SUPREME COURT NO. 98649-5
COA NO. 36867-0-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAAC S. SPRAUER,

Petitioner.

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

The Honorable Brian Huber, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER

Isaac Sprauer asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Sprauer requests review of the decision in State v. Isaac Shane Sprauer, Court of Appeals No. 36015-6-III (slip op. filed May 12, 2020), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a challenge to a community custody condition on the ground that it is not crime related can be raised for the first time on appeal?

2. Whether the community custody condition prohibiting association and contact with felons must be stricken because it is not directly related to the circumstances of the crime under the statutory standard and violates the First Amendment right to association under the constitutional standard?

D. STATEMENT OF THE CASE

Isaac Sprauer and Tammy Myers used to be in a dating relationship. RP 244-45. Myers testified that one day the two were at her residence when Sprauer became angry and strangled her. RP 251-60. Sprauer acknowledged an altercation occurred but denied choking her. RP

342-45. Sprauer was convicted of committing second degree assault. CP 55. The court imposed an exceptional sentence of 30 months in confinement followed by 18 months of community custody. CP 66-67.

Sprauer raised various sentencing issues on appeal, including a challenge to a community custody condition that he "not associate nor have contact with persons with felony convictions, except as approved by the Department." CP 67.

The Court of Appeals refused to address Sprauer's argument that the condition was not crime related under the requisite statutory standard because it was raised for the first time on appeal. Slip op. at 7-8. The Court of Appeals proclaimed: "For an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that is illegal or erroneous as a matter of law, and (2) it must be ripe." Slip op. at 7 (citing State v. Peters, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019)). The Court of Appeals held it "will not consider the argument that the sentencing condition is not crime related" because "Sprauer had the opportunity to raise that contention in the trial court and create a record, but failed to do so." Slip op. at 8 (citing Peters, 10 Wn. App. 2d at 591 (citing State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137, review denied, 193 Wn.2d 1029, 445 P.3d 561 (2019)).

The Court of Appeals accepted the State's concession that the condition, as written, was vague and needed modification. Slip op. at 8. But it declined to strike the condition outright, rejecting Sprauer's additional argument that the condition violated his First Amendment right to freedom of association. Slip op. at 8-10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT SHOWING A CRIME-RELATED CHALLENGE TO A COMMUNITY CUSTODY CONDITION MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The Court of Appeals held Sprauer could not argue for the first time on appeal that the community custody condition failed to comply with the statutory requirement that it be crime related. The Court of Appeals decision bucks decades of Supreme Court precedent and other decisions from the Court of Appeals. Review is warranted under RAP 13.4(b)(1) and (b)(2).

"In 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). Ford cited In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) for the rule that "sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or

constitutional." Ford, 137 Wn.2d at 477. Ford cited State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) for the proposition that "imposition of a criminal penalty not in compliance with sentencing statutes may be addressed for the first time on appeal."

Ford and Moen cited State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993), which recognized case law "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal." Ford, 137 Wn.2d at 477-78; Moen, 129 Wn.2d at 546-47 (finding the reasoning of Paine persuasive). "A justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." Ford, 137 Wn.2d at 478 (quoting Paine, 69 Wn. App. at 884).

The Supreme Court reaffirmed the principle in In re Pers. Restraint of Call, 144 Wn.2d 315, 331, 28 P.3d 709 (2001), citing Ford and pointing out that "[c]ourts have the duty and power to correct an erroneous sentence upon its discovery."

The Supreme Court in State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) cited Ford and Paine among other cases in support of the

rule that illegal or erroneous sentences may be challenged for the first time on appeal. The purpose of the rule "is to preserve the integrity of sentencing laws." State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113, 114–23 (2009), disapproved on other grounds by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014).

In State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019), this Court observed "[c]onditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement." (citing State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (citing Bahl, 164 Wn.2d at 744).

Courts resolve crime-related issues by reviewing the factual basis for the condition under a substantial evidence standard and "[t]he court will strike the challenged condition if there is no evidence in the record linking the circumstances of the crime to the condition." Padilla, 190 Wn.2d at 683. A trial court lacks statutory authority to impose a condition when it is unrelated to the facts of the crime. State v. Johnson, 180 Wn. App. 318, 325-26, 327 P.3d 704 (2014).

