SUPREME COURT NO. 96986-2

NO. 35613-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JULIAN GARCIA,

Petitioner.

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

The Honorable John W. Lohrmann, Judge
The Honorable Brandon Johnson, Judge Pro Tem

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Julian Garcia asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Julian Garcia, filed October 2, 2018 ("Opinion" or "Op."), attached as this petition's Appendix A. Garcia's October 9 amended motion for reconsideration was denied on October 25, 2018. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. A community custody condition prohibiting Garcia from contact with probationers and parolees is not crime-related, nor is it narrowly tailored to protect his constitutional rights to free speech and association. Should the condition, therefore, be stricken?

2. This issue presents a significant conflict between this Court and the Courts of Appeals. Even if the issue becomes moot, should this Court consider the issue, as it is a matter of continuing and substantial public interest and is likely to recur?

3. Should this Court remand so that the $200 criminal filing fee may be stricken under this Court's decision in State v. Ramirez, ___

Wn.2d ___, 426 P.3d 714 (2018), which was issued shortly before the Court of Appeals issued its opinion in this case?

D. STATEMENT OF THE CASE

1. Charges and plea

The State charged Julian Garcia with two counts of second degree assault – domestic violence and one count of interfering with the reporting of domestic violence. CP 4-6. The charges arose from an altercation occurring between Garcia, his mother, and his brother, with whom Garcia lived at the time of the incident. CP 1-3. In other words, the altercation was alleged to involve only family members, and to have taken place entirely in the home.

Garcia ultimately pleaded guilty to one count of third degree assault – domestic violence (mother) and one count of fourth degree assault – domestic violence (brother). CP 7-20; see also RCW 9A.36.031(1)(d) (third degree assault); RCW 9A.36.041 (fourth degree assault, a gross misdemeanor); RCW 10.99.020 (defining crimes of domestic violence as certain crimes when committed against household members).

2. Sentencing

A sentencing hearing occurred on September 18, 2017. Although a first-time offender waiver (FTOW) had been discussed, 3RP 15, there is

no indication that the trial court in fact imposed such a sentence. CP 21-33 (judgment and sentence).

The court sentenced Garcia to 37 days of incarceration on each charge, to run concurrently. CP 25. Based on an offender score of zero, this reflects a standard range sentence for count 1, third degree assault.[1] CP 21-22. The court also sentenced Garcia to 12 months of community custody on count 1. CP 25; see RCW 9.94A.702(1)(c) (for offenders sentenced to one year or less confinement, court may impose up to 12 months of community custody for "crimes against persons" under RCW 9.94A.411(2)).

As a condition of community custody, the court also ordered that Garcia "not associate with any individuals who are on probation or parole or any person his probation officer or the court specifically restricts him from associating with, namely[.]" CP 29 (Condition 7). No name is specified. CP 29.

The trial court also ordered that Garcia to pay $800 in legal financial obligations including the $500 crime victim assessment, a $100 DNA database fee, and a $200 criminal filing fee. CP 23. However, the

[1] In its answer to Garcia's motion for reconsideration, the State argued for the first time that Garcia's offender score was one, and that therefore he must have received a FTOW sentence because he was only sentenced to 37 days of confinement. State's Answer at 23. However, the State did not appeal the judgment and sentence calculating Garcia's offender score as zero. CP 22.

trial court also found to be Garcia indigent. CP 53-54; see also CP 52 (motion and declaration for order of indigency setting forth Garcia's lack of income).

3. Appeal and motion for reconsideration raising, in part, *Ramirez* issue.

Garcia appealed two separate community custody conditions, including Condition 7 regarding probationers and parolees. CP 36.

In an October 2, 2018 opinion, the Court of Appeals rejected Garcia's challenge to this condition. Op. at 2-7; see also State v. Julian Garcia, noted at ___ Wn. App. 2d ____, 2018 WL 4771124 at *1-3 (2018). But it agreed that a condition requiring Garcia to undergo a chemical dependency assessment should be stricken. Op. at 7-8; Garcia, 2018 WL 4771124 at *3.

Meanwhile, on September 20, 2018 this Court issued a decision in Ramirez, 426 P.3d 714. There, this Court held that House Bill 1783 amendments to several facets of the state's legal financial obligation regime applied prospectively to cases not yet final on appeal. Ramirez, 426 P.3d at 722-23 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)).

On October 9, Garcia sought reconsideration of the Court of Appeals' decision as to Condition 7. In that motion, he also sought relief

under Ramirez, asking that the now-discretionary $200 filing be stricken based on his indigency. Amended Motion for Reconsideration at 12 (citing, inter alia, RCW 36.18.020(2)(h)).

The Court of Appeals, however, denied the motion, including the relief requested under Ramirez. App. B.

4. Relief requested

Garcia now asks that this Court grant review, reverse the Court of Appeals as to the condition prohibiting association with probationers and parolees, and grant relief under Ramirez.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION ILLUSTRATES A SIGNIFICANT CONFLICT BETWEEN THE COURTS OF APPEALS AND THIS COURT. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (4) TO ADDRESS THIS CONFLICT AND CLARIFY THE LAW.

As Garcia argued below, Condition 7, ordering that he "not associate with any individuals who are on probation or parole" is not crime-related, and it is also unconstitutional. CP 29. Several cases from the Court of Appeals, including one specifically relied on by the court below, purport to authorize such a condition notwithstanding crime-relatedness. These cases are, however, at odds with controlling authority from this Court. This Court should grant review to provide much-needed

clarification. RAP 13.4(b)(1). The case also involves a community custody condition with the potential to affect probationers throughout the state. Review is therefore appropriate under RAP 13.4(b)(4), as well.

Even if the case becomes moot, moreover, this Court should nonetheless accept the case to resolve this issue, as it involves a matter of continuing and substantial public interest.

a. Standard of review and applicable law

Erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

Current RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. As a condition of community custody, the trial court may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). A court may impose other "crime-related prohibitions" beyond those specifically listed. RCW 9.94A.703(3)(f).

Under RCW 9.94A.505(9), the trial court may also impose "crime-related prohibitions" as a condition of sentence. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). Such prohibitions may include "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" State v. Nguyen, ___ Wn.2d ___, 425 P.3d 847, 853 (2018) (quoting State v. Irwin, 191 Wn. App. 644, 657, 364 P.3d 830 (2015). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Whether the trial court has statutory authority to impose specific community custody conditions is a question of law that this Court reviews

de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The imposition of crime-related prohibitions is, however, generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P. 3d 686 (2010).

But appellate courts review more carefully conditions that interfere with a fundamental constitutional right. Id. Because prohibiting contact with certain individuals implicates a person's constitutional rights to free speech and freedom of association, "Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." Warren, 165 Wn.2d at 33. A sentencing court necessarily abuses its discretion by violating an accused's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

b. The condition prohibiting association with probationers and parolees is not crime-related, and the Court of Appeals' decision conflicts with authority from this Court.

Condition 7, prohibiting Garcia from associating with individuals subject to probation or parole, must be stricken because it is not crime-related. Several Court of Appeals cases, including one specifically relied on by the court below, purport to authorize such a prohibition, notwithstanding its crime-relatedness. These cases are, however, at odds

with authority from this Court, State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other grounds by Sanchez Valencia, 169 Wn.2d 782. This Court should grant review to provide much-needed clarification.

First, in 1992, Division One held that a restriction on an offender's freedom of association need not be crime-related. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). There, a defendant convicted of possession of cocaine with intent to deliver challenged a condition forbidding association with individuals who use, possess, or deal controlled substances. Id. at 449, 454.

Division One rejected the argument, stating first that

> [w]e . . . reject Llamas's assertion that the condition is invalid because it is not crime-related. There is no statutory requirement that a special community placement condition imposed under [former] RCW 9.94A.120(8)(c) [, allowing condition that "[t]he offender . . . not have direct or indirect contact with the victim of the crime or a specified class of individuals,"] be crime-related.

Llamas-Villa, 67 Wn. App. at 456 (emphasis added). The statutory language cited by the Court is the language now found in RCW 9.94A.703(3)(b), set forth above.[2]

[2] Curiously, in upholding the condition, the Court nonetheless went on to explain that the prohibition was, in fact, crime-related. Llamas-Villa, 67 Wn. App. at 456 (holding prohibition valid because associating with such individuals was "conduct intrinsic to the crime for which Llamas was convicted").

Llamas-Villa, however, predated this Supreme Court's decision in Riles, 135 Wn.2d at 347. In Riles, petitioner Gholston was convicted of raping a 19-year-old woman. But the trial court prohibited him from having unauthorized contact with minors. Id. at 349.

Reversing the Court of Appeals, which had itself relied on Llamas-Villa,[3] this Court held the statutory authority to prohibit contact with a specified class of individuals did not justify prohibiting Gholston from contacting minors, where the victim was an adult. Riles, 135 Wn.2d at 352-53. This Court noted that "[former] RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a 'specified class of individuals.' The 'specified class of individuals' seems in context to require some relationship to the crime." Riles, 135 Wn.2d at 350 (emphasis added).

The statutory language cited by Riles is the language now found in RCW 9.94A.703(3)(b), and the same language at issue in Llamas-Villa.

Following Riles, a prohibition on contact with a specified class of individuals must relate to the crime in question. And here, the record reveals no connection between (1) the circumstances of the underlying crimes and (2) association with probationers or parolees. Again, this case involved a plea, so there was no trial. And according to the probable

[3] State v. Gholston, noted at 86 Wn. App. 1028, 1997 WL 288938, at *4 (1997).

cause statement, the charges resulted from a family argument that turned violent. CP 1-3. The record contains no hint that any association with probationers or parolees contributed to the altercation. Under Riles, Garcia should have prevailed on appeal.

But, notwithstanding Riles, Llamas-Villa continues to be cited by courts of this state for the proposition that that there is no requirement that a community custody condition involving a specified class of individuals be crime-related.

For example, Division Three of the Court of Appeals (the lower court in this case) cited Llamas-Villa with approval in State v. Bobenhouse, 143 Wn. App. 315, 332, 177 P.3d 209, 217 (2008) ("There is no requirement that a condition imposed under this statute be crime related."), aff'd, 166 Wn.2d 881, 214 P.3d 907 (2009).[4] Yet, as shown, Llamas-Villa is no longer good law.

Second, the Court of Appeals relied its own, and likewise flawed, decision in State v. Acevedo, 159 Wn. App. 221, 248 P.3d 526 (2010) to uphold the challenged condition in this case. Op. at 6. In the present case, after discussing Riles, the Court of Appeals stated:

> With this understanding of Riles in mind, we finally return to Mr. Garcia's case. He contends that the prohibition on

[4] This Court, while affirming, did not address the proposition for which Llamas-Villa was cited. Bobenhouse, 166 Wn.2d 881.

> association with anyone on "probation or parole"[] is not a crime-related condition and is therefore invalid despite his failure to challenge the condition in the trial court. *The short answer is that we previously rejected this argument in another case where an offender also was sentenced under the first offender waiver.* [Acevedo, 159 Wn. App. at 233.] Mr. Garcia has not provided us any reason to overrule Acevedo.

Op. at 6 (emphasis added). The passage continues, "This prohibition is a time-tested standard that is recommended for use in the federal courts and long has been considered constitutional." Op. at 6-7 (citing United States v. King, 608 F.3d 1122, 1128-1129 (9th Cir. 2010); United States v. Napulou, 593 F.3d 1041 (9th Cir. 2010)).[5]

Although Acevedo does not cite Llamas-Villa, Acevedo seems to take the same premise for granted. In Acevedo, a condition prohibited Acevedo from "associat[ing] with any individuals who are on probation or parole." Acevedo, 159 Wn. App. at 233. Division Three upheld the condition because a 2006 version of the FTOW statute allowed conditions to be imposed under former RCW 9.94A.700(5)(b), which allowed the trial court to prohibit individuals on community custody from contacting a specified class of individuals. Acevedo, 159 Wn. App. at 233.

Again, this is the same language now found in RCW 9.94A.703(3)(b), and the same language at issue in Llamas-Villa.

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[5] The Court's erroneous assertion that federal cases support its position is addressed in section "d" below.

As stated, here, the Court of Appeals explicitly relied on Acevedo over Riles because both cases involved a FTOW sentence. But the reason this would permit Acevedo, a Court of Appeals case, to control over Riles, a Supreme Court case, is opaque.[6]

Strangely, the Court Appeals also frames the Riles language as a "limiting construction" that is part of a First Amendment challenge. Op. at 6. But Garcia raised a First Amendment challenge below[7] and does so now. Thus, the Court of Appeals' attempt to distinguish Riles fails. Riles controls. Yet, for no reason that Mr. Garcia can discern, the Court appeared to select its own decision over authority from this Court.

c. As argued below, but ignored by the Court of Appeals, the condition is also unconstitutional.

