

69706-4

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NO. 69706-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARY MAZALIC,

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in ordering appellant to participate in urinalysis and breathalyzer examinations as a condition of community custody. CP 12 (condition 15).¹

Issue Pertaining to Assignment of Error

The sentencing court declined to impose community custody conditions restricting appellant's use and possession of controlled substances or alcohol because they were unrelated to the circumstances of appellant's offenses. However, the trial court ordered appellant to participate in urinalysis and breathalyzer examinations in order to monitor her compliance with other community custody conditions. Did the trial court err in imposing the urinalysis and breathalyzer examinations where that condition is not reasonably related to the monitoring of other community custody conditions?

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged appellant Mary Mazalic with one count each of first-degree assault of a child, first-degree criminal mistreatment, and tampering with a witness. CP 121-22. Mazalic was convicted by a jury as charged. CP 43, 46, 49; RP 1365-67.

¹ The Judgment and Sentence "Appendix 4.2: Additional Conditions of Community Custody" is attached to this brief as an appendix.

The jury also returned special verdicts finding the complaining witness was particularly vulnerable and Mazalic manifested deliberate cruelty and abused her position of trust in commission of the assault and mistreatment counts. CP 44-45, 47-48.

Based on the special verdicts, the trial court imposed concurrent exceptional sentences of 360 months on the assault and 120 months on the mistreatment counts. The court imposed a concurrent standard range sentence of 12 months on the witness tampering count. CP 1-21. The trial court also imposed 36 months of community custody for the assault conviction. Id. Mazalic timely appeals. CP 22-23.

C. ARGUMENT

THE TRIAL COURT ERRED BY ORDERING MAZALIC TO PARTICIPATE IN URINALYSIS AND BREATHALYZER EXAMINATIONS BECAUSE THE CONDITION IS NOT REASONABLY RELATED TO THE MONITORING OF COMMUNITY CUSTODY CONDITIONS.

A trial court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “If the trial court exceeds its sentencing authority, its actions are void.” State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. State v. Sanchez Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

Under RCW 9.94A.703(2) the following conditions are required as part of any term of community custody, unless waived by the court:

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as directed by the department; and
- (e) The offender shall obtain prior approval of the department for the offender's residence location and living arrangements.

RCW 9.94A.703(3) permits a sentencing court to impose any or all of the following conditions of community custody:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) The offender shall refrain from consuming alcohol; or
- (f) The offender shall comply with any crime-related prohibitions.

Here, the trial court declined to impose restrictions on Mazalic's use, possession, and participation in treatment related to alcohol and lawfully issued controlled substances because it found such conditions were not reasonably related to the circumstances of her offenses. RP 1408, 1412, 1415; CP 11-12 (conditions 9, 10, and 14).² However, the trial court ordered Mazalic to participate in urinalysis and breathalyzer examinations in order to enforce the condition requiring Mazalic to "obey all municipal, county, state, tribal and federal laws." RP 1415; CP 11 (condition 3). Such urinalysis and breathalyzer testing was unnecessary to

² Community custody condition four of the judgment and sentence mirrors the vacated language of community custody condition 10 of Appendix 4.2: Additional Conditions of Community Custody. CP 5 (Order 4.2, Condition 4).

enforce a drug and alcohol restriction and is not reasonably related to the enforcement of other conditions of community custody.

The “prime purpose” of conditions requiring submission to urinalysis and breathalyzer testing is to monitor the ingestion of alcohol and controlled substances. State v. Parramore, 53 Wn. App. 527, 532, 768 P.2d 530 (1989). The converse is also true: if the consumption of drugs and alcohol is not restricted it is unnecessary to monitor such consumption.

Parramore is instructive in this regard. Parramore was convicted of delivery of marijuana. Parramore, 53 Wn. App. at 528. Community custody conditions prohibited him from purchasing, possessing, or ingesting any controlled substances without a prescription. Parramore was also ordered to submit to urinalysis or breathalyzer testing in order to monitor his compliance with the controlled substance restrictions. Parramore, 53 Wn. App. at 529.

On appeal, Parramore challenged the breathalyzer and urinalysis testing. Parramore, 53 Wn. App. at 529. The Court of Appeals agreed it was error to impose the breathalyzer testing condition because there was no evidence of any connection between alcohol use and Parramore’s conviction for delivering marijuana. Parramore, 53 Wn. App. at 531.

The Court also concluded however, that the urinalysis testing was appropriate to monitor Parramore's ingestion of controlled substances in accordance with the community custody condition restrictions. Parramore, 53 Wn. App. at 531-32. The Court noted that, "if the court decides that an offender's crime was caused by drug or alcohol use, a prohibition against alcohol or drug use can be imposed during community supervision, with regular monitoring by urinalysis or breathalyzer tests." Parramore, 53 Wn. App. at 533.

