FILED
June 4, 2012
Court of Appeals
Division III
State of Washington

No. 30222-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSE LEONEL MENDEZ MONCADA,

Defendant/Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The record does not support the findings that Mr. Moncada has the current or future ability to pay Legal Financial Obligations, including the means to pay costs of incarceration and medical care.

2. The trial court erred by ordering Mr. Moncada not to purchase, possess or look at pornographic material as a condition of community custody.

3. The trial court erred by ordering Mr. Moncada to undergo plethysmograph examinations about deviant sexual behavior as directed by his community corrections officer as a condition of community custody.

Issues Pertaining to Assignments of Error

1. Should the findings that Mr. Moncada has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?

2. The word "pornography" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 3. Is the condition of community custody prohibiting Mr. Moncada from purchasing, possessing or viewing

"any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer" unconstitutionally vague?

3. The due process clauses of the federal and state constitutions protect fundamental rights, such as the right to be free from government intrusion in one's body. Qualified professional may use penile plethysmograph testing in the diagnosis and treatment of sexual deviancy, but the test may not be used to monitor conditions of community custody. Does the condition of community custody requiring Mr. Moncada to submit to penile plethysmograph testing as required by his community corrections officer violate Mr. Moncada's constitutional right to be free from bodily intrusions?

B. STATEMENT OF THE CASE

The defendant, Jose Leonel Mendez Moncada, was found guilty after jury trial of first degree rape of a child (Count 1) and attempted first degree child molestation (Count 3). CP 96. As to both counts, the jury found by special verdict the aggravating circumstance of use of a position of trust to facilitate the commission of the crime. CP 55, 59.

Pursuant to RCW 9.94A.507, the court imposed confinement of concurrent terms of life with a minimum term of 140 months plus 35

months on aggravating circumstance (Count 1) and life with a minimum term of 60 months plus 15 months on aggravating circumstance (Count 2). CP 96, 98.

As part of the Judgment and Sentence, the court made the following pertinent findings:

> **¶ 2.7 Financial Ability**: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [sic].
> …
> **¶ 4.D.4. Costs of Incarceration**: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of $50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed $100.00 per day of incarceration (the rate in 2011 is $79.75 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).
>
> **¶ 4.D.5 Costs of Medical Care**: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 97 and 100 (bolding in original)**.**

In part, the court imposed the following conditions of sentence:

…
[x] Do not purchase, possess, or view any pornographic material in any form as defined by the treatment provider or the supervising Community Corrections Officer

[x] Submit to regular polygraph and plethysmograph examinations about deviant sexual behavior upon the request of the supervising Community Corrections Officer
…

CP 99. This appeal followed. CP 108.

C. ARGUMENT

1. The findings that Mr. Moncada has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48,94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the

defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). In determining the amount and method of payment os costs, *the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."* RCW 10.01.160(3) (emphasis added).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." A court-ordered legal financial obligation may include the costs of incarceration (prison and/or county jail) and medical care incurred in a county jail. RCW 9.94A.760; RCW 10.01.160; RCW 70.48.130; s*ee also* RCW 9.94A.030(30).

b. <u>There is insufficient evidence to support the trial court's findings that Mr. Moncada had the present or future ability to pay legal financial obligations, including the means to pay costs of incarceration and medical care</u>. <u>Curry</u> concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. <u>Curry</u> recognized, however,

that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court made express and formal findings that Mr. Moncada had the present ability or likely future ability to pay legal financial obligations ("LFOs"), including the means to pay for the costs of incarceration and the means to pay for any costs of medical care incurred by Yakima County on his behalf. CP 99 at ¶ 2.7[1], 100 at ¶¶ 4.D.4 and 4.D.5. But, whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge

[1] The Judgment and Sentence at ¶ 2.7 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted)." Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312. A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

The record here does not show that the trial court took into account Mr. Moncada's financial resources and the nature of the burden of imposing LFOs including the costs of incarceration and medical care on him. In fact, the record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Moncada has the present or future ability to pay LFOs, including the means to pay costs of incarceration (¶ 4.D.4)[2] and the means to pay costs of medical care (¶ 4.D.5). The findings are therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported findings. Bertrand is clear: where there is no evidence to support the trial court's findings regarding ability and means to pay, the findings must be stricken. As to

[2] The sentencing court imposed a total term of confinement of 175 months. The costs of incarceration at $50/day would roughly total $266,146 (18,250/year x's 14.58 years).

medical costs, the State may argue that the issue is somehow "moot" because it appears no medical costs were imposed in this case. However, Mr. Moncada does not challenge the *imposition* of medical costs. Rather, the trial court made a specific finding that he has the means to pay costs of medical care, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Similarly, Mr. Moncada is not at this time challenging the *imposition* of costs of incarceration at Yakima County Jail or in a prison, or the specified monetary assessments at ¶ 4.D.3 of the Judgment and Sentence.[3] As with medical costs, the trial court's findings that he has the means and ability to pay costs of incarceration and total legal financial obligations are unsupported by the record and must be stricken. Id.

The reversal of the trial court's judgment and sentence findings at ¶ 2.7, ¶¶ 4.D.4 and 4.D.5 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Moncada until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that " '[t]he defendant may petition the court at any time for remission or modification of the

[3] CP 100.

payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*' " Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's findings that Mr. Moncada has or will have the ability to pay these LFOs when and if the State attempts to collect them, the findings are clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

2. The sentencing condition prohibiting the purchase, possession or viewing of "any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer" is unconstitutionally vague.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the

condition must provide ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Additionally, even offenders on community custody retain a constitutional right to free expression. *See* Procunier v. Martinez, 416 U.S. 396,408-09,94 S.Ct. 1800,40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment.

"[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Accordingly vagueness challenges to conditions of community custody may be raised for the first time on appeal. Bahl, 164 Wn.2d at 745, 193 P.3d 678; State v. Jones, 118 Wn. App. 199, 204 n. 9, 207-08, 76 P.3d 258 (2003).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.

Bahl, 164 Wn.2d at 753, 193 P.3d 678. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. Id.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52, 193 P.3d 678. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752, 193 P.3d 678.

Here, the trial court imposed a sentencing condition prohibiting the purchase, possession or viewing of pornographic materials. Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn. App. 630, 639,111 P.3d 1251 (2005). Thus, a condition of community placement prohibiting an offender from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer" is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; accord Sansone, 127 Wn. App. at 634, 639-41. Here, too, the condition prohibiting Mr. Moncada from possessing pornography is unconstitutionally vague and must be stricken.

Further, the unconstitutional "vagueness" is not eliminated by the further provision that "pornography" is to be "defined by the treatment provider or the supervising community corrections officer." CP 99. In State v. Bahl, the court struck as unconstitutionally vague a condition that prohibited the defendant from possessing "sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes." 164 Wn.2d at 761. The court concluded that what most rendered this condition vague was the provision that the sexual stimulus material must be for the defendant's own deviancy. Bahl, 164 Wn.2d at 761. The court noted that such a condition could not identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed and the record did not show that any deviancy had yet been identified. Accordingly, the court concluded, "the condition is utterly lacking in any notice of what behavior would violate it." Bahl, 164 Wn.2d at 761. Likewise here, there had been no diagnosis of sexual deviancy nor any record as to how the counselor was to define "pornography" as it applied to Mr. Moncada's particular situation. Thus, the condition lacks sufficient notice of what behavior would violate it and must be stricken.

In United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.2002), the court addressed the danger of allowing a probation officer to interpret what material is pornographic:

> The government asserts that any vagueness is cured by the probation officer's authority to interpret the restriction. This delegation, however, creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating." A probation officer could well interpret the term more strictly than intended by the court or understood by Guagliardo.

Guagliardo, 278 F.3d at 872 (internal citations omitted). The Bahl court agreed that the impermissible vagueness is not cured by simple reference to a third party's unknown and unspecified definition of "pornography" that purports to establish the boundary between compliance and violation of the sentencing condition. Bahl, 164 Wn.2d at 758.

In fact, the condition here is even less specific than in Bahl, and does not limit the prohibited materials to those related to the defendant's particular deviancy. It simply prohibits Mr. Moncada from possessing any pornographic materials as defined by the CCO or sexual deviancy therapist. This seems to suffer the same vagueness problems created by a condition that simply delegates to the CCO to define the scope of the prohibition, which Bahl also struck as unconstitutional, concluding, "The fact that the condition provides that Bahl's community corrections officer

can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758.

Thus, for all these reasons, the community placement condition prohibiting the purchase, possession or viewing of pornographic material is unconstitutionally vague. The offending condition must be stricken from the conditions of supervision.

3. **The condition of community custody requiring Mr. Moncada to undergo plethysmograph testing as required by his community corrections officer violates Mr. Moncada's constitutional right to be free from bodily intrusions.**

The trial court ordered Mr. Moncada to undergo penile plethysmograph testing as required by his community corrections officer. Plethysmograph testing is used in the diagnosis and treatment of sexual offenses, but is not a monitoring tool to be used by a community corrections officer. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Moncada's constitutional right to be free from bodily intrusions.

a. Mr. Moncada has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts. The due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests.[4] Troxell v. Granville, 530 U.S. 57,65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007) (citing O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odeshoo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174,156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165,72 S.Ct. 205, 96 L.Ed.2d 183 (1952); In re Marriage of Parker, 91 Wn. App. 219,224,957 P.3d 256 (1998).

[4] In addition to the due process protection found at Article 1, section 3, Article 1, section 7 of the Washington constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The enumeration of certain rights in the state constitution "shall not be construed to deny others retained by the people." Wash. Const. art. 1, § 30.

