IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 45502-1-II

STATE OF WASHINGTON

Respondent,

vs.

JAMES PARKER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 07-1-00211-7

BRIEF OF RESPONDENT

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Date: May 20, 2014

TABLE OF CONTENTS

Page

Contents

TABLE OF AUTHORITIES iii
I. INTRODUCTION 1
II. ISSUES PRESENTED FOR REVIEW 1
III. STATEMENT OF THE CASE 2
IV. ARGUMENT 7
I. Mr. Parker Received Adequate Notice of His Alleged Violations in Accord with his Due Process Rights. 7
A. Standard of Review. 7
B. The Department of Corrections provided Mr. Parker with notice specifying which condition of his sentence he allegedly violated. 7
II. DOC, not the court, properly Imposed a condition on use of prescribed Drugs. 9
A. Standard of Review. 9
B. The Department of Corrections had the authority to prohibit Mr. Parker from purchasing, possessing, or consuming drugs during his Community Custody. 10
III. The Community Custody condition prohibiting drugs without CCO approval was not vague. 12
A. Standard of Review 12
B. The sentencing condition satisfied due process by providing adequate notice of proscribed behavior. 12
C. The Community Custody condition to "Obey all municipal, county, state, tribal, and federal laws" is not vague. 15
IV. CONCLUSION 18

TABLE OF AUTHORITIES

Page

Washington Supreme Court Cases

City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) 16

In re Blackburn, 168 Wn.2d 881, 232 P.3d 1091 (2010) 7, 8

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 10

State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008) 12, 16

State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) 8

State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010) .. 12, 13, 14

State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). 7

Washington Appeals Court Cases

In re Golden, 172 Wash.App. 426, 290 P.3d 168 (2012). 11

State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993) 10

State v. Snedden, 166 Wn.App. 541, 271 P.3d 298 (2012) 10

State Statutes

RCW 9.94A.030 10

RCW 9.94A.704 11

RCW 9.94A.715 11

Other Authorities

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). 8

I. INTRODUCTION

Appellant pled guilty to Rape of a Child in the Second degree in 2008, and was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA). His sentence included 125 months of Community Custody (CC). The Department of Corrections (DOC) imposed CC conditions including DOC approval of prescribed drugs. Appellant requested DOC permission to use medical marijuana and was refused. Appellant used marijuana anyway, was found guilty of a probation violation, and sanctioned. Appellant now asks the court to reverse the sanction and strike the DOC's Community Custody drug condition.

II. ISSUES PRESENTED FOR REVIEW

1. Did Mr. Parker receive adequate notice of his violation?
2. Did the Department of Corrections impose proper community custody conditions?
3. Did the Department of Corrections impose unconstitutionally vague community custody conditions?

III. STATEMENT OF THE CASE

Appellant pled guilty of Rape of a Child in the Second degree – DV on January 25, 2008. CP 11.

A Department of Corrections Pre-Sentencing Report was filed on March 8, 2008. CP 138-155. The report described Mr. Parker's Alcohol and Drug use as:

> Parker stated that he began smoking marijuana at about age 11 and elaborated that he used daily from about age 14 through age 20. He stated that he last used marijuana about nine months ago and quit because his current employer, Coast seafood, employs regular drug testing. He admitted that he tried crack cocaine (reported in the psychosexual as methamphetamine) on two occasions about 7 years ago but did not like it. He denies the experimentation or use of any other drugs.
> Parker stated he began drinking alcohol at about age 11. He stated that he was a "heavy drinker," being drunk frequently, between the ages of 14 and 20, when he consumed mainly beer but occasionally hard liquor, mostly in the form of tequila. He stated that he quit drinking at age 21, but began drinking occasionally (with months in between) a few years ago. CP 147.

He was sentenced on April 18, 2008, under the Special Sex Offender Sentencing Alternative (SSOSA). CP 6-7.

Mr. Parker asserts that the court conditioned his partially suspended sentence on him obeying "all municipal, state, tribal, and federal laws." Appellant's Brief at 3. This is incorrect. The trial

court's Judgment and Sentence did not impose those community custody conditions on Mr. Parker. CP 1-11.

The DOC imposed conditions for Mr. Parker's community custody in section H of the Pre Sentence Investigation Report. CP 153-158. These DOC conditions imposed the following conditions of his supervision:

> 1. Obey all municipal, county, state, tribal, and federal laws.
> ...
> 17. Do not purchase, possess, or consume drugs without a valid prescription from a licensed medical professional. Provide [Community Corrections Officer (CCO)] with verification of all prescriptions received within 72 hours of receipt.
> ...
> CP 154

After his release from prison Mr. Parker attempted several times to persuade the Department of Corrections to allow him to use medical marijuana. Appellant's Brief 3-4.

Mr. Parker gave several urinalysis (UA) samples that showed positive for marijuana and DOC charged him with multiple violations of the conditions of his sentence proscribing drug use. CP 12-15, 22-25, 32-33, 36-39, 44-47, 82-84.

On August 22, 2013, the Department of Corrections filed a Notice of Probation Violation alleging Appellant gave a urine sample that was positive for marijuana.

On September 6, 2013, Appellant filed a pro se motion to modify his Judgment and Sentence and dismiss the probation violation.

On September 27, 2013, the court heard the State's Probation Violation show cause motion and Appellant's motion to modify the Judgment and Sentence and dismiss the probation violation.

Mr. Parker admitted he tested positive for marijuana on the occasions DOC tested him. RP 4.

At the hearing, DOC Officer Apker was asked about Mr. Parker's conditions:

> COURT: Okay. Anything else you wanted to say about the supervision and the, and this particular restriction, or anything?
>
> OFFICER APKER: Well, as far as the restrictions, other restrictions are also no use of alcohol, as with most of our offenders. we have to be able to monitor them in a safe environment. And he also has to abide by all federal court, tribal laws as well. And I believe the federal law still prohibits the use of THC. Also, when we do home visits I have to be able to visit him at his home randomly, which puts me at risk if I went into a room full of marijuana. It would be the same thing as showing up to a house with an offender who was intoxicated with alcohol. I have to be able to do those home visits in a safe manner. RP 6.

Mr. Parker argued that his sentencing conditions did not prohibit the use of marijuana because it had been legalized in Washington. RP 8, 11-12.

On October 8, 2013, the court filed an opinion denying the motion to dismiss the probation violation and denying the motion to modify the Judgment and Sentence. CP 128-129.

In its opinion the trial court reasoned:

> The Judgment and Sentence of April 18,2008, provides: "The defendant shall comply with all rules, regulations and requirement of DOC and shall perform affirmative acts as required by DOC to confirm compliance with the orders of the court."
>
> Appendix H includes a number of restrictions and requirements regarding controlled substances and alcohol.
> The DOC "Conditions, Requirements and Instructions" pertaining to supervision by DOC and signed and dated by Defendant August 5, 2009, provide in pertinent part that Defendant shall "Obey all municipal, county, state, tribal and federal laws." It also includes the same restrictions and requirements regarding controlled substances and alcohol as those set forth in Appendix H.
>
> Finally, under current law medical marijuana under specified conditions is legal in the State of Washington; the private use of marijuana by persons over the age 21 under specified conditions is now legal in the State of Washington; the possession of Marijuana under federal law remains unlawful; and administratively the federal Department of Justice has announced priorities in how they will enforce the federal Controlled Substances Act as it relates to

> Marijuana, but reserves the right to enforce the law as written. DOJ Memo. James Cole. August 29. 2013.
>
> Defendant makes a number of arguments under provisions of the federal Constitution (e.g. cruel and unusual punishment, due process, and equal protection) to assert that he should be allowed to use medical Marijuana for his pain. However, none of the cases he cites in support of his arguments are analogous to the situation in this case under the various laws which now exist as described above.
> The federal Controlled Substances Act (CSA) can continue to be enforced against persons within a state such as Washington that has decriminalized such activities. *Gonzales v. Raich,* 545 U.S. I (2005).
>
> Under the "dual sovereignty" doctrine, even though the use of Marijuana may be permitted by a State such as Washington (a sovereign"), it may be and still is prohibited by the federal government (also a sovereign"). *Moore v. Illinois* 55 U.S. (14 How.) 13, 20 1852).
> Consequently, persons acting in compliance with Washington's marijuana laws are still subject to arrest, indictment and conviction under the federal CSA.
>
> Defendant is required to "Obey all... . . . .. .federal laws." DOC would appear to have an interest in assuring that the persons it supervises do so. This Court is unaware of any case which would permit this Court or DOC to ignore the requirements of federal law in this type of situation. For these reasons, the Defendant's motions should be denied.

On October 11, 2013, the Superior Court found Appellant guilty of violating his community custody conditions and imposed 30 days confinement.

Appellant timely appealed his sanction and the validity of the Community Custody conditions.

IV. ARGUMENT

I. Mr. Parker Received Adequate Notice of His Alleged Violations in Accord with his Due Process Rights.

A. Standard of Review.

Alleged violations of the due process right to adequate notice are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Failure to provide adequate notice is a constitutional error requiring reversal unless the state can show that it was harmless beyond a reasonable doubt. *In re Blackburn*, 168 Wn.2d 881, 888, 232 P.3d 1091 (2010)

B. The Department of Corrections provided Mr. Parker with notice specifying which condition of his sentence he allegedly violated.

Mr. Parker was notified by DOC that he had violated his conditions by using marijuana. CP 12-15. He argues that because he was not given notice that he was in violation of another condition requiring him to obey all federal laws, that his due process rights were violated. He cites *In re Blackburn*, 168 Wn.2d 881, 232 P.3d

1091 (2010), as authority. However, *Blackburn* is distinguishable. In *Blackburn* our Supreme Court considered the required degree of specificity the DOC must use in a notice of violation before reclassifying an offender from community custody to total confinement. That is not the situation here.

The United States Supreme Court has determined that, in the context of parole violations, minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. *State v. Dahl,* 139 Wn.2d 678, 990 P.2d 396 (1999), quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. *Id.* at 484, 92 S.Ct. 2593.

Here, Mr. Parker was given notice that he violated his conditions of parole by using marijuana. CP 12-15. He appeared at the violation hearing and argued, for the first time, that since it was now legal to use marijuana legally in Washington, he was not in

violation. VRP 7-8. DOC Officer Apker replied to the court's question, that use of marijuana was still illegal under federal law, and, since the Judgment and Sentence "says federal, state, tribal, local laws. So we still have to follow all federal, federal laws, which includes THC."

Mr. Parker was notified he had violated his conditions by using marijuana. He freely admitted use of marijuana before it was legalized. At the sentence violation hearing, he argued that since marijuana use in Washington is now legal, he did not violate his conditions. The State responds that it is still a violation because it is illegal under all the other jurisdiction's laws he is bound to obey. He was still only cited for use of marijuana, not for violating another condition.

This issue is inapposite and the appeal should be denied.

II. DOC, not the court, properly Imposed a condition on use of prescribed Drugs.

A. Standard of Review.

Here, the Department of Corrections imposed the conditions to which Appellant objects. Courts review the decision to impose

supervision conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *State v. Snedden*, 166 Wn.App. 541, 543, 271 P.3d 298 (2012). Discretion is abused when 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).

B. The Department of Corrections had the authority to prohibit Mr. Parker from purchasing, possessing, or consuming drugs during his Community Custody.

Mr. Parker argues the sentencing court erred by imposing a condition restricting drug use because there was no evidence that any drugs were involved in his offense. CP 1-11; Pre-Sentence Investigation, Supp. CP 154.

Mr. Parker is incorrect. The Department of Corrections, not the court, imposed the drug-related conditions.

Mr. Parker argues that the DOC-imposed conditions are not crime related. This argument misses the mark. A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted," RCW 9.94A.030(10) . This definition

does not apply to DOC, which is an agency and not a court. Instead, DOC's authority to impose conditions of community custody on Mr. Parker came from former RCW 9.94A.715(2)(b) (2007), which directed the department to perform a risk assessment and then impose "additional conditions of the offender's community custody based upon the risk to community safety." That language is now codified in RCW 9.94A.704(2)(a). *In re Golden,* 172 Wash.App. 426, 432-33, 290 P.3d 168 (2012).

Nothing in the text of former RCW 9.94A.715, or its successor statute, RCW 9.94A.704, limits DOC's supervisory conditions to those that are "crime related." Instead, it must perform a risk assessment and then impose conditions with public safety in mind. The statute grants DOC broader authority than that given the trial courts in order to follow up on the department's duty to conduct an individualized risk assessment. While the trial court must focus generally on the defendant's crime, the department focuses on the risks posed by the defendant. It thus can, as here, impose conditions related to defendant's history as a heavy drug user even though he is not being supervised for a drug offense.

Mr. Parker admitted to the DOC investigator that he was a heavy user of both alcohol and marijuana from 14 to 20 years old.

The DOC conditions do not conflict with those imposed by the trial court.

DOC can impose additional conditions of community supervision.

III. The Community Custody condition prohibiting drugs without CCO approval was not vague.

A. Standard of Review

The Court applies an abuse of discretion standard of review to issues of Community Custody condition vagueness, and if the condition is unconstitutionally vague, it will be manifestly unreasonable. *State v. Valencia,* 169 Wn.2d 782, 239 P.3d 1059 (2010), quoting *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

B. The sentencing condition satisfied due process by providing adequate notice of proscribed behavior.

Mr. Parker argues that the DOC condition prohibiting him from "purchasing, possessing, or consuming drugs without a valid prescription from a licensed medical professional" (CP 121) is too vague.

The Supreme Court's recent opinion in *Valencia* is instructive in dealing with Mr. Parker's vagueness challenge. The trial court in

Valencia had imposed a condition prohibiting the defendant from possessing "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." *State v. Valencia*, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010) (internal quotation marks omitted). On review, the Supreme Court found that this condition failed both of the prongs used to test for vagueness. *State v. Valencia*, 169 Wn.2d 782, 793–95, 239 P.3d 1059 (2010).

The court first determined that this condition failed to provide adequate notice of proscribed behavior. The court allowed that the term "paraphernalia" was commonly associated with the materials employed for using or selling drugs. *State v. Valencia*, 169 Wn.2d 782, 794, 239 P.3d 1059 (2010). However, the court noted that "nothing in the condition as written" limited its application to those types of materials. *State v. Valencia*, 169 Wn.2d 782, 794, 239 P.3d 1059 (2010). Given the broad definition of materials encompassed by the word "paraphernalia," which included " 'personal belongings' " or " 'articles of equipment,' " the court held that the condition did not provide reasonable notice as to what the defendants could or could not possess. *State v. Valencia*, 169 Wn.2d 782, 794, 239 P.3d 1059 (2010) (quoting Webster's Third New International Dictionary 1638 (2002)).

The court also determined that the Condition violated the second prong of the vagueness test because of the "wide range" of items encompassed by "paraphernalia" and the consequent discretion this gave probation officers in finding that a violation of the condition had occurred. *State v. Valencia*, 169 Wn.2d 782, 794–95, 239 P.3d 1059 (2010). The court reasoned that because of the breadth of items covered by the term, "an inventive probation officer" could use possession of an everyday item to arrest the defendant for a violation while another probation officer might adhere more to the intent of the condition and not arrest the defendant for possessing an everyday item not connected to drug use or sales. State v. *Valencia*, 169 Wn.2d 782, 794–95, 239 P.3d 1059 (2010) (internal quotation marks omitted). The court held that "[a] condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." *Valencia*, 169 Wn.2d at 795, 239 P.3d 1059 (2010).

The condition Mr. Parker argues is too vague reads:

> Do not purchase, possess, or consume drugs without a valid prescription from a licensed medical professional. Provide [Community Corrections Officer (CCO)] with verification of all prescriptions received within 72 hours of receipt. CP 121.

This condition is admittedly inartfully written, however it is clear that it restricts Mr. Parker from using drugs that require a prescription without first obtaining a written prescription and clearing it with DOC. It is obvious that drugs not requiring a prescription, e.g., aspirin, over-the-counter cold medications, etc, are not included in this condition.