Here, like Parramore, there is no evidence of any connection between alcohol and drug use and Mazalic's convictions. Indeed, the trial court specifically declined to impose any restrictions on Mazalic's drug and alcohol use for this very reason. In this sense, Parramore supports Mazalic's argument here. Because Mazalic is not subject to restrictions in her use of alcohol and lawfully obtained controlled substances, there is no need to monitor Mazalic's ingestion of such substances through urinalysis and breathalyzer testing.

State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008), is instructive by way of contrast. Pursuant to his sentence for violations of a protection order and sex offender registration Vant was ordered to refrain from possessing or consuming any controlled substances. The trial court further ordered Vant to submit to random urinalysis/portable breath

test/blood alcohol content tests at the discretion of his community corrections officer. Vant, 145 Wn. App. at 595-97

On appeal Vant argued the random testing was neither statutorily mandated nor an area of concern considering the nature of his offenses. Vant, 145 Wn. App. at 603. Concluding the restrictions on the possession and consumption of controlled substances was properly issued, the Court found enforcement of the restrictions was likewise permitted. Vant, 145 Wn. App. at 603-04. Under these circumstances, the Court of Appeals concluded the random urinalysis and blood alcohol testing was appropriate to “ensure compliance with its conditions” prohibiting possession and consumption of controlled substances. Vant, 145 Wn. App. at 604.

Unlike Vant, here Mazalic’s use of alcohol and lawfully issued controlled substances was specifically unrestricted because such substances were unrelated to the circumstances of her offenses. Thus, there is no need to monitor Mazalic’s ingestion of such substances through urinalysis and breathalyzer testing.

Because urinalysis and breathalyzer testing is unnecessary to enforce or monitor drug and alcohol restrictions, and because there are no findings that drugs or alcohol contributed to Mazalic’s offenses, the conditions requiring such testing should be stricken from the judgment and sentence.

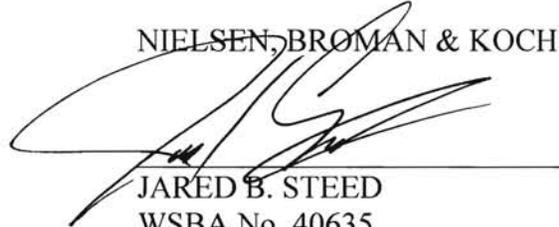
D. CONCLUSION

For the reasons set forth, Mazalic requests that this Court strike the challenged conditions of community custody.

DATED this 10th day of October, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

v.

MAZALIC, MARY ELIZABETH

Defendant.

No. 11-1-02097-0

APPENDIX 4.2
ADDITIONAL CONDITIONS
OF COMMUNITY CUSTODY

ADDITIONAL CONDITIONS OF COMMUNITY CUSTODY:

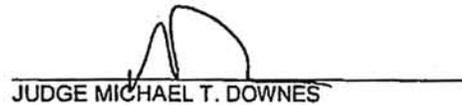
1. Have no direct or indirect contact with N.A. [REDACTED]
2. Pay all ~~restitution and~~ legal financial obligations.
3. Obey all municipal, county, state, tribal and federal laws.
4. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer.
5. Do not seek employment or volunteer positions, which place you in contact with or control over minor children.
6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
7. Do not date men or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
8. Do not remain overnight in a residence where minor children live or are spending the night.
9. ~~Do not consume alcohol.~~
10. ~~Do not possess or consume controlled substances unless you have a legally issued prescription.~~
11. Find and maintain fulltime employment and/or a fulltime educational program during the period of supervision, as directed by the supervising Community Corrections Officer.
12. Participate in a mental health evaluation and abide by any recommended course of treatment, to include a regimen of prescribed medications, as directed by the supervising Community Corrections Officer.

13. Participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.
14. ~~Participate in substance abuse treatment as directed by the supervising Community Corrections Officer.~~
15. Participate in urinalysis, Breathalyzer, and polygraph examinations as directed by the supervising Community Corrections Officer, to monitor compliance with conditions of community custody.
16. Your residence, living arrangements and employment must be approved by the supervising Community Corrections Officer.
17. You must consent to DOC 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.

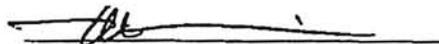
Dated this 29th day of November, 2012.



LISA D. PAUL, #16064
Deputy Prosecuting Attorney



JUDGE MICHAEL T. DOWNES



MAX P. HARRISON, #12243
Attorney for Defendant

Refused to sign
MARY ELIZABETH MAZALIC
Defendant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69706-4-1
)	
MARY MAZALIC,)	
)	
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 11TH DAY OF OCTOBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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- [X] MARY MAZALIC
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FILED
OCT 11 11:41 AM '13
CLERK OF COURT
JANICE M. BROWN

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF OCTOBER, 2013.

x *Patrick Mayovsky*