

69402-2

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COA NO. 69402-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RACHELS,

Appellant.

REC'D

APR 19 2013

King County Prosecutor
Appellate Unit

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

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to clarify the sentence.

2. The court improperly delegated a sentencing condition to the community corrections officer.

Issue Pertaining to Assignments of Error

Whether the court unlawfully delegated its sentencing authority to the community corrections officer in allowing the officer to impose a pre-approved residence requirement as a condition of probation?

B. STATEMENT OF THE CASE

Robert Rachels pled guilty to three misdemeanor counts of communication with a minor for immoral purposes. CP 9-17, 18. The court imposed a suspended sentence of 364 days confinement with credit for time served. CP 18. In the judgment and sentence, a box was checked next to the following: "The defendant shall serve 24 months of probation under the supervision of the Washington State Department of Corrections (DOC) and comply with the standard rules and regulations of supervision." CP 18.¹

¹ The court subsequently entered an order clarifying the judgment and sentence to show "the 24 months of supervision ordered by the court shall be 12 months of supervised DOC supervision and 12 months of unsupervised supervision." CP 24.

The court imposed a number of probation conditions, including one that required Rachels to "follow treatment recommendations as set forth in 4/27/12 evaluation by Michael Compte." CP 20. Another condition directed Rachels to "have no unsupervised contact with minors unless supervised by a responsible adult aware of these convictions." CP 20. Rachels was also required to register as a sex offender. CP 22.

The defense later filed a motion entitled "Defense Motion to Clarify Conditions of Sentence," in which Rachels requested a court order specifying that he was not required, under the terms of his sentence, to live at an address that has been approved in advance by the DOC. CP 25-41. Counsel's declaration in support of the motion averred Rachels was released on the day of sentencing but faced problems finding housing because he was a registered sex offender. CP 26. He found a landlord who was willing to rent him an apartment at 1215 East Spring Street. CP 26. He moved into the apartment and registered at that address, which is in a high density, mixed residential and business area. CP 26.

According to the declaration, community corrections officer (CCO) Pat Tanaka maintained Rachels must only live in DOC-approved housing and refused to approve of his residence because a Seattle University dormitory was located on the same street. CP 26. The CCO

said Rachels would be in violation of his probation if he continued to live at that address, but indicated the DOC would no longer consider it a violation if Rachels obtained a court order clarifying that he does not require the CCO's approval for his housing. CP 26, 27.

Counsel pointed out that the court did not order Rachels to live in DOC-approved housing as part of the sentence and there is no reference in the judgment and sentence to housing approval. CP 18-20, 26. The CCO gave Rachels a "Conditions, Requirements, and Instructions" form when Rachels initially reported to the DOC. CP 26, 38-41. That document does not require Rachels to live in DOC-approved housing. CP 26-27, 38-41. Under the heading "standard conditions," the document provides Rachels must "[n]otify the CCO before changing residence." CP 27, 38. The document further requires Rachels to avoid "contact with victim or minor children of similar age or close proximity where minors congregate, UNLESS authorized by the CCO." CP 27, 38.

Defense counsel noted the judgment and sentence requires Rachels to comply with the recommendation of the psychosexual evaluation, but the evaluation did not recommend that Rachels avoid living near a residence hall belonging to an adult education institution. CP 28. Counsel maintained Rachels was in compliance with his probation and that the

requirement that he obtain DOC approval for his choice of residence was unwarranted. CP 29.

At the September 6, 2012 hearing on the motion, counsel reiterated that Rachels should be allowed to continue to live in his current residence because there was no sentencing condition that required DOC approval. RP² 21-22. Counsel further noted the court has the final say on misdemeanor probation and the CCO indicated he would follow the court's order on the issue. RP 22. Counsel requested that the court enter an order that Rachels need not obtain housing approved by the DOC. RP 22.

The court wanted to hear from CCO Tanaka before making a decision on the motion. RP 26. At the ensuing September 12 hearing on the matter, CCO Tanaka told the court that Rachels had applied to reside in an apartment about a block away from a Seattle University female dormitory. RP 32. Tanaka denied the transfer request because the apartment was in close proximity to that dormitory. RP 32.

The court indicated the whole point of supervision was for the CCO to "make the decisions" and the court would not "micromanage" various aspects of supervision. RP 38-39. The court believed the CCO

² The verbatim report of proceedings is referenced as follows: RP – 6/1/12, 9/6/12, 9/12/12 (one volume containing three dates).

had the ability to impose conditions that were not imposed by the sentencing court. RP 39. The court therefore denied the defense motion that Rachels is not required to live at an address approved by his CCO. CP 42; RP 42. This timely appeal follows. CP 43-45.

C. ARGUMENT

THE DEPARTMENT OF CORRECTIONS LACKED AUTHORITY TO UNILATERALLY IMPOSE A PROBATIONARY CONDITION AND THE COURT UNLAWFULLY DELEGATED ITS AUTHORITY IN ALLOWING THE DEPARTMENT TO DO SO.

The court did not impose a pre-approved residential requirement on Rachels in the judgment and sentence. The Department of Corrections (DOC), through the assigned community corrections officer (CCO), imposed that requirement without judicial ratification. The court unlawfully delegated its sentencing authority to the DOC. The court erred in denying the motion to clarify that the CCO lacked the authority to impose the residence condition in the absence of judicial ratification. CP 42.

Rachels did not commit a felony offense. See State v. Besio, 80 Wn. App. 426, 431, 907 P.2d 1220 (1995) (Sentencing Reform Act only applies to felonies). He pled guilty to misdemeanors, and is therefore subject to RCW 9.95.210(1)(a), which provides "in granting probation, the superior court may suspend the imposition or the execution of the sentence

and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer."