There are a legion of Court of Appeals decisions holding crime-related challenges to sentencing conditions can be raised for the first time on appeal. E.g. State v. Norris, 1 Wn. App. 2d 87, 92, 96-100, 404 P.3d

83 (2017), aff'd in part, rev'd in part sub nom., State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018); State v. Warnock, 174 Wn. App. 608, 611-14, 299 P.3d 1173 (2013); State v. McWilliams, 177 Wn. App. 139, 150, 311 P.3d 584 (2013), review denied, 179 Wn.2d 1020, 318 P.3d 279 (2014); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), disapproved on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); State v. Jones, 118 Wn. App. 199, 204, 206-07, 76 P.3d 258 (2003); State v. Julian, 102 Wn. App. 296, 304-05, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003, 20 P.3d 944 (2001).

In State v. Johnson, 4 Wn. App. 2d 352, 357-60, 421 P.3d 969, review denied, 192 Wn.2d 1003, 430 P.3d 260 (2018), Division Three reversed community custody conditions that were not crime related, recognizing they could be challenged for the first time on appeal. Division Three did the same in State v. Cordero, 170 Wn. App. 351, 373-74, 284 P.3d 773 (2012).

Division Three, however, has recently chosen to depart from what everyone thought was settled law. The Court of Appeals in Sprauer's case relied on its decisions in State v. Peters, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019) and State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019). Peters thought State v. Blazina, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015) "clarified" the law and "made clear that the exception for

illegal or erroneous sentences does not apply when the challenged sentence term, had it been objected to in the trial court, was one that depends on a case-by-case analysis." Peters, 10 Wn. App. 2d at 581-82. According to Peters, for a challenge to a community custody condition to be entitled to review for the first time on appeal, there must be a manifest constitutional error or a sentencing condition that is illegal or erroneous as a matter of law. Id. at 583. Additionally, the challenge must be ripe for review, meaning "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. at 582 (quoting State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015)). Peters relied on Casimiro as authority to refuse review of a challenge to a sentencing condition that is not crime related "when the offender had the opportunity to raise the contention in the trial court, creating a record, and failed to do so." Id. at 591 (citing Casemiro, 8 Wn. App. 2d at 249). Notably, Casimiro involved an affirmative agreement to the conditions at sentencing. Casimiro, 8 Wn. App. 2d at 249. Peters, however, extended Casimiro to situations where the defendant merely fails to object.

Here, the Court of Appeals held it would not consider Sprauer's argument that the sentencing condition is not crime related because "Sprauer had the opportunity to raise that contention in the trial court and

create a record, but failed to do so." Slip op. at 8 (citing Peters, 10 Wn. App. 2d at 591 (citing Casimiro, 8 Wn. App. 2d at 249)).

The Peters court read Blazina too broadly. Blazina did not undo settled law on the issue, recognizing the concern about sentence conformity motivated earlier decisions to allow review of sentencing errors raised for the first time on appeal. Blazina, 182 Wn.2d at 833. Challenges to discretionary legal financial obligation (LFO) orders, on the other hand, do not "promote sentencing uniformity in the same way" because "[t]he trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Id. at 834. There is no bright line statutory standard that must be met before LFOs can be imposed.

In contrast, the requirement that a condition be crime related provides the substantive basis by which to judge the imposition of a community custody condition, and such a determination must be supported by substantial evidence in the record. Whether facts in the record meet that standard can be resolved as a question of law: either the standard is met or it isn't. This has been a workable standard for many years. Appellate courts have had no difficulty addressing it for the first time on appeal.

In terms of ripeness, this statutory question does not depend on the particular circumstances of the attempted enforcement, as in Cates. See Cates, 183 Wn.2d at 535 (challenge to search condition of sentence not ripe for review where its propriety depended on the factual circumstances of attempted enforcement). The legality of the condition is measured at the time of sentencing — whether the record shows the condition is crime related. Sprauer, meanwhile, is subject to the restriction immediately upon release, which further demonstrates ripeness. Bahl, 164 Wn.2d at 751. In fact, Sprauer has already been released from the confinement portion of his sentence and is currently on community custody. Permitting a preenforcement challenge may reduce the significant risk of hardship. Id. at 752. In particular, permitting the challenge will prevent Sprauer from being jailed or sanctioned for violating a condition for which the trial court never had authority to impose. See RCW 9.94A.631(1) (a community corrections officer may arrest an offender without a warrant if he or she suspects the offender has violated a condition; if arrested, the offender must be jailed); RCW 9.94A.6332(7) (sanctions for violation).

