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STATE OF WASHINGTON
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DEPUTY

NO. 36140-0-II
Clark County No. 05-1-01601-9

STATE OF WASHINGTON,

Respondent,

vs.

LANCE SMITH

Appellant.

BRIEF OF APPELLANT

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PM 11-16-07

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR 1

I. MR. SMITH WAS DENIED A FAIR TRIAL..... 1

II. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH TRIAL AND SENTENCING. 1

III. MR. SMITH WAS DENIED HIS RIGHT OF ALLOCUTION AT SENTENCING..... 1

IV. THE TRIAL COURT ERRED IN IMPOSING CERTAIN CONDITIONS OF COMMUNITY CUSTODY. 1

V. THE TRIAL COURT ERRED IN IMPOSING A LIFETIME NO CONTACT ORDER ON EACH COUNT. 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

I. MR. SMITH WAS DENIED A FAIR TRIAL WHEN THE STATE ELICITED TESTIMONY WHICH EMPHASIZED MR. SMITH’S EXERCISE OF HIS RIGHT TO REMAIN SILENT. 1

II. MR. SMITH WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WHEN HIS ATTORNEY FAILED TO MAKE NECESSARY OBJECTIONS AND MOTIONS IN LIMINE AND FAILED TO PRESERVE MR. SMITH’S RIGHT OF ALLOCUTION. 1

III. MR. SMITH IS ENTITLED TO A NEW SENTENCING HEARING WHERE THE TRIAL COURT IMPOSED THE MAXIMUM STANDARD RANGE SENTENCE ON COUNTS III-V, AND AN EXCEPTIONAL SENTENCE ON COUNT VI, WITHOUT INVITING MR. SMITH TO MAKE A STATEMENT ON HIS OWN BEHALF AT SENTENCING. 1

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED, AS A CONDITION OF COMMUNITY CUSTODY, THE REQUIREMENTS THAT MR. SMITH TAKE ANTABUSE AT

<p>HIS COMMUNITY CORRECTIONS OFFICER’S DIRECTION, AND THAT HE NOT BE IN ANY PLACE WHERE ALCOHOL IS SOLD BY THE DRINK FOR CONSUMPTION OR IS THE PRIMARY SALE ITEM.</p>	<p>2</p>
<p>V. THE TRIAL COURT ERRED IN ENTERING A LIFETIME NO CONTACT ORDER WHICH APPLIES TO EACH COUNT..</p>	<p>2</p>
<p>C. STATEMENT OF THE CASE.....</p>	<p>2</p>
<p>I. PROCEDURAL HISTORY</p>	<p>2</p>
<p>II. FACTUAL HISTORY.....</p>	<p>3</p>
<p>D. ARGUMENT.....</p>	<p>6</p>
<p>I. MR. SMITH WAS DENIED A FAIR TRIAL WHEN THE STATE ELICITED TESTIMONY WHICH EMPHASIZED MR. SMITH’S EXERCISE OF HIS RIGHT TO REMAIN SILENT.</p>	<p>6</p>
<p>II. MR. SMITH WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WHEN HIS ATTORNEY FAILED TO MAKE NECESSARY OBJECTIONS AND MOTIONS IN LIMINE AND FAILED TO PRESERVE MR. SMITH’S RIGHT OF ALLOCUTION.</p>	<p>9</p>
<p>III. MR. SMITH IS ENTITLED TO A NEW SENTENCING HEARING WHERE THE TRIAL COURT IMPOSED THE MAXIMUM STANDARD RANGE SENTENCE ON COUNTS III- V, AND AN EXCEPTIONAL SENTENCE ON COUNT VI, WITHOUT INVITING MR. SMITH TO MAKE A STATEMENT ON HIS OWN BEHALF AT SENTENCING.</p>	<p>11</p>
<p>IV. THE TRIAL COURT ERRED WHEN IT IMPOSED, AS A CONDITION OF COMMUNITY CUSTODY, THE REQUIREMENTS THAT MR. SMITH TAKE ANTABUSE AT HIS COMMUNITY CORRECTIONS OFFICER’S DIRECTION, AND THAT HE NOT BE IN ANY PLACE WHERE ALCOHOL IS SOLD BY THE DRINK FOR CONSUMPTION OR IS THE PRIMARY SALE ITEM.</p>	<p>14</p>

