NO. 47169-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FREDERICK MITCHELL DETWILER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Vicki L. Hogan

No. 13-1-03686-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly impose statutorily authorized community custody conditions which were crime-related and to which defendant agreed in a lawful plea agreement?

2. Did the trial court properly impose community custody conditions which were explicitly clear and which provided adequate notice of the proscribed behavior?

3. Did the trial court properly revoke defendant's SSOSA suspended sentence when it had sufficient evidence that defendant violated a condition of his community custody?

B. STATEMENT OF THE CASE.

1. Procedural History

On September 25, 2013, the Pierce County Prosecutor's office (State) charged Frederick Mitchell Detwiler (defendant) with one count of rape of a child in the first degree, Pierce County Cause No. 13-1-03686-1. CP 1. The parties agreed to amend the information as to the charging period such that defendant's age throughout the charging period is eighteen years and older. CP 4; 6/13/14 & 8/15/14RP 3-4.

Defendant entered a plea of guilty on June 13, 2014. CP 5-14. On August 15, 2014, the trial court sentenced defendant to a standard range of 131.9 months to life total confinement and community custody for life

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following confinement. CP 17-36. Pursuant to a joint recommendation from the State and defense derived from a negotiated plea agreement, the trial court issued a Sex Offender Sentencing Alternative (SSOSA) and suspended all but twelve months of total confinement. CP 5-14; 6/13/14 & 8/15/14RP 3.

Defendant was released from confinement on October 10, 2014. 1/16/15RP 7. On December 4, 2014, the State filed a petition for a hearing to determine noncompliance with condition or requirement of sentence after defendant admitted to using marijuana on December 1, 2014, and December 2, 2014. CP 37-40; 1/16/15RP 5. On January 16, 2015, after hearing testimony from defendant's CCO and from defendant, the trial court revoked defendant's SSOSA due to a violation of the terms of his community custody. 1/16/15RP 6-26; 36; CP 45-47. Defendant filed a timely notice of appeal. CP 48.

2. Substantive Facts

Between July 1, 2007, and August 17, 2008, defendant engaged in sexual intercourse with his nephew, J.D.. CP 4. On August 26, 2013, J.D.'s therapist reported to Child Protective Services that J.D. disclosed that defendant had oral and anal intercourse with J.D. five to six years prior. CP 2. Defendant admitted to detectives during a taped interview that he touched J.D's penis and they performed oral sex on each other. CP 2-3. Defendant also stated that he touched J.D. inappropriately when he (defendant) was drunk. CP 3.

The Department of Corrections (DOC) conducted a pre-sentence investigation. CP 69-93. During this investigation, defendant stated that he is an alcoholic. CP 74. He attributed his past crimes to being intoxicated. CP 76. He stated he used marijuana daily from the age of fifteen. CP 82. Defendant stated he was intoxicated "at the time he had sexual relations with his nephew." CP 85. DOC determined that one of the factors contributing to defendant's risk to re-offend was his chemical dependency. CP 84. DOC concluded that intervention applied to defendant's chemical dependency, among other areas, would assist in reducing potential risk to community safety. CP 84. DOC did not support the recommendation for a SSOSA because of defendant's moderate to high risk level to re-offend as determined in the psychosexual evaluation. CP 85. DOC recommended, and the trial court imposed, community custody conditions in the judgment and sentence (appendix H) which explicitly stated the defendant shall not "purchase, possess, or consume alcohol or marijuana." CP 35.

The judgment and sentence mandated as a condition for a SSOSA suspended sentence that treatment shall include the requirements and conditions set forth in the psychosexual evaluation conducted by Certified Sex Offender Treatment Provider Michael Comte (appendix G). CP 30. Mr. Comte noted in his evaluation of defendant that abstinence from all controlled substances including alcohol and marijuana would be key to control defendant's sexual and other impulses. CP 59. The corresponding recommendation, "(defendant) should be prohibited from possessing and

consuming alcohol and mind-altering substances, including marijuana," was included in the judgment and sentence as a condition for a SSOSA suspended sentence (appendix G). CP 31. Defendant signed the conditions for SSOSA. CP 30-32.

