

APPELLANT'S BRIEF
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STATE OF WASHINGTON
BY: *DM*

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

NO. 34939-6-II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID CHARLES VESSEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 99-1-00065-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Petitioner entered a plea of guilty to two counts of Rape of a Child in the Second Degree on June 9, 1999. Following the preparation of a Pre-Sentence Investigation (PSI) report he was sentenced on September 17, 1999, to a mid-range sentence of one hundred and nineteen (119) months of incarceration on each count, to be served concurrently. The Court also imposed a mandatory three (3) years of community custody or placement, as set out in Appendix A of the Judgment and Sentence, and referred to therein. In this appendix, the recommendations of the PSI author were fully adopted, and included the recommendation that the Petitioner be prohibited from consuming alcohol and from entering establishments where it is the chief item of sale.

Petitioner embarked upon a number of appeals, including a Personal Restraint Petition. The latter was dismissed October 15, 2002, and became final November 15, 2002.

Petitioner filed his *pro se* CrR 7.8 motion with the Clallam County Superior Court on May 18, 2006, six years and eight months after he was sentenced.

Though there are other equally or far more sweeping restrictions on Petitioner's actions and freedom, Petitioner challenges only the prohibition on entering taverns and bars.

II. STANDARD OF REVIEW

A trial court's CrR 7.8(b) decision is reviewed for abuse of discretion. *State v. Olivera-Avila*, 89 Wn.App. 313, 949 P.2d 824 (1997) (citing *State v. Ellis*, 76 Wn.App. 391, 884 P.2d 1360 (1994)).

III. ARGUMENT

A. This Collateral Attack on Petitioner's Guilty Plea is Time-Barred.

Petitioner takes great pains to set out an analysis of how his claim is not time-barred. This analysis fails and the petition should be summarily dismissed upon this ground alone.

Petitioner correctly argues that the statutory one-year limit for a collateral attack does not apply under certain conditions, as set out in RCW 10.73.100. Petitioner cites CrR 7.8(b)(4) – *Relief from Judgment or Order*, and asserts the judgment is void. It is void because it was entered by the court which lacked “jurisdiction of the parties or of the subject matter, or . . . lacked the inherent power to make or enter the particular order involved.” *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968). Petitioner then argues that, under RCW 10.73.100(5), the sentencing court, in entering or accepting the Department of Corrections’ standard recommendation with respect to entering places where alcohol is the chief item of sale, imposed a sentence in excess of its jurisdiction, suggesting that this falls under the “excessive sentence exception” as set out in *In re Personal Restraint of Perkins*, 143 Wn.2d 261, 19 P.3d 1027

(2001), a case in which a sentence twenty one months in excess of the maximum was successfully challenged more than a year after final judgment. The case before the court today is vastly dissimilar and does not come under the rubric of an illegal sentence.

Petitioner's analysis goes on to set out the mandatory conditions set by the sentencing court and lists certain discretionary conditions. Petitioner argues that the sole non-crime related condition is to be found in the prohibition against alcohol, which may be imposed even where alcohol is not deemed to have been part of the crime. However, this is not the case for the very first condition mentioned, that the "offender shall remain, within, or outside of, a specified geographical boundary," is not necessarily crime-related and would appear to give the court a great deal of discretion in ordering the offender to either stay in or out of a certain location. This could be an area of the town, a town itself, an area of the county or a county or even a state. Clearly such a condition has potentially a greater effect upon the assertedly trampled rights of this Petitioner.

Under the analysis in *State v. Robinson*, 104 Wn.App. 657, 17 P.3d 653 (2001), a case in which the reviewing court held that the petitioner's attempt to withdraw her plea was time-barred, the petitioner claimed that the issue is properly to be analyzed under RCW 10.73.100(2). However, the *Robinson* Court disagreed and first addressed whether, under RCW 10.73.090, the judgment was facially valid.

While Robinson bases her argument on RCW 10.73.100(2), it is not necessary to reach that provision, as the one-year time limit under RCW 10.73.090 applies in the first place only "if the judgment and sentence is valid on its face." *See In re Personal Restraint of Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) ("Instead of determining whether Thompson's petition fits under the RCW 10.73.100(2) exception to the one-year limit, we discuss whether pursuant to RCW 10.73.090 the judgment and sentence was valid on its face."). "'Constitutionally invalid on its face' means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." *Id.* (quoting *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796 (1986)). "The phrase 'on its face' has been interpreted to mean those documents signed as part of a plea agreement." *Id.* (citing *State v. Phillips*, 94 Wn.App. 313, 317, 972 P.2d 932 (1999)).

State v. Robinson, 104 Wn. App. 657, 664.

The Court held the judgment was valid on its face and the petitioner had sufficient notice of the twelve month limit in the judgment and sentence itself. Furthermore, the issue challenged in *Robinson*, an alleged lack of a finding that the trial court was required to make with respect to a deadly weapon allegation, was found to have been supported by the probable cause affidavit as well as an admission by petitioner.

