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No. 71547-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE ALLEN JACKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Shane Jackson invited twenty-year-old Alyschia McDowell and her friend Shelbi Douty over to his house for dinner one evening. Ms. Douty drank too much and fell asleep after dinner. Mr. Jackson and Ms. McDowell then engaged in sexual intercourse. Ms. McDowell reciprocated when Mr. Jackson kissed her and made several statements suggesting she was a willing participant. Two weeks later, however, she told police she had not consented to the sexual intercourse. Because Ms. McDowell's alleged expressions of non-consent on the night of the incident were ambiguous, the State did not prove she "clearly expressed" a lack of consent. Therefore, the State failed to prove an essential element of the crime of third degree rape beyond a reasonable doubt.

In the alternative, the condition of community custody requiring Mr. Jackson to participate in substance abuse treatment must be stricken because it is not crime-related. Also, the condition requiring Mr. Jackson to "consent" to probation searches by his community corrections officer (CCO) must be stricken because it permits warrantless searches conducted without reasonable cause, in violation of the state and federal constitutions.

B. ASSIGNMENTS OF ERROR

1. The State did not prove all of the essential elements of the crime beyond a reasonable doubt, in violation of constitutional due process.

2. The condition of community custody requiring Mr. Jackson to participate in substance abuse treatment is not authorized by statute because it is not crime-related.

3. The condition of community custody requiring Mr. Jackson to consent to warrantless searches conducted without reasonable suspicion violates the state and federal constitutions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An essential element of the crime of third degree rape is that the victim did not consent to sexual intercourse and that this lack of consent was clearly expressed by words or conduct. In this case, Ms. McDowell's words and conduct at various times indicated she was a willing participant in the sexual intercourse. Where the alleged victim's words and conduct expressing a lack of consent are at best ambiguous, has the State failed to prove an essential element of the crime of third degree rape beyond a reasonable doubt?

2. A sentencing court is authorized by statute to require an offender to engage in substance abuse treatment as a condition of community custody only if the evidence shows, and the court finds, that drugs or alcohol contributed to the crime. Did the court err in requiring Mr. Jackson to participate in substance abuse treatment as a condition of community custody, where the evidence did not show, and the court did not find, that drugs or alcohol contributed to the crime?

3. Both the Fourth Amendment and article I, section 7, preclude a CCO from searching an offender's home or personal effects without "reasonable cause" to believe the offender has actually violated a condition of the sentence. Here, as a condition of community custody, the trial court ordered Mr. Jackson to "consent" to searches simply upon his CCO's request, in order to "monitor" his compliance with supervision. Does the condition authorize random searches without reasonable cause, in violation of the federal and state constitutions?

D. STATEMENT OF THE CASE

On August 24, 2012, Shelbi Douty asked her friend Alyschia McDowell to accompany her to Shane Jackson's house in Everett that evening. RP 101. Ms. Douty had just broken up with her boyfriend

and was interested in Mr. Jackson. RP 101. Ms. McDowell agreed to go along. RP 102. She was 20 years old. CP 65-66; RP 88.

Mr. Jackson prepared dinner while the two young women drank mixed drinks. RP 105-06. By the end of the night, they had finished two fifths of hard alcohol. RP 106. Mr. Jackson did not drink as much as the women and did not appear to be drunk that evening. RP 142.

Sometime after dinner, Ms. Douty had drunk so much that she became sick and threw up in the bathroom. RP 110. Ms. McDowell and Mr. Jackson helped her to Mr. Jackson's bedroom, where she lay down on the floor and fell asleep. RP 111-12. Ms. McDowell was also drunk; she was stumbling around and slurring her words. RP 107-08.

At first, Mr. Jackson seemed to be flirting with Ms. Douty, but as the evening progressed, he flirted with Ms. McDowell. RP 108. After Ms. Douty went to sleep, Mr. Jackson approached Ms. McDowell as she was walking through the laundry room. RP 116. He put his arms around her and pulled her close to him. RP 116. She asked what he was doing and put her hand on his chest, trying to push him away. RP 116-17. When he leaned down to kiss her, she was confused and said she thought he liked Ms. Douty. RP 117. He said he liked her—Ms. McDowell—too, and Ms. Douty would not mind. RP 117. Ms.