The Court of Appeals decision, in refusing to address Sprauer's crime-relatedness challenge for the first time on appeal, cannot be squared with this Court's reasoning in Ford. "In Ford, we held that an unpreserved sentencing error may be raised for the first time on appeal because

sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, *or is unsupported in the record*." State v. Jones, 182 Wn.2d 1, 6, 338 P.3d 278 (2014) (emphasis added). A challenge to the existence of prior convictions for purposes of computing the offender score can be raised for the first time on appeal despite the lack of defense objection precisely because the record does not support the sentencing decision. Importantly, "it is the State, not the defendant, who bears the ultimate burden of ensuring the record supports the existence and classification of out-of-state convictions. Ford, 137 Wn.2d at 480.

As Ford demonstrates, it matters who bears the burden of proof. Courts have not expressly addressed the question of which party has the burden of proof on the crime relatedness of a community custody condition. Does the State have the burden of proving the condition is crime related or does the defendant have the burden of proving it is not crime related? The burden should be on the State.

The Supreme Court's reasoning in State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) supports this conclusion. In that case, the defendant argued the State should have the burden of proving offenses did not constitute the "same criminal conduct" for purposes of sentencing. This Court held the burden was on the defendant to prove offenses

satisfied this statutory standard. Graciano, 176 Wn.2d at 539. In resolving the issue, the Court focused on whether the determination favored the defendant or the State. The distinction mattered because "in general, '[t]he burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor.'" Id. (quoting State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). Thus, the State must prove the existence of a prior conviction because it favors the State by increasing the offender score over the default. Id. In contrast, "a 'same criminal conduct' finding favors the defendant by lowering the offender score below the *presumed* score." Id. "Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct." Id.

If facts exist to justify a sentencing condition, the burden should be on the State to produce them. To the extent imposition of a condition is reviewed for abuse of discretion, the reasoning in Graciano compels the conclusion that the State bears the burden of producing sufficient facts to warrant the exercise of its discretion in its favor. And if substantial evidence does not show a relationship to the crime, the trial court has no business imposing the condition. The legality of the condition is measured at the time of sentencing, as the court has no authority to impose a

condition like the one at issue here if substantial evidence in the record does not show it is crime related.

Division Three's contrary approach relieves the State of its burden of justifying the propriety of a community custody condition on crime-related grounds. And it relieves the trial court of justifying the imposition of such a condition based on substantial evidence. Under the Court of Appeals' approach, the State need prove nothing and the trial court need not have any evidence in the record to support its ruling in order for a sentencing condition to be upheld on appeal. That approach places the integrity of the sentencing scheme in jeopardy.

In a more enlightened moment, a different panel in Division Three observed that community custody conditions must survive the "rigors of appellate scrutiny" and "[w]hen sentencing an individual to a term of community custody, trial courts are tasked with crafting supervision conditions that are sufficient to promote public safety but also respectful of a convicted person's statutory and constitutional rights." State v. Johnson, 4 Wn. App. 2d 352, 355, 421 P.3d 969, review denied, 192 Wn.2d 1003, 430 P.3d 260 (2018). At the trial level, unfortunately, the rule is more honored in the breach than the observance. Even the most cursory examination of the case law shows community custody conditions are nearly always imposed in a rote manner at sentencing with absolutely

no discussion about their propriety. Adoption of Division Three's hands-off approach will only exacerbate the problem by incentivizing trial courts not to care. Sprauer asks the Supreme Court to resolve the conflict created by Division Three.

2. THE CONDITION IS NOT CRIME-RELATED UNDER THE STATUTORY STANDARD AND VIOLATES SPRAUER'S FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION.

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Substantial evidence must support this determination. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). The court may also order a person to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(b). The Supreme Court has interpreted the "specified class of individuals" aspect of this provision "to require some relationship to the crime." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The First Amendment right to freedom of association, meanwhile, protects a person's right to enter into and maintain human relationships. State v. Moultrie, 143 Wn. App. 387, 399 n. 21, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008); United States v. Reeves, 591 F.3d 77, 82 (2d Cir. 2010). A convicted defendant's constitutional rights are subject to infringement. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the infringements themselves must be constitutional. "The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

Restriction on an offender's freedom of association with a specified class of individuals must be "reasonably necessary to accomplish the essential needs of the state and public order." State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993). Prohibitions affecting fundamental rights must be narrowly tailored. Padilla, 190 Wn.2d at 683. "There must be no reasonable alternative way to achieve the State's interest." State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

The condition imposed on Sprauer is not crime related and, under the constitutional standard, is unnecessary to accomplish the essential needs of the state and public order. Association with felons did not have anything to do with Sprauer's crime against Myers. He did not have an

accomplice. The evidence is that he got in an argument with Myers while the two were alone in the trailer and then assaulted her. RP 250-60. No one else was involved in perpetrating the attack. No one, let alone a convicted felon, encouraged him to do it.