Under Riles, the condition must be stricken as unrelated to the circumstances of the crime. But, as argued below, the condition also

[6] As stated, Garcia disputes the proposition that he received a FTOW sentence. While it was considered by the trial court, there is nothing in the record to indicate such a sentence was actually imposed. CP 21-33 (written judgment and sentence, containing no indication that FTOW sentence was imposed).

But even if even if Garcia did receive such a sentence, for the reasons explained, Acevedo does not control over Riles. Under the FTOW statute, the trial court is—with a few inapplicable exceptions—only authorized to impose conditions under RCW 9.94A.703. See RCW 9.94A.650(4) ("As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work."); see also Op. at 5 n. 4 (acknowledging this fact).

[7] Brief of Appellant at 10-12; Reply Brief of Appellant at 5-6.

violates the First Amendment. The Court of Appeals ignored this argument in its rush to sidestep Riles. The trial court's order prohibiting Garcia from associating with any probationers and parolees is so broad as to bear no reasonable relation to the goal of promoting safety and public order. CP 29. The condition is, therefore, unconstitutional, and must be stricken for this reason as well.

While the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, appellate courts review more carefully conditions that interfere with a fundamental constitutional right. Rainey, 168 Wn.2d at 374; Riles, 135 Wn.2d at 347. Crime-related prohibitions affecting fundamental rights must be narrowly drawn. Warren, 165 Wn.2d at 34; see also United States v. Caravayo, 809 F.3d 269, 274-76 (5th Cir. 2015) (under the federal sentencing scheme, to survive a First Amendment challenge, special conditions of supervised release "must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course").

Here, the crimes occurred in the home. CP 1-3. The trial court's order prohibiting Garcia from associating with any probationer or parolee bears no reasonable relation to the goal of promoting safety and public order. There is, moreover, no indication that it was sensitively imposed. There is no discussion in the record of the condition or its possible

connection with the crimes. The condition is, therefore, unconstitutional, and it must be stricken for this reason as well. Bahl, 164 Wn.2d at 757-58.

d. The Court of Appeals' decision also misconstrues federal law.

The Court of Appeals' opinion also appears to misapprehend the status of related prohibitions in the federal system. As noted above, the Court remarked that such a prohibition is a "time-tested standard that is recommended for use in the federal courts and has long been considered constitutional." Op. at 6-7.

But, as pointed out in Garcia's reply brief, such prohibitions in the federal system require a high level of crime-relatedness. Under the federal sentencing scheme, for example, to survive a First Amendment challenge, special conditions of supervised release "must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course." Caravayo, 809 F.3d at 274-76.

Indeed—as one of the cases cited by the Court of Appeals makes clear—the government's power to impose such a condition is carefully circumscribed by both the constitution and applicable statutes:

> In determining the conditions to be imposed, . . . the court must consider certain factors set forth in 18 U.S.C. § 3553(a), including "the nature and circumstances of the offense and the history and characteristics of the defendant" and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to

> provide just punishment, to afford adequate deterrence, to protect the public, and to encourage rehabilitation.

United States v. Napulou, 593 F.3d 1041, 1044 (9th Cir. 2010).

As the Napulou case also states, the federal district court's discretion is further limited by 18 U.S.C. § 3583(d), which provides that any condition must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a). Napulou, 593 F.2d at 1044.

Further, the government bears the burden of demonstrating that these statutory standards are met. Id. at 1045 (citing United States v. Weber, 451 F.3d 552, 558 (9th Cir.2006)).

As these passages indicate, federal law provides no support for the broad language contained in the Court of Appeals' opinion. Op. at 6-7. Rather, the challenged condition would not withstand scrutiny in the federal system. Here, the trial court appears to have simply imposed a "boilerplate" condition. But, again, the crime occurred among family members in the home. CP 1-3. Thus, it is unclear how the condition prohibiting contact with probationers and parolees relates to the crime of conviction. It is equally unclear how it would prevent future crimes or protect the public.

Such a condition is, moreover, likely to be counterproductive, in that may inhibit the formation of valuable relationships in, for example, a supervised individual's struggle to overcome addiction. See Reply Brief at 4.[8] And, as recent high-profile cases demonstrate,[9] such conditions, if not sensitively imposed, may serve as blunt tools more effective at trapping individuals in the system than protecting the public.

e. Even if this case becomes moot, this Court should still grant review and reverse the Court of Appeals.

Should the case become moot, however, this Court should nonetheless grant review. The case raises "'matters of continuing and substantial public interest,'" In re Det. of A.S., 91 Wn. App. 146, 154-55,

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[8] As Garcia argued below:

> [The] State appears to believe that Garcia would benefit from drug treatment. [Brief of Respondent] at 10-12. But probationers and parolees are likely to be among individuals participating in drug treatment in any given setting. As written, the prohibition would allow Garcia's community custody officer find Garcia in violation of his community custody conditions for attending, for example, a Narcotics Anonymous meeting, or for seeking support from a mentor with a criminal history. Perhaps the State would argue this is not the kind of association it wishes to curtail. If that is so, however, the existing condition does not say so. As written, Garcia is subject to the whims of his community corrections officer about whom he may and may not associate with, to Garcia's detriment.

Reply Brief at 4 (footnote omitted).

[9] P.R. Lockhart, Meek Mill's decade-long probation shows how broken America's justice system is (available at http://www.vox.com/identities/2018/6/28/17487850/meek-mill-genece-brinkley-retrial-petition-probation-reform-criminal-justice) (last accessed Nov. 16, 2018).

955 P.2d 836 (1998) (quoting Dunner v. McLaughlin, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)), and should therefore be considered.

The criteria to be weighed in determining whether a sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination that will provide future guidance to public officers; and (3) the likelihood that the question will recur. State v. Beaver, 184 Wn.2d 321, 330-31, 358 P.3d 385, 390 (2015).

Here, this case involves a challenge to community custody condition that is likely to recur in similar, if not identical, form.[10] All three of the above criteria are satisfied. Even if the matter becomes moot, this Court should exercise discretion to hear the matter. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009).

2. THIS COURT SHOULD ORDER THAT THE $200 CRIMINAL FILING FEE BE STRICKEN.

For the reasons stated, if this Court grants review, it should also order that the $200 criminal filing fee be stricken consistent with Ramirez.

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[10] As the Court of Appeals' opinion notes, the terms "probationers" and "parolees" are not terms currently used under the Sentencing Reform Act. But the condition might affect Garcia's association with an individual from another state. Op. at 6 n. 5. And, specific to this case, it is not inconceivable that a creative community corrections officer would interpret the terms broadly.

More broadly, however, any opinion issued by this Court could affect a related condition prohibiting contact with those on community custody.

Here, the record indicates Garcia is indigent under RCW 10.101.010(3) based on his income. CP 51-52. And House Bill 1783, including RCW 36.18.020(2)(h),[11] applies prospectively to this case. Ramirez, 426 P.3d at 722-23. Consistent with Ramirez, this Court should remand for the $200 filing fee to be stricken based on indigency. CP 32.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and remand for resentencing. This Court should also remand for the $200 criminal filing fee to be stricken.

DATED this 26th day of November, 2018.

Respectfully submitted,

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Attorneys for Petitioner

[11] RCW 36.18.020(2)(h) now provides that

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

APPENDIX A

FILED
OCTOBER 2, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JULIAN JESUS GARCIA, Appellant.	)	No. 35613-2-III UNPUBLISHED OPINION

KORSMO, J. — Julian Jesus Garcia appeals from two conditions of his judgment and sentence. We agree with one of his arguments and reverse the requirement that he obtain a chemical dependency assessment. We otherwise affirm.

FACTS

Mr. Garcia entered guilty pleas to one count of third degree assault and one count of fourth degree assault in accord with the procedures set forth in *Alford v. North Carolina*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Both offenses were denominated as domestic violence crimes.

The court selected the first offender waiver of presumptive sentence and imposed a term of 37 days in jail, with credit for 37 days served to that point. The court also imposed a 12 month term of community supervision that included two conditions that are at issue here. First, the court directed that Mr. Garcia "not associate with any individuals who are on probation or parole." Clerk's Papers at 29. The defense did not object to this provision.

Second, the court directed that Mr. Garcia be assessed for chemical dependency and comply with all recommendations. Mr. Garcia personally objected to this requirement, telling the court that drugs had no role in the case at all and noting that the police report said the same thing. The prosecutor responded by advising the court that another case against Mr. Garcia involving methamphetamine had recently been dismissed. The trial court did not address this dispute when it selected the assessment condition.

Mr. Garcia appealed to this court. A panel considered the case without hearing argument.

ANALYSIS

This appeal presents challenges to the two noted sentence conditions. We will consider the challenges together.

