

No. 45502-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Parker,

Appellant.

Jefferson County Superior Court Cause No. 07-1-00211-7

The Honorable Judge Pro Tem James Bendell

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Parker's sanction violated his Fourteenth Amendment right to notice of the allegation against him.
2. Mr. Parker's sanction violated his state constitutional right to notice under Wash. Const. art. I, §§ 3 and 22.
3. The Notice of Violation failed to specify the sentencing condition(s) Mr. Parker allegedly violated.

ISSUE 1: The Department of Corrections (DOC) must provide adequate notice of the statute or sentencing condition a person is alleged to have violated. Here, the court sanctioned Mr. Parker for violating a sentencing condition that was never mentioned on his violation notices. Was Mr. Parker given inadequate notice to prepare his defense, in violation of his Fourteenth Amendment right to due process?

4. The sentencing court erred by imposing sentencing conditions that were not crime-related.
5. Because drug use did not contribute to Mr. Parker's offense, the sentencing court lacked authority to impose drug-related sentencing conditions.
6. The sentencing court lacked authority to order Mr. Parker not to "purchase, possess, or consume drugs without a valid prescription from a licensed medical professional."
7. The sentencing court lacked authority to order Mr. Parker to provide verification of all prescriptions received within 72 hours.

ISSUE 2: A court may impose crime-related prohibitions as sentencing conditions. Here, the court's SSOSA order suspended Mr. Parker's sentence on condition that he refrain from buying or using drugs even though there was no evidence that his offense was drug-related. Did the court exceed its authority by imposing a condition of supervision that was not crime-related?

8. Mr. Parker's sanction infringed his Fourteenth Amendment right to due process.
9. Mr. Parker was sanctioned for violating a condition of supervision that is unconstitutionally vague.
10. The sentencing court's prohibition against use or possession of "drugs" is unconstitutionally vague.

ISSUE 3: A sentencing condition is unconstitutionally vague if an ordinary person could not understand what it means, or if it creates a risk of arbitrary enforcement. Here, Mr. Parker was ordered not to use or buy "drugs" without providing DOC a valid prescription. Did the sentencing court's failure to define "drugs" render the sentencing condition unconstitutionally vague under the Fourteenth Amendment?

11. Mr. Parker was sanctioned for violating a condition of supervision that is unconstitutionally vague as applied.
12. The sentencing court's prohibition against use or possession of "drugs" is unconstitutionally vague as applied.
13. The legal status of marijuana use in Washington makes the sentencing court's prohibition against violating federal law unconstitutionally vague as applied to Mr. Parker's marijuana use.

ISSUE 4: Due process requires the government to provide fair warning of proscribed conduct. Here, Mr. Parker was sanctioned for using marijuana in violation of federal law, despite the federal government's announcement that it will not pursue marijuana users covered by Washington's marijuana statutes. Is the condition requiring Mr. Parker to refrain from violating federal law unconstitutionally vague under the Fourteenth Amendment, as applied to Mr. Parker?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

James Parker was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA) for an offense he committed in 2007. CP 1, 6. There were no allegations that Mr. Parker's crime involved drug use. Pre-Sentence Investigation, Supp. CP¹

The court conditioned Mr. Parker's partially suspended sentence on him obeying "all municipal, county, state, tribal, and federal laws." CP 120. The court also imposed the following drug-related condition of his supervision:

Do not purchase, possess, or consume drugs without a valid prescription from a licensed medical professional. Provide [Community Corrections Officer (CCO)] with verification of all prescriptions received within 72 hours of receipt. CP 121.

After he was released from prison, Mr. Parker suffered a serious workplace injury. CP 128, 124-26. His doctors prescribed him several narcotic pain medications. CP 124-26. Mr. Parker also got authorization to use medical marijuana. CP 127. Mr. Parker's doctors agreed that medical marijuana was a good option for him because it reduced his dependence on narcotic pain medications. CP 124-25; RP 7.

¹ The pre-sentencing report noted that Mr. Parker had a history of marijuana use. Pre-Sentence Investigation, Supp CP.

Mr. Parker provided the Department of Corrections (DOC) with his medical marijuana authorization and letters from his doctors. CP 129. He asked that DOC permit him to use medical marijuana. CP 129. His request was denied. CP 129. Mr. Parker filed an administrative appeal. He argued that marijuana use permitted him to stop relying on narcotic pain medications like oxycodone. CP 95-99. DOC upheld the decision prohibiting Mr. Parker from using marijuana. CP 129.