McDowell later said she did not want to kiss Mr. Jackson but at the time, she willingly kissed him back. RP 119, 200.

After the couple kissed for a while, Mr. Jackson pushed Ms. McDowell up against the washer. RP 120. He hooked his fingers over the top of her shorts and tried to pull them down. RP 121. She said "No, don't," pushed his hand away, and pushed against his chest. RP 121. He stumbled backwards. RP 121. She said, "I'm sorry. But, no." RP 121. At that point, soap had spilled onto the top of the washer and onto Ms. McDowell's shorts. RP 121. She apologized again, they both laughed, and they cleaned up the soap with some towels. RP 122.

Mr. Jackson then took hold of Ms. McDowell's hips, propped her up on the washer, and tried to kiss her again. RP 122. He managed to pull off her shorts and underpants, which had elastic waists, then put his hand on her shoulder and told her to lean back. RP 123. He pushed her legs open and put his mouth between her legs. RP 123. She sat up quickly, pressed her legs together, and said "No, stop. Just don't." RP 123. He asked why not and she said "I don't want to." RP 124. He said, "I just want to kiss you down there," and she said "No. Thank you, though. I'm sorry." RP 124. He sighed, said "Okay, just

kissing." RP 124. They then kissed some more, with Ms. McDowell participating willingly. RP 124, 200.

Ms. McDowell felt dizzy and said, "I'm really sorry but I just want to go to bed. I'm dizzy." RP 124. Mr. Jackson said, "Okay. Just stay right here. I'll be right back," and he left the room. RP 124. She hopped off of the washer, put her shorts back on, and walked out. RP 125. She saw him again in the hallway and said she needed to check on Ms. Douty. RP 125. He said he had just checked on her and she was fine. RP 125. Ms. McDowell said she needed to lie down and asked where she was sleeping. RP 125. He took her elbow with one hand, put his other hand on the small of her back, and guided her to his brother's bedroom. RP 125-26. He gave her a blanket and she lay down on the bed. RP 126.

Mr. Jackson took off his shirt and knelt on the bed next to Ms. McDowell. RP 128. She asked what he was doing and he said, "Just kissing you." RP 128. He kissed her on the mouth and she kissed him back. RP 128, 200. He then hooked his fingers over her shorts and took them off. RP 129. She said, "No, don't," and when he asked, "Why not?" she said, "No, please don't." RP 129. Mr. Jackson then took hold of her knees and kissed her between her legs. RP 129. At

first, she said, "No. Just stop," but then she said, "No. You're not even doing it right." RP 129-30. He looked at her, laughed, and said, "I love that you're trying to tell me what to do." RP 131. Ms. McDowell said, "you just suck at this, and I don't want you to." RP 131. She crossed her legs and turned to her side. RP 131. In response, Mr. Jackson stopped trying to give her oral sex. RP 131.

Mr. Jackson then put Ms. McDowell's legs around his waist, bumped his hips against her pelvis and said, "I just want you so bad." RP 131. She said, "I'm sorry but no," "I'm not even on birth control." RP 131-32. He sighed, said, "Okay," and left the room. RP 131-33. She did not put her pants back on because she was too tired. RP 133. She was beginning to fall asleep when Mr. Jackson returned to the room. RP 134. He lay down on the bed and she could see that he had a condom on his penis. RP 134-35. She said, "Oh," and looked at him. RP 135. He then took her knee, leaned forward, and the two engaged in vaginal intercourse. RP 135-36.

