

No. 35779-8-II



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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL R. VANT,

Appellant.

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

The Honorable Richard A. Strophy, Judge
Cause No. 06-1-01817-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... *

B. STATEMENT OF THE CASE *

C. ARGUMENT..... *

 1. There was sufficient evidence presented at trial to allow a rational trier of fact to conclude that on August 29, 2006, Raven Carter's residence, or at least one of her residences, was 7030 Steamboat Island road NW in Olympia, Washington, that Vant knew it, and that he knowingly violated the no-contact order. 2

 2. It was not error for the court to include Vant's 1984 conviction for rape while armed with a deadly weapon without performing a comparability analysis. 4

 3. The state concedes that although the defendant failed to object to the State's inclusion of two prior convictions for violations of the sex offender registration statute, the State did not produce independent proof of the convictions and the matter must be remanded for resentencing. 6

 4. The court had the authority to require random urine, breath, or blood tests, and polygraph tests, as well as prohibit Vant from possessing or perusing sexually explicit images. 7

 5. The state concedes that the combined total imprisonment and community custody imposed in this case could potentially exceed the statutory maximum, which would be 60 months for the Class C felony. 15

D. CONCLUSION..... 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Bergstrom</u> , No. 78355-1 (October 25, 2007).....	6
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	4, 7
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	13, 14
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	9
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	2

Decisions Of The Court Of Appeals

<u>State v. Bahl</u> , 137 Wn. App. 709, 159 P.3d 416 (2007).....	10, 11, 12
<u>State v. Flores-Moreno</u> , 72 Wn. App. 733, 866 P.2d 648 (1994).....	13
<u>State v. Jones</u> , 118 Wn. App 199, 76 P.3d 258 (2003).....	9, 14
<u>State v. Letourneau</u> , 100 Wn. App. 424, 997 P.2d 436 (2000).....	9
<u>State v. Lopez</u> , 79 Wn. App. 755, 904 P.2d 1179 (1995).....	2
<u>State v. Sansone</u> , 127 Wn. App. 630, 111P.3d 1251 (2005).....	10, 11

<u>State v. Sloan,</u> 121 Wn. App. 220, 87 P.3d 1214 (2004).....	15, 16, 17
<u>State v. Smith,</u> 130 Wn. App.721, 123 P.3d 896 (2005).....	11

Statutes and Rules

RCW 9.94A.030(13).....	8
RCW 9.94A.030(42).....	6
RCW 9.94A.525(17).....	5
RCW 9.94A.700(4).....	7
RCW 9.94A.700(5).....	8
RCW 9.94A.715(2)(a)	7
RCW 9A.20.021(1)(c)	15
RCW 9A.44.30(1).....	5
RCW 9A.44.130(4)(i)	5
RCW 9A.44.130(4)(ii)	5
RCW 9A.44.130(4)(v)	59A.44.130(10)(a)

Other Authorities

Black's Law Dictionary, fifth edition 1891, 1979.....	4
Laws of 1990, chapter 3, §401	9

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence to allow a jury to find that Raven Carter's mother's home could be considered Raven's residence, and whether the defendant knowingly violated the order of protection.

2. Whether the court incorrectly calculated the defendant's offender score by including a 1984 federal conviction for rape with a deadly weapon without performing a comparability analysis.

3. Whether the trial court incorrectly calculated the defendant's offender score by including two prior convictions for violating the sex offender registration statute.

4. Whether the trial court had the discretion to order the defendant to submit to various conditions of community custody, including submitting to random urine tests, breath tests, and polygraph tests, and to refrain from possessing or perusing sexually explicit images.

5. Whether the court incorrectly imposed a sentence for a Class C felony in which the term of incarceration, combined with the term of community custody, could potentially exceed sixty months.

B. STATEMENT OF THE CASE.

The State accepts Vant's statement of the facts of the case.

C. ARGUMENT

1. There was sufficient evidence presented at trial to allow a rational trier of fact to conclude that on August 29, 2006, Raven Carter's residence, or at least one of her residences, was 7030 Steamboat Island Road NW in Olympia, Washington, that Vant knew it, and that he knowingly violated the no-contact order.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Circumstantial evidence carries equal weight with direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). Credibility determinations are for the trier of fact. Varga, supra, at 201.

Vant is not contesting the fact that a no-contact order existed. He acknowledged at trial that he had knowledge of the order. [12-20-06 RP 73-74] He disputes that 7030 Steamboat Island Road NW in Olympia, Washington, the address where his

sister, Raven Carter's mother, lived, was also a residence of Raven Carter, the person protected in the no-contact order.

The evidence presented by the State included the testimony of Raven Carter, who said she lived "off and on" at 7030 Steamboat Island Road NW, that on August 29, 2006, she had personal property and possessions at that address, that she was there on August 30 when she gave a statement to a deputy sheriff, and that she received her mail at that address. She also said that she stayed in, and kept personal property at, various other locations. [12-20-06 RP 9-13] Vant himself testified that he knew Raven Carter was living there, that he was told he could go get his stuff because she wouldn't be there, but "I'm not aware of what I did or didn't do." [12-20-06 RP 75-76, 86-87]

The jury was instructed that both parties are entitled to the benefit of all the evidence, regardless of which party introduced it. [CP 11, 12-20-06 RP 91] Vant had no obligation to take the stand, but because he chose to do so, the jury may consider his statements that prove the State's case.

Vant argues that because Raven Carter did not live full time at her mother's home, that address was not her residence.

Black's Law Dictionary defines "residence" as:

Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently . . . Residence implies something more than mere physical presence and something less than domicile. . . .

. . . [A] person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile. . . .

Black's Law Dictionary, fifth edition 1891, 1979.

It was apparent from the evidence that while Raven Carter had more than one residence, her mother's home, the place where Vant was seen, was one of them, and he knew it. There was sufficient evidence to convince a rational trier of fact that 7030 Steamboat Island Road NW was one of Raven Carter's residences.

2. It was not error for the court to include Vant's 1984 conviction for rape while armed with a deadly weapon without performing a comparability analysis.

Vant is correct that the State is required to prove, by a preponderance of the evidence, that an out-of-state conviction is comparable to a Washington felony. State v. Ford, 137 Wn.2d 472,

973 P.2d 452 (1999). However, in this case, Vant provided that proof during trial when he stipulated, on the record, that he had been previously convicted of a felony sex offense. [12-20-06 RP 62-63] It was good strategy on his part to prevent the State from providing independent proof that he had been convicted of rape while armed with a deadly weapon. For scoring purposes, it does not matter whether the prior offense was comparable to a Class A, B, or C felony, or even whether it was a felony at all, only that it was a sex offense. RCW 9.94A.525(17).

In Washington, sex offenders are required to register pursuant to RCW 9A.44.130. There are a number of different categories of offenders, such as offenders in custody (RCW 9A.44.130(4)(i)), offenders not in custody but under state or local jurisdiction (RCW 9A.44.130(4)(ii)), offenders who are new residents or returning Washington residents (RCW 9A.44.130(4)(v), etc. All offenders required to register, however, are described as having “been found to have committed or . . . been convicted of any sex offense or kidnapping offense. . .” RCW 9A.44.130(1). For purposes of this section, “sex offense” is defined in RCW 9A.44.130(10)(a), and includes, “any offense defined as a sex offense by RCW 9.94A.030.

RCW 9.94A.030(42) includes a list of the various crimes that constitute sex offenses, which is not necessary to reproduce here, but the point is that, except for failing to register as a sex offender under RCW 9A.44.130(11), any felony sex offense requires registration. Since Vant stipulated during trial that he had committed a felony sex offense, and did not dispute that he was required to register, he provided the court with the evidence it needed to establish by a preponderance of the evidence that the prior conviction should be counted in his offender score. The State did not need to produce independent evidence of the conviction—it was already in the record. It would be fundamentally unfair to permit a defendant to stipulate to a conviction at trial and then, by remaining silent at sentencing, cause his case to be remanded so that the State could produce the judgment and sentence he had already admitted to. The result would be the same and increasingly scarce State resources would be wasted.

3. The State concedes that although the defendant failed to object to the State's inclusion of two prior convictions for violations of the sex offender registration statute, the State did not produce independent proof of the convictions and the matter must be remanded for resentencing.

The Washington Supreme Court has recently issued an opinion in State v. Bergstrom, No. 78355-1 (October 25, 2007), in

which it holds (citing to State v. Ford, *supra*) that if the State alleges prior convictions at sentencing and the defense fails to specifically object, the case is remanded for sentencing and the State is permitted to introduce new evidence. That is the situation in this case, and on remand the State will be permitted to introduce copies of the judgments and sentences, or other appropriate proof of the convictions.

4. The court had the authority to require random urine, breath, or blood tests, and polygraph tests, as well as prohibit Vant from possessing or perusing sexually explicit images.

Several statutory provisions govern the applicable community custody conditions. RCW 9.94A.715(2)(a) provides that community custody must include the conditions set forth in RCW 9.94A.700(4) and may include those in RCW 9.94A.700(5). The court also may 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." RCW 9.94A.715(2)(a).

RCW 9.94A.700(4) outlines the conditions that are mandatory 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 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(5) lists additional conditions that may be included:

(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 crime-related prohibitions.

A "crime-related prohibition" is a court order prohibiting conduct that directly relates to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(13).

This court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition may be manifestly unreasonable if the court has no authority to impose it. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003)

Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). For example, this court affirmed a crime-related prohibition requiring a person who was convicted of delivery of marijuana to undergo urinalysis to monitor his use of marijuana, even though his crime did not involve the use of marijuana. [State v.] Parramore, 53 Wn. App. [527] at 531 [768 P.2d 530 (1989)]. But in the same case, we struck a condition prohibiting that person from consuming alcohol because the State failed to show any connection between his use of alcohol and his delivery of marijuana conviction. *Id.*

State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (2000).

Vant has been convicted of a sex offense and is required to register. The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against reoffense by convicted sex offenders. LAWS OF 1990, ch. 3, § 401. It is reasonable for a court to impose

conditions that will serve the purpose of protecting the community, by prohibiting Vance from viewing sexually explicit materials, which common sense tells us are not going to encourage a non-deviant mind-set, and random polygraph tests, which enable authorities to detect violations of his conditions of release.

A statute or condition is presumed to be constitutional and the challenging party must overcome that presumption by proof beyond a reasonable doubt. “. . . [T]he constitution does not require ‘impossible standards of specificity’ or ‘mathematical certainty’ because some degree of vagueness is inherent in the use of our language.” (Cite omitted.) State v. Sansone, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). The presumption of constitutionality applies to sentencing conditions. State v. Bahl, 137 Wn. App. 709, 715, 159 P.3d 416 (2007).

Since Vant is not raising a First Amendment argument, the analysis of the challenged condition must be as applied, not as it appears on its face.

A rule can be facially vague or vague as applied. When a challenged prohibition does not involve First Amendment rights, it must be evaluated as applied. (Cite omitted.) The relevant conduct is the actual conduct of the party challenging the ordinance, not hypothetical situations at the periphery of the rule's scope. (Cite omitted.)

State v. Smith, 130 Wn. App. 721, 727, 123 P.3d 896 (2005).

In State v. Sansone, *supra*, Division I of the Court of Appeals held that the term “pornography” is unconstitutionally vague because it has not been defined in such a way that ordinary people can understand what it includes. *Id.*, at p. 639. The problem in Sansone, however, was that while he was prohibited from possessing or perusing pornographic material, the material at issue consisted of pictures of clothed women -- provocatively clothed, but nevertheless clothed. The State there conceded the pictures were not pornographic, apparently because they might have appeared in mainstream publications, but maintained it was still inappropriate for a sex offender to possess. Sansone successfully argued to Division I that the state failed to prove that, as applied, the term was not impermissibly vague. (The court noted that “obscenity”, however, did have a legal definition. *Id.*, at p. 640.)

Nearly two years after Sansone, Division I decided State v. Bahl, 137 Wn. App. 709, 159 P.3d 416 (2007). After being convicted of second degree rape and first degree burglary, Bahl was given conditions of community custody that included a prohibition against possessing or accessing pornographic materials

as directed by his supervising Community Corrections Officer (CCO), or possessing or controlling “sexual stimulus material for your particular deviancy” as defined by the supervising CCO and therapist. *Id.*, at p. 713. He argued both that the terms “erotic material” and “sexual stimulus material” were overbroad under the First Amendment, and thus facially invalid, and also that they were void for vagueness. The court said:

What his argument fails to recognize is that he is not complaining about a statute affecting the public generally. He is attempting to invoke the overbreadth doctrine to attack a condition of his own particular sentence. An offender’s usual constitutional rights during community placement are subject to [Sentencing Reform Act]-authorized infringements.

.....

Even where a facial challenge is appropriate, the challenger must show that the challenged rule is impermissibly vague in all of its applications, and so a factual record showing how it applies to the challenger is “not unimportant.” (Cite omitted.)

Id., at pgs. 714, 716. The court went on to say that “[t]erms other than ‘pornography’ are not so easily dealt with outside a factual context.” (Cite omitted.) *Id.* At p. 718. Bahl’s judgment was affirmed.

Since Vant can attack the vagueness of the condition only as applied, his appeal here is at the least premature. The State has

not yet applied any sanctions to him for violating the condition, so it cannot be said that any future application of the condition will be unconstitutionally vague as applied to the facts.

Vant argues that the court abused its discretion by ordering that he submit to polygraph testing without limiting the area of inquiry to compliance with conditions of community supervision, citing to State v. Flores-Moreno, 72 Wn. App. 733, 866 P.2d 648 (1994). Since that case was decided, however, the Supreme Court issued an opinion in State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), in which it said:

RCW 9.94A.010 states the purpose of the SRA, which includes, among other things, imposition of just punishment, protection of the public and offering the offender an opportunity for self-improvement. . . . The Legislature has granted the trial courts discretion, within the framework of the structured sentencing guide of the SRA, to impose additional "special" conditions on offenders in furtherance of legislative purpose.

