68349-7 68349-7

NO. 68349-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHANNON C. TRAYLOR,

Appellant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 14 PM 2:43
FILED

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 2

A. SINCE ALCOHOL IS UNAMBIGUOUSLY THE CHIEF COMMODITY FOR SALE AT SOME ESTABLISHMENTS, A PROHIBITION AGAINST FREQUENTING SUCH ESTABLISHMENTS IS NOT FACIALLY VAGUE. 3

B. THE TERM 'DRUG PARAPHERNALIA" CAN BE UNDERSTOOD BY PERSONS OF ORDINARY INTELLIGENCE. .5

IV. CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Eckblad, 152 Wn.2d 515, 98 P.3d 1184 (2004)................. 4
State v. Locklear, 105 Wn. App. 555, 20 P.3d 993 (2001) 4
State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009) 4
State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2012).............. 6

FEDERAL CASES

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994)... 5

WASHINGTON STATUTES

RCW 69.60.101(a) 5

OTHER AUTHORITIES

http://answers.ask.com/Health/Addictions/what_is_drug_paraphernalia 6
http://en.wikipedia.org/wiki/Drug_paraphernalia 6

I. ISSUES

Are the following sentencing conditions unconstitutionally vague:

(a) a prohibition against "frequent[ing] establishments where alcohol is the chief commodity for sale;

(b) a prohibition against "possess[ing] drug paraphernalia"?

II. STATEMENT OF THE CASE

On the night of May 12, 2009, an alarm was activated at the back door of the Edmonds Smoke Shop. 2 RP 43-44. On responding to the alarm, police found that a rock had been thrown through the glass front door. 1 RP 46, 59. Seventeen cartons and 25 boxes of cigarettes had been taken. 2 RP 157. A witness saw three men fleeing from the store and entering a nearby car. 2 RP 101-04. Police stopped the car and arrested three men. These included the defendant (appellant), Shannon Traylor. 2 RP 121-23, 205-06.

The defendant was charged with second degree burglary. CP 105. A jury found him guilty. CP 58. The court sentenced him under the prison-based sentencing alternative to 29.75 months' confinement plus the same period of community custody. CP 10.

The court stated that it would impose "normal conditions." 3 RP 314. These included the following:

> 2. Do not possess or consume alcohol and do not frequent establishments were alcohol is the chief commodity for sale.
>
> . . .
>
> 5. Do not possess drug paraphernalia.

CP 17. No challenge to these conditions was raised.

III. ARGUMENT

The sole issue raised on this appeal concerns community custody conditions. Although no challenge to the conditions was raised in the trial court, the argument can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744 ¶ 5, 193 P.3d 678 (2008).

The defendant claims that two conditions are unconstitutionally vague. The test for vagueness is the same for statutes and community custody conditions. Id. at 754 ¶ 27. A statute is unconstitutionally vague if it fails to either (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) provide ascertainable standards of guilty to protect against arbitrary enforcement." Id. at 753 ¶ 23. "If persons of ordinary intelligence can understand what

the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite." Id. at 754 ¶ 26. Unless a law implicates constitutional rights, "a facial vagueness challenge can succeed only if the statute is impermissibly vague in all of its applications." Id. at 745 n. 2.

A. SINCE ALCOHOL IS UNAMBIGUOUSLY THE CHIEF COMMODITY FOR SALE AT SOME ESTABLISHMENTS, A PROHIBITION AGAINST FREQUENTING SUCH ESTABLISHMENTS IS NOT FACIALLY VAGUE.

The first condition that the defendant challenges precludes him from "frequent[ing] establishments where alcohol is the chief commodity for sale." CP 17, condition 2. As the defendant acknowledges, this condition would clearly apply to some establishments. Brief of Appellant at 3. Examples would be liquor stores or taverns. As a result, this condition is not vague in *all* its applications.

In Bahl, the court upheld similar language in a condition. That condition precluded the defendant from frequenting "establishments whose primary business pertains to sexually explicit or erotic materials." The court held that this condition was sufficiently clear to satisfy due process standards. Id. at 758-59¶¶ 38-42. The same is true of the condition in the present case.