Ms. McDowell had never had sexual intercourse before. RP 93. She felt a great deal of pain. RP 136-37. She said "it hurt" and "[s]top." RP 137. Mr. Jackson asked why it hurt and she said, "Because this is like sandpaper. It's just dry." RP 138. He reached

over and grabbed some "lube" from the windowsill by the bed and said, "I have lube." RP 138. Ms. McDowell said, "This hurts and I think I'm going to throw up." RP 138. She rolled onto her stomach, trying to get up because she felt sick but Mr. Jackson continued having intercourse with her. RP 140. She did not try to stop him or say anything because she was "very drunk" and had been told that if something like this happened, she should not try to resist. RP 140. Ms. McDowell then asked Mr. Jackson if he had "whiskey dick or something." RP 142. She understood "whiskey dick" to mean "that sometimes guys have too much alcohol and can't finish." RP 142. Mr. Jackson stopped, looked at her, and said, "Oh, I wasn't going to finish." RP 142. He asked if she wanted him to stop, and when she said yes, he stopped and got off of her. RP 142, 203.

Ms. McDowell called Ms. Douty the next day and told her that she had had sex with Mr. Jackson. RP 320. Ms. Douty became angry and hung up the phone because she was interested in Mr. Jackson and felt betrayed. RP 320-21. Ms. Douty and Mr. Jackson had a romantic relationship for several months following the incident. RP 324-26. More than a year later, Ms. Douty continued to feel betrayed by her friend. RP 327.

About four days later, Ms. McDowell told her mother what had happened. RP 159. Her mother called 911 and took her to the hospital, where she was examined by a SANE nurse. RP 161, 252. The nurse noted Ms. McDowell had some redness and swelling to her private parts, including a tear and some bleeding in her hymen. RP 261-62. The nurse testified the injuries were consistent with first-time sexual intercourse. RP 272.

Ms. McDowell did not make a report to police until two weeks after the incident. RP 224-25.

Mr. Jackson was charged with one count of third degree rape. CP 65-66. Following a jury trial, he was convicted as charged. CP 6-22.

E. ARGUMENT

1. The State did not prove beyond a reasonable doubt that Ms. McDowell clearly expressed a lack of consent because her statements and actions were ambiguous

a. To prove the crime, the State was required to prove beyond a reasonable doubt that Ms. McDowell expressed to Mr. Jackson clearly and unambiguously that she did not consent to sexual intercourse

It is a fundamental principle of constitutional due process that the State bears the burden to prove every element of the charged

offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In order to find a defendant guilty beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315. On review, the Court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

To prove the charged crime of third degree rape, the State was required to prove beyond a reasonable doubt that (1) Mr. Jackson

engaged in sexual intercourse[1] with Ms. McDowell; (2) Ms. McDowell did not "consent"[2] to the sexual intercourse; and (3) her lack of consent "was clearly expressed by words or conduct." RCW 9A.44.060(1)(a); CP 37, 65-66.

The term "clearly expressed" is not defined by statute. The Court applies the ordinary meaning of the term. State v. Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012), review denied, 176 Wn.2d 1012, 297 P.3d 708 (2013). "Clearly" means "something asserted or observed leaving no doubt," and "expressed" means "to make known an emotion or feeling." Id. (quoting Webster's Third New International Dictionary 420, 803 (1993). Thus, the statute requires the State to prove the alleged victim "did not freely agree to sexual intercourse," and "the lack of consent was made known to [the defendant] by words

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[1] "Sexual intercourse" means
> that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex; or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 34; see RCW 9A.44.010(a).

[2] "Consent" means "that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." CP 35; see RCW 9A.44.010(7).

or conduct without doubt or question." Higgins, 168 Wn. App. at 854. The focus is on the alleged victim's words and actions rather than the defendant's subjective assessment of what is being communicated. Id.