During sentencing, the trial court specified in the colloquy that defendant must comply with the community custody conditions set forth in appendixes G and H. 6/13/14 & 8/15/14RP 13-14. The trial court reiterated during sentencing that defendant cannot consume alcohol or drugs at all, including marijuana. 6/13/14 & 8/15/14RP 28; 32-33. Defendant affirmed his agreement with all of the conditions; he posed no questions regarding the drug and alcohol prohibition and raised no objections to the conditions. 6/13/14 & 8/15/14RP 17-18; 35.

On November 26, 2014, CCO Nichols and CCO Cooper conducted a home visit with defendant. CP 99. Defendant asked the CCOs during the visit whether he (defendant) could smoke marijuana if he had documentation from a physician stating it was a prescription. CP 99. CCO Nichols told defendant that she was very certain or 99 percent sure that his community custody conditions included a prohibition against smoking marijuana. CP 99; 1/16/15RP 10. CCO Nichols instructed defendant not to smoke marijuana, even with a prescription from a physician, until he received further clarification about his conditions from her (CCO Nichols). CP 99; 1/16/15RP 11. Defendant left a voicemail for CCO Nichols later that same day stating he had looked at his judgment and

sentence himself and was not able to find any conditions prohibiting him from smoking marijuana. CP 99.

On December 3, 2014, defendant reported to CCO Nichols' office as directed, at which time CCO Nichols showed defendant the conditions listed in appendix H of his judgment and sentence that explicitly prohibit purchasing, possessing, or consuming alcohol or marijuana. CP 99. CCO Nichols informed defendant that he would have a urinalysis test done. CP 100. Defendant subsequently informed CCO Nichols that he had smoked marijuana on December 1, 2014 and December 2, 2014. CP 100. Defendant stipulated having smoked marijuana on December 1, 2014 and December 2, 2014 during the hearing to determine noncompliance. 1/16/15RP 5.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY IMPOSED STATUTORILY AUTHORIZED COMMUNITY CUSTODY CONDITIONS TO WHICH DEFENDANT AGREED IN A LAWFUL PLEA AGREEMENT.

a. The trial court properly imposed community custody condition prohibiting defendant from purchasing, possessing, or consuming alcohol and marijuana because the prohibition was crime-related.

Whether a trial court had statutory authority to impose a community custody condition is reviewed de novo. ***State v. Johnson,*** 180 Wn. App. 318, 325, 327 P.3d 704 (2014). A community custody condition is beyond the court's authority to impose if it is not authorized by the

legislature. ***State v. Warnock,*** 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

The trial court may impose as part of any term of community custody, conditions that defendant "refrain from possessing or consuming alcohol; or comply with any crime-related prohibitions." RCW 9.94A.703(3)(e),(f). A prohibition of conduct must be directly related but it need not be causally related. ***State v. Zimmer,*** 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Whether a community custody prohibition is crime-related is reviewed for abuse of discretion. ***State v. Autrey,*** 136 Wn. App. 460, 466, 150 P.3d 580 (2006). A sentence will only be reversed if it is "'manifestly unreasonable' such that 'no reasonable man would take the view adopted by the trial court.'" ***State v. Riley,*** 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (citing ***State v. Blight,*** 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

A trial court which finds an offender eligible for a SSOSA may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). The report of that examination shall include:

> [r]ecommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

RCW 9.94A.670(3)(b)(v). As conditions of a suspended sentence under a SSOSA, a trial court must require the offender to comply with any conditions imposed by DOC and impose "[s]pecific prohibitions and affirmative conditions relating to the known precursor activities *or* behaviors identified in the proposed treatment plan . . ." RCW 9.94A.670(b),(d) (emphasis added).

Our state Supreme Court has held that a trial court had authority to prohibit a person convicted of computer trespass and possession of a stolen access device from possessing a computer, associating with other computer hackers, and communicating with computer bulletin boards because those were crime-related prohibitions. ***State v. Riley,*** 121 Wn.2d 22, 846 P.2d 1365 (1993). In ***Riley***, the defendant used his computer to obtain stolen access codes from a long distance telephone company. During the execution of a search warrant, an investigator found the stolen access codes, a computer program used to obtain access, handwritten notes detailing the defendant's hacking activity, and a how-to-hack manual. The facts did not show that the defendant contacted a computer bulletin board or that such a board had any relation to the crime. The defendant in that case argued that the prohibition against owning a computer was not crime-related because he could not commit the crime without a modem.