Comparison with other cases shows why the condition in Sprauer's case cannot stand. In Riles, petitioner Gholston was convicted of raping a nineteen-year-old woman but the trial court ordered him not to have contact with "any minor-age children." Riles, 135 Wn.2d at 349. The Supreme Court struck the condition because "[i]t is not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime." Id. at 350, 353.

In State v. Hearn, 131 Wn. App. 601, 607, 128 P.3d 139 (2006), the defendant, convicted of drug possession, challenged the constitutionality of a community custody placement restriction that she refrain from "associating with known drug offenders." Hearn held the restriction on the ability to associate with known drug offenders was constitutional because the condition would help prevent further criminal conduct and was reasonably related to the drug crime for which the defendant was convicted. Id. at 608-09.

In Moultrie, the defendant, convicted of raping a developmentally delayed woman, challenged a condition that prohibited unsupervised

contact with vulnerable and disabled adults as unconstitutionally overbroad. Moultrie, 143 Wn. App. at 390, 398. The court upheld the condition because "vulnerable" and "disabled" adults accurately described the class of people victimized by the crime for which Moultrie was convicted. Id. at 399. "Thus, an order prohibiting contact with such individuals is reasonably related to the State's essential need to protect such adults and is not overbroad." Id.

In State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230, 231 (2014), on the other hand, the court struck down a prohibition on contact with physically mentally vulnerable individuals because it was not crime-related, as the defendant did not offend against such individuals.

In State v. Munoz-Rivera, 190 Wn. App. 870, 876, 892-93, 361 P.3d 182 (2015), the defendant, convicted of assault and harassment, challenged a community custody condition that stated he "shall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered." The court struck the condition because it was not crime related, as there was no evidence of drug use. Id. at 893.

The common thread in these cases is that a condition restricting association with a specified class of people will be upheld against constitutional and statutory challenge if contact with a class of individuals

bears a relationship to the crime. If there is no such relationship, the condition will fall. Sprauer did not associate with any convicted felons in committing his crime against Myers. Contact with convicted felons bears no relationship to the crime. The condition must therefore be stricken either because it is not crime related or because it violates Sprauer's First Amendment right to freedom of association.

When restriction on a fundamental right is involved, a relationship to the circumstances of the crime represents the constitutional floor. In Riley, a sentencing condition prohibited a computer hacker convicted of computer trespass from "associating with other computer hackers" and "communicating with computer bulletin boards." Riley, 121 Wn.2d at 36. The Supreme Court upheld the prohibition against constitutional challenge because it was reasonably related to the crime of computer trespass, as it helped to "prevent Riley from further criminal conduct" and "discourage[ed] his communication with other hackers." Id. at 38. The Court of Appeals here, in citing Riley, ignores its actual holding tying the condition to the circumstances of the crime.

It is telling that the Court of Appeals felt the need to look to nonbinding federal case law, citing United States v. Munoz, 812 F.3d 809, 820 (10th Cir. 2016) and United States v. Napulou, 593 F.3d 1041, 1047 (9th Cir. 2010). Slip op. at 9-10. Those federal cases are unhelpful

because they did not use the Washington statutory standard for addressing crime-related conditions nor did they use the Washington standard for addressing challenges to conditions that affect constitutional rights. The federal standard for supervision conditions is more amorphous and less rigorous. See Napulou, 593 F.3d at 1044 (citing 18 U.S.C. § 3583(d), which provides that any condition must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission).

That being said, Napulou struck down a sentencing condition that prohibited contact with misdemeanor offenders as being too broad because past offenders may currently be law abiding and the condition was otherwise not reasonably related to the risk of reoffense. Napulou, 593 F.3d at 1045-46. Napulou distinguished its case from others in which similar conditions were upheld. Id. (citing United States v. Ross, 476 F.3d 719, 721-22 (9th Cir. 2007) (restricting a defendant who was convicted of acquiring a firearm for a white supremacist from associating with known neo-Nazis or white supremacists); United States v. Romero, 676 F.2d 406, 407 (9th Cir. 1982) (prohibiting a drug offender from associating with persons who have been convicted of drug offenses or with anyone

unlawfully involved with drugs); Malone v. United States, 502 F.2d 554 (9th Cir. 1974) (prohibiting association with Irish organizations or visits to Irish pubs where defendant was motivated to commit his crime because of involvement in the American Irish Republican movement). The Court of Appeals curiously overlooked this part of the Napulou decision.

As for Munoz, the 10th Circuit dispensed with the constitutional challenge by glibly observing "Keeping Mr. Muñoz away from other convicted felons is a sensible way to reduce the risk of recidivism, which is a legitimate purpose of supervised release even if the condition encroaches on a constitutionally protected interest." Munoz, 812 F.3d at 820. Whether a condition is "sensible" is not the standard for assessing conditions that affect a constitutional right in Washington. In Washington, such prohibitions must be "reasonably necessary to accomplish the essential needs of the state and public order." Riley, 121 Wn.2d at 37-38. The condition here fails to meet that controlling standard.

F. CONCLUSION

For the reasons stated, Sprauer requests that this Court grant review.

DATED this 11th day of June 2020.

Respectfully submitted,

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CASE # 368670
State of Washington v. Isaac S. Sprauer
DOUGLAS COUNTY SUPERIOR COURT No. 171001485

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Brian C. Huber

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FILED
MAY 12, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36867-0-III
Respondent,	)	
	)	
v.	)	
	)	
ISAAC SHANE SPRAUER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Isaac Sprauer appeals the exceptional sentence imposed for his conviction of second degree domestic violence (DV) assault and challenges community custody and legal financial obligation (LFO) terms of his judgment and sentence. The State concedes some error. We remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

Following an assault by strangulation of his former girlfriend and a scuffle with her adult son, Isaac Sprauer was charged with second degree DV assault and fourth degree assault. The charges were later amended to increase the charge for assaulting the girlfriend to first degree DV assault.

The defense challenged Mr. Sprauer's competency to stand trial. An evaluation at Eastern State Hospital concluded he was competent, while a defense evaluation of his competency and possible diminished capacity concluded he was not competent, and that

competency restoration was unlikely. After hearing testimony from both experts, the trial court issued a decision finding Mr. Sprauer competent, saying "[a]lthough this Court believes that the Defendant has some mental health issues, most likely as a result of or contributed to by methamphetamine use, there is a difference between having mental health issues and competency to stand trial." Clerk's Papers (CP) at 22.

The charges proceeded to a two-day jury trial. The jury found Mr. Sprauer guilty of the lesser included charge of second degree assault of his former girlfriend and acquitted him of the charge of fourth degree assault of her son. It made a special finding that Mr. Sprauer and his former girlfriend had been members of the same family.

At sentencing, the State announced for the first time that it was requesting an exceptional sentence. It pointed out that Mr. Sprauer had a history of third and fourth degree assaults and harassment, but because he had been crime-free for five years, the crimes had washed out. With an offender score of zero, his standard range would be three to nine months, which the State argued was clearly too lenient. The trial court continued the sentencing so that the lawyers could review whether an exceptional sentence on the ground requested would be permitted under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a concern raised by the defense.

At the continued hearing, defense counsel continued to oppose an exceptional sentence but said he no longer had *Blakely* concerns because the aggravator related to the offender score, not a factual dispute. The defense also opposed a mental health

evaluation of Mr. Sprauer being requested by the State. Defense counsel informed the court that Mr. Sprauer claimed he never wanted to assert incompetency or diminished capacity, both of which had been his former lawyer's "trial strategy." Report of Proceedings (RP) at 472.