Because the statute requires proof that the alleged victim communicated a lack of consent "without doubt or question," the State must prove the alleged victim's words or actions were "unambiguous." "Ambiguity" means "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." Webster's Third New International Dictionary 66 (1993). Thus, a communication that is "ambiguous," *i.e.,* that can be understood in more than one way, is not "without doubt or question." Accordingly, if the alleged victim's words or actions communicated both consent *and* non-consent—both "yes" *and* "no"—the State cannot prove the lack of consent was "clearly expressed." If the victim's words or actions communicated both "yes" and "no," therefore, the evidence is insufficient to prove an essential element of the crime.

b. The State did not prove Ms. McDowell clearly expressed a lack of consent because her words and actions communicated both "yes" and "no"

Ms. McDowell did not clearly express a lack of consent because her words and actions were capable of being understood in more than one way. First, when Mr. Jackson approached her and put his arms around her in the laundry room, she simply pushed him away, asked what he was doing, and said she thought he liked her friend, Ms. Douty. RP 116-17. By doing so, she communicated confusion rather than lack of consent. To reinforce the impression that she did not object to his overtures, when he proceeded to kiss her, she kissed him back. RP 119, 200.

Although at times Ms. McDowell said "no," or told Mr. Jackson to "stop," when she did so, he stopped and then continued only when her words or actions suggested "yes" or "maybe." For instance, when he propped her up onto the washing machine, opened her legs and put his mouth between her legs, she said "no, stop" and pushed him away. RP 123-24. But then she willingly reciprocated when he began kissing her again. RP 124, 200.

Later, when they were in bed, and he had his mouth between her legs, she said "No. Just stop," but then said, "You're not even doing it

right," and "you just suck at this." RP 129-30. This was not a clear communication of a lack of consent, but rather a critique of Mr. Jackson's method. In response, Mr. Jackson stopped trying to give her oral sex. RP 131.

Similarly, when Mr. Jackson began to try to have vaginal intercourse with Ms. McDowell, she said "I'm sorry but no," but then said, "I'm not even on birth control." RP 131-32. Again, this was not a clear communication of a lack of consent. A reasonable interpretation of her words was that she did not want to have intercourse because she was afraid of getting pregnant. In response, Mr. Jackson left the room and came back with a condom. RP 134-35. The two then engaged in sexual intercourse. RP 135-36.

Likewise, when Ms. McDowell experienced pain during the intercourse and said "it hurt," and "[s]top," Mr. Jackson asked why. RP 137-38. She replied, "Because it's like sandpaper. It's just dry." RP 138. Again, her response was not a clear expression of non-consent. One meaning to draw from her words was that she was interested in continuing if not for the discomfort. In response, Mr. Jackson offered her some "lube" from the windowsill. RP 138.

Finally, when Mr. Jackson continued to have intercourse with Ms. McDowell, she did not try to stop him or say anything further because she was "very drunk" and believed it was not wise to say anything. RP 140. At the end, when he asked if she wanted him to stop and she said yes, he stopped. RP 142, 203.

Ms. McDowell's communications were ambiguous because she expressed both "yes" and "no." In contrast, in cases where the courts held the evidence was sufficient to prove the alleged victims "clearly expressed" a lack of consent, their words and actions consistently communicated "no." In Higgins, for example, one night Higgins went camping with his girlfriend N.N. Higgins, 168 Wn. App. at 848. N.N. fell asleep in the tent and awoke to find Higgins rubbing her chest and back. Id. She asked him to move over, moved herself closer to the tent door, and went back to sleep. Id. He again tried to wake her, began tugging on her shorts, and asked, "Do you want to?" Id. She replied "no" and went back to sleep. Id. He then moved on top of her and pulled down her shorts and underwear. Id. She said, "Stop. You're drunk," and he responded "you're drunk too." Id. She repeated "stop" five or six times and started crying. Id. While she struggled to get out from under his body weight, he pulled his pants down, pinned her arms,

and had sexual intercourse with her. Id. Afterward, she grabbed her clothing and ran out to her car where she stayed for a few hours. Id.