The Supreme Court in that case relied on the necessity of preventing the defendant from further criminal conduct in holding that it was reasonably crime-related to prohibit the defendant from

communicating with computer bulletin boards and from owning a computer because both were means of discouraging future criminal behavior. *Id.* at 37-8. The Court in that case stated the defendant's "freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order." *Id.* The Supreme Court did not state that the prohibitions needed to have induced or contributed to the crime in order to be crime-related but rather focused on helping prevent further criminal conduct for the duration of the defendant's sentence. *Id.* at 38. The prohibited behavior need not be a "precursor" to the crime; other behavior may be prohibited as reasonably necessary to prevent re-offense.

In this case, the community custody condition prohibiting defendant from possessing or consuming marijuana was reasonably necessary to prevent further, related criminal conduct. The pre-sentence investigation and the psychosexual evaluation of defendant both identify chemical dependency as a contributing factor to defendant's risk to re-offend. CP 84; CP 59. Defendant admitted to having a substance abuse problem and that he has smoked marijuana every day from the age of 15 years up to the time of his arrest in this case, which includes the dates of the crime. CP 58; CP 82. He attributes his pattern of criminal behavior to being under the influence. CP 59. It is worth noting that in the psychosexual evaluation with Comte, defendant admitted molesting six other children on at least nine other occasions while he was a juvenile. CP

53-54; CP 60. A number of the molestations occurred while he was smoking marijuana daily. CP 53; CP 58.

Defendant stated he was intoxicated when he had oral sex with his nephew. CP 85. He has also indicated that being intoxicated makes him do things he wouldn't normally do and acknowledged he has problems with drugs and alcohol. CP 82; CP 62. According to the pre-sentence investigation report, "A history of substance abuse is a risk factor for criminal behavior. Substance abuse erodes significant pro-social bonds that contribute to increased criminal risk. Substance misuse may facilitate or instigate criminal behavior." CP 81.

Not only does the defendant admit he has a substance abuse problem (CP 58) he further indicates in the psychosexual evaluation and treatment plan that he "considered prescription psychoactive medications to be more debilitating then [sic] illegal drugs." CP 59. It is clear from the psychosexual evaluation that drugs (including marijuana) and alcohol are closely associated with and factors in defendant's criminal behavior.

The psychosexual evaluation and treatment plan concluded that defendant is "in the moderate-to-high risk for further sexual offending and general criminality." CP 63. The evaluation and the pre-sentence investigation clearly prescribe abstinence from alcohol and marijuana as key to reducing defendant's risk to reoffend. CP 84; CP 64. As in ***Riley***, the prohibition of marijuana possession and consumption, with

consumption being the issue at hand, is crime-related as a means of helping prevent recidivism.

b. Defendant agreed to this lawful community custody condition as part of his valid plea agreement.

A plea agreement is a contract; therefore, issues concerning a plea agreement are questions of law which are reviewed de novo. ***State v. Bisson,*** 156 Wn.2d 507, 517, 130 P.3d 820 (2006). "Plea agreements are valid and must be upheld when entered into voluntarily and with an understanding of the consequences." ***State v. Hilyard***, 63 Wn. App. 413, 418, 819P.2d 809 (1991). The defendant, much like the State, must be bound by a valid plea agreement accepted by the trial court. ***In re Breedlove,*** 138 Wn.2d 298, 307, 979 P.2d 417 (1999) (citing ***Hilyard,*** 63 Wn. App. at 420). When a defendant is fully apprised of the consequences of a plea agreement which is entered into voluntarily, intelligently, and knowingly, the defendant must be held to his bargain unless one of four limited exceptions apply. *See* ***State v. Majors,*** 94 Wn.2d 354, 616 P.2d 1237 (1980). Exceptions to precluding a defendant from appealing a guilty plea are issues of the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made. *Id.* at 356.