The court imposed an exceptional sentence of 30 months and 18 months of supervision, entering a finding that "unscored misdemeanors and washed felonies of an assaultive and harassing nature" resulted in a sentence that was "clearly too lenient." CP at 72. The terms of community supervision imposed included undergoing a mental health evaluation and complying with recommended treatment, and not associating or having contact with felons except as approved by the Department of Corrections. As for costs, the court told Mr. Sprauer it was "going to waive . . . legal/financial obligations other than the mandatory $500 victim assessment fee" for the reason that it did not want him "tangled up in financial obligations that will make it harder for you to do what you need to do in terms of [the] mental health evaluation, mental health treatment, [those] kinds of things." RP at 485-86. The judgment and sentence form included requirements that Mr. Sprauer "pay supervision fees as determined by DOC," "an annual assessment of $100.00 for collection services," and imposed interest on the LFOs. CP at 66, 68 (boldface omitted).

Mr. Sprauer appeals.

ANALYSIS

Three of the errors assigned by Mr. Sprauer are conceded by the State. We address those briefly before turning to the one contested issue.

Resentencing is required within the standard range

Mr. Sprauer argues that the trial court committed *Blakely* error by basing an exceptional aggravated sentence on judicial fact finding. Alternatively, if the error was invited when defense counsel withdrew his *Blakely* objection, he claims ineffective assistance of counsel.

Following the United States Supreme Court's 2004 decision in *Blakely*, the Washington Supreme Court and the legislature proceeded on parallel tracks to address its impact on the exceptional sentencing provisions of the Sentencing Reform Act of 1981, chapter 9.94A RCW. On April 12 and 14, 2005, the state house and senate, respectively, voted to amend former RCW 9.94A.530 and 9.94A.535. LAWS OF 2005, ch. 68, § 1. The changes to RCW 9.94A.535 segregated aggravating factors that must be determined by a jury from the four that bill proponents believed could still be considered and imposed by the court. RCW 9.94A.535(2), (3). Among those that proponents believed could still be considered and imposed by courts were aggravators applicable when unscored prior offenses "result[ed] in a presumptive sentence that is clearly too lenient." RCW 9.94A.535(2)(b), (d).

On the same day the house approved the changes, however, the Washington Supreme Court held that the conclusion that a presumptive sentence "is clearly too lenient" is "one that must be made by the jury." *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). This was because earlier decisions of the court required courts to find one of two factual bases to support the "too lenient" conclusion: either the "'(1) "egregious effects" of defendant's multiple offenses [or] (2) the level of defendant's culpability resulting from the multiple offenses.'" *Id.* (alteration in original) (quoting *State v. Batista*, 116 Wn.2d 777, 787-88, 808 P.2d 1141 (1991)).

The court held in *Hughes* that statutory provisions that allow courts to consider and impose fact-dependent aggravators are not *facially* unconstitutional, because under *Blakely* there is at least one way they can be applied constitutionally: an aggravator need not be found by a jury if a defendant consents to judicial fact finding. 154 Wn.2d at 133-34. In the 15 years since *Hughes* was decided, the legislature has not seen fit to amend RCW 9.94A.535 to move the aggravators requiring a "clearly too lenient" finding from RCW 9.94A.535(2) (considered by the court) to RCW 9.94A.535(3) (considered by the jury). As a result, and as happened in this case, lawyers and judges reading the statute and not having *Hughes* in mind would assume that the aggravator found by the court in Mr. Sprauer's case could be imposed without a jury finding.

We accept the State's concession that Mr. Sprauer must be sentenced within the standard range. We forgo analysis of whether this is a case of invited error and ineffective assistance of counsel.[1]

Mental health evaluation

RCW 9.94B.080 authorizes sentencing courts to order an offender under community supervision to undergo a mental status evaluation and treatment, but only if it finds that "reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." With respect to adults, "mentally ill person" means a person who is "[a]cutely mentally ill," "[c]hronically mentally ill," or "[s]eriously disturbed," as those terms are further defined in RCW 71.24.025(1), (10) and (39).

The State concedes the trial court did not make the findings required by RCW 9.94B.080 before ordering Mr. Sprauer to obtain a mental health evaluation and comply with recommended treatment. We accept the State's concession. The condition may be re-imposed only if supported by the required findings.

Costs and interest

[1] We also decline to address Mr. Sprauer's contention that the State was required to give notice of its intent to seek the exceptional sentence before trial. Where the trial court could not constitutionally impose an exceptional sentence under RCW 9.94A.535(2)(d) on these facts nor can it impanel a jury to consider a subsection (2) aggravating circumstance (*see* RCW 9.94A.537(2)), whether notice was required before trial is moot.

