

65405-5

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NO. 65405-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARRELL ROWDEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether two the conditions of community custody imposed by the trial court are valid because they are contingent upon the defendant's sexual deviancy treatment specialist or Community Corrections Officer finding that they are necessary to protect community safety.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Darrell Rowden, with indecent liberties for an incident that took place on March 1, 2008. CP 1-3. A jury trial was held in April 2010 before the Honorable Barbara Mack. At the conclusion of the trial, the jury found Rowden guilty as charged. CP 14; RP (4/7/10) 74-75.

The trial court sentenced Rowden to 21 months in prison, which is the low end of the standard range. CP 50, 52; RP (5/7/10) 14-15. The trial court imposed 22 conditions of community custody, 4 of which Rowden now challenges on appeal. CP 58-59.

2. SUBSTANTIVE FACTS

D.P. was an elderly Alzheimer's patient at North Auburn Rehabilitation, a residential care facility. RP (4/6/09) 6, 8. By 2008,

D.P. was unable to recognize family members or have a coherent conversation, and she needed help with virtually every daily task, including toileting, dressing, walking, and eating. RP (4/6/10) 9; RP (4/7/10) 7-8. She carried a baby doll everywhere she went. RP (4/7/10) 7.

Rowden was also a resident at the facility because he was paraplegic. He was younger than most of the other residents, and he could move around in his manual wheelchair "really well." RP (4/7/09) 20.

In the evening on March 1, 2008, nursing assistant Maria Chavez-Martinez walked into the dining room and saw D.P. and Rowden. RP (4/6/09) 10-11. Rowden's right hand was inside D.P.'s blouse touching D.P.'s breast. RP (4/6/09) 19-20. When Chavez-Martinez asked what was going on, Rowden said, "Nothing, nothing," and quickly rolled away in his wheelchair. RP (4/6/09) 12.

Chavez-Martinez reported the incident to her supervisor, and the police were notified. RP (4/6/10) 64, 87. Auburn Police Officer Brian O'Neill interviewed Rowden, who at first adamantly denied that he had done anything wrong. RP (4/6/10) 94. When O'Neill confronted Rowden with the allegations, however, Rowden stated,

"If I did, then it was by accident. Maybe I was pulling her shirt down." RP (4/6/09) 95.

C. **ARGUMENT**

1. **TWO CONDITIONS OF COMMUNITY CUSTODY SHOULD BE MODIFIED OR STRICKEN, BUT THE OTHER CONDITIONS ARE VALID BECAUSE THEY ARE CONTINGENT UPON A FUTURE DETERMINATION BY DOC THAT THEY ARE NECESSARY TO PROTECT COMMUNITY SAFETY.**

Rowden claims that four of his conditions of community custody are either partially or wholly invalid. Specifically, Rowden claims that the trial court erred in ordering the following: 1) that he should not purchase or possess alcohol; 2) that he should obtain a substance abuse evaluation; 3) that he should obtain a mental health evaluation; and 4) that he should not access the internet. See Brief of Appellant. The State concedes that the trial court erred in ordering that Rowden should not purchase or possess alcohol, and that he should not access the internet. However, the other two conditions are valid because they are contingent upon a determination by Rowden's sexual deviancy treatment specialist or Community Corrections Officer that the conditions are necessary.

As a preliminary matter, the record shows that the trial court relied upon a presentence investigation report prepared by the

Department of Corrections in imposing Rowden's sentence and conditions of community custody. RP (5/7/10) 6, 15-19. However, this report was apparently not filed, and Rowden has not made the report a part of the record on appeal. Accordingly, the record is arguably insufficient to consider Rowden's claims because the information the court relied upon in imposing the community custody conditions at issue is not before this Court on appeal. But in any event, two of Rowden's claims should be rejected.

As noted above, Rowden is correct that Former RCW 9.94A.700(5)¹ authorized the trial court to prohibit the consumption of alcohol, but not the purchase or possession of alcohol. Brief of Appellant, at 8. Therefore, the State concedes that condition of community custody no. 16 must be modified, striking the words "purchase" and "possess." CP 59.

In addition, Rowden is also correct that this Court held in State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008) that prohibiting internet access unless such access is authorized by a sexual deviancy treatment provider is an invalid condition of

¹ As Rowden notes in his brief, the Sentencing Reform Act has been substantially revised and recodified since he committed his crime in 2008. See Brief of Appellant at 7, n.3. The Brief of Respondent cites to the relevant statutes in effect at the time of the commission of the crime.

community custody if the crime at issue did not involve the internet. O'Cain is directly on point, and thus, the State concedes that condition no. 17 must be stricken. CP 59.

On the other hand, Rowden is incorrect that the trial court was not authorized to order that he obtain a substance abuse evaluation and follow any treatment recommendations "[i]f directed by [his] sexual deviancy treatment specialist or Community Corrections Officer" as stated in condition no. 14. CP 58. It is true that treatment conditions *directly* imposed by the court under Former RCW 9.94A.715(2)(a) must be "reasonably related to the circumstances of the offense," and thus, trial courts cannot directly order substance abuse evaluations or treatment unless the commission of the crime involved the use of drugs or alcohol. See State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003). But under Former RCW 9.94A.715(2)(b), the Department of Corrections "may require the offender to participate in rehabilitative programs" whether or not they are crime-related, if such programs are deemed necessary to lessen the offender's "risk to community safety." Accordingly, the fact that the trial court ordered Rowden to obtain a substance abuse evaluation and treatment *only* "[i]f directed by [his] sexual deviancy treatment specialist or Community Corrections

Officer" means that the condition valid, because it merely authorizes potential future action that is already authorized by Former RCW 9.94A.715(2)(b).² Accordingly, the Court should reject Rowden's argument that condition no. 14 is unlawful.

The same is true of condition no. 13, which authorizes a mental health evaluation and treatment *only* "if directed by [his] sexual deviancy [treatment] specialist." CP 58. Again, Rowden is correct that a trial court may not *directly* impose mental health treatment conditions under Former RCW 9.94A.509(9) unless the court finds that the condition is crime-related and the court follows specific procedures. But as is the case with the condition regarding substance abuse, the mental health condition is contingent upon a finding by the sexual deviancy treatment provider that a mental health evaluation is necessary. Thus, this condition also falls within the parameters of Former RCW 9.94A.715(2)(b).

D. CONCLUSION

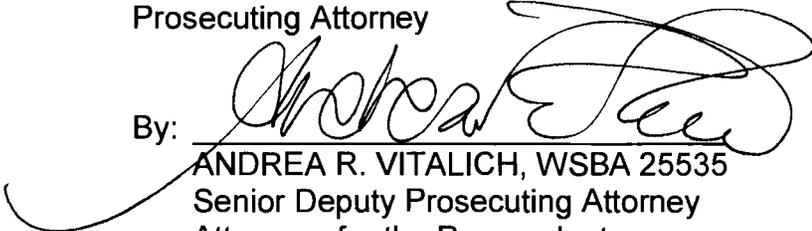
The State concedes that the restrictions upon purchasing or possessing alcohol and accessing the internet should be stricken. The other conditions at issue should be affirmed.

² In this respect, the condition is arguably superfluous.

DATED this 17th day of December, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared Steed and Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DARRELL ROWDEN, Cause No. 65405-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

12/17/10
Date

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