Similarly, in State v. Corey, __ Wn. App. __, 325 P.3d 250, 252 (2014), Corey entered a hot tub with A.B. and A.R.B. A.B. told him she was 16 years old, was not interested in men, and was dating A.R.B. Id. Corey asked A.B. if she wanted to go to a nearby sex store with him and she said "no." Id. While in the hot tub he began rubbing her leg and she pushed his hand away and moved to the other side of the hot tub. Id. Corey moved next to her, put his hand up her shorts, and tried to touch her private areas. Id. She told him to stop and said she did not like to be touched. Id. He laughed, told her he was not going to hurt her, then forcibly tried to put his fingers inside her. Id. She left the hot tub and sat on the side of the pool. Id. He entered the pool and tried to pull her in with him. Id. She told him to stop touching her, left the pool, and got back into the hot tub. Id. He followed her into the hot tub, took off his shorts, and touched her on her back with his penis. Id. He also touched her on the inside of her thighs and when she pushed his hand away, he pushed his hand up further and digitally penetrated her vagina. Id. She finally pushed him away and left the pool area. Id.

In contrast to those cases, in this case, Ms. McDowell did not "clearly express" a lack of consent. Her words and actions did not consistently communicate "no," but sometimes communicated "yes" or "maybe." Thus, she did not make her lack of consent known to Mr. Jackson "without doubt or question." Higgins, 168 Wn. App. at 854. Because her communications were susceptible to more than one interpretation, they were ambiguous. Thus, the State did not prove an essential element of the crime beyond a reasonable doubt.

2. Two of the conditions of community custody are invalid and must be stricken

At sentencing, the court imposed 36 months community custody. CP 10. As a condition of community custody, the court ordered Mr. Jackson to "[p]articipate in substance abuse treatment as directed by the supervising Community Corrections Officer." CP 21. The court also ordered: "You must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access." CP 21. Both of these conditions are invalid and must be stricken.

A trial court's authority to impose sentencing conditions is derived wholly from statute and is further constrained by the

requirements of the Constitution. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a condition if it applies the wrong legal standard. Id. The court also abuses its discretion if it imposes a condition that is unconstitutional. Bahl, 164 Wn.2d at 753. The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Rainey, 168 Wn.2d at 374.

When a term included in a sentencing order is found to be improper, "[t]he simple remedy is to delete the questionable provision from the order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

a. The condition requiring Mr. Jackson to participate in substance abuse treatment is invalid because it is not crime-related

A condition of community custody requiring the offender to participate in alcohol or drug treatment must be "crime-related." RCW

9.94A.703(3)(c); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003); State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). A "crime-related condition" is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). To justify such a condition, the evidence must show and the court must find that alcohol or drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208. Alcohol or drug treatment "'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol [or drugs] contributed to the offense." Id. at 208.

Here, the evidence does not show and the trial court did not find that alcohol or drugs contributed to the offense. To the contrary, the deputy prosecutor requested the condition for reasons unrelated to the current offense. At sentencing, the prosecutor said "the court does have enough of a body of evidence from the presentence investigation reports to conclude that Mr. Jackson has struggled in the past with OxyContin addiction." RP 440. Mr. Jackson had told a CCO as part of the presentence investigation that he had developed a dependence on oxycodone following a back injury he suffered at work in 2004, when he had been prescribed the medication for pain. CP 74. He was

enrolled in a suboxone[3] withdrawal program at the time of his arrest in this case. Id.

But there is no evidence that Mr. Jackson was taking oxycodone at the time of the incident, or that his use of drugs contributed to it. There is no evidence that drugs played any role at all in the alleged crime.

Because the condition of community custody requiring Mr. Jackson to participate in substance abuse treatment is not "crime-related," it is not authorized by statute and must be stricken.

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[3] "Suboxone" is a formulation of "buprenorphine," which is an opioid receptor modulator that is used to treat opioid addiction. Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/Buprenorphine.

b. *The condition requiring Mr. Jackson to "consent" to CCO searches of his home to "monitor" his compliance with supervision is unconstitutional because it permits warrantless searches conducted without reasonable cause*[4]

i. Warrantless CCO searches during community custody are unconstitutional unless based upon reasonable cause to believe the offender has violated a condition of the sentence

Although persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to the protections of article I, section 7 and the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d. 709 (1987); U.S. Const. amend. IV; Const. art. I, § 7. Under article I, section 7, a CCO may not search the home or personal effects of a person on community custody without a warrant unless the officer has reasonable cause to believe the offender has violated a condition or requirement of the sentence. Winterstein, 167 Wn.2d at 628-29.