This does not mean that the defendant can be sanctioned for engaging in conduct that no reasonable person would view as a violation. A law that is valid on its face can be vague as applied. State v. Eckblad, 152 Wn.2d 515, 521-22, 98 P.3d 1184 (2004). If a person of ordinary intelligence would not understand that a statute applies to particular conduct, then the law is vague as applied to that conduct. State v. Locklear, 105 Wn. App. 555, 560-61, 20 P.3d 993 (2001).

For example, the defendant raises the hypothetical situation of being sanctioned for frequenting a sports stadium. It is highly unlikely that a violation would be charged or found under such circumstances. But if that happened, it would not be constitutionally valid. A person of ordinary intelligence would not understand that the court's prohibition applied to that conduct. Consequently, under those circumstances the prohibition would be unconstitutionally vague as applied.

The defendant points out that a violation does not require "willfulness." State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009). That case allows imposition of sanctions when a defendant does not know that he is violating a condition, "if it is reasonably obvious to everyone else" that the conduct is a violation. Id. at 703

¶ 25. Thus, the analysis of McCormick is consistent with the "vagueness as applied" doctrine. If no reasonable person would understand that the defendant's conduct constituted a violation, that conduct is not subject to sanction.

In short, the challenged condition is valid on its face. It is not invalidated by the possible existence of some circumstances under which it might be considered vague.

B. THE TERM 'DRUG PARAPHERNALIA" CAN BE UNDERSTOOD BY PERSONS OF ORDINARY INTELLIGENCE.

The defendant next challenges the condition that bars him from "possess[ing] drug paraphernalia." CP 17, condition 5. The term "drug paraphernalia" is defined by statute:

> "[D]rug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance

RCW 69.60.101(a). The statute goes on to set out a lengthy list of items that constitute "drug paraphernalia." The United States Supreme Court has upheld similar statutory language against a vagueness challenge. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525-26, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994).

When a term is defined by statute, a court should not be required to reproduce the same definition in a judgment and sentence. Doing so simply invites error and confusion.

In any event, the statutory definition of "drug paraphernalia" coincides with the ordinary understanding of that term. For example, ask.com defines "drug paraphernalia" as "any kind of equipment, product or materials that are used in making, using or concealing any kind of illegal drugs." http://answers.ask.com/Health/Addictions/what_is_drug_paraphernalia (visited 1/11/13). Wikipedia gives an almost identical definition: "any equipment, product, or material that is modified for making, using, or concealing drugs." http://en.wikipedia.org/wiki/Drug_paraphernalia (visited 1/11/13). Since the term "drug paraphernalia" has a clear and commonly-understood meaning, it is not unconstitutionally vague.

The defendant claims that this case is governed by State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2012). There, the court invalidated a prohibition against possessing "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances." As the court pointed out, this prohibited the

defendant from possessing "paraphernalia," *not* "drug paraphernalia." Id. at 794 ¶ 18. Virtually any commonplace item, such as sandwich bags or paper, could be used as drug paraphernalia. Id. at 794-95 ¶19. Consequently, the condition in that case was unconstitutionally vague.

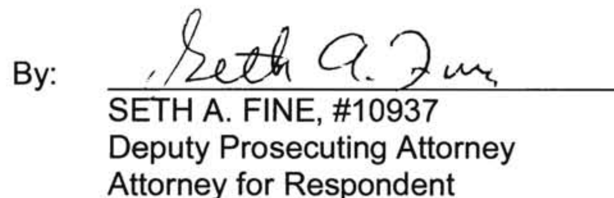
The prohibition in this case is significantly different. It does not prohibit than the defendant from possessing anything that *can* be used ingest or process drugs. Rather, it only prohibits items that are actually used for that purpose, or that are intended or designed for such use. Such a prohibition is constitutionally valid.

IV. CONCLUSION

The challenged community custody conditions should be affirmed. Since the defendant has not challenged either his conviction or the other sentence provisions, those should be affirmed in any event.

Respectfully submitted on January 11, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent