

Original
Court of Appeals

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NO. 34188-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BOBBY EARL LANNING, JR.,

Appellant.

BRIEF OF APPELLANT

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PM 6/20/06

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

Does a trial court err when it imposes community custody conditions and other conditions in the judgment and sentence not authorized by the legislature?

STATEMENT OF THE CASE

By information filed November 17, 2005, the Clark County Prosecutor charged defendant Bobby Earl Lanning, Jr. with one count of failure to register as a sex offender under RCW 9A.44.130(10)(a). CP 1. The state's certificate of probable cause filed with the information alleged that (1) the defendant had a prior sex conviction, (2) the defendant had registered an address per the registration statute and had not registered a change of address, and (3) an October of 2005 check revealed that he was no longer residing at the registered address. CP 2-3. The probable cause statement contained no further factual allegations. *Id.* On December 7, 2005, the parties appeared before the court and the defendant filed a written "Statement of Defendant on Plea of Guilty to Non-Sex Offense." CP 4-11.

Although the guilty plea form did not state that the offense of failure to register itself included a new registration requirement, the defense attorney did acknowledge that the prosecutor claimed it did while the defense did not. RP 6-7. Following brief argument on this issue the court imposed a 60 day sentence along with a requirement that the defendant register as a sex offender as a result of the failure to register conviction. CP 13-15. In addition, as part of the judgment and sentence, the court ordered the defendant to submit to DNA testing. CP 20. This requirement is found under paragraph 4.2 of the judgment and sentence. *Id.* It states:

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4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

CP 20.

As part of the DNA testing requirement the court imposed a \$100.00 fee for the "collection of biological sample (for crimes committed on or after July 1, 2002)." CP 18. In fact, the defendant's criminal history included one prior failure to register conviction that the defendant committed in April and May of 2004. CP 29.

As part of the judgment and sentence the court also imposed 12 months of community custody along with certain conditions. CP These conditions included the following:

- ☒ Defendant shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him/her to be violating such laws.
- ☒ Defendant shall not commit any like offenses.
- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices.

- ☒ Defendant shall submit to urine, breath or other screening whenever requested to do so by treatment program staff and/or the community corrections officer.
- ☒ Defendant shall sign necessary release of information documents as required by the Department of Corrections.

CP 21-23.

Following imposition of sentence in this case the defendant filed timely notice of appeal. CP 30.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE AND WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out these arguments.

(1) RCW 43.43.754 Does Not Authorize the Trial Court to Order a Defendant to Submit Multiple DNA Samples or Pay Multiple DNA Fees.

Under RCW 43.43.754 the trial court is authorized to require that a defendant convicted of a felony give a DNA sample for identification analysis. Under RCW 43.43.7541 the trial court has authority to impose a fee for the collection of the biological sample. Subsection (1) of the former

statute states:

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

RCW 43.43.754.

Under this statute the question arises whether or not the phrase “convicted of a felony” means “every time a person is convicted of a felony” even if a biological sample and fee have previously been collected as part of another judgment and sentence. Since the statute does not use the phrase “every time a defendant is convicted of a felony” it is susceptible to two equally reasonable interpretations: first, that the process should be repeated with every judgment and sentence, and second, that the process should only be performed once.

The court’s primary duty when interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Under RCW 43.43.753 the legislature has stated it’s intent as regards the collection of biological samples of DNA. This purpose is to create a forensic DNA database of all offenders which can be checked against DNA samples taken as evidence in crime scenes, thereby aiding in the identification of the perpetrators of new crimes. The reason such a database

is effective is that each person's DNA is unique and once obtained functions like fingerprints do in aiding to identify the perpetrators of crimes and exclude innocent persons. *See State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

In addition part of the theory behind DNA analysis is that DNA does not change over time. Once a sample is taken, analyzed and the results placed in a database, there is no need to take a new sample if the defendant is convicted of a new felony. Interpreting RCW 43.43.754 to require the taking of a new sample for each subsequent felony conviction does not further the purpose of DNA testing. In fact, requiring a new sample and subsequent testing for each new felony sentence has a detrimental effect upon the creation of a state database because it wastes scarce state resources in the analysis of duplicate samples. Consequently, the interpretation of RCW 43.43.754 that best implements the intent of the legislature is the one that limits its application to the collection of a single DNA sample.

In the case at bar the defendant's criminal history includes a Clark County conviction on February 23, 2005, for the offense of failure to register committed between April and May of 2004. CP 29. This conviction was well after the July 1, 2002 implementation date for RCW 43.43.754. Consequently the State of Washington had already gathered the defendant's DNA sample and placed the results of the test in the state data bank. As a

result there is neither a need nor authority for gathering a second sample and imposing a second fee. Thus, the trial court in this case erred when it imposed a second DNA test and fee.