**V. THE TRIAL COURT ERRED IN ENTERING A LIFETIME
NO CONTACT ORDER WHICH APPLIES TO EACH COUNT.18**

E. CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<i>State v. Aguilar-Rivera</i> , 83 Wn.App. 199, 920 P.2d 623 (1996).....	14
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	22
<i>State v. Bandura</i> , 85 Wn.App. 87, 931 P.2d 174, <i>review denied</i> , 132 Wn.2d 1004 (1997).....	11
<i>State v. Canfield</i> , 120 Wn.App. 729, 86 P.3d 806 (2004).....	14
<i>State v. Canfield</i> , 154 Wn.2d 698, 116 P.3d 391 (2005).....	15
<i>State v. Crider</i> , 78 Wn.App. 849, 899 P.2d 24 (1995).....	14, 17
<i>State v. Easter</i> , 130 Wn. 2d. 228, 922 P.2d 1285 (1996).....	7, 8, 9
<i>State v. Hatchie</i> , 133 Wn.App. 100, 135 P.3d 519 (2006).....	15
<i>State v. Hatchie</i> , No. 78889-8 (9-6-07).....	14, 15
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	8
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	11
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	14, 15
<i>State v. Jones</i> , 117 Wn.App. 89, 68 P.3d 1153 (2003).....	12
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	21
<i>State v. Julian</i> , 102 Wn. App. 296, 9 P.3d 851 (2000), <i>review denied</i> , 143 Wn.2d 1003 (2001).....	21
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	7
<i>State v. Llamas-Villa</i> , 67 Wn. App. 448, 836 P.2d 239 (1992).....	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251(1995).....	11
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 186 (1995).....	11
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	21
<i>State v. Suarez-Bravo</i> , 72 Wn.App. 359, 864 P.2d 426 (1994).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984).....	10, 11

Statutes

RCW 9.94A.500.....	14
RCW 9.94A.700(4).....	18
RCW 9.94A.700(4) and (5) (2003).....	18
RCW 9.94A.700(5).....	18

Other Authorities

Black's Law Dictionary 259 (8 th ed. 2004).....	19
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A. ASSIGNMENTS OF ERROR

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V. THE TRIAL COURT ERRED IN ENTERING A LIFETIME NO CONTACT ORDER WHICH APPLIES TO EACH COUNT.

C. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Appellant, Lance Smith, by Second Amended Information, with Count I: Child Molestation in the First Degree; Count II: Child Molestation in the First Degree; Count III: Rape of a Child in the Second Degree; Count IV: Rape of a Child in the Second Degree; Count V: Rape of a Child in the Second Degree; Count VI: Child Molestation in the Second Degree; Count VII: Child Molestation in the Third Degree. CP 20-22. The alleged victim, in each count, was N.K.R. CP 20-22. On each count, the State alleged that Mr. Smith used a position of trust or confidence to facilitate the crime. CP 20-22.

A jury trial commenced on January 17th, 2007. Report of Proceedings, Volume 3. The jury returned verdicts of guilty on each count, and answered “yes” in special verdicts asking whether Mr. Smith used a position of trust or confidence to facilitate the crime. CP 62-75. Mr. Smith was not, however, given an exceptional sentence on any count

but Count VI, in which he was given the statutory maximum of 120 months where the top of the standard range was 116 months. CP 78, 82. The total confinement period ordered was 280 months, which was the top end of the minimum term for each of counts III, IV, and V. CP 78-82. This timely appeal followed. CP 95.

II. FACTUAL HISTORY

N.K.R. is the grand niece of Mr. Smith. 3 RP, 276. She was born on 4/6/91. 3 RP, 275. Mr. Smith lived with N.K.R. and her family in 1995 and 1996, again from 1999 to 2001 in a fifth wheel trailer on their property, and again from 2004 to 2005 in a trailer on the property. 3 RP 276-280. N.K.R. testified that beginning when she was in Kindergarten, Mr. Smith kissed her chest once or twice over her clothing. 3 RP, 309. Her memory of the event was poor. 3 RP, 309. When she was in third grade, according to her testimony, Mr. Smith kissed her on her chest underneath her shirt. 3 RP, 310. N.K.R. said no touching occurred again until she was in seventh grade. 3 RP, 314. The touching just described all occurred before N.K.R. was twelve, according to her. 3 RP, 316. Her ability to estimate time appeared impaired, however, when she testified that she was twelve in the third grade. 3 RP, 316.

When N.K.R. was in seventh grade, she said, Mr. Smith began touching her again. 3 RP, 317. This touching included kissing her on the

chest and touching her underneath her pants. 3 RP, 317. It also progressed, according to her testimony, to Mr. Smith putting his mouth on her vagina, and Mr. Smith inserting his fingers into her vagina. 3 RP, 320-321.

