

NO. 36029-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ISIDORO SANCHEZ-VALENCIA,

Appellant.

BRIEF OF APPELLANT

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DIVISION II
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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when entered judgment against him for an offense unsupported by substantial evidence.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it imposed a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited.

3. This court's refusal to address argument II as not ripe will violate the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment against that defendant for an offense unsupported by substantial evidence?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if it imposes a community custody condition so vague that it does not put the defendant on notice of what conduct it prohibited?

3. Does the court of appeals' refusal to address a constitutional challenge to a community custody condition as not ripe for adjudication violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, as well as the defendant's right to effective appellate review under Washington Constitution, Article 1, § 22?

STATEMENT OF THE CASE

Factual History

In August of 2006, agents of the Cowlitz-Wahkiakum County Drug Task Force contacted Detective Bryan Acee of the Clark-Skamania Drug Task Force and asked him to begin surveillance on Jesus Gonzalez-Perez, who then lived at 2612B Grand Boulevard in Vancouver. RP 132-136.¹ According to Officer Acee, Jesus Gonzalez-Perez is a “major drug trafficker” with some thirty people working below him, including brothers Loreano and Albert Valencia-Rojas, who worked directly under him. *Id.* After receiving this information, Officer Acee began coordinating surveillance on the Grand Boulevard address, which included hundreds of hours of surveillance by multiple officers. RP 136-178.

Initially, Officer Acee identified about six vehicles regularly parked at the Grand Boulevard address, each one of which was registered to Rene Turner. RP 136-137. The utilities and telephone at that address were in Ms Turner’s name, and Officer Acee saw her and her infant child at the address on numerous occasions. *Id.* He also regularly saw Mr. Gonzalez-Perez, Alberto Valencia-Rojas and Loreano Valencia-Rojas at the address. RP 120-140. During their surveillance activities, Officer Acee and those working

¹The record in this case includes five volumes of continuously numbered verbatim reports, referred to herein as “RP.”

under him saw dozens of people come to the address each day for short periods of time, and on one occasion he observed some type of hand to hand transaction between a visitor and someone who came out of the house. RP 136-138.

At the end of August, Officer Acee saw about 30 people help the occupants at the Grand Boulevard address move boxes and personal items from that residence to a house at 806 S.E. 141st Street in Vancouver. RP 140. These people included Rene Turner, Alberto Valencia-Rojas, their small child, and Alberto's brother Loreano, as well as about 12 others that Officer Acee could identify. RP 140-154. At the time of the move, Ms Turner put the utilities and the telephone for the new address in her name. *Id.* After the move, the suspicious activities continued, with numerous persons coming to the house every day for a few minutes, and with the officers one time following Mr. Gonzalez-Perez when he drove to a location in Vancouver and met with persons Officer Acee knew to be members of the "Norteno" Hispanic gang. RP 140-157.

On September 19, 2006, Officer Acee saw a person in a Honda Accord drive up to the house at about 11:50 in the morning, knock on the door, enter and then come back out a few minutes later with a shoe box in his hand. RP 157-158. This person then got in his car and left. *Id.* Over a three hour period on October 2, 2006, Officer Acee saw seven different subjects

arrive at the house, enter, and then exit a few minutes later holding a shoe box or a bag. RP 159-160. Each person then left in the vehicle they had driven to the house. *Id.* Finally, on October 18, 2006, Officer Acee obtained a warrant to search the house at 806 S.E. 141st Street, as well as the persons of Rene Turner, Jesus Gonzalez-Perez, Alberto Rojas-Valencia, and Loreano Rojas-Valencia. RP 161-162. On October 21, 2006, Officer Acee then returned to the house with a number of other officers to perform surveillance for a number of hours prior to executing the warrant. *Id.*

When Officer Acee arrived on the morning of October 21st, he saw the defendant Isidro Sanchez-Valencia working at the end of the driveway repairing a mailbox that someone had knocked over the previous day. RP 233-234. His repairs included setting the mailbox in brick and cement, and he called a number of occupants in the house to look at his work after he had finished. *Id.* At the time, the defendant was 53-years-old, and he later told the officers that one of the people in the house by the name of Carlos was his nephew. RP 467. In fact, prior to arriving at the house on October 21st, the officers had never seen the defendant during any of their hundreds if not thousands of hours of surveillance. RP 231-234. He was not one of the “dozens” of people a day who had visited the Grand Boulevard Address, he was not one of the 30 or so people who had helped in the move to the house on 141st Street, and he was not one of the seven people Officer Acee saw visit

the house on October 7th. *Id.*

After watching the defendant repair the mailbox and enter the house, Officer Acee saw a number of people drive up to the house, enter, and then leave carrying black plastic garbage bags that appeared to have something light in them. RP 163-173. One of these people was a Mark Turner, who was driving a Buick Regal. RP 168-172. After he left, Officer Acee had two other officers stop this vehicle, arrest Mr. Turner, and search his car. RP 273-283. This search uncovered a backpack located behind the driver's seat with a black plastic garbage bag in it that contained a clear plastic bag that contained about one pound of marijuana. *Id.*