We turn initially to the governing statutes. In addition to legislatively specified conditions, the court has authority to impose conditions of community supervision that are related to the crimes for which the defendant was convicted. *State v. Riley*, 121

Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Appellate courts will review crime-related prohibitions for abuse of the trial court's discretion. *Id.* at 37. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). However, any condition that is beyond the trial court's authority to impose also constitutes an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-792, 239 P.3d 1059 (2010).

Primarily at issue is RCW 9.94A.703(3). It provides:

> **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:
> (a) Remain within, or outside of, a specified geographical boundary;
> (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
> (c) Participate in crime-related treatment or counseling services;
> (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
> (e) Refrain from possessing or consuming alcohol; or
> (f) Comply with any crime-related prohibitions.

This statute was made relevant to Mr. Garcia's sentence by the use of the first offender sentencing alternative, RCW 9.94A.650. In addition to imposing some sentence conditions of its own, the first offender alternative incorporates the discretionary conditions of RCW 9.94A.703. *See* RCW 9.94A.650(4).

The scope of these discretionary conditions was at issue in the case on which Mr. Garcia places primary reliance, *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998). *Riles* was a consolidation of the appeals of Mr. Riles and Mr. Gholston; Riles had been

convicted of raping a young child, while Mr. Gholston was convicted of raping a young adult. *Id.* at 332-338. In both cases, the offenders were prohibited from having contact with children. Known at that point as "special conditions," the discretionary conditions were found in former RCW 9.94A.120(9)(c) (1996). *See Riles*, 135 Wn.2d at 335 (quoting statute).[1] Five of the six special conditions in existence then are found, verbatim, in current RCW 9.94A.703(3).[2]

The *Riles* court had no difficulty in upholding the condition that Mr. Riles not congregate where children regularly gathered. The restriction on Mr. Gholston did not fare as well. Looking at the special conditions of former §120(9)(c), the court commented that while the language of those conditions did not expressly require that they be crime-related, only the "no alcohol" provision was not crime-related. 135 Wn.2d at 349-350. Thus, the provision limiting contact with specific classes of individuals "seems in context to require some relationship to the crime." *Id.* at 350. The court determined that it was "not reasonable" "to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime." *Id.*

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[1] The conditions existing at the time of *Riles* were repealed and reenacted in a new statute, RCW 9.94A.700(5), by Laws of 2000, ch. 28, § 22. Subsequently, those conditions were repealed in 2008 and reenacted in their current form in another new statute, RCW 9.94A.703, by Laws of 2008, ch. 231, § 9. At that time, current condition (3)(d) was enacted for the first time and former condition (3)(vi), addressing sex offenders, was removed.

[2] Current conditions (a), (b), (c), (e), and (f) were found in subsections (i), (ii), (iii), (iv), and (v) of former RCW 9.94A.120(9)(c).

Based on this ruling, Mr. Garcia argues that both the no contact and treatment conditions are invalid because they are not crime-related prohibitions. In contrast, the State contends that the no contact condition need not be crime-related under the plain language of the statute. Although appellant's briefing demonstrates that our case law is inconsistent[3] on that point, *Riles* clearly applied the crime-related prohibition limitation to the no contact "special condition," a provision that lives on in RCW 9.94A.703(3)(b). In light of that treatment by *Riles*, the State's argument is untenable.[4]

Riles specifies why the no contact provision must be crime-related. Critically, the *Riles* court expressed its reasoning after reaching the conclusion that it was unreasonable

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[3] For several reasons, our inconsistency is understandable. First, the *Riles* observation that only the ban on alcohol use is not crime related is incorrect—the geographic limitations that can be imposed on an offender are for the purpose of allowing supervision of the offender and are not crime-related. *See* DAVID BOERNER, SENTENCING IN WASHINGTON: COMMUNITY SUPERVISION § 4.4, at 4-4 (1985). Second, the addition in 2008 of RCW 9.94A.703(d) authorized courts to require rehabilitative treatment when necessitated by the circumstances of the offense, the need to prevent re-offense, or the safety of the community. The latter two grounds are not limited to crime-related conditions. Finally, the statute is not a model of drafting clarity. In light of current subsection (f) [former subsection (v)] expressly authorizing the imposition of crime-related prohibitions, it is redundant to specify other conditions that also must be crime-related. It would have been simpler and clearer just to have used subsection (f) in conjunction with any non-crime-related conditions the legislature desired to authorize instead of setting forth specific additional crime-related prohibitions.