The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). People convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); United States v. Weber, 451 F.3d 552, 570-71 (9th Cir. 2006), (Noonan, J., concurring) ("[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethsymography testing crosses it.").

b. Penile plethysmograph testing implicates the test subject's constitutional right to freedom from bodily restraint. The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn. App. at 222-23. Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of testing is questionable. In re Marriage of Ricketts, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn. App. at 226 (test violated father's constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or

absence of less intrusive measures); Weber, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a "run of the mill" medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the "highly invasive nature" of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been "no showing" regarding the test's reliability or that other less intrusive means are not available for obtaining the information); *see* United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding trial court did not abuse its discretion by refusing to admit plethysmograph test results as evidence because test fails to satisfy "scientific validity" prong of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579,113 S.Ct. 2786,125 L.Ed.2d 469 (1993)), cert. denied, 516 U.S. 1077 (1996).

The Ninth Circuit Court's opinion in Weber is instructive. Weber pled guilty to possession of child pornography, and the district court ordered special conditions of supervised release that included participation in mental health counseling and/or a sexual offender treatment program. Weber, 451 F.3d at 555. The court further ordered Weber to comply with all conditions of his treatment program, including submission to risk

assessment evaluations, and physiological testing, including but not limited to polygraph, plethysmograph and Abel testing. Id. Weber objected only to the requirement that he undergo plethysmograph testing. Id.

Under the federal statute governing supervised release after a prison term, the district court has wide discretion to impose special conditions of supervised release, even conditions that infringe upon fundamental rights. Weber, 451 F.3d at 557. Conditions of supervision, however, must be rationally related to the "goal of deterrence, protection of the public, or rehabilitation of the offender." Id. at 558 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cir. 2003), citing 18 U.S.C. §§ 3553(a), 3583(d)). Special conditions may involve "no greater deprivation of liberty than is necessary for the purposes of supervised release." Id., quoting T.M., 330 F.3d at 1240, in turn quoting 18 U.S.C. § 3583(d)(2).

The Weber Court reviewed psychological studies both critical and supportive of plethysmographic testing of sex offenders. Although the court concluded that it could not categorically rule out plethysmograph testing for all offenders, it noted problems with the test. Weber, 451 F.3d at 566. The American Psychiatric Association, for example, has expressed

reservations concerning the reliability and validity of plethysmograph testing. Id. at 564 (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-R 567 (4th ed. 2000)).

The court went on to point out the relevant question is whether plethysmograph testing will promote the goals of rehabilitation and deterrence in an individual case, because supervised release conditions must be "'reasonably related' to 'the nature and circumstances of the offense and the history and character of the defendant.'" Id. (quoting 18 U.S.C. § 3583(d)(1), 3553(a)(1)). "Only a finding that plethysmograph testing is likely given the defendant's characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant's significant liberty interest in his own bodily integrity." Id. at 567. Even then, the district court must consider if other less invasive alternatives are open, as there are several alternatives available in the treatment of sexual offenders. Id. at 567-68. The court therefore remanded Weber's case for an evidentiary hearing. Id. at 570.

c. Mr. Moncada's constitutional right to freedom from bodily intrusion is violated by the requirement that he submit to penile plethysmograph testing at the pleasure of his community corrections officer. The Washington Supreme Court recognized the usefulness of

plethysmograph testing in the diagnosis and treatment of sex offenses. State v. Riles, 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998). As a result, the court upheld plethysmograph testing for a sex offender as part of court-ordered sexual deviancy therapy, but not for an offender who was not ordered to undergo sexual deviancy treatment. Id. at 344-46. "[P]lethysmograph testing does not serve a monitoring purpose . .. It is instead a treatment device that can be imposed as part of crime-related treatment or counseling." Id. at 345.

Here, the court required Mr. Moncada to submit to such testing "upon the request of the supervising Community Corrections Officer" rather than at the direction of his sexual deviancy treatment provider. CP 99. The testing was ordered in the same sentence with polygraph testing, which is a procedure utilized by DOC to monitor compliance. Riles, 135 Wn.2d at 342-43.

The danger is that the testing is not connected to Mr. Moncada's sexual deviancy diagnosis or treatment, but can be ordered by the CCO for any reason, including monitoring Mr. Moncada's compliance with community custody conditions. In addition, the trial court ordered Mr. Moncada to submit to invasive plethysmograph testing without any individual determination that such testing would be valuable in his case.

In these circumstances, the testing requirement violates Mr. Moncada's constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Moncada submit to plethysmograph testing as required by his CCO.

D. CONCLUSION

For the reasons stated, the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration, as well as the conditions prohibiting pornography and requiring Mr. Moncada to submit to invasive penile plethysmograph testing at the direction of his community corrections officer, should be stricken from the Judgment and Sentence.

Respectfully submitted on June 4, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 4, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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