After the recreational use of marijuana was legalized in Washington State, Mr. Parker began using marijuana to regulate his pain. RP 8. His marijuana use appeared on several urinalysis (UA) results and DOC charged him with multiple violations of the conditions of his sentence. CP 12-15, 22-25, 32-33, 36-39, 44-47, 82-84.

The first notice of violation alleged that Mr. Parker had violated the condition of his sentence proscribing drug use. CP 12-15. The subsequent notices did not mention which sentencing condition he was alleged to have violated. CP 22-25, 32-33, 36-39, 44-47, 82-84. None of the notices alleged that he had violated the condition requiring him to obey all federal laws. CP 22-25, 32-33, 36-39, 44-47, 82-84.

At a consolidated hearing addressing the alleged violations, Mr. Parker argued that his sentencing conditions did not prohibit the use of marijuana because it had been legalized in Washington. RP 8, 11-12. For

the first time, the state argued that Mr. Parker had violated the condition prohibiting him from breaking federal law. RP 12.

The court found that Mr. Parker had violated the conditions of his sentence by breaking federal law against marijuana use. CP 129-30. The court declined to determine whether Mr. Parker's conduct constituted a violation of the condition proscribing drug use. CP 130. Mr. Parker was sanctioned to thirty days in custody. CP 133. This timely appeal follows. CP 132-33.

ARGUMENT

I. MR. PARKER DID NOT RECEIVE ADEQUATE NOTICE OF HIS ALLEGED VIOLATIONS, WHICH INFRINGED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review.

Alleged violations of the due process right to adequate notice are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Failure to provide adequate notice is a constitutional error requiring reversal unless the state can show that it was harmless beyond a reasonable doubt. *In re Blackburn*, 168 Wn.2d 881, 888, 232 P.3d 1091 (2010).

- B. The Department of Corrections did not provide Mr. Parker with notice specifying which condition of his sentence he allegedly violated.

Due process requires the state to provide adequate notice of alleged sentencing violations. *Blackburn*, 168 Wn.2d at 884-85. The notice must “inform the offender of the specific violations alleged” and permit the accused to prepare a meaningful defense. *Id.* at 885. Preparation of an adequate defense requires the accused to be informed of DOC’s legal theory:

Because laws vary so widely, the strategic choices that an offender makes in presenting witnesses and documentary evidence will necessarily be tied to the particular definition of the crime that he or she allegedly committed.

Id. at 886 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Absent adequate notice, the risk arises that DOC could surprise the accused with a new legal theory at the violation hearing: “An offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target.” *Id.*

In Mr. Parker’s case, the DOC provided notice only that he was alleged to have used marijuana. CP 12-15, 22-25, 32-33, 36-39, 44-47, 82-84. The first notice stated that he had been previously ordered not to use drugs. CP 14. None of the notice documents mentioned the condition

prohibiting Mr. Parker from violating federal law.² CP 12-15. In fact, the supplemental and second through fifth supplemental notice documents did not mention any conditions of his sentence. CP 22-25, 32-33, 36-39, 44-47, 82-84.

The inadequate notice created a situation in which Mr. Parker was “asked to hit a moving target.” *Blackburn*, 168 Wn.2d at 886. For the first time at the hearing, the state claimed that Mr. Parker had violated the condition requiring him to obey all federal laws in addition to the one prohibiting drug use. RP 12. The court’s order does not specify which condition Mr. Parker violated. CP 131. The memorandum opinion, however, found that Mr. Parker had violated the condition related to federal laws. CP 128-30. The state cannot show that this constitutional error was harmless beyond a reasonable doubt. *Id.* at 888.

The court infringed Mr. Parker’s right to due process by committing him to jail when he had not received adequate notice of the sentencing condition he was alleged to have violated. *Blackburn*, 168 Wn.2d at 884-85. Mr. Parker’s order of violation must be vacated. *Id.* at 888.

² Nowhere in the record is there any reference to any particular federal statute.

II. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY IMPOSING COMMUNITY CUSTODY CONDITIONS THAT WERE NOT CRIME-RELATED.

A. Standard of review.

Whether a court has imposed a community custody condition beyond the bounds of its authority is reviewed *de novo*. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). An unlawful sentencing condition may be raised for the first time on appeal. *Id.*

B. The court did not have the authority to prohibit Mr. Parker from purchasing, possessing, or consuming “drugs.”

The trial court does not have power to impose community custody conditions unless they are authorized by statute. *Warnock*, 174 Wn. App. at 611. A court may order a person on supervision to “comply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). The SSOSA statute also permits a sentencing court to impose crime-related prohibitions. RCW 9.94A.670(6)(a).

“Crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances for which the offender has been convicted...” RCW 9.94A.030(10). A condition is not crime-related if there is no evidence linking the prohibited conduct to the offense. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Specifically, a court may not impose drug-related conditions of supervision if there is no evidence that drugs were involved in the crime of conviction. *Warnock*, 174 Wn. App. at 614.

There was no evidence that any drugs were involved in Mr. Parker's offense. CP 1-11; Pre-Sentence Investigation, Supp. CP. Despite this, the court ordered Mr. Parker to undergo a substance abuse evaluation and prohibited him from purchasing, possessing, or consuming drugs or drug paraphernalia; entering into areas where drugs are sold or used; and associating with people who use or sell drugs. CP 121.

The court exceeded its authority by imposing conditions of Mr. Parker's sentence that were not crime-related. *Warnock*, 174 Wn. App. at 614. The conditions pertaining to drugs must be stricken, and cannot form the basis for a violation. *O'Cain*, 144 Wn. App. at 775.

III. THE COURT VIOLATED MR. PARKER'S RIGHT TO DUE PROCESS BY IMPOSING SENTENCING CONDITIONS THAT WERE UNCONSTITUTIONALLY VAGUE.

A. Standard of review.

Constitutional issues are reviewed *de novo*. *Products, Inc. v. Washington State Dep't of Labor & Indus.*, 43636 -1-II, 2014 WL 710682, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Feb. 25, 2014). A claim that a sentencing condition is unconstitutionally vague may be raised for the

first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

Generally, conditions of community custody are reviewed for abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A court abuses its discretion by imposing an unconstitutional sentencing condition. *Id.*

B. A sentencing condition is unconstitutionally vague if it does not provide fair warning of proscribed conduct or if it permits arbitrary enforcement.

Due process requires that the state provide citizens with fair warning of proscribed conduct. *Valencia*, 169 Wn.2d at 791; U.S. Const. Amend XIV; art. I, § 3. A sentencing condition is unconstitutionally vague if it (1) fails to define the proscribed conduct with “sufficient definiteness” that an ordinary person can understand what is prohibited or (2) fails to provide “ascertainable standards” to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

Failure to satisfy either requirement renders the condition void for vagueness. *Id.* Unlike a statute or ordinance, the court does not begin with the presumption that a sentencing condition is constitutional. *Valencia*, 169 Wn.2d at 793.

In *Valencia*, for example, the court found that a sentencing condition prohibiting possession of “paraphernalia that can be used for

ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances” was unconstitutionally vague. *Id.* The court declined to read the word “paraphernalia” to mean only “drug paraphernalia,” because the sentencing condition did not include such limiting language. *Id.*

The court also found that the *Valencia* condition violated the second alternative of the vagueness test:

...an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. Another probation officer might not arrest for the same “violation,” i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.

Valencia, 169 Wn.2d at 794-95.

The remedy for an unconstitutionally vague sentencing condition is to strike the condition from the judgment and sentence. *Valencia*, 169 Wn.2d at 795. Such a condition cannot form the basis for a violation. *Id.*

C. The sentencing condition prohibiting Mr. Parker from possessing or using “drugs” is unconstitutionally vague on its face and as applied in this case.

When a term in a condition of supervision is undefined, the court may consider its ordinary meaning as provided by a standard dictionary. *Bahl*, 164 Wn.2d at 754. In this case, the court prohibited Mr. Parker from purchasing, possessing, or consuming “drugs” without a valid prescription

from a licensed medical professional. CP 121. The sentencing condition also requires Mr. Parker to provide “verification of all prescriptions received within 72 hours of receipt.” CP 121.

The document informing Mr. Parker of the conditions does not define the word “drug.” CP 120-23. The dictionary lists the first two definitions of “drug” as “a substance used as a medication or in the preparation of medication” and “a commodity that is not salable or for which there is no demand.” *Merriam-Webster.com* (accessed 3/12/14). Only the third entry defines “drug” as “something and often an illegal substance that causes addiction, habituation, or a marked change in the consciousness.” *Id.*

The condition prohibiting Mr. Parker from using or purchasing “drugs” fails both alternatives of the test for unconstitutional vagueness. *Bahl*, 164 Wn.2d at 752-53. First, it does not describe the prohibited conduct with sufficient definiteness that an ordinary person can understand what is proscribed. *Id.* It is unclear whether the condition encompasses over-the-counter medications and prescriptions for things like antibiotics in addition to controlled substances. The word “drug” could also be interpreted to include herbal remedies and “unsalable commodities” of any kind. The average person would be left guessing about what, exactly, the sentencing condition includes. *Id.*

Second, the “drugs” condition fails to provide “ascertainable standards” to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53. An “inventive probation officer” could interpret the condition prohibiting “drugs” to include acetaminophen and aspirin. *Valencia*, 169 Wn.2d at 794-95. Another officer could find violation only for use or possession of illegal drugs. *Id.* The condition of supervision proscribing purchase or use of “drugs” is unconstitutionally vague on its face. *Bahl*, 164 Wn.2d at 752-53.

The sentencing condition prohibiting “drugs” is also unconstitutionally vague as applied to the facts of Mr. Parker’s case. Recreational use of marijuana has been legalized in Washington. Laws of 2013, c. 3, § 22. Even if the prohibition against “drugs” is read to include only illegal substances, it is not clear whether that encompasses marijuana.³

Additionally, the clause requiring Mr. Parker to inform his CCO with “verification of all prescriptions within 72 hours of receipt” is vague as applied. CP 121. The text of the condition does not specify whether a “prescription” could include doctor’s authorization to use medical

³ DOC is permitted by statute to restrict marijuana use by people who are on community supervision. RCW 69.51A.005(4). But the conditions of Mr. Parker’s sentence do not mention marijuana. CP 120-23. It is unclear whether DOC was attempting to exercise that power in this case.

marijuana. It does not make clear whether or not Mr. Parker needs to obtain permission to take prescription drugs. In Mr. Parker's case, DOC denied him permission to take medical marijuana despite the fact that the drug was recommended by multiple doctors and would have reduced his reliance on narcotic pain medication. CP 124-25. Accordingly, the sentencing condition relating to "drugs" is unconstitutionally vague as applied to Mr. Parker.

The condition of supervision prohibiting Mr. Parker from buying or using "drugs" is unconstitutionally vague on its face and as applied to this case. *Bahl*, 164 Wn.2d at 752-53. The condition must be stricken and Mr. Parker's sanction for its violation must be reversed. *Id.*

D. The sentencing requirement that Mr. Parker obey all federal laws is unconstitutionally vague as applied to this case.

The court conditioned Mr. Parker's suspended sentence on him obeying all "municipal, county, state, tribal, and federal laws." CP 120. This condition fails both prongs of the test of unconstitutional vagueness as applied to Mr. Parker's case. *Bahl*, 164 Wn.2d at 752-53. First, the condition does not provide "sufficient definiteness" for the ordinary person to understand what is prohibited. *Id.* Mr. Parker was sanctioned for violation of the federal law criminalizing use of marijuana. CP 2-3. But the United States Department of Justice has announced its intent not to

enforce that law against most individual users in Washington State. DOJ Memo, James Cole, August 19, 2013.⁴ The text of the condition is insufficient to make it clear to the average person whether it proscribes violation of federal laws that the federal government does not intend to enforce. *Bahl*, 164 Wn.2d at 752-53.

Second, the condition is too vague to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53. In Mr. Parker's case, the state pursued his sanction under the theory that he had violated the sentencing condition prohibiting drug use. CP 14. It was only at the hearing that the assistant attorney general argued that Mr. Parker had violated the prohibition against breaking federal law. RP 12. The facts of the case demonstrate that reasonable probation officers could differ regarding whether violation of an unenforced federal law constitutes violation of the sentencing condition. *Valencia*, 169 Wn.2d at 794-95. The condition regarding federal law permits arbitrary enforcement as applied to Mr. Parker. *Id.*

The condition of Mr. Parker's supervision prohibiting him from violating federal law is unconstitutionally vague as applied to this case. *Bahl*, 164 Wn.2d at 752-53. The condition must be stricken and Mr. Parker's sanction its violation must be reversed. *Id.*

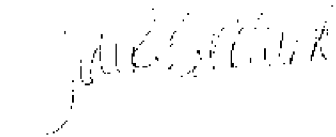
⁴ Available at: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

CONCLUSION

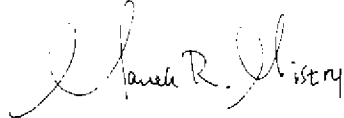
The court erred by imposing drug-related sentencing conditions that were not related to Mr. Parker's crime of conviction. The sentencing conditions proscribing drug use and violation of federal law were unconstitutionally vague. Mr. Parker did not receive adequate notice of his alleged violations of the conditions of his sentence, in violation of his right to due process. The conditions must be stricken and Mr. Parker's sanction for their violation must be reversed.

Respectfully submitted on March 26, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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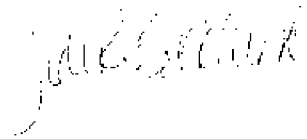
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 26, 2014.



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BACKLUND & MISTRY

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