Defense counsel never interviewed N.K.R. 3 RP, 342. The first time he spoke to her was in cross examination. 3 RP, 342.

Detective Evelyn Oman testified for the State. 4 RP, 379. The prosecutor asked her if, in the course of her investigation, she spoke to Mr. Smith. 4 RP, 379. She replied that she hadn't because she had been thwarted by incorrect phone numbers. 4 RP, 379. Specifically, she said "I had been given two telephone numbers and one of them, the person that answered said they didn't know him and the second number was disconnected." 4 RP, 380. Defense counsel did not object to this testimony. 4 RP, 380.

Laurie Brown, Mr. Smith's sister, testified for the State. 4 RP, 410. The prosecutor asked her if she spoke with her brother after N.K.R. made the accusation of abuse. 4 RP, 413. She testified that she spoke with him six to eight weeks after the accusation. 4 RP, 413. She testified that Mr. Smith said he had not done it; that if anything did happen he was not aware of it. 4 RP, 414.

Tamara Webb, N.K.R.'s mother, testified for the State. 3 RP, 296. The prosecutor asked her about how her daughter and Mr. Smith interacted, and she said they were "always friendly." 3 RP, 296. When asked if she noticed anything unusual about their interaction, she said "Everybody always told me it seemed strange, but I just thought it was because he was our uncle and he loved us." 3 RP, 296. Defense counsel did not object to this testimony. 3 RP, 296.

Mr. Smith was convicted as charged on each count, with the jury answering "yes" on the special verdict form for each count. CP 62-75. At sentencing, the State recommended the maximum standard range sentence (for Counts III-V) of 280 months. 4 RP, 527. The court heard from the State, Defense counsel, N.K.R., and considered the PSI. 4 RP, 523-534. At no time during sentencing did the court ask Mr. Smith if he wished to speak on his behalf. 4 RP, 523-537. Nor did Defense counsel object to the court's denial of Mr. Smith's right of allocution. 4 RP, 523-537. It is not clear, from the record, that Mr. Smith was even aware he had the right to address the court prior to sentencing. *Id.*

The trial court followed the State's recommendation, imposing 280 months on Counts III, IV, and V, as well as 198 months on Counts I and II (the top of the standard range for those counts), 60 months on Count VII (the top of the standard range for that count), and 120 months on Count VI

(four months longer than the top of the standard range, which was 116 months). CP 78-82. The court found that substantial and compelling reasons exist which justify an exceptional sentence above the standard range on all counts, but imposed an exceptional sentence only on Count VI. CP 78-82. The court also imposed an Anti-Harassment No-Contact order which prohibits Mr. Smith from contacting N.K.R. for life. CP 103-104. This timely appeal followed. CP 95.

D. ARGUMENT

I. MR. SMITH WAS DENIED A FAIR TRIAL WHEN THE STATE ELICITED TESTIMONY WHICH EMPHASIZED MR. SMITH'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

It is well settled that a defendant's pre-arrest silence cannot be used by the State in its case in chief as substantive evidence of a defendant's guilt. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); *State v. Easter*, 130 Wn. 2d. 228, 922 P.2d 1285 (1996). Commenting on a defendant's pre-arrest silence is constitutional error which must be proven harmless beyond a reasonable doubt to avoid reversal. *State v. Easter*, 130 Wn.2d at 242. The State bears this burden of proof, not the defendant. *Id.* Although defense counsel did not object to this testimony, constitutional error which denies a defendant a fair trial or his right to effective assistance of counsel may be raised for the first

time on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

In *Easter*, an officer testified that when he asked the defendant, who had been in a traffic accident, what happened, the defendant “totally ignored him.” *State v. Easter*, 130 Wn.2d at 232. He further testified that when he continued to ask questions, the defendant looked down and ignored his questions. *Id.* He also said the defendant “was evasive, wouldn’t talk to me, wouldn’t look at me, wouldn’t get close enough for me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak.” *State v. Easter*, 130 Wn.2d at 233. The Supreme Court held this testimony was an improper comment on the defendant’s pre-arrest silence. *State v. Easter*, 130 Wn.2d at 241. Further, the error was not harmless because there was not overwhelming untainted evidence of the defendant’s guilt. *State v. Easter*, 130 Wn.2d at 242.