[4] A similar issue is currently pending in the Washington Supreme Court in State v. Cates, 179 Wn. App. 1002, review granted, 327 P.3d 54 (2014). Oral argument is scheduled for September 30, 2014.

The Sentencing Reform Act (SRA) similarly requires a CCO to have "reasonable cause" to believe a violation has occurred before he or she may conduct a warrantless search. RCW 9.94A.631(1) provides:

> If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

Because Washington constitutional and statutory law require a CCO to have "reasonable cause" before conducting a warrantless search, a search conducted without reasonable cause also violates the Fourth Amendment. Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007). In Samson, the United States Supreme Court upheld a suspicionless search of a parolee by a law enforcement officer, but the search was expressly authorized by a California State law that required parolees to agree to searches without suspicion as a condition of the grant of parole. Samson, 547 U.S. at 852-56. In Freeman, the Tenth Circuit explained that, under Samson, suspicionless searches of parolees are constitutional "only when authorized under state law." Freeman, 479 F.3d at 747-48.

The standard of reasonable cause requires a CCO to have a "well-founded suspicion that a violation has occurred" before he or she may conduct a warrantless search. State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011). This standard is analogous to the requirements of a Terry[5] stop and requires individualized suspicion arising from "specific and articulable facts and rational inferences." Id. It is "defined as a substantial possibility that criminal conduct has occurred or is about to occur." Id.

ii. The condition is unconstitutional because it permits a suspicionless, random search of Mr. Jackson's home

The condition plainly requires Mr. Jackson to "consent"[6] to searches of his home conducted for the purpose of "monitoring" his compliance with supervision. CP 21. It does not require a search be based upon reasonable cause. Thus, on its face, the condition permits routine, random, suspicionless searches of Mr. Jackson's home in order

[5] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[6] The "consent" purportedly required by the condition is not in itself sufficient to establish an exception to the warrant requirement. A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given. State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). Here, Mr. Jackson does not have the option of refusing to consent to a warrantless search. Therefore, the "consent" exception to the warrant requirement does not apply.

to determine whether he is complying with supervision. It does not require the CCO to have a pre-existing, articulable basis to suspect that a violation might have actually occurred.

The community custody provision allowing broad, suspicionless searches of Mr. Jackson's home runs afoul of the express guarantee provided by article I, section 7, that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, a search warrant is required to establish the "authority of law" that is necessary to conduct a search under article I, section 7. Winterstein, 167 Wn.2d at 628. Any exception to the warrant requirement, including the exception for probation searches, must be "narrow" and "jealously and carefully drawn." Id.

Mr. Jackson's privacy interest in his home, in particular, is entitled to heightened protection under article I, section 7. "Article I, section 7 is more protective of the home than is the Fourth Amendment," and a person's privacy interest in the home is entitled to "heightened constitutional protection" under the state constitution. State v. Groom, 133 Wn.2d 679, 685, 947 P.2d 240 (1997).

The broad search condition in this case is far from "narrow" or "jealously and carefully drawn." It does not adequately protect Mr.

Jackson's substantial right to privacy in his home, or establish the "authority of law" required under article I, section 7. Thus, the condition violates Mr. Jackson's constitutionally protected right to privacy.

The express language of the condition indicates the court intended to impose a "monitoring"[7] condition authorizing random, suspicionless searches for the purpose of determining whether Mr. Jackson is complying with other conditions of community custody. See CP 21. Under limited circumstances, Washington courts have approved the use of "monitoring" search conditions, such as random urinalysis or polygraph testing, when imposed to ensure compliance with other conditions of community custody. See State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (holding "[a] trial court has authority to impose monitoring conditions such as polygraph testing"); State v. Vant, 145 Wn. App. 592, 603, 186 P.3d 1149 (2008) (upholding conditions authorizing random urinalysis and polygraph testing to monitor compliance with other conditions of community custody); State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000) ("Polygraphs and urinalyses are classified as monitoring tools rather

[7] "Monitor" means "to watch, observe, or check esp. for a special purpose." Webster's Third New International Dictionary 1460 (1993).

than actual conditions of community placement," which trial court may impose "to enforce its other lawful conditions").