At some point when people were arriving and leaving, Officer Acee saw the defendant and a young boy come out of the house. *Id.* The defendant was carrying a black plastic bag. *Id.* He put the bag in an Isuzu Rodeo registered to Rene Turner, got in with the young boy, and drove off. RP 174, 249-256. One of the police officers followed the defendant as he drove through a parking lot and onto Mill Plain in Vancouver, but then lost him when she got stuck behind a light. *Id.* Although a number of officers had followed vehicles leaving the house over the duration of their surveillance, and they had seen those drivers employ counter-surveillance driving techniques, the officer who followed the defendant did not see him use any such driving methods. RP 125-132, 272.

Eventually, after all of the vehicles at the residence were gone, the officers executed the search warrant. RP 178-195, 248-272, 298-311, 395-438, 439-453. Upon entering, they found no one in the residence. *Id.* Most of the officers smelled the odor of cut marijuana when they entered, and on the floor of the closet in one of the bedrooms, the officers found 68 one pound clear plastic bags of marijuana. *Id.* They also found digital scales, prepaid cell phones, black plastic garbage bags, a loaded pistol, paperwork belonging to Rene Turner, Alberto Rojas-Valencia, and Loreano Rojas-Valencia, and a bag with \$126,000.00 dollars cash in it. *Id.* The officers found nothing associating the defendant to the address. *Id.*

After securing and searching the house, the officers hid their vehicles, and then returned to the residence to await for people to return. RP 200-202. At about 5:50 pm, Renee Turner returned to the residence driving a Chevy Tahoe. RP 202-203. Alberto Valencia was in the front passenger seat and their baby was in an infant seat. *Id.* They had left earlier with two black garbage bags. *Id.* When they returned, the officers arrested them. *Id.* The officers found a loaded handgun in the glove compartment of the truck. *Id.* A number of the other people who had left the residence returned after Ms Turner and they were all arrested. RP 205-221. One of these individuals had \$8,500.00 cash on him. *Id.*

The defendant was the first person to return to the house after Ms

Turner and Alberto Valencia-Rojas. RP 204-206, 233-235. He was still driving Ms Turner's Isuzu Rodeo. *Id.* The young boy with whom he had left was in the front seat, and Ms Turner's younger sister was now in the back seat. *Id.* According to Officer Acee, there was an odor of marijuana in the vehicle. *Id.* However, there was no marijuana, cash, guns, or drug paraphernalia in the vehicle or on the defendant's person when he returned. *Id.* The defendant did give them the wrong name at the time he was arrested and interviewed. RP 467. However, the officers soon uncovered his true name when the defendant told them that one of the people in the house was his nephew Carlos, and that person then told the police what the defendant's real name was. *Id.*

Procedural History

By information filed October 26, 2006, the Clark County Prosecutor charged eight different individuals, including the defendant, with possession of marijuana with intent to deliver and conspiracy to deliver marijuana. RP 1-4. All of the possession with intent charges included an allegation that the offense occurred within 1,000 feet of a school bus stop, and some of the charges included firearm's enhancements (although not the defendant's charges). *Id.* By second amended information filed January 8, 2008, the state eliminated all of the charges in the information except those brought against the defendant (Counts VIII and XI), although the substance of the charges did

not change. CP 1-2. The case later came on for trial before a jury along with the trial of a co-defendant named Eduardo Chavez Sanchez. RP 1.

During the jury trial, the state called and recalled seven police officers, including Officer Acee. RP 152, 248, 273, 283, 347, 395, 439, 462, 482. The state also called an evidence technician from the Vancouver Police Department who tested the marijuana. RP 379. Finally, the state called a School District Employee and a Clark County GIS technician. RP 519, 530. The former identified three school bus stops in the vicinity of 806 141st Street in Vancouver. RP 519-529. The latter testified that the house and the bus stops were less than 1,000 feet apart. RP 530-543. After the state finished with its witnesses, the defendant rested without calling any witnesses, although the co-defendant called three short witnesses. RP 556-580

In this case, the court instructed the jury without objection from the defendant. RP 584-586. The parties then presented closing arguments without objection, after which the jury retired for deliberation. RP 604-671. The jury later returned verdicts of guilty on both charges, along with a special verdict that the first offense had been committed within 1,000 feet of a school bus stop. RP 62-64.

At sentencing, the court determined that both the possession with intent charge and the conspiracy charge constituted the same criminal conduct under RCW 9.94A.589. CP 100. The court then sentenced the defendant

within the standard range, adding 24 months for the school bus stop enhancement, and including a term of community custody. CP 99-115. The community custody conditions included the following:

- ☒ 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 or data storage devices.

CP 106.

After sentencing, the defendant filed timely notice of appeal. CP 116.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by

a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with possession of marijuana with intent to deliver. In support of this charge the police and the state went to great lengths to prove that Jesus Gonzalez-Perez was running a marijuana distribution ring from the first and second house in which he was residing in Vancouver. In support of this claim, the state presented the evidence of numerous pounds of marijuana and over \$100,000.00 dollars cash found in the house Jesus Gonzalez-Perez shared with Alberto and

Loreano Rojas-Valencia and Alberto's girlfriend Rene Turner. The officers many hours of surveillance determined that dozens of people routinely made very short visits to the house.

The problem with this evidence in the case at bar is that none of it relates to the defendant Isidro Sanchez-Valencia. The only time the police ever saw the 52-year-old defendant was on the day they executed the search warrant. On this occasion, he was at the house with his nephew, pouring cement and setting bricks to repair a mailbox that someone else had damaged the day before. Not once, in spite of the hundreds if not thousands of hours of surveillance time, did the police ever see the defendant associated with any drug activity. In fact, the police don't even know how he got to the house on the day they executed the search warrant because he was there at the time they arrived.

It is true that the police saw the defendant take a black garbage bag out of the house and leave in one of the cars registered to Rene Turner. During the trial, the state argued that there must have been marijuana in that bag. However, the bag was never recovered. Neither was any marijuana found in the car when the defendant returned. The defendant had no money on him, and while Officer Acee believed he smelled marijuana in the car, he didn't claim that he smelled any marijuana on the defendant's person. Certainly the defendant's mode of driving did not give rise to any inference

that he was involved in illegal activity. He used no counter-surveillance driving techniques, and when he left he was gone for almost five hours.

The states case against this one defendant, as opposed to the many charged in this case, was based solely upon mere possibility, suspicion, speculation, and conjecture. Certainly the defendant might have knowingly had marijuana in the bag and might have intended to deliver it to another person. However, the evidence is also as consistent with the conclusion that either there was not marijuana in the bag, or if there was he did not know this fact and did not intend to deliver any drug. Such evidence does not prove beyond a reasonable doubt that the defendant even possessed marijuana, let alone knew it was marijuana and intended to deliver it. Thus, this court should reverse the defendant's conviction and remand with instructions to dismiss.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT IMPOSED A COMMUNITY CUSTODY CONDITION SO VAGUE THAT IT DOES NOT PUT THE DEFENDANT ON NOTICE OF WHAT CONDUCT IT PROHIBITED.

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111

Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which had the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

State v. Aver, 109 Wn.2d at 306-07.

In the case at bar the defendant argues that the following community

custody condition the court imposed in this case violates due process because it is void for vagueness.

- ☒ 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 or data storage devices.

CP 106.

In this provision the phrase “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” is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and is used to facilitate the transfer of drugs. Is the defendant prohibited from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the defendant prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is the defendant prohibited from using a blender? Matches are often used as a source of phosphorous in the manufacture of methamphetamine. Is the defendant prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is the defendant prohibited from possessing cigarette paper? Baggies are

often used to contain controlled substances. Is the defendant now forced to only use waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps the defendant will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase "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" is so vague as to leave the defendant open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

III. THIS COURT'S REFUSAL TO ADDRESS ARGUMENT II AS NOT RIPE WILL VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS THE DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.

In a recent decision this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In this case, *State v. Motter*, No. 34251-2-II (filed 7-24-07), a defendant convicted of first degree burglary appealed his

sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphernalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter’s challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law’s constitutionality is not ripe for review unless the challenger was harmed by the law’s alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter’s challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

State v. Motter, No. 34251-2-II (filed 7-24-05).

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court violates the defendant’s right to procedural due process under Washington Constitution,

Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986), for example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right

includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer

adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court.

This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

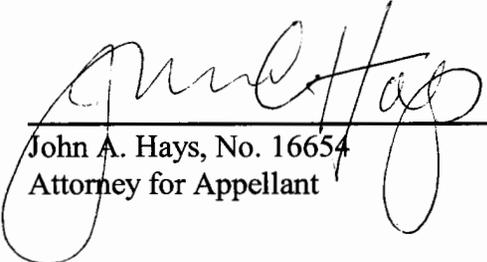
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

CONCLUSION

Substantial evidence does not support the charge for which the defendant was convicted. As result, this court should vacate the conviction and remand with instructions to dismiss. In the alternative, the court should vacate the community custody condition that is unconstitutionally vague.

DATED this 13th day of February, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

WAC 137-104-050

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-080

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