Here, the State emphasized Mr. Smith’s pre-arrest silence in two ways: By eliciting testimony from Detective Oman that she attempted to speak with Mr. Smith during the investigation but was not able to do so, having been thwarted by wrong telephone numbers, and by eliciting testimony from Laurie Brown that she talked with Mr. Smith about the charges and he denied them, stating that if anything had happened, he was not aware of it.

When Detective Oman testified about her attempt to contact Mr. Smith, the clear implication of her testimony was that Mr. Smith had provided false information (a telephone number that rang to a home at which he didn't live, and a second number that was disconnected) in an effort to avoid speaking to her. There was no reason for the State to offer this testimony other than to make Mr. Smith look guilty because he failed to speak to the police about the accusations N.K.R. made against him. Indeed, absent this improper purpose, this testimony was not relevant.

Here, the error was not harmless beyond a reasonable doubt because the remaining untainted evidence was not overwhelming. This was a "he said, she said" case in which the only substantive evidence against Mr. Smith was the testimony of N.K.R. There was no physical evidence to corroborate N.K.R.'s allegations. Further, N.K.R. seemed, at times during her testimony, to be very confused. For example, she testified that she went to live with her father at age twelve, and said she was in third grade at the time (typically, third graders are eight and seventh graders are twelve). This is precisely the type of case in which comments on the defendant's exercise of his right to remain silent are the most prejudicial: Where there is no evidence of the crime beyond the testimony of the alleged victim. Mr. Smith should be granted a new trial.

II. MR. SMITH WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WHEN HIS ATTORNEY FAILED TO MAKE NECESSARY OBJECTIONS AND MOTIONS IN LIMINE AND FAILED TO PRESERVE MR. SMITH'S RIGHT OF ALLOCUTION.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *McFarland* at 334-35. A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In this case, Mr. Smith was denied effective assistance of counsel both at trial and at sentencing. At trial, defense counsel failed to move in limine to prohibit testimony which highlighted Mr. Smith's exercise of his

right to remain silent and failed to object to testimony by Tamara Webb that everybody had always told her that Mr. Smith's interactions with N.K.R. seemed strange.

As argued above, the testimony which highlighted Mr. Smith's exercise of his right to remain silent served to deny Mr. Smith of a fair trial because there was not overwhelming untainted evidence of Mr. Smith's guilt. Defense counsel, had he been prepared for trial, should have moved in limine to prevent the State's witnesses from testifying about Mr. Smith's exercise of his right to remain silent. This was a bell that could not be un-rung because a reasonable person, believing himself innocent of these allegations, would be expected to proclaim his innocence to the police. Further, there is obviously no legitimate trial strategy in failing to move for the exclusion of testimony that, if admitted, denies the client a fair trial.

Tamara Webb's testimony that everybody had told her that Mr. Smith's interactions with her daughter seemed strange was hearsay and constituted improper opinion testimony on Mr. Smith's guilt. A witness may not give testimony expressing an opinion about a defendant's guilt. *State v. Jones*, 117 Wn.App. 89, 91, 68 P.3d 1153 (2003); *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994). Here, even worse than the introduction of this improper opinion was the fact that it was

presented as the opinion of others who were not named and who were not called to testify. Mr. Smith was not given an opportunity to cross examine the “everybody” to whom Ms. Webb referred about their opinion. Defense counsel should have objected to this testimony and proposed a limiting instruction.

Mr. Smith was also denied effective assistance of counsel at sentencing because his attorney failed to preserve his right to allocate. The legal argument pertaining to this issue is incorporated in subsection III, below.

III. MR. SMITH IS ENTITLED TO A NEW SENTENCING HEARING WHERE THE TRIAL COURT IMPOSED THE MAXIMUM STANDARD RANGE SENTENCE ON COUNTS III-V, AND AN EXCEPTIONAL SENTENCE ON COUNT VI, WITHOUT INVITING MR. SMITH TO MAKE A STATEMENT ON HIS OWN BEHALF AT SENTENCING.