[4] Likely due to RCW 9.94A.650(4), the State does not argue that the first offender waiver itself independently authorizes these challenged conditions. We therefore express no opinion on this point, but simply note that the original understanding of the first offender waiver was to allow probationary conditions for certain offenders who are undergoing treatment. *See* BOERNER, *supra*, § 4.5, at 4-6.

to prohibit Mr. Gholston from associating with children. Noting that any restriction on the freedom of association must be "necessary to accomplish the essential needs of the state and the public order," the court concluded that there was no showing that children needed protection from Mr. Gholston. 135 Wn.2d at 350. Because the order was not essential in Mr. Gholston's case, it was not justified, although a similar order in Mr. Riles's case did not constitute an infringement of his constitutional rights. *Id.* We believe that *Riles* placed a limiting construction on the no contact provision in order to avoid any potential infringement of Mr. Gholston's First Amendment rights.

With this understanding of *Riles* in mind, we finally return to Mr. Garcia's case. He contends that the prohibition on association with anyone on "probation or parole"[5] is not a crime-related condition and is therefore invalid despite his failure to challenge the condition in the trial court. The short answer is that we previously rejected this argument in another case where an offender also was sentenced under the first offender waiver. *State v. Acevedo*, 159 Wn. App. 221, 233, 248 P.3d 526 (2010). Mr. Garcia has not provided us any reason to overrule *Acevedo*. This prohibition is a time-tested standard

[5] This archaic language arguably does not extend to those on community supervision pursuant to modern felony convictions. Washington abolished probationary sentences for felony cases in 1984. *See* RCW 9.94A.575. Those sentences were imposed according to the authorization of RCW 9.92.060, et seq., and RCW 9.95.200 et seq. Presumably, only those sentenced on felony convictions entered in other states or in Washington before 1984, or those who have received probationary sentences for misdemeanor offenses in this state, might be subject to "probation or parole" at this time. The addition of the words "community supervision" would clarify the trial court's intent.

that is recommended for use in the federal courts and long has been considered constitutional. *E.g.*, *United States v. King*, 608 F.3d 1122, 1128-1129 (9th Cir. 2010); *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010).

We believe that the trial court can choose to impose this crime-related condition. For a first time offender like Mr. Garcia, a limit on association with other recent offenders currently on probation or parole would serve to improve his chances of avoiding a rapid return to criminal behavior. For all offenders, we also believe this limitation on association would serve to improve the offender's odds of not re-offending, furthering one of the goals of RCW 9.94A.703(3)(d). Accordingly, the trial court did not err in determining that Mr. Garcia should limit his association with those on probation or parole.[6]

Mr. Garcia also argues that the requirement that he undergo an assessment and possible substance abuse treatment is not crime-related because this offense was not the product of substance abuse. For a slightly different reason, we agree that the provision should be stricken.

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[6] If the limitation would have genuinely impacted Mr. Garcia's right of association, we presume he would have alerted the trial court to the specific problem so that a more nuanced provision could be ordered. For instance, an offender whose spouse was on probation or had a felony record would have a strong argument that the spouse should be exempted from the prohibition.

At sentencing, a "trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). This "real facts doctrine" has existed from the beginning of the Sentencing Reform Act of 1981. *See* former RCW 9.94A.370 (1984).

Here, the State did not prove that Mr. Garcia was involved with any controlled substances during this offense or at an earlier time. He expressly disputed that drugs were involved in the assault case and pointed to the police reports as supporting evidence. In contrast, all the prosecutor could point to was the fact that a previous methamphetamine case had been *dismissed.*

The parties were free to enter a plea agreement that included an assessment and/or drug treatment as a condition of the first offender sentence. They did not. Instead, the defendant disputed the existence of a drug problem and the State provided no evidence to the contrary. On this record, no facts about the offense or about Mr. Garcia supported the need for any assessment. There was no basis for finding that one was appropriate under either RCW 9.94A.703(3)(c) or (d).

There being no evidence in the record to support the condition, it must be stricken. Accordingly, we affirm the no contact provision and remand to strike the assessment condition.

No. 35613-2-III
State v. Garcia

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

APPENDIX B

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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JULIAN JESUS GARCIA, Appellant.	)	No. 35613-2-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of October 2, 2018 is hereby denied.

PANEL: Korsmo, Lawrence-Berrey, Siddoway

FOR THE COURT:

Lawrence-Berrey C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

November 26, 2018 - 3:11 PM

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