(2) The Trial Court May Only Order Community Custody Conditions Specifically Authorized under the Sentencing Reform Act.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The

court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were “reasonably related” to the defendant’s commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant pled guilty to failure to register as a sex offender under RCW 9A.44.130(10)(a). In subsection (9)(a)(i) this statute provides it’s own definition of the term “sex offender” and states that this term includes “[a]ny offense defined as a sex offense by RCW 9.94A.030.” Under RCW 9.94A.030(41)(a)(i) the term “sex offense” is defined to included any “felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11).”¹ Thus, violation of RCW 9A.44.130(10)(a) is itself a sex offense for which a person must register. The imposition of community custody for sex offense sentences of confinement for one year or less is controlled by RCW 9.94A.545. This statutes states:

Except as provided in RCW 9.94A.650, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under

¹RCW 9A.44.130(11) makes it a Class C felony to fail to register following a kidnapping conviction. As the sole exception under RCW 9.94A.030(41) it is not itself a “sex offense” and a violation of it’s provisions does not trigger a new registration requirement.

RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

RCW 9.94A.545².

As this statute explicitly states the sentencing court “may impose up to one year of community custody” for sex offenses “with confinement of one year or less.” Thus the trial court in the case at bar had authority to impose community custody. In addition the statute also provides that the trial court may “subject the defendant to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720.” RCW 9.94A.720 mandates that the court require the defendant to submit to supervision of community custody by the Department of Corrections. Subsection 2 of RCW 9.94A.715 states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the

²RCW 9.94A.650 controls sentences for first time offenders and has no application in the case at bar.

offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, "the conditions of community custody shall include those provided for in RCW 9.94A.700(4)." In addition, "[t]he conditions may also include those provided for in RCW 9.94A.700(5)." Herein one finally finds the actual conditions.³ Subsection

³In 1983 author Umberto Eco published a book entitled *The Name of the Rose* in which a 14th century Italian monastery maintains a secret and priceless collection of books secured in a tower library designed as a vast labyrinth. As many readers of Umberto Eco would probably agree the book is itself a labyrinth so deep and obscure as to leave all but the most dedicated readers hopelessly lost within it's pages. However, as an author of the obscure and impenetrable Umberto Eco stands as a rank amateur in the face of the Washington State Legislature and it's ever-increasing labyrinth called the

4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(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 not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

sentencing reform act. Judge Morgan put it as follows:

Before closing, we want to observe that the trial court should not be faulted for the defects in its judgment and sentence. Since 1981, the SRA has been amended by 175 session laws, an average of almost eight per year! It has become so astoundingly and needlessly complex that it cannot possibly be used both quickly and accurately. It is extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related. The situation was recognized but not remedied--it may even have been exacerbated--by wholesale recodifications in 2001. The SRA screams for thoughtful simplification.

In re Jones, 118 Wn. App. at 211-212 (footnote omitted).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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 not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition

of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- ☒ Defendant shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him/her to be violating such laws.
- ☒ Defendant shall not commit any like offenses.
- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices.
- ☒ Defendant shall submit to urine, breath or other screening whenever requested to do so by treatment program staff and/or the community corrections officer.
- ☒ Defendant shall sign necessary release of information documents as required by the Department of Corrections.

CP 21-23.

The last sentence of RCW 9.94A.715(2)(b) provides that “the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” Thus, the

first half of the first condition listed above and the second condition are valid. However neither this provision nor any other allows the court to prohibit the defendant from being “in the company of any person known by him/her to be violating such laws.” Thus, the second half of the first condition listed above is invalid.

Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances “except pursuant to lawfully issued prescriptions.” There is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit a defendant from possessing or using “any paraphernalia that can be used for the ingestion of controlled substance” such as “pagers, cell phone, and police scanners.” Similarly sections 4 and 5 of RCW 9.94A.700 do not give the trial court authority to require a defendant to take urinalysis tests or require a defendant to “sign necessary release of information documents as required by the Department of Corrections.” Thus the trial court exceeded it’s authority when it imposed the third and fourth conditions just mentioned.

It is true that RCW 9.94A.700(5)(e) does authorize the court to impose “crime-related prohibitions.” However as the decision in *Jones* explains the trial court must have facts to support the conclusion that the

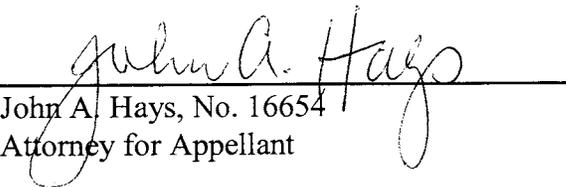
condition imposed “relates to the circumstances of the crime” before it may impose the condition. In the case at bar the defendant committed the crime of failure to register as a sex offender. The state did not allege, the defendant did not admit and the court did not find any facts that related “to the circumstances of the crime.” Thus the conditions here at issue cannot be saved under RCW 9.94A.700(5)(e). As a result the trial court abused it’s discretion when it imposed the conditions noted above.

CONCLUSION

The trial court exceeded its authority when it imposed a second DNA test and fee and when it imposed community custody conditions not authorized by the legislature. As a result this court should vacate these portions of the sentence and remand for imposition of a new sentence with these provisions stricken.

DATED this 20th day of June, 2006.

Respectfully submitted,



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APPENDIX

RCW 43.43.753

The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."

The legislature further finds that DNA data bases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.