A defendant has a statutory right to allocate before the court imposes sentence. RCW 9.94A.500 (1) provides, in part: “The court shall...allow arguments from...the offender...” In *State v. Hatchie*, No. 78889-8 (9-6-07) the Supreme Court reiterated ““Failure by the trial court to solicit a defendant’s statement in allocution constitutes legal error.”” *Hatchie* at 18-19, citing *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005) (*overruled in part on other grounds*). However, the appellate courts have been divided on the question of whether this right is waived if

not objected to at the trial level. See *State v. Crider*, 78 Wn.App. 849, 861, 899 P.2d 24 (1995) (holding the right to allocute is fundamental and not subject to harmless error); *State v. Aguilar-Rivera*, 83 Wn.App. 199, 920 P.2d 623 (1996) (adopting the holding and reasoning of *State v. Crider*, supra); *State v. Canfield*, 120 Wn.App. 729, 732-33, 86 P.3d 806 (2004) (holding a SSOSA revocation hearing is a sentencing hearing within the meaning of the SRA and the offender must be specifically invited to speak before the court renders a decision); *State v. Hatchie*, 133 Wn.App. 100, 118, 135 P.3d 519 (2006) (holding that the right to allocute is waived if not asserted at sentencing). The Supreme Court has settled the debate by holding that a defendant waives his right to allocution if he does not assert the right at the trial court level. *State v. Canfield*, 154 Wn.2d 698, 116 P.3d 391 (2005); *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005); *State v. Hatchie*, No. 78889-8 (9-6-2007).

Of course a defendant, who is not a lawyer, must rely upon his counsel to tell him whether and when he can speak, because he would have no way of knowing that he even possessed such a right unless he is told. As such, it is difficult to accept rules which hold that rights are waived unless asserted because they presuppose that lay people would know that such rights exist. The “waived if not asserted” concept is even

more troublesome where, as here, the right in question is not subject to a rule requiring that the holder of the right be advised of his right(s).

Because the right to allocate is waived if not asserted, an attorney's failure to assert this right on behalf of his client is objectively unreasonable. In a case such as this, where Mr. Smith did not plead guilty but rather proceeded to trial, allocution is critical because it was his only opportunity to address the court about his sentence. Mr. Smith faced a potential sentence that could have exceeded 280 months of minimum confinement. Although the court did not impose an exceptional sentence on counts III through V, it imposed the highest minimum term under the standard range (280 months) and did impose an exceptional sentence on count VI. Defense counsel was aware that the PSI writer, the alleged victim and the deputy prosecutor were recommending 280 months. When the trial court announced the sentence without even acknowledging Mr. Smith or inviting him to speak, defense counsel should have objected, asked the court to vacate the sentence, and asserted his client's right to address the court.

The trial court also bears some responsibility in the denial of Mr. Smith's right of allocution. As Division III observed in *Cridler*: "Offering a defendant the opportunity to address the court prior to passing sentence should be a rote exercise at every sentencing. It should be a mechanical

act so routine as to require no thought.” *Crider* at 861. The State may suggest in response that the trial court would have imposed the same sentence whether Mr. Smith addressed the court or not. Such argument would be pure folly and require clairvoyance. Because Mr. Smith received a sentence at the top of the standard range, as well as an exceptional sentence on Count VI, he should be granted a new sentencing hearing before a different judge because he was denied effective assistance of counsel at sentencing.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED, AS A CONDITION OF COMMUNITY CUSTODY, THE REQUIREMENTS THAT MR. SMITH TAKE ANTABUSE AT HIS COMMUNITY CORRECTIONS OFFICER’S DIRECTION, AND THAT HE NOT BE IN ANY PLACE WHERE ALCOHOL IS SOLD BY THE DRINK FOR CONSUMPTION OR IS THE PRIMARY SALE ITEM.

Lifetime community custody must be imposed for sex offense convictions where, as here, defendants are sentenced under RCW 9.94A.712. RCW 9.94A.712 specifies that unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4) and may include those conditions found in RCW 9.94A.700(5). Many of the conditions appear in list form under RCW 9.94A.700(4) and (5) as follows:

(4)

- (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)
- (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.

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). ‘Circumstances’ is defined as ‘an accompanying or accessory fact.’ Black’s Law Dictionary 259 (8th ed. 2004). In addition, the court can also order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of re-offending, or the safety of the community. RCW 9.94A.712(6)(a)(i)). Finally, under RCW 9.94A.720 (b), the offender shall report as directed to the community corrections officer, remain within prescribed geographic boundaries, notify the community corrections officer of any change of address or employment, and pay supervision costs.

As Mr. Smith was sentenced under the authority of RCW 9.94A.712, the court imposed certain reasonable and authorized conditions of community custody. However, the court also imposed the following objectionable conditions that are neither authorized by statute nor crime-related.

(a) Defendant shall not possess alcohol or be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item.Error! Bookmark not defined.

There was no mention of alcohol playing any role in Mr. Smith's conduct at trial. Yet, the trial court held, as a condition of his community custody, that he could neither possess alcohol nor be in a place, such as bar, where alcohol is the primary sale item, or be in a place, such as a restaurant, where alcohol is sold by the drink for consumption (this would effectively prohibit Mr. Smith from being in any restaurant other than a fast food restaurant).¹ While Mr. Smith did not object to these alcohol-related conditions at sentencing, he objects to them on appeal. Objections to community custody 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). Here, there is no evidence that alcohol possession or control contributed to Mr. Smith's crime. As such, the conditions that he not possess alcohol or be in a place where it is a primary sale item or is sold at all by the drink for consumption are erroneous and

¹ Mr. Smith is aware that the court can – and did in his case – order that he not consume alcohol while on supervision. See RCW 9.94A.700(5)(d).

should be stricken. The trial court abused its discretion when imposing those two conditions.

(b) Take Antabuse if directed to do so by the community corrections officer.

Antabuse can only be prescribed by a physician, and the decision of whether a person should take such a medication should only be made by a physician. A community corrections officer, unless he or she is also a physician, should not be ordering anyone to take a substance that must be prescribed by and controlled by a physician. Further, even if it were proper for a community corrections officer to make such a decision, antabuse is an extreme measure to impose, particularly where there is no evidence in the record that Mr. Smith suffers from alcoholism. This condition should be stricken.

V. THE TRIAL COURT ERRED IN ENTERING A LIFETIME NO CONTACT ORDER WHICH APPLIES TO EACH COUNT.

As part of a condition of Mr. Smith's sentence, the trial court imposed a lifetime no contact order with N.K.R. While a lifetime condition of sentence may be appropriate for sentences with a statutory maximum of life, no contact orders cannot exceed the statutory maximum for the underlying offense. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Mr. Smith was convicted of five class A felonies

with maximum life sentences, one class B felony with a statutory maximum of 10-years, and one class C felony with a statutory maximum of 5 years. The harassment no contact order entered by the court did not distinguish which charge or charges it was entering on. Without this distinction, the order seemingly applies to all seven charges even though it was error to enter it on the 10-year maximum and five-year maximum offenses (Counts VI and VII). The order should be vacated, with the court retaining the option of re-issuing the order only as to counts I-V.

E. CONCLUSION

Mr. Smith should be granted a new trial. Alternatively, he should be granted a new sentencing hearing.

RESPECTFULLY SUBMITTED this 16th day of November, 2007.


ANNE M. CRUSER, WSB# 27944
Attorney for Mr. Smith

APPENDIX

RCW 9.94A.500 Sentencing hearing – Presentencing procedures – Disclosure of mental health services information.

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW **10.95.030** for the crime of aggravated murder in the first degree, sentenced to death, the court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court.

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter **69.50** RCW, a criminal solicitation to commit such a violation under chapter **9A.28** RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. In addition, the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. If the court determines that the defendant may be a mentally ill person as defined in RCW **71.24.025**, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal

history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all risk assessment reports and presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

(2) To prevent wrongful disclosure of information related to mental health services, as defined in RCW 71.05.445 and 71.34.345, a court may take only those steps necessary during a sentencing hearing or any hearing in which the department presents information related to mental health services to the court. The steps may be taken on motion of the defendant, the prosecuting attorney, or on the court's own motion. The court may seal the portion of the record relating to information relating to mental health services, exclude the public from the hearing during presentation or discussion of information relating to mental health services, or grant other relief to achieve the result intended by this subsection, but nothing in this subsection shall be construed to prevent the subsequent release of information related to mental health services as authorized by RCW 71.05.445, 71.34.345, or 72.09.585. Any person who otherwise is permitted to attend any hearing pursuant to chapter 7.69 or 7.69A RCW shall not be excluded from the hearing solely because the department intends to disclose or discloses information related to mental health services.

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DIVISION II

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STATE OF WASHINGTON
BY Vase
DEPUTY

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

STATE OF WASHINGTON,)
) Court of Appeals No. 36140-0-II
) Clark County No. 05-1-01601-9
 Respondent,)
) AFFIDAVIT OF MAILING
 vs.)
)
 LANCE B. SMITH,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 16th day of November

2007, affiant sent a facsimile transmission directed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AFFIDAVIT OF MAILING - 1 -

Anne M. Cruser
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AND

Mr. Lance Smith
DOC# 295819
Washington State Penitentiary
1313 N.13th Avenue
Walla Walla, WA 99362-1065

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (To Mr. Smith)
- (3) AFFIDAVIT OF MAILING

Dated this 16th day of November 2007


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: November 16th, 2007, Kalama, Washington

Signature: Anne M. Cruser