sherin suffered from alcohol poisoning with a 0.40% BAC. Even if Sherin did not drink frequently, the facts that he may have suffered from a behavioral issue that could be exacerbated by alcohol and that he had engaged in binge drinking on at least one occasion were legitimate causes for concern.

Sherin argues that the absolute sobriety condition was not “narrowly tailored” to his rehabilitative needs, as he believes is required by *State v. Oakley*, 2001 WI 103, ¶16, 245 Wis. 2d 447, 629 N.W.2d 200, and the doctrine of stare decisis. However, the requirement that a condition of supervision be narrowly tailored to an offender’s rehabilitative needs is part of a strict scrutiny analysis that applies only when the condition at issue impinges upon a fundamental constitutional right. *Id.* In *Oakley*, the circuit court had imposed a condition of probation that impinged upon the offender’s fundamental right to procreation. *Id.* Sherin cites no authority holding that there is any fundamental constitutional right to drink alcohol, and we are aware of none. Therefore, the strict scrutiny analysis discussed in *Oakley* does not apply here—merely the standard requirement that any conditions of supervision be reasonable and appropriate.

We also reject Sherin’s argument that the circuit court needed “studies” as an evidentiary basis to deny his motion. It is well established that alcohol and drug use lowers a person’s inhibitions. *State v. Flattum*, 122 Wis. 2d 282, 296 n.5, 361 N.W.2d 705 (1985). Sherin’s conviction for sexual assault of a child provided a basis for the court to conclude that Sherin had a sexual attraction to children. The court could rely upon common knowledge to determine that public safety and Sherin’s own rehabilitation would be served by an absolute sobriety condition.

In sum, we conclude that the absolute sobriety condition was reasonable and appropriate, and that the court did not erroneously exercise its discretion by refusing to modify it.

Upon the foregoing,

IT IS ORDERED that the postconviction order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals