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71547-0

NO. 71547-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE A. JACKSON,

Appellant.

BRIEF OF RESPONDENT

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II. ISSUES

(1) The victim told the defendant at least 17 times that she did not want sexual intercourse with him. Was this sufficient evidence to support the jury's determination that she clearly and unambiguously expressed her lack of consent to sexual intercourse?

(2) Did the trial court err by imposing a condition of community custody requiring defendant to consent to home visits by a community corrections officer for visual inspection of defendant's residence?

(3) Where there is no indication that defendant's drug use related to the circumstances of the crime, should the case be remanded for clarification by the sentencing court that the condition of community custody requiring participation in treatment only applies to alcohol abuse treatment?

III. STATEMENT OF THE CASE

On August 24, 2012, Shane Allen Jackson, defendant, asked SD to dinner at his house, SD asked her friend AM to accompany her. Prior to this AM had only met defendant once. The plan was to play videos while defendant made dinner. Since

there would be alcohol, SD and AM would sleep on the couch. AM was twenty years old at the time. RP 90-94, 100-105, 314-315.

SD drove AM to defendant's house. While he prepared dinner, the two women had mixed drinks. By the end of the night, the three of them had consumed two fifths of hard liquor. Defendant did not drink as much as SD and AM. RP 105-106, 142, 315-316, 327.

After dinner AM was drunk. SD got sick and threw up in the bathroom. AM and defendant helped SD to defendant's bedroom where SD passed out on the floor. After situating SD in the bedroom, AM went to clean up the dishes. RP 107-112, 114-115, 317.

Defendant approached AM in the laundry room. He put his arm around her waist, pulled her in towards him, and tried to kiss her. She pushed him away and said, "No." Defendant convinced AM to kiss him. He then lifted her up onto the washing machine and tried to remove her shorts. AM pushed his hand away, said, "No, don't." She jumped off the washing machine and pushed defendant away. He stumbled back, and she said, "I'm sorry. But, no." RP 116-121, 200.

Defendant again lifted AM up onto the washing machine. This time, he removed her shorts and underwear in one quick move. He pushed her back, spread her legs and fitted his hips between her legs. As defendant leaned down to attempt oral sex on her, she crunched up, clamped her legs together, and said, "No, stop. Just don't." Defendant asked why. She replied, "I don't want to." Defendant said okay, just kissing then. He tried to kiss her again. She replied, "I'm really sorry but I just want to go to bed. I'm dizzy." RP 122-124.

Defendant told AM to stay there, he would be right back. He left the laundry room. She put her shorts back on and left the laundry room. She saw defendant in the hallway, told him that she needed to lay down, and asked where she was sleeping. Defendant grabbed her elbow, placed his hand on her back, and took her to his brother's bedroom. She lay down on the bed. Defendant took off his shirt and knelt down on the bed. She asked what he was doing. Defendant replied, "Just kissing you." RP 124-126, 128.

Defendant removed her shorts. She said, "No, don't." Defendant asked why. She replied, "No, please don't." Defendant grabbed her knees and began to perform oral sex on her. She

said, "No. Just stop." Defendant continued the oral sex. She pushed his head and said, "No. You're not even doing it right." Defendant replied, "I love that you're trying to tell me what to do." AM said, "No, you just suck at this, and I don't want you to." She crossed her legs and turned to the side. RP 128-131.

Defendant sat up, pulled AM's legs around his waist, bumped his hips against her pelvis and said, "I just want you so bad." She replied, "I'm sorry but no." Defendant asked why not. She replied that she was not even on birth control. Defendant told her that she could not get pregnant from the first time. She said, "That's just stupid." Defendant said, "Okay, fine," patted her on the leg, and left the bedroom. AM thought she would finally go to sleep. RP 132-134.

Defendant came back into the bedroom and got on the bed. AM asked him what he was doing. He showed her that he had a condom. He pushed the blanket away, grabbed her by the knees, and put his penis into her vagina. She instantly felt excruciating pain, like she was being torn apart.[1] She pushed herself up on her

[1] AM was examined by Sexual Assault Forensic Nurse Examiner Sealja Puvogel on August 30, 2012. The injuries observed were consistent with AM's report of what happened to her. There was a tear in AM's fossa navicularis. Nurse Puvogel stated, "A tear to the fossa navicularis would be very uncomfortable." RP 255, 260-262, 264-265.

elbows, scooted back on the bed and said, "Ow, ow, ow. Stop." Defendant's response was, "God, you're so fucking tight." He placed her legs over his shoulders and continued thrusting. AM was overwhelmed and felt completely defeated. Everything that she had done up to that point to placate defendant without angering him and not letting it happen had failed. RP 134-137.

Defendant moved AM's legs back around his waist and she again told him it hurt. He asked why. She said, "Because this is like sandpaper. It's just dry." Defendant reached over, grabbed something from the window sill, and said, "I have lube." AM told defendant that she did not feel well. He asked he what was wrong and she said, "This hurts and I think I'm going to throw up." She took her legs off defendant's shoulder, tossed them to her left, and turned on to her side. Defendant continued thrusting. AM tried to get up. She tried to straighten her legs and roll on to her stomach and push herself up. She got dizzy and her vision went black. She slumped back on her knees in a crouch. Defendant grabbed her waist and pulled her up saying, "Hey, hey, hey. Stay awake. Stay up here." AM did not have the strength to fight against defendant. She remembered being told that in a situation like this she should

not anger the person if she felt the other person could overpower her. AM collapsed on the bed. RP 138-141.

Defendant flipped AM on to her back and raised one of her legs in the air. She could not take it anymore. She got mad and said to defendant, "Do you have a whiskey dick or something." Defendant replied, "Oh, I wasn't going to finish." She said, "Get off of me." Defendant got off. RP 141-142, 202-203.

AM went to get SD so they could leave but she could not rouse her. Defendant pulled AM onto the bed and told her to just go to sleep. AM went to the bathroom and there was a gush of blood when she tried to go. She threw up in the toilet and went back to try and wake SD. AM ended up lying on the floor next to SD. RP 142-145, 203-204.

On August 25, 2012, defendant posted the following comment on his Facebook profile: "I'm going to hell for what I did last night. Sorry ladies." On September 1, 2012, defendant sent AM the following message:

> I know you probably hate me or whatnot, as well you should. Will you please call me so we can talk about what happened, though? I feel really horrible about it. Typically, I'm not that kind of person to do something like that. I think about it every day and I know that I will continue to do so until the issue is addressed by the two of us together.

> I lost [SD] completely, it would seem. And I'm not saying you and I need to remain friends, though I would like to because you're awesome, I'm just hoping we can talk about this one time. You have my number. I hope to hear from you soon.

On September 4, 2012, defendant sent AM the following message:

> I'm sure you read the message I sent you by now I just want you to know I'm truly very sorry about what happened. I can't express how bad I feel, actually, over Facebook, though. If you ever want to talk, I'll be here for you. No matter the situation you actually want to talk about, you can call me anytime. Again, my deepest apologies.

RP 170-173, 192-193.

Defendant was charged with Third Degree Rape. CP 65-66. The jury found him guilty as charged. CP 22; RP 421-424. Defendant was sentenced to 20 months confinement followed by 36 months community custody. The court imposed twenty-five conditions of community custody. CP 6-21; RP 448-451.

IV. ARGUMENT

A. SUFFICIENCY OF EVIDENCE.

Defendant argues the evidence was insufficient to support his conviction for third degree rape; specifically, that AM did not clearly and unambiguously express to defendant her lack of consent to sexual intercourse. Appellant's Opening Brief 9-17.

1. Legal Standard.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2,

813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

2. Third Degree Rape.

> A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person:
>
> Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct,

RCW 9A.44.060(1)(a). "'Consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7). "'Clearly

expressed' is not defined by the statute, but 'clearly' ordinarily means something asserted or observed leaving no doubt or question and 'expressed' ordinarily means to make known an emotion or feeling." State v. Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012), review denied, 176 Wn.2d 1012, 297 P.3d 708 (2013), citing Webster's Third New International Dictionary 420, 803 (1993). Here, it is uncontested that defendant engaged in sexual intercourse with AM. Appellant's Opening Brief 1.

Thus, RCW 9A.44.060(1)(a) requires that the State show that (1) AM did not freely agree to sexual intercourse with defendant, and (2) the lack of consent was made known to defendant by words or conduct without doubt or question. Higgins, 168 Wn. App. at 854; State v. Guzman, 119 Wn. App. 176, 185, 79 P.3d 990 (2003). The focus is properly on the victim's words and actions rather than defendant's subjective assessment of what is being communicated. Higgins, 168 Wn. App. at 854.

In the present case, AM told the defendant at least 17 times that she did not want sexual intercourse: (1) When he tried to remove her shorts, she pushed his hand away and said, "No, don't." RP 121. (2) When he tried to perform oral sex on her, she clamped her legs together and said, "No, stop. Just don't." RP 123.

(3) When he asked her why, she said, "I don't want to." RP 124. (4) When he again asked why not, she said "No. Thank you, though." RP 124. (5) When he started removing her underpants, she said, "No, don't." RP 129. (6) When he said why not, she said "No, please don't." RP 129. (7) When he again tired to perform oral sex, she said, "No. Just stop." RP 129. (8) When he nonetheless continued, she pushed his head and said, "No. You're not even doing it right." RP 130. (9) When he said that he loved her telling him what to do, she crossed her legs and said, "No, you just suck at this, and I don't want you to." RP 131. (10) When he bumped his hips against her pelvis, she said, "I'm sorry but no." RP 131. (11) When he asked why not, she said, "I don't want you to." RP 132. (12) When he again asked why not, she said, "Dude, I'm not even on birth control. I'm not going to get pregnant. No." RP 132. (13) When he claimed that she don't get pregnant from the first time, she said, "That's just stupid." RP 132. (14) When he penetrated her, she said, "Ow, ow, ow. Stop." RP 136. (15) When he continued, she said that it hurt. RP 138. (16) When he asked way, she said, "Because this is like sandpaper." RP 138. (17) When he asked her what was wrong, she said, "This hurts and I

think I'm going to throw up." RP 138. Even then, the defendant continued to have intercourse with her. RP 138-142.

Viewing the facts and all reasonable inferences from those facts in the light most favorable to the State, substantial evidence supports the conclusion that AM did not consent to sexual intercourse with defendant and that at the time of the act of sexual intercourse AM's lack of consent was clearly expressed to defendant by her actual words and conduct. There was sufficient evidence to show all the elements of third degree rape.

B. CONDITIONS OF COMMUNITY CUSTODY.

The court imposed twenty-five conditions of community custody. CP 11, 20-21. Defendant argues that the court lacked authority to impose two of the conditions: (1) participation in substance abuse treatment as directed by the supervising Community Correction's Officer, and (2) consent to DOC home visits to monitor compliance with Supervision. Appellant's Opening Brief 17-33.

A defendant always has standing to challenge his sentence on grounds of illegality. State v. Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d

739, 744, 751, 193 P.3d 678 (2008); State v. Jones, 118 Wn. App. 199, 204 n. 9, 76 P.3d 258 (2003). The court reviews whether the trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The court reviews the imposition of crime-related prohibitions and conditions of community custody for abuse of discretion. Armendariz, 160 Wn.2d at 110; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A trial court abuses its discretion when its decision is based on untenable grounds, including those that are contrary to law. Riley, 121 Wn.2d at 37; Brooks, 142 Wn. App. at 850.