Mr. Sprauer contends that reference in the judgment and sentence form to costs not intended to be imposed by the court are clerical errors or, if not clerical errors, they were improperly imposed in light of his indigence and the trial court's failure to inquire into his ability to pay. The State agrees that the only cost imposed was the crime victim compensation assessment.

On this score, we will simply direct the trial court to note Mr. Sprauer's objections at resentencing.

First Amendment challenge to community custody condition prohibiting association with felons

Finally, Mr. Sprauer contends for the first time on appeal that the condition prohibiting association with felons must be struck because it is not crime related, violates the First Amendment to the United States Constitution, and is vague. The statutory authority for the restriction is RCW 9.94A.703(3)(b), which permits the court to order the defendant to have no contact with "a specified class of individuals."

For an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that is illegal or erroneous as a matter of law, and (2) it must be ripe. If it is ineligible for review for one reason, we need not consider the other. *State v. Peters*, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019).

We will not consider the argument that the sentencing condition is not crime related. *See* RAP 2.5(a). Mr. Sprauer had the opportunity to raise that contention in the trial court and create a record, but failed to do so. *Peters*, 10 Wn. App. 2d at 591 (citing *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137, *review denied*, 193 Wn.2d 1029, 445 P.3d 561 (2019)).

In arguing that the condition is vague, Mr. Sprauer points to this court's unpublished decision last year in *State v. Knott*[2] as persuasive authority for requiring the condition to be modified to refer to persons "whom defendant knows to have a felony conviction." Br. of Appellant at 36 (emphasis omitted). The court reasoned in *Knott* that "associate" and "have contact" are not vague terms "provided the object of the association and contact is known." *Knott*, slip op. at 13. The State does not object to modifying the condition to make it clear that it prohibits only Mr. Sprauer's contact with persons known to him to have felony convictions.

Mr. Sprauer's First Amendment challenge is that the condition impinges upon his right to enter into and maintain human relationships and, as our Supreme Court held in *State v. Riley*, restricting an offender's association with a specified class of individuals must be "'reasonably necessary to accomplish the essential needs of the state and public

[2] No. 35546-2-III, slip op. at 14 (Wash. Ct. App. Mar. 28, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/355462_unp.pdf. Unpublished decisions have no precedential value, are not binding on any court, and may be cited by parties only for such persuasive value as the court deems appropriate. *See* GR 14.1.

order.'" 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (quoting *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974)). In *Riley*, the defendant, who had been convicted of computer trespass, was restricted from associating with computer hackers. In upholding the condition, the Supreme Court stated: "The prohibition . . . is punitive and helps prevent Riley from further criminal conduct for the duration of his sentence." *Id.* at 38. The Tenth Circuit Court of Appeals cited similar reasons for rejecting a First Amendment challenge to a condition prohibiting association with felons, stating that keeping the defendant away from other convicted felons "is a sensible way to reduce the risk of recidivism, which is a legitimate purpose of supervised release even if the condition encroaches on a constitutionally protected interest." *United States v. Munoz*, 812 F.3d 809, 820 (10th Cir. 2016).

This is not a case where Mr. Sprauer presented a competing interest in associating with a felon who is, e.g., a life partner. In such a case, the Ninth Circuit Court of Appeals has said that a court "must undertake an individualized review of that person and the relationship at issue, and must provide a justification for the imposition of such an intrusive prohibitory condition." *United States v. Napulou*, 593 F.3d 1041, 1047 (9th Cir. 2010); *and see In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (requiring that no-contact order restricting contact with a child must be sensitively imposed). Absent such a competing interest, however, the goal of preventing an offender from further criminal conduct for the duration of his sentence, recognized in *Riley*,

suffices. As the Ninth Circuit Court pointed out in *Napulou*, a condition of supervised release that prohibits association with convicted felons without the permission of a probation officer was then a standard condition recommended by the Sentencing Commission. 593 F.3d at 1047 (citing U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(c)(9) (2008)).[3]

We remand for resentencing within the standard range, with any requirement for a mental health evaluation to be supported by the findings required by RCW 9.94B.080, and with directions to the trial court to modify the supervision condition dealing with persons with felony convictions to refer, instead, to persons "whom defendant knows to have a felony conviction."

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

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, J.

Fearing, J.

[3] *See* https://www.ussc.gov/sites/default /files/pdf/guidelines-manual/2008/manual /GL2008.pdf [https://perma.cc/9MA2-6J5Z].

NIELSEN KOCH P.L.L.C.

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