But those cases do not apply here because they did not address the constitutionality of the search conditions under article I, section 7. More important, the cases authorized searches that were much more limited in purpose and scope than the intrusive searches authorized by the condition in this case. No Washington case has held that a trial court may permit broad, random, suspicionless searches of an offender's home for the general purpose of monitoring his compliance with supervision.

Courts in other jurisdictions have refused to read a "reasonable suspicion" requirement into conditions of probation that on their face authorized random, suspicionless probation searches. In Fitzgerald v. State, 805 N.E.2d 857, 864 (Ind. Ct. App. 2004), for example, the Indiana court struck down a condition of probation that provided: "You shall waive your right against *unreasonable* searches by the Probation Officer or anyone acting on behalf of the Probation Officer for the purpose of insuring compliance with your conditions of probation." The court rejected the State's argument that "reasonableness is inherent in the test of the probation condition." Id. at 865. The court explained,

"[i]n effect, the State is asserting that any search conducted by a Probation Department for purposes of probation compliance is automatically cloaked with reasonableness. Such is not the case." Id.

Similarly, in State v. Bennett, 288 Kan. 86, 88, 200 P.3d 455 (2009), the Kansas court struck down a condition that provided: "Defendant is to submit to random searches deemed necessary that Community Corrections or Law Enforcement may conduct without probable cause or need for further Court order." The court held the condition was unconstitutional because it authorized "searches at any time for potentially any reason," even though it did not specifically state that such searches could be conducted without reasonable suspicion. Id. at 99.

In several similar cases, courts have struck down conditions of probation that on their face authorized random, suspicionless searches. These courts did not conclude that the requirement of reasonable cause was an inherent component of the condition. See United States v. Farmer, 755 F.3d 849, 851, 854-55 (7th Cir. 2014) (striking down condition that stated, "[t]he defendant shall submit to the search, with the assistance of other law enforcement as necessary, of his person, vehicle, office, business, and residence, and property, including

computer systems and peripheral devices"); State v. Fields, 67 Haw. 268, 271, 282, 686 P.2d 1379 (1984) (striking condition that stated Fields was "subject at all times during the period of her probation to a warrantless search of her person, property and place of residence for illicit drugs and substances by any law enforcement officer including her probation officer"); Commonwealth v. LaFrance, 402 Mass. 789, 791 n.2, 793, 525 N.E.2d 379 (1988) (striking condition that stated probationer must "[s]ubmit to any search of herself, her properties or any place where she then resides or is situate, with or without a search warrant, by a probation officer or by any law enforcement officer at the direction or by the request of the probation officer"); State v. Schwab, 95 Or. App. 593, 596-97, 771 P.2d 277 (1989) (striking condition that stated probationer must "submit to search of his person, automobile and premises and seizure of any contraband without consent and without a search warrant by his probation officer to verify compliance with the conditions of probation").

The probation conditions struck down in the foregoing cases are indistinguishable from the condition at issue here. Consistent with this weight of authority, this Court should similarly conclude that the

condition is unconstitutional because, on its face, it authorizes random, suspicionless searches of Mr. Jackson's home.

Moreover, reading a "reasonable cause" requirement into the condition is contrary to the constitutional due process requirement that conditions of community custody be sufficiently clear to provide fair warning of proscribed conduct and prevent arbitrary and discriminatory enforcement. See State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A condition authorizing CCO searches that does not specify the search must be based upon reasonable cause does not provide adequate notice to offenders or reasonable guidance to law enforcement.[8]

In sum, the condition should be stricken because it permits unconstitutional searches conducted without reasonable cause.

iii. The challenge is ripe because the condition is unconstitutional on its face

In determining whether a challenge to a community custody condition is "ripe" for review, the Court considers whether (1) the

[8] In State v. Massey, 81 Wn. App. 198, 913 P.2d 424 (1996), the Court of Appeals upheld a community custody condition authorizing CCO searches that did not explicitly state the search must be based upon reasonable cause. To the extent Massey conflicts with the principles discussed here, it should not be followed.

challenge is "primarily legal," (2) the condition places an immediate restriction on the defendant's conduct, and (3) the defendant would suffer significant risk of hardship if the Court declined to review it. State v. Valencia, 169 Wn.2d 782, 788-89, 239 P.3d 1059 (2010); State v. Bahl, 164 Wn.2d 739, 747-48, 193 P.3d 678 (2008).