In ***Majors***, the State Supreme Court held the defendant waived his right to appeal after he entered a guilty plea pursuant to a negotiated plea

agreement. The defendant in that case was initially charged with first-degree murder but pleaded guilty to a reduced charge of second-degree murder as part of the plea agreement. The Court in that case relied in part on the circumstances of the defendant's plea in finding no reason the defendant should not be held to the terms of the plea agreement. *Id.* at 357-58. In that case, (1) the defendant was represented by counsel at all stages of the plea bargaining; (2) the defendant freely admitted to the charges; and (3) the defendant understood the consequences as a result of his plea. *Id.* at 357-58.

In the present case, the defendant is arguing that the condition was not authorized based on an assessment of whether it is crime-related. He presents no arguments regarding the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made; therefore, he fails to show an exception to precluding an appeal of his guilty plea.

The factors presented in ***Majors*** are analogous to the circumstances in which defendant entered his guilty plea. Defendant in this case was represented by counsel at all stages of the plea bargaining as indicated by the signed statement on plea of guilty and during the plea hearing. CP 5-14; 6/13/14 & 8/15/14RP 4-6. Defendant freely admitted to the charges in his signed statement on plea of guilty (CP 5-14) and during the plea hearing. 6/13/14 & 8/15/14RP 8. Defendant was fully aware of the consequences, conditions, and recommendations of his plea as

indicated by his signature on his statement on plea of guilty (CP 13) and on the SSOSA recommendation from the state. CP 95-97. He affirmed his awareness of the consequences of his plea during the plea hearing. 6/13/14 & 8/15/14RP 5-9. Defendant's plea was valid, derived from a negotiated plea agreement from which defendant benefited. Defendant bargained for a SSOSA suspended sentence and the accompanying conditions of a SSOSA. He was fully aware of those conditions upon which a SSOSA suspended sentence was contingent. CP 95-97. He cannot now dispute his lawful plea.

2. THE TRIAL COURT PROPERLY IMPOSED COMMUNITY CUSTODY CONDITIONS THAT WERE EXPLICITLY CLEAR AND WHICH PROVIDED ADEQUATE NOTICE OF THE PROSCRIBED BEHAVIOR.

The imposition of community custody conditions is reviewed for abuse of discretion and will only be reversed if the condition is manifestly unreasonable or based on untenable grounds. ***State v. Johnson,*** 184 Wn. App. 777, 779, 340 P.3d 230 (2014) (citing ***State v. Valencia,*** 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010)). "A condition is manifestly unreasonable if it is beyond the court's authority to impose." ***Johnson,*** 184 Wn. App. at 779 (citing ***State v. Jones,*** 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). The imposition of an unconstitutional community

custody condition is manifestly unreasonable. ***State v. Valencia,*** 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

"If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." ***State v. Bahl***, 164 Wn.2d 739, 754, 193 P.3d 678 (2008) (citing ***City of Spokane v. Douglass***, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

It is within the trial court's authority to impose community custody conditions that prohibit otherwise lawful activity such as the consumption of alcohol or even the consumption of legally prescribed marijuana. ***State v. Kolesnik***, 146 Wn. App. 790, 808, 192 P.3d 937 (2008) (condition prohibiting defendant from possessing legal items such as scales, pagers, hand held electronic scheduling and data storage devices was a lawful, crime-related prohibition); *see also* ***State v. Jones***, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (affirming the trial court's order prohibiting defendant from consuming alcohol).

Our state Supreme Court has held that community custody conditions were unconstitutionally vague when the wording of the conditions does not specify which materials are prohibited and when the condition improperly delegates "unfettered authority" to the community corrections officer to define the materials. ***Bahl***, 164 Wn.2d at 758, 761. The Supreme Court in that case also held that a condition was not unconstitutionally vague when all of the challenged terms of the condition

taken in context and considered together are sufficiently clear. *Id.* at 760. In ***Bahl***, the defendant was convicted of second degree rape and first degree burglary.