Defendant was sentenced to community custody pursuant to RCW 9.94A.701. Therefore, the court had authority to impose conditions of community custody set out in RCW 9.94A.703. As a term of community custody the court may order defendant to "Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Defendant was ordered to have no contact with AM. CP 11. Conditions of community custody may also include participation in "crime-related treatment or counseling services" and "rehabilitative programs," or

performance of "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c),(d). Additionally, the sentencing court has authority to impose and enforce crime-related prohibitions and affirmative conditions as a part of the sentence. RCW 9.94A.505(8). A "crime-related prohibition" is a court order "directly relating to the circumstances of the crime for which the offender was convicted." RCW 9.94A.030(10). A trial court may impose a sentence that is required or allowed by law. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); State v. O'Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008).

The prevention of coerced rehabilitation is the main concern when reviewing crime-related prohibitions. Riley, 121 Wn.2d at 37. Otherwise, the assignment of crime-related prohibitions has "traditionally been left to the discretion of the sentencing judge." Id.; State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989). A sentence will be reversed only if it is "manifestly unreasonable" such that "no reasonable man would take the view adopted by the trial court." Riley, 121 Wn.2d at 37; State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

1. Home Visits.

Defendant challenges the condition that requires his consent to home visits to monitor his compliance with supervision. The challenged condition reads:

> You must consent to [Department of Corrections] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access.

CP 21. Defendant argues this condition allows community corrections officer to search his residence without reasonable suspicion, and thus, violates article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution. He further argues that this condition is insufficiently clear to provide fair warning of proscribed conduct and prevent arbitrary and discriminatory enforcement. Appellant's Opening Brief 21-33.

a. **The Challenged Condition Does Not Allow Community Correction Officer To Search Defendant's Residence Without Reasonable Suspicion.**

Community corrections officers have authority to search the home and possessions of those under their supervision based upon a reasonable or well-founded suspicion. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483

U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Defendant concedes this point. Appellant's Opening Brief 22-23. RCW 9.94A.631(1) provides, "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." Defendant does not challenge the constitutionality of RCW 9.94A.631.[2] Appellant's Opening Brief 22.

In addition to the challenged condition, the court imposed conditions of community custody that required prior approval of the location of defendant's residence and living arrangement and notification of any change in the address. CP 11, 21. Taken as a whole, those conditions require affirmative conduct that is reasonably related to defendant's risk of reoffending, or the safety of the community. The court has authority to require a defendant "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(d). Defendant does

[2] A legislative act is presumptively constitutional, and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt. State v. Heckel, 143 Wn.2d 824, 833, 24 P.3d 404 (2001).

not challenge those community custody conditions. Rather, defendant challenges the condition that requires his consent to "home visits" by community correction officers to monitor his compliance with supervision. Community corrections officers are "responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions." RCW 9.94A.030(4). As such they must be allowed to monitor whether the offender is complying with court ordered conditions of release. Washington courts have held that community custody monitoring conditions are valid. State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (holding polygraph testing is a valid community custody monitoring condition), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Vant, 145 Wn. App. 592, 603-604, 186 P.3d 1149 (2008) (holding polygraph testing and imposition of random urinalysis/PBT/BAC tests to ensure compliance with other conditions are valid community custody monitoring conditions).

The challenged community custody condition requires defendant's consent to "home visits" to monitor his compliance with supervision. This condition does not require defendant to consent to searches. Home visits are something less than a search. "Visit"

means: "to go somewhere to see and talk to someone in an official way or as part of your job." http://www.merriam-webster.com/dictionary/visit. "Search" means: "to carefully look for someone or something; to try to find someone or something." http://www.merriam-webster.com/dictionary/search. The Court has recognized the fundamental difference between consent search and consent to a home visit:

> Moreover, as the State correctly contends, there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes. When police obtain consent to search a home pursuant to a "knock and talk" they go through private belongings and affairs without restriction. Such an intrusion into privacy is not present, however, when the police seek consensual entry to question a resident.

State v. Khounvichai, 149 Wn.2d 557, 564, 69 P.3d 862 (2003) (limiting application of the requirement in State v. Ferrier, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998) to the "inherently coercive" knock and talk procedure where police request entry for the purpose of obtaining consent to conduct a warrantless search for contraband or evidence of a crime). It is well established that a discovery made in plain view is not a search. Article I, section 7 "[does] not prohibit a seizure without a warrant, where there is no

need of a search, and where contraband subject-matter or unlawful possession of it is fully disclosed and open to the eye and hand." Khounvichai, 149 Wn.2d at 565. An officer has not conducted a search if the officer observes evidence in plain view.

A convicted defendant's constitutional rights during the period of community custody are subject to the infringements authorized by the Sentencing Reform Act of 1981, RCW 9.94A. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996); State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). Washington recognizes a warrantless search exception, to search a parolee or probationer and his home or effects with reasonable cause. State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); Massey, 81 Wn. App. at 200. Even where a sentencing condition infringes on a fundamental right, an abuse of discretion is the appropriate standard of review. In re Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

The home visits in the challenged condition involve only visual inspection of the areas of the residence where defendant lives. CP 21. Requiring consent to home visits for visual inspection was reasonably related to monitoring the defendant's risk of

reoffending and to insuring the safety of the community. The challenged condition of community custody does not require defendant's consent to searches without reasonable suspicion.

b. **The Challenged Condition Is Sufficiently Clear To Provide Fair Warning Of Proscribed Conduct And Prevent Arbitrary And Discriminatory Enforcement.**

Defendant argues that the challenged condition allows community custody officers to search his home without reasonable cause. Appellant's Opening Brief 23-29. This claim is not supported by the plain language of the condition—the condition only requires consent to home visits—or the law. As this Court has noted:

> RCW 9.94A.631's plain language expressly authorizes a search of a probationer's 'person, residence, automobile, 'or other personal property' without a warrant if the CCO has reasonable cause to believe that the probationer violated a condition of the sentence. ... [T]he standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion.

State v. Massey, 81 Wn. App. 198, 201, 913 P.3d 424 (1996) (emphasis in original).

The Supreme Court has held a community custody condition void for vagueness where it left too much discretion to the individual community corrections officers and would lead to arbitrary

enforcement. State v. Valencia, 169 Wn.2d 782, 795. 239 P.3d 1059 (2010). In contrast, here, the challenged condition does not give the community correction officer authority to search. Rather, the authority to search is from RCW 9.94A.631. The statute requires the community corrections officer must have reasonable cause to believe that an offender has violated a condition or requirement of the sentence prior to requesting consent to search. RCW 9.94A.631(1). The court can presume that a reasonable officer knows the law he is charged with enforcing. United States v. Hernandez, 55 F.3d 443, 446 (9th Cir. 1995).

The challenged condition does not require defendant's consent to the search of his residence. The challenged condition plainly states that the purpose for home visits is to monitor defendant's compliance with the conditions of his community custody. CP 21. A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Valencia, 169 Wn.2d at 793. The challenged condition does not give a Community Corrections Officer authorization to search defendant's residence without

reasonable suspicion and does not lead to arbitrary or discriminatory enforcement.

c. **Defendant's Challenge To The Community Custody Condition Is Not Ripe For Review.**

The challenged condition is not ripe for review until defendant is actually subjected to an allegedly improper search. Massey, 81 Wn. App. at 200. A claim is ripe for review on direct appeal if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Valencia, 169 Wn.2d at 786; State v. Bahl, 164 Wn.2d 739, 751, 193, P.3d 678 (2008). The court must also consider the hardship to the parties of withholding court consideration. Id. Defendant is not currently under hardship because of the challenged condition. A condition of sentence is not ripe for review until the defendant has been harmfully affected by the challenged condition. Valencia, 169 Wn.2d at 791; Massey, 81 Wn. App. at 200. Nothing in the record reflects that DOC has attempted to search defendant's residence.

Here, the issue raised is primarily legal; whether the challenged condition allows community corrections officer to search defendant's residence without reasonable cause, in contradiction of RCW 9.94A.631(1). Nothing about this statutory question will

change between now and when defendant is released from prison, supporting its characterization as a legal question. Valencia, 169 Wn.2d at 788; State v. McWilliams, 177 Wn. App. 139, 153, 311 P.3d 584 (2013) review denied, 179 Wn.2d 1020, 318 P.3d 279 (2014). Additionally, since defendant was sentenced to the challenged condition at issue, the third factor of the ripeness test, whether the challenged action is final, is also met. Valencia, 169 Wn.2d at 789.

The second factor of the ripeness test asks whether the issues require further factual development. The challenged condition does not place an immediate restriction on defendant's conduct. The condition necessitates that the State take additional action allowing for the search of a person or residence. Bahl, 164 Wn.2d at 749; State v. Ziegenfuss, 118 Wn. App. 110, 113–115, 74 P.3d 1205 (2003) (challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines); Massey, 81 Wn. App. at 200–201, (challenge to sentencing condition subjecting defendant to search premature until search actually conducted); State v. Phillips, 65 Wn. App. 239, 243–244, 828 P.2d 42 (1992) (same as Ziegenfuss). Such conditions are not ripe for review until the State attempts to enforce them because

their validity depends on the particular circumstances of the attempted enforcement. Valencia, 169 Wn.2d at 789.

In Massey, the defendant challenged a similar sentencing court order. The order required that Massey submit to searches by a community corrections officer as a condition to community placement, the order did not state that searches must be based on reasonable suspicion. Massey, 81 Wn. App. at 199. The court found that the validity of such conditions depends on the particular circumstances of the attempted enforcement, and held that Massey's claim was premature until he was subjected to a search that he deemed unreasonable. Massey, 81 Wn. App. at 200.

Reasonableness or reasonable suspicion is a legal conclusion based on the particular facts and circumstances surrounding the search in a given case. State v. Patterson, 51 Wn. App. 202, 204–208, 752 P.2d 945, review denied, 111 Wn.2d 1006 (1988). Because a fact-based inquiry regarding reasonableness is required, defendant's challenge fails to satisfy the second factor which requires there be no need for further factual development for review. Valencia, 169 Wn.2d at 786; Bahl, 164 Wn.2d at 751. Accordingly, defendant's appeal lacks the factual context necessary to show harm to resolve the issue. Thus, the factual development

of the claim is essential to assessing its validity. The trial court's imposition of the challenged condition of community custody requiring consent to home visits for the purposes of visual inspection to monitor his compliance with supervision should be affirmed.

2. Substance Abuse Treatment.

Defendant also challenges the condition that requires he participate in substance abuse treatment as directed by the supervising Community Corrections Officer. Appellant's Opening Brief 18-20; CP 21.

The record shows that defendant provided alcohol to minors and had been drinking just prior to the committing the crime. RP 104-107. This evidence is sufficient to show that defendant's alcohol use related to the circumstances of the crime. State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006). The PSI discussed defendant's alcohol and drug use. CP 74. At sentencing defense asked that the court not impose conditions 5-12, addressing defendant's use of checking accounts, possession and handling money, negotiable assets, or fiduciary responsibility, and his use of drugs and alcohol. RP 443. The trial court addressed defendant's supplying alcohol to a minor. RP 445, 447. Based on

defendant's history, the court expressed concern that this might happen again. RP 448. The trial court did not specifically address treatment.

The court has authority to order an offender to participate in crime-related treatment or counseling services as a condition of community custody. RCW 9.94A.703(3)(c). However, since there is no indication that defendant's drug use related to the circumstance of the crime, this court should remand the case for the sentencing court to clarify that the condition only requires participation in alcohol abuse treatment.

V. CONCLUSION

For the reasons state above, defendant's conviction should be affirmed. The condition of community custody requiring consent to home visits should also be affirmed. The case should be remanded to the sentencing court for clarification that the

community custody condition requiring participation in treatment only applies to alcohol abuse treatment.

Respectfully submitted on December 1, 2014.

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