In the present case, the challenge is to the prohibition upon entering places where the chief item of sale is alcoholic beverages, taverns and bars and liquor stores. This standard prohibition is found in the pre-sentence investigation report, prepared by Lourene O'Brien of the Department of Corrections. This report was submitted to the Court

and parties on September 13, 1999.¹ Counsel for the Defendant clearly had received a copy of the report, and in sufficient time to permit him to raise some exceptions to the PSI itself (*Transcript – Sentencing Hearing 9/17/99*, p. 3-4). The Defendant had pled guilty on June 9, 1999, to an Amended Information. In his Statement of Defendant on Plea of Guilty (CP 20), the recommendation to be made by the prosecutor is set out as within the standard range, i.e. up to 136 months, together with community placement and legal financial obligations. At sentencing, the prosecutor adopted the PSI recommendation, as did Judge Wood. Under the *Robinson* analysis, citing *State v. Phillips, Id.*, “facially valid” has been interpreted in light of the documents signed as part of a plea agreement. Clearly the Judgment and Sentence in this matter comported with this requirement.

The fact that the PSI was given ahead of time to the defense and included the challenged prohibition, was incorporated into the judgment and sentence signed off by Defendant and counsel, with the requisite warnings (CP 38 -- *Judgment and Sentence: §V.5.1*, p. 7) means that, under *Robinson*, the reviewing court does not have to consider the excep-

¹ It appears that two PSI were prepared, one received by counsel on September 2, 1999 (CP 32) and a second one September 13, 1999. Both were prepared by the same DOC officer, Lourene O’Brien. It is not known whether or not they are identical. There was some controversy over Ms. O’Brien’s access to the SOSA evaluation, even though a defendant-signed waiver existed. It appears that the second PSI formed the basis for the sentencing recommendation and that the community placement conditions were standard for this type of offense.

tions set out under RCW 10.73.100.

This challenge should be analyzed under RCW 10.73.090 and deemed time-barred.

B. Under Washington Case Law Certain Affirmative Conditions Imposed Upon a Convicted Defendant May Be Validly Questioned. However, Remaining Out of Places Where Alcohol is the Chief Item for Sale Does Not Amount to an Affirmative Condition. Jones is Inapposite.

In *State v. Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the defendant pled to Burglary in the First Degree and, as a condition of community custody, was required to affirmatively undertake both mental health and alcohol treatment. The Court held that these conditions, in the absence of any specific findings that alcohol was a factor in the charged crime, or any specific findings at sentencing or on remand that affirmative conditions were needed, could not be imposed unless shown to be crime-related or have influenced the offense itself.

In the present case, there are no such affirmative conditions. Merely being prohibited from entering establishments specializing in the sale or service of alcohol is not the same as being ordered to undergo treatment and, presumably, being required to make progress and achieve certain goals.

Petitioner's argument is not supported by the *Jones* decision and analysis. *Jones* does not dictate the outcome -- it addresses a totally different matter.

C. **A Convicted Defendant's Freedom of Association May Be Restricted if Reasonably Necessary to Accomplish the Goals of the State and Public Order.**

Petitioner pled guilty to two counts of Child Rape in the Second Degree. The sentence he received was in accordance with sentencing guidelines for these offences and his criminal history.

RCW 9.94A.715(6) recognizes that it is the Department of Corrections' responsibility to "determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders . . . on the basis of risk to community safety *and* conditions imposed by the court." (*Emphasis added.*)

Preventing harm to society and, in particular, minor children, is a compelling state interest that justified limitations on the offender's freedoms or constitutional rights under the Sentencing Reform Act. *In re Waggy*, 111 Wn.App. 511 (2002), citing *State v. Letourneau*, 100 Wn.App. 424, 997 P.2d 436 (2000). *See also* RCW 9.94A.010.

Thus, in *Waggy*, the Court held justified the requirement that the Petitioner inform his community placement officer of relationships with adult females, in order that they may be properly informed about his criminal history. Even though he was not informed of this at the time of plea, the reviewing court did not find any infringement upon petitioner's freedom of association rights as there was a clear public interest in informing the public about such potential dangers. The *Waggy* Court held that it is sufficient that the Petitioner is informed that community custody is a consequence of a guilty plea but not necessary that he be

informed of the specific restrictions. The court analyzed that, though community custody is a direct consequence of a plea, in that there is no effect upon the range of sentence, the conditions themselves are *not* direct consequences. *Waggy* 111 Wn.App. 511, 517.

Freedom of association was not improperly impacted when a defendant, convicted of drug possession, was prohibited from associating with drug offenders. *State v. Hearn*, 131 Wn.App. 601, 128 P.3d 139 (2006). Crime-related prohibitions which limit fundamental rights are permissible provided the restrictions are reasonably necessary and narrowly drawn. *Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993), citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. Cal. 1975); *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974). A reviewing court looks to whether the order prohibits "a real and substantial amount of protected conduct in contrast to the statute's legitimate sweep." *State v. Riles*, 135 Wn.2d 326, 346-347, 957 P.2d 655 (1998). A convicted defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and public order. *State v. Warren*, 134 Wn.App. 44, 138 P.3d 1081 (2006).

Petitioner asserts that alcohol was not involved in the crime at all. He self-reports that he does not drink nor use controlled substances (CP 31: PSI p.4). This self-serving statement is to be balanced against the contradictory statements of the victim. *Ibid*. It is by no means clear

that drugs and alcohol were not involved in these crimes and it is therefore entirely proper that these prohibitions be included.

D. Careful Reading of RCW 9.94A.710 in Combination with RCW 9.94A.720, Suggests that the Department of Corrections is Empowered to Impose Restrictions on Petitioner as it Sees Fit.

RCW 9.94A.710 deals with community custody for sex offenders who committed crimes on or after June 6, 1996 and before July 1, 2000, and requires the sentencing court to order the convicted offender to be enrolled in community custody for three years. Unless waived by the sentencing court, the terms shall include those conditions set out in RCW 9.94A.700(4)² and may include conditions in RCW 9.94A.700(5).

The statute then goes on to require that “[A]s part of any sentence that includes a term of community custody imposed under this section, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.” RCW

² (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.

9.94A.710(2).

RCW 9.94A.720(c) reads “[F]or offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include . . . *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.” (Emphasis added.)

It seems clear that, read in conjunction, these sections empower the Department of Corrections to impose conditions upon offenders.

In that the PSI, prepared as it was by a DOC employee, suggested to the sentencing court that the alcohol establishment prohibition be part of the sentence, and the sentencing court did impose that condition, and, given that DOC appears to have the right to impose such a condition upon anyone sentenced to community custody after June 6, 1996, as this Petitioner clearly was, then there can be no argument that DOC and the Court cannot impose that condition.

E. **Restricting Alcohol Consumption is Rationally Related to Precursor-Behavior Avoidance. This is Recognized by the Legislature in the Statutory Prohibition in RCW 9.94A.700.**

Under RCW 9.94A.700, *Community Placement*, section (5)(d) specifically allows the sentencing court to impose a no-alcohol prohibition for the period of community custody. It has been noted in the Petitioner’s brief, as well as in case law, that this is an accepted prohibition.

Given that the prohibition against alcohol consumption is permissible and unquestioned, it is a short and entirely reasonable step to similarly prohibit entry into establishments, the function of which is to further the use of the prohibited substance.

There is research that addresses the connection between alcohol use and sexual activities. While recognized as a complex field with numerous influences, there appears to be a strong connection between imbibing and risk taking. It is common knowledge that alcohol reduces inhibitions. It is similarly recognized that risk-taking behaviors often go hand in hand with alcohol consumption. See: *Alcohol, Disinhibition, Sexual Arousal and Deviant Sexual Behavior*, William H. George, *Alcohol Health & Research World*, Spring 1991; *Sex, Alcohol and Sexually transmitted Diseases: A National Survey*, JSTOR: Family Planning Perspectives: Vol. 26, No. 6 (1994); *Alcohol and Sexual Assault*, NIAAA, *Alcohol Health and Research World*, Vol. 25, No. 1, 2001, Antonia Abbey, Tina Zawacki *et al.*

While not an explicit condition, the entry into such an establishment cannot but increase the likelihood that the offender will indulge in prohibited behavior, i.e. consume alcohol. The potential for the offender breaking the law while under the influence of alcohol was deemed large enough by the legislature when enacting RCW 9.94A.700(5)(d). It cannot be the intention to allow the offender to place himself directly in the line of temptation, with the resulting greater potential for reoffending.

Such a restriction is a common sense one, and something that the reviewing Court should not ignore. It is limited in terms of its duration and of minimal impact on the Petitioner's freedoms.

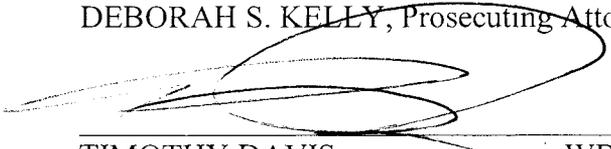
IV. CONCLUSION

In conclusion, the prohibition against Petitioner entering establishments where alcohol is the chief item of sale is not in excess of the sentencing court's and the Department of Corrections' respective jurisdictions. On the contrary, the court is entirely justified, for the period of community placement, in restricting the freedoms guaranteed to a defendant where it can be shown that such a restriction is in the interests of community safety. To do otherwise would be a dereliction of the court's duty to society.

The Petitioner's claim is frivolous and utterly without merit and should be denied. Petitioner's arguments must fail and the reviewing court is respectfully requested to affirm the sentence in all its aspects.

DATED this 9th day of April, 2007.

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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
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STATE OF WASHINGTON,
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DAVID CHARLES VESSEY,
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NO. 34939-6-II

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STATE OF WASHINGTON)
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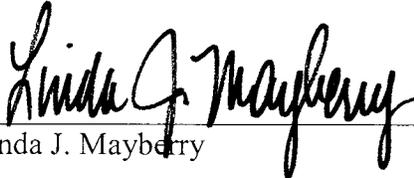
The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 9th day of April, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

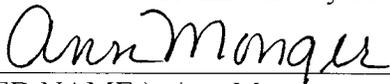
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SUBSCRIBED AND SWORN TO before me this 9th day of April, 2007.


(PRINTED NAME:) Ann Monger
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/21/2008