Riles, *supra*, at 341. "Trial courts have authority to require polygraph testing under RCW 9.94A.120(9)(c) [recodified in July of 2001 as RCW 9.94A.505(8)] to monitor compliance with other conditions of community placement." *Id.*, 351-52.

Vant's Judgment and Sentence contains the requirement of community custody that he submit to "random polygraph per CCO."

[CP 38] Since under Riles, *supra*, the court's authority is limited to monitoring the conditions of the sentence, that limitation can be implied.

Similarly, the court has the authority to order Vant to refrain from consuming alcohol under RCW 9.94A.700(5)(d) whether or not alcohol contributed to the crime. State v. Jones, 118 Wn. App. 199, 206, 76 P.3d 258 (2003). It was required to order him to abstain from unprescribed controlled substances under RCW 9.94A.700(4)(c). It follows that if the court has the authority to do that, it has the authority to order random urine, breath, or blood tests to monitor compliance with those conditions, just as it can order polygraph tests to monitor compliance. In Jones, the court upheld the imposition of the condition that he abstain from alcohol, but found that the requirement that he participate in alcohol counseling was error, since there was no evidence that alcohol had contributed to his crimes. However, that is a rehabilitative program that was not crime-related. Jones, *supra*, at 207-08. In Vant's case, the requirement for urine, blood, or breath tests is not a rehabilitative program, but a method of monitoring compliance with conditions properly imposed.

5. The State concedes that the combined total imprisonment and community custody imposed in this case could potentially exceed the statutory maximum, which would be 60 months for the Class C felony.

Vant was sentenced to 18 months on the charge of failing to register as a sex offender, and given a community custody range of 36 to 48 months. The maximum total could be 66 months, six months over the statutory maximum. RCW 9A.20.021(1)(c).

In State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004), Sloan was convicted for rape of a child in the third degree, for which the maximum penalty was 60 months. The court imposed a 60-month sentence and 36 to 48 months of community custody. Sloan argued on appeal that the combination of confinement plus community custody exceeded the maximum possible sentence. Division One of the Court of Appeals disagreed, interpreting the sentence to allow for community custody if Sloan obtained earned early release up to the point a 60-month sentence had been fully served. When imposing such a sentence in the future, trial courts were instructed to explicitly order that the prison sentence plus any community custody ordered could not extend the sentence past the statutory maximum. Sloan, 121 Wn. App. at 223-224.

Confinement for 18 months plus any period of community custody exceeding 42 months in this case would obviously result in a total extending beyond the statutory maximum of 60 months. However, if the defendant earns early release, and the duration of the community custody is for that period of earned early release, the sentence will necessarily not exceed the statutory maximum. Therefore, the appropriate solution is that required by the appellate court in State v. Sloan, *supra*. The judgment and sentence should be amended to read that the defendant shall be under community custody after release from prison for a period of 36 to 48 months, or for the period of earned early release, whichever is longer, provided that the specific period of community custody imposed by the Department of Corrections shall not exceed 60 months when added to the period of time the defendant has spent in custody for that particular conviction. In this way, the sentence on its face would necessarily restrict the defendant's total penalty to not more than the statutory maximum without departing from the penalty found to be appropriate by the sentencing judge.

The defendant certainly has a valid right to an assurance that the sentence imposed upon him will not result in a penalty extending beyond the statutory maximum. That assurance will be

provided by remanding to the trial court for an amendment to the Judgment and Sentence adding the language proposed above, pursuant to State v. Sloan, *supra*.

D. CONCLUSION.

The State produced sufficient evidence at trial to support Vant's conviction for violation of the no-contact order. His offender score properly included a 1984 federal conviction for rape with a deadly weapon, but the matter must be remanded to allow the State to prove by a preponderance of the evidence his two prior convictions for violation of the sex offender registration statute. The court was within its discretion to order him, as conditions of community custody, to submit to breath, blood, urine, or polygraph tests, and to refrain from possessing or perusing sexually explicit images. The court incorrectly imposed a total of 66 months of imprisonment combined with community custody, and the matter must be remanded for the court to clarify that in no event will Vant's sentence exceed 60 months.

The State respectfully asks this court to affirm Vant's conviction for violation of the no-contact order, to find that the conditions of community custody were properly imposed, and to remand for resentencing to correct the trial court errors.

Respectfully submitted this 6th of November, 2007.

Carol La Verne

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on 11/16/07, 2007.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 16, 2007

Signature: 

