68349-7

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COA NO. 68349-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHANNON TRAYLOR

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

OPENING BRIEF OF APPELLANT

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1. The community custody condition requiring appellant to "not frequent establishments where alcohol is the chief commodity for sale" violates due process because it is unconstitutionally vague. CP 17.

2. The community custody condition prohibiting possession of "drug paraphernalia" violates due process because it is unconstitutionally vague. CP 17.

Issue Pertaining To Assignments Of Error

Are the community custody conditions (1) requiring appellant to "not frequent establishments where alcohol is the chief commodity for sale" and (2) prohibiting possession of "drug paraphernalia" unconstitutionally vague because they does not provide fair warning of proscribed conduct and expose appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

The State charged Shannon Traylor by amended information with second degree burglary. CP 101. Following a jury verdict of guilty, the court sentenced Traylor to a prison-based Drug Offender Sentencing Alternative consisting of 29.75 months confinement and 29.75 months of community custody. CP 10, 58. The deputy prosecutor recommended a list of self-described "normal conditions" of community custody, which the trial

court adopted in the judgment and sentence. CP 11, 17; 3RP[1] 314. These conditions included (1) "do not frequent establishments where alcohol is the chief commodity for sale" and (2) "[d]o not possess drug paraphernalia." CP 17. This appeals follows. CP 4-6.

C. ARGUMENT

1. THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM ENTERING "ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF COMMODITY FOR SALE" IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered Traylor to "not frequent establishments where alcohol is the chief commodity for sale." CP 17. The condition is unconstitutional because it is insufficiently definite to apprise him of prohibited conduct and does not prevent arbitrary enforcement.

a. The Condition Violates Due Process Because It Does Not Provide Fair Notice And Invites Arbitrary Enforcement.

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to

[1] The verbatim report of proceedings is referenced as follows: 1RP - 2/11/11; 2RP - 5/19/11; 3RP - three consecutively paginated volumes consisting of 10/24/11, 10/25/11, 10/26/11 and 1/9/12.

provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The challenged condition here does not provide Traylor with adequate notice as to what places he is prohibited from frequenting. In many cases, it is impossible for a reasonable person to determine, before entering an establishment, whether alcohol is the "chief commodity" for sale. While alcohol is likely the primary commodity sold at liquor stores, most "establishments" defy such easy classification. It is often quite difficult if not impossible to determine — before entering a neighborhood mini-market, grocery store, or restaurant — whether alcohol is sold there and in what amount. Notice is insufficient where a person would have to interview a property owner before entering an establishment to inquire whether alcohol is a "chief commodity" sold there.

Even more problematic: how does a reasonable person quantify what constitutes a chief commodity? The court's order offers no standard as to how this is determined. Does each individual business owner arbitrarily determine whether they think alcohol is a chief commodity for sale? Does the community corrections officer subjectively determine which establishments qualify under the "chief commodity" standard?

Perhaps the "chief commodity" standard is based on sales receipts that show a certain percentage of the establishment's income comes from alcohol sales? If so, what percentage of sales would establish alcohol as the "chief" commodity? For example, if a restaurant's receipts show that 25% of its sales are alcohol-related, will Traylor violate this condition if he enters to buy a burger?

Maybe the gross quantity of alcohol (number of bottles and cans) sold determines the standard. Costco may well sell more alcohol as a "commodity" than any other comparable "commodity" class. If so, will Traylor violate this condition if he frequents Costco?[2]

Moreover, sales volume of alcohol is not static. It will invariably change from week to week or month to month at any given establishment,

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[2] This is no small concern, particularly after the recent passage of Initiative 1183 in the November 2011 election. That initiative closed state liquor stores and allows hard liquor sales in new locations, including grocery stores and big box stores like Costco.

which could mean alcohol may be a chief item for sale one day but not another.

Perhaps the "chief commodity" standard is determined by looking at the amount of alcohol consumed by patrons? If so, it is clear that large amounts of intoxicating beverages are sold during various sporting events. Is Traylor therefore prohibited from entering Safeco or CenturyLink Fields, or similar venues?

As these examples show, a reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Compare Bahl, 164 Wn.2d at 754, 758 (holding the following condition unconstitutionally vague because it did not provide ascertainable standards for enforcement: "[d]o not possess or access pornographic materials, as directed by the supervising [CCO]."); State v. Sanchez Valencia, 169 Wn.2d 782, 785, 794-95, 239 P.3d 1059 (2010) (striking down the following condition as unconstitutionally vague: "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.").

In light of recent Washington case law relieving the State from its burden to prove the "willfulness" of sentencing violations,[3] it is now even more important for community custody conditions to be specific and clear. A person should not be punished for inadvertently violating an unconstitutionally vague condition.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Conditions of community custody will be reversed if manifestly unreasonable. Id. at 791-92. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792.

The condition here is unconstitutional because fails to provide reasonable notice as to what conduct is prohibited and exposes Traylor to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken.

b. This Pre-Enforcement Claim Is Ripe For Review.

A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. Sanchez Valencia, 169 Wn.2d at 787. Although the State has not yet charged Traylor with violating the condition, this pre-

[3] See State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009) (State need not prove nonfinancial violations of sentence are willful).

enforcement challenge is ripe for review. Courts routinely entertain preenforcement challenges to sentencing conditions. Id. A pre-enforcement challenge to a community custody condition is ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

The issue in Traylor's case is ripe. It is primarily legal: does the condition prohibiting Traylor from frequenting establishments where alcohol is the chief item for sale violate due process vagueness standards? See Bahl, 164 Wn.2d at 752 (describing whether condition prohibiting possession of pornography was unconstitutionally vague as an issue of law); Sanchez Valencia, 169 Wn.2d at 788 (condition prohibiting use of paraphernalia related to drugs was ripe for review on vagueness ground because time will not cure the problem of its vague nature).

Second, this question is not fact-dependant. Either the condition as written is unconstitutionally vague or it is not. See Sanchez Valencia, 169 Wn.2d at 788-89 ("in the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development.").

Third, the challenged condition is final because Traylor has been sentenced under the condition at issue. Id. at 789 ("The third prong of the

ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue."). The condition prohibiting Traylor from frequenting establishments where alcohol is the chief item for sale is ripe for review.

The Snohomish County deputy prosecutor described the conditions listed in Appendix A of the judgment and sentence as "the normal conditions." 3RP 314. Now that we have entered the post-Initiative 1183 era, it is particularly appropriate for this Court to issue a published decision that conclusively directs Snohomish County to remove this erroneous condition from its boilerplate judgment and sentence forms. There is no reason for this error to continue.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM POSSESSING DRUG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered, "[d]o not possess drug paraphernalia." CP 17. This condition violates due process because it is not sufficiently definite to apprise Traylor of prohibited conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

In Sanchez Valencia, the Supreme Court struck down the following condition as unconstitutionally vague: "Defendant shall not

possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices." Sanchez Valencia, 169 Wn.2d at 785, 794-95. The court concluded the provision violated both prongs of the vagueness test: it failed to provide fair notice and failed to prevent arbitrary enforcement. Id. at 794-95.

The condition here is even less specific and must likewise be stricken. Again, under the due process clause, a condition is unconstitutionally vague if (1) it does not define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 753. If either one of these requirements is unsatisfied, the condition must fall as unconstitutionally vague. Id.

The second prong of the vagueness test — whether a condition provides ascertainable standards of guilt to protect against arbitrary enforcement — is of particular concern. As reasoned in Sanchez Valencia, "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest

for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Id. at 794-95. As in Sanchez Valencia, the breadth of potential violations under this condition offends the second prong of the vagueness test, rendering the condition unconstitutionally vague.

To make matters worse, the condition is written in terms of strict liability. There is no mens rea attached to the condition prohibiting possession of drug paraphernalia. CP 17; see Sanchez Valencia, 169 Wn.2d at 794 ("The Court of Appeals also erroneously read into the condition an intent element. Intent is not part of the condition as written.").

The condition prohibiting Traylor from possessing drug paraphernalia is void for vagueness and should be stricken from the judgment and sentence. For the same reasons set forth in C.1.b., infra, the pre-enforcement challenge to this condition is ripe for review. The issue may also be raised for the first time on appeal. Bahl, 164 Wn.2d at 744.

D. CONCLUSION

Traylor requests the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 29th day of June, 2012

Respectfully Submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2012.

x Patrick Mayovsky