It is evident that Mr. Parker understood this condition since he asked the DOC to be allowed to use marijuana, providing them with his medical marijuana authorization and letters from his doctors. CP 129. Mr. Parker filed an administrative appeal. He argued that marijuana use permitted him to stop relying on narcotic pain medications like oxycodone. CP 95-99.

The condition is also not so vague that a corrections officer could reasonably charge him for possessing aspirin, Tylenol, or any other drug that does not require a prescription.

This appeal is without merit and should be denied.

C. The Community Custody condition to "Obey all municipal, county, state, tribal, and federal laws" is not vague.

Mr. Parker argues the requirement to obey all laws is vague because state and federal laws differ in the area of marijuana use. However, this is not "vague" as used by our courts.

A community custody condition is vague if it fails to define the forbidden conduct " 'with sufficient definiteness that Ordinary people can understand what conduct is proscribed' " or " 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752–53, 193 P.3d 678 (2008) (quoting (1990)). *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)

The sentencing court examined this argument in its opinion at CP 128-29:

> Finally, under current law medical marijuana under specified conditions is legal in the State of Washington; the private use of marijuana by persons over the age 21 under specified conditions is now legal in the State of Washington; the possession of Marijuana under federal law remains unlawful; and administratively the federal Department of Justice has announced priorities in how they will enforce the federal Controlled Substances Act as it relates to Marijuana, but reserves the right to enforce the law as written. DOJ Memo. James Cole. August 29. 2013.
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> Defendant makes a number of arguments under provisions of the federal Constitution (e.g. cruel and unusual punishment, due process, and equal protection) to assert that he should be allowed to use medical Marijuana for his pain. However, none of the cases he cites in support of his arguments are

> analogous to the situation in this case under the various laws which now exist as described above.
> The federal Controlled Substances Act (CSA) can continue to be enforced against persons within a state such as Washington that has decriminalized such activities. *Gonzales v. Raich,* 545 U.S. I (2005).
>
> Under the "dual sovereignty" doctrine, even though the use of Marijuana may be permitted by a State such as Washington (a sovereign"), it may be and still is prohibited by the federal government (also a sovereign"). *Moore v. Illinois* 55 U.S. (14 How.) 13, 20 1852).
> Consequently, persons acting in compliance with Washington's marijuana laws are still subject to arrest, indictment and conviction under the federal CSA.
>
> Defendant is required to "Obey all... . . . .. .federal laws." DOC would appear to have an interest in assuring that the persons it supervises do so. This Court is unaware of any case which would permit this Court or DOC to ignore the requirements of federal law in this type of situation. For these reasons, the Defendant's motions should be denied.

The condition to obey all federal laws and the federal Controlled Substance Act are sufficiently definite that "Ordinary people can understand what conduct is proscribed'" and do provide "ascertainable standards of guilt to protect against arbitrary enforcement."

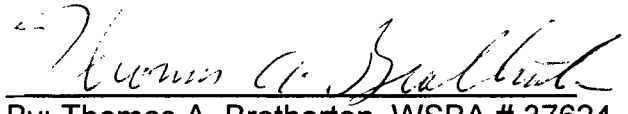
This appeal is without merit and should be denied.

IV. **CONCLUSION**

The State respectfully requests the Court to affirm the trial court's sanction because the Community Custody conditions imposed by The Department of Corrections are valid, not vague, and Mr. Parker received proper notice of his violations.

Respectfully submitted this 8th day of May, 2014

SCOTT ROSEKRANS, Jefferson County Prosecuting Attorney



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PROOF OF SERVICE

I, Wendy M. Davis, certify that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the brief, using the Court's filing portal, to:

Jodi Backlund
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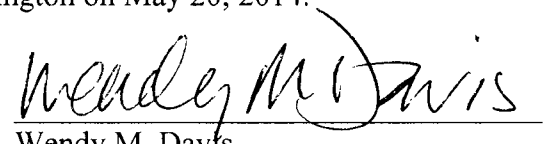
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on May 20, 2014.



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