The more the question is purely legal and the less that any additional facts would aid in the Court's inquiry, the more likely the challenge is to be ripe. Bahl, 164 Wn.2d at 748. Generally, the question of the constitutionality of a community custody condition is purely legal and requires no further factual development. Id. That is, either the condition as written is constitutional or it is not. Valencia, 169 Wn.2d at 789.

As discussed above, the community custody condition is unconstitutional on its face because it authorizes random, suspicionless searches of Mr. Jackson's home. The constitutionality of the condition is a purely legal question and requires no further factual development. It is therefore ripe for review.

In State v. Massey, 81 Wn. App. 198, 913 P.2d 424 (1996), the Court of Appeals held a similar challenge was not ripe because Mr. Massey had not yet been subject to an unconstitutional search. But Mr.

Jackson is not challenging the constitutionality of a probation search. He is challenging the constitutionality of the condition of community custody that requires him to "consent" to random, suspicionless searches or face arrest and jail. No further factual development is needed to decide whether the condition as written authorizes searches without reasonable cause and is unconstitutional on its face.

In addition, Mr. Jackson would suffer significant risk of hardship if the Court declined to review the condition. An offender should not be required to face revocation proceedings before being permitted to challenge his conditions of release and need not "expose himself to actual arrest or prosecution to be entitled to challenge a [condition] that he claims deters the exercise of his constitutional rights." Bahl, 164 Wn.2d at 747 (quotation marks and citation omitted). Preenforcement review serves the interest of judicial efficiency and helps prevent hardship on the defendant "who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." Id. at 751.

Here, the condition requires Mr. Jackson to "consent" to suspicionless searches by his CCO. CP 21. If he refuses, he is subject

to immediate arrest and jail. See RCW 9.94A.631(1) ("If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department."). Mr. Jackson should not have to wait until that occurs before he is able to challenge the constitutionality of the condition.

In United States v. Baker, 658 F.3d 1050, 1054-55 (9th Cir. 2011), overruled on other grounds by United States v. King, 687 F.3d 1189 (9th Cir. 2012), the Ninth Circuit permitted a facial challenge to a condition of probation that required the defendant to submit to searches without reasonable suspicion. The court held the challenge was ripe because it did not require further factual development and the defendant "need not refuse to abide by a condition of supervised release to challenge its legality on direct appeal." Id.

Likewise, in State v. Fields, 67 Haw. 268, 274-77, 686 P.2d 1379 (1984), the Hawaii Supreme Court permitted a facial challenge to a condition of probation that subjected the defendant to searches without reasonable suspicion. The court reasoned that the potential deprivation of the defendant's fundamental right to privacy provided "reason to act before there is an attempt to enforce the sentencing

court's order." Id. at 276. It would not be in the public interest to compel the issue to wend its way through the appellate process after the sentencing court's order had been enforced. Id.

As in those cases, Mr. Jackson's facial challenge to the community custody condition is ripe for review. It requires no further factual development to decide, and Mr. Jackson should not be required to refuse to comply with the condition, subjecting himself to arrest and jail, before he may challenge it.

F. CONCLUSION

The State did not prove beyond a reasonable doubt an essential element of the crime of third degree rape, requiring the conviction be reversed and the charge dismissed. In the alternative, two of the conditions of community custody are invalid and must be stricken.

Respectfully submitted this 29th day of August, 2014.

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71547-0-I
	)	
	)	
SHANE JACKSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	SHANE JACKSON 320917 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 29TH DAY OF AUGUST, 2014.

X_____

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