The trial court in that case imposed a life term of community custody on the rape charge which included conditions prohibiting him from: (1) possessing or accessing pornographic materials, (2) possessing or controlling stimulus material for his particular deviancy, and (3) frequenting establishments whose primary business pertains to sexually explicit or erotic material. The Court relied in part on the plain language of the condition taken in context in which it was used when it held that the condition prohibiting the defendant from frequenting establishments whose primary business pertains to sexually explicit or erotic material was not unconstitutionally vague. *Id.* at 760. The dictionary definitions of "establishments," "sexually explicit," and "erotic," when read in the context in which they were used in that case, provide notice to the defendant of the prohibited behavior without further research on the part of the defendant.

However, the Supreme Court found that conditions implicating a First Amendment right, such as the condition prohibiting the defendant from possessing pornographic material, "must be clear and must be reasonably necessary to accomplish essential state needs and public order." *Id.* at 757-58. In holding that the conditions regarding pornographic material and stimulus material were unconstitutionally

vague, the Supreme Court relied on the ambiguity of the wording of the condition. *Id.* at 758,761. There are a wide range of materials that can be defined as pornographic and an even wider range of materials that may or may not be considered stimulus for the defendant's particular deviancy. The Supreme Court found the wording left the conditions open to interpretation by the corrections officers and did not provide "ascertainable standards for enforcement." *Id.* at 758, 761.

In this case, the community custody conditions use wording when, taken on its face and in the context in which it was used provided ascertainable standards for enforcement and sufficient notice of the prohibited behavior. Persons of ordinary intelligence would understand "[d]o not purchase, possess, or consume alcohol or marijuana," (CP 35) as proscribing abstaining from consuming alcohol or marijuana. This condition is listed under the heading, "Defendant shall comply with the following other conditions during the term of community placement / custody," on appendix H of the judgment and sentence. CP 35. The language of the prohibition is explicit and repeated. CP 35; CP 59; CP 64; 6/13/14 & 8/15/14RP 32-33. Unlike the conditions in ***Bahl*** that were ruled unconstitutionally vague, there is no need for the community corrections officer to define "marijuana" or "alcohol," nor is there a First Amendment right implication in the prohibition of the consumption of marijuana. The condition specifies exactly what is prohibited in this case, the consumption of marijuana.

3. THE TRIAL COURT PROPERLY REVOKED DEFENDANT'S SSOSA SUSPENDED SENTENCE.

A trial court's decision to revoke a SSOSA suspended sentence rests within the discretion of the trial court and "will not be disturbed absent an abuse of discretion." ***State v. McCormick***, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). "A court may revoke an offender's SSOSA at any time if it is reasonably satisfied the offender violated a condition of the suspended sentence." ***State v. Partee,*** 141 Wn. App. 355, 361, 170 P.3d 60 (2007) (citing ***State v. Rohrich,*** 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). State and Federal due process laws do not require a showing that the defendant willfully violated the condition of a suspended sentence. ***McCormick***, 166 Wn.2d at 706.

The trial court in this case was reluctant to grant the privilege of a SSOSA suspended sentence given defendant's level of risk to reoffend. The trial court at sentencing stated:

> I'm concerned about the level of your ability to accept responsibility for the fact that you can't engage in criminal activity and you cannot consume alcohol or drugs at all. . . . It's a huge risk for this court. . . . I want the record to reflect that I have some serious concerns. . . . [T]he community corrections officer, the person who must supervise you is not convinced that you will be able to be successful.

6/13/14 & 8/15/14RP 28-29. The trial court clearly warned defendant that a single violation of any term of the court's order would result in the revocation of the SSOSA suspended sentence. "You get one shot, one opportunity to follow every rule, every condition by the community corrections officer, by the treatment provider and you have all of the conditions that I am going to go over with you." *Id.* at 31.

In this case, defendant admits he smoked marijuana on December 1, 2014 and on December 2, 2014. CP 100; Brief of App. 5. As demonstrated in the previous sections of this brief, prohibition of consumption of marijuana was a lawful community custody condition to which defendant agreed in exchange for a SSOSA suspended sentence. Defendant stipulated to the violation (1/16/15RP 5), providing the court sufficient evidence of the violation; therefore, the trial court did not abuse its discretion in revoking defendant's SSOSA suspended sentence.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the trial court's revocation of defendant's suspended sentence.

DATED: September 21, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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