The legislature further finds that the DNA identification system used by the Federal Bureau of Investigation and the Washington state patrol has no ability to predict genetic disease or predisposal to illness. Nonetheless, the legislature intends that biological samples collected under RCW 43.43.754, and DNA identification data obtained from the samples, be used only for purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized under RCW 43.43.752 through 43.43.758.

RCW 43.43.754

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

(a) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do serve a term of confinement in a city or county jail facility, the city or county shall be responsible for obtaining the biological samples either as part of the intake process into the city or county jail or detention facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(b) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do not serve a term of confinement in a city or county jail facility, the local police department or sheriff's office is responsible for obtaining the biological samples after sentencing on or after July 1, 2002.

(c) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense, who are serving or who are to serve a term of confinement in a department of corrections facility or a department of social and health services facility, the facility holding the person shall be responsible for obtaining the biological samples either as part of the intake process into such facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(2) Any biological sample taken pursuant to RCW 43.43.752 through 43.43.758 may be retained by the forensic laboratory services bureau, and shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons. Nothing in this section

prohibits the submission of results derived from the biological samples to the Federal Bureau of Investigation combined DNA index system.

(3) The director of the forensic laboratory services bureau of the Washington state patrol shall perform testing on all biological samples collected under subsection (1) of this section, to the extent allowed by funding available for this purpose. The director shall give priority to testing on samples collected from those adults or juveniles convicted of a felony or adjudicated guilty of an equivalent juvenile offense that is defined as a sex offense or a violent offense in RCW 9.94A.030.

(4) This section applies to all adults who are convicted of a sex or violent offense after July 1, 1990; and to all adults who were convicted of a sex or violent offense on or prior to July 1, 1990, and who are still incarcerated on or after July 25, 1999. This section applies to all juveniles who are adjudicated guilty of a sex or violent offense after July 1, 1994; and to all juveniles who were adjudicated guilty of a sex or violent offense on or prior to July 1, 1994, and who are still incarcerated on or after July 25, 1999. This section applies to all adults and juveniles who are convicted of a felony other than a sex or violent offense, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, or communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense, on or after July 1, 2002; and to all adults and juveniles who were convicted or adjudicated guilty of such an offense before July 1, 2002, and are still incarcerated on or after July 1, 2002.

(5) This section creates no rights in a third person. No cause of action may be brought based upon the noncollection or nonanalysis or the delayed collection or analysis of a biological sample authorized to be taken under RCW 43.43.752 through 43.43.758.

(6) The detention, arrest, or conviction of a person based upon a data base match or data base information is not invalidated if it is determined that the sample was obtained or placed in the data base by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated or otherwise altered in any future proceeding including but not limited to posttrial or postfact-finding motions, appeals, or collateral attacks.

RCW 43.43.7541

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

RCW 9.94A.030(41)

(41) "Sex offense" means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11);

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.070 or 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.545

Except as provided in RCW 9.94A.650, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not

sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(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 not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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 not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions

of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not

reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

RCW 9.94A.720

(1)(a) Except as provided in RCW 9.94A.501, all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.501.

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody, it shall be deemed a violation of community placement for the purposes of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.737. At

any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.715 (3) or (5).

The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under RCW 9.94A.634, 9.94A.737, and 9.94A.740. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection has the same definition as in RCW 9.41.010.

RCW 9A.44.130(9)-(11)

(9) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

(a) "Sex offense" means:

(i) Any offense defined as a sex offense by RCW 9.94A.030;

(ii) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(iii) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection; and

(v) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

(b) "Kidnapping offense" means: (i) The crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment, as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent; (ii) any offense that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a kidnapping offense under this subsection (9)(b); and (iii) any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a kidnapping offense under this subsection (9)(b).

(c) "Employed" or "carries on a vocation" means employment that is full-time or part-time for a period of time exceeding fourteen days, or for an aggregate period of time exceeding thirty days during any calendar year. A person is employed or carries on a vocation whether the person's employment is financially compensated, volunteered, or for the purpose of government or educational benefit.

(d) "Student" means a person who is enrolled, on a full-time or part-time basis, in any public or private educational institution. An educational institution includes any secondary school, trade or professional institution, or institution of higher education.

(10)(a) A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (9)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (9)(a) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

(11)(a) A person who knowingly fails to register or who moves within the state without notifying the county sheriff as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony kidnapping offense as defined in subsection (9)(b) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony kidnapping offense as defined in subsection (9)(b) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

FILED
COURT APPEALS

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STATE OF WASHINGTON

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CITY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 BOBBY EARL LANNING, JR,)
10 Appellant,)

**CLARK CO. NO.05-1-02531-0
APPEAL NO: 34188-3-II
AFFIDAVIT OF MAILING**

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.
13)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 20TH day of JUNE, 2006,
14 affiant deposited into the mails of the United States of America, a properly stamped envelope
15 directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

BOBBY EARL LANNING, JR
C/O DEPT OF CORRECTIONS
9105 N.E. HIGHWAY 99, #B
VANCOUVER, WA 98665

17 and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 20TH day of JUNE, 2006.

Cathy E. Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN TO before me this 20th day of JUNE, 2006.



John A. Hays
NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso, WA 98626
Commission expires: 10-24-09