The court specified a number of conditions in the judgment and sentence as part of probation. CP 18, 20. None of them require Rachels to obtain the approval of his CCO before living at a residence.

The court ordered Rachels to "comply with the standard rules and regulations" of DOC supervision. CP 18. But the standard conditions, as set forth in the DOC supervision form provided to Rachels, did not include a pre-approved residence requirement. CP 38. The only standard condition referencing a residence provides Rachels must "[n]otify the CCO before changing residence." CP 38. The requirement does not require approval prior to changing residence. It merely requires notification.

Another standard condition of the supervision form requires Rachels to avoid "contact with victim or minor children of similar age or close proximity where minors congregate, UNLESS authorized by the CCO." CP 38. As part of the judgment and sentence, the court similarly ordered Rachels to "have no unsupervised contact with minors unless supervised by a responsible adult aware of these convictions." CP 20. The court further required Rachels to "follow treatment recommendations

as set forth in 4/27/12 evaluation by Michael Compte." CP 20. During the hearings on the motion, the court expressed concern that the residence was somewhere near a middle or high school and made a fleeting reference to Compte's report that provides Rachels is not to have contact or communication with children.³ RP 24-25, 33, 40.

These conditions prohibit Rachels from having contact with minors. No condition prohibits him from living near minors.

More to the point, the CCO did not deny approval of the residence on the basis that it was somewhere near a middle or high school, but rather because it was a block away from a Seattle University female dormitory. RP 32. Rachels's motion was directed at the CCO's decision to not approve his residence on the basis that it was close to the Seattle University dormitory. Whether it would be appropriate to authorize a residence located in proximity to a middle or high school was not at issue because the CCO did not deny approval of the residence on that basis.

At the September 12 hearing, the CCO maintained restrictions on housing "will be part of his condition of his treatment. The treatment condition will say that he is not to live – reside around area [sic] where

³ The prosecutor quoted Compte's April 27, 2012 report as follows: "Mr. Rachels should not be permitted contact and communication with children in any milieu and any exception should be discussed with his community corrections officer and clinician." RP 31.

children congregate or females congregate." RP 39. Defense counsel responded "It's not the case, Your Honor. It doesn't say that." RP 39. The court did not resolve the dispute, but it does not matter for the purpose of this appeal. The CCO's own words show such a treatment condition may be imposed in the future, but did not yet actually exist as of the September 12 hearing on the motion.

The DOC lacks authority to unilaterally impose conditions of probation. "[T]he precise delineation of the terms of probation is a core judicial function. The task cannot be delegated to a probation officer, treatment provider or other agency." State v. Williams, 97 Wn. App. 257, 264, 983 P.2d 687 (1999), review denied, 140 Wn.2d 1006, 999 P.2d 1261 (2000); see State v. Richard, 58 Wn. App. 357, 359-60, 792 P.2d 1279 (1990) (trial court erred when it found probation violation of curfew condition that probation officer had added to a community supervision plan without a court order; it is the court, not the probation officer, that imposes the conditions of community supervision on juvenile).

There is no unlawful delegation only if "the court ratifies the terms recommended by the probation officer or treatment agency and adopts them as its own." Williams, 97 Wn. App. at 265. The court here took no action that amounted to ratification of the CCO's pre-approved residence requirement.

The court did not ratify the residence requirement by incorporating it into a modified judgment and sentence. See State v. Playter, 12 Wn. App. 388, 390-91, 531 P.2d 831 (1974) (no unlawful delegation where trial court adopted the recommendation of alcohol treatment provider as his own when he incorporated into the judgment and sentence a letter from the provider outlining the program and its conditions); State v. Wilkerson, 107 Wn. App. 748, 755-56, 31 P.3d 1194 (2001) (no unlawful delegation where district court imposed modification of sentence in open court with Wilkerson present after a contested hearing, and set forth the new condition clearly and precisely in a sentencing order).

The court did not even informally ratify the CCO's residence requirement. See Williams, 97 Wn. App. at 260-61, 265-66 (while not necessarily condoning informal procedure used, finding no unlawful delegation where court commissioner adopted alcohol and drug conditions as his own by initialing his approval on the probation officer's form listing conditions of supervision).

Instead, the court mistakenly believed the CCO could impose conditions that had not been imposed by the sentencing court, including living and approved housing conditions. RP 39. The court maintained the dispositive question was "*the whole point in having the CCO monitor this and make the decisions* is that it is much more tailored I think to the

individuals and am I going to kind of micromanage CCOs in general or Mr. Tanaka in specifically in various aspects of the supervision? And the answer is no." RP 38-39 (emphasis added).

The court's deference is misplaced. What the court called micromanaging is what the law calls judicial duty. Whatever else a CCO can do on its own authority, the law is clear that the CCO cannot decide what conditions of probation to impose on his own. At minimum, the court must ratify a CCO's decision to impose a probation condition that is not found in the judgment and sentence. Williams, 97 Wn. App. at 265.

A trial court necessarily abuses its discretion when its ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Such is the case here. "[T]he precise delineation of the terms of probation is a core judicial function." Williams, 97 Wn. App. at 264. The court failed to exercise its core function in abdicating its sentencing authority to the CCO. CP 42. Rachels requests reversal of the order denying his motion to clarify the sentence.

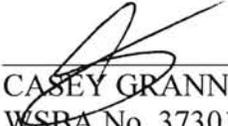
D. CONCLUSION

Rachels requests reversal of the order denying his motion to clarify and remand for proceedings consistent with this Court's opinion.

DATED this 19th day of April 2013

Respectfully Submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69402-2-1
)	
ROBERT RACHELS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT RACHELS
6413 FAUNTLEROY WAY SW
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SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF APRIL, 2013.

X